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Senate

The Senate met at 1 p.m. and was called to order by the President pro tempore [Mr. THURMOND].

PRAYER

The Chaplain, Dr. Lloyd John Ogilvie, offered the following prayer:

Gracious Father, thank You that Your power is given in direct proportion to the pressures and perplexities we face. We are given great courage and confidence as we are reminded that You give more strength as our burdens increase, and You entrust us with more wisdom as problems test our endurance. We are cheered and comforted to know that You will never leave nor forsake us. Your love has no end, and Your patience has no breaking point.

Today we want to affirm what You have taught us: that You have called us to supernatural servanthood empowered by Your spiritual gifts of wisdom, knowledge, discernment, and vision. You lovingly press us beyond our dependence on erudition and experience alone. Thank You for giving us challenges that help to recover our humility and opportunities that force us to the knees of our hearts.

Help us, Lord, to move forward with our responsibilities by being attentive to You and obedient in following Your guidance. Give us that sure sense of Your presence and the sublime satisfaction of knowing and doing Your will. Through our Lord and Saviour. Amen.

RECOGNITION OF THE MAJORITY LEADER

The PRESIDENT pro tempore. The able majority leader is recognized.

SCHEDULE

Mr. LOTT. Mr. President, today the Senate will resume consideration of S. 25, the pending campaign finance reform bill. As announced last week, there will be no rollcall votes during today's session. Senators who desire to speak with regard to the pending amendment or bill are encouraged to do so during today's session. We should be able to get 5 hours or so of debate in today if the Senators are willing to speak.

I also remind my colleagues that a cloture vote is scheduled on the pending amendment regarding paycheck protection at 2:15 tomorrow. Also, under the provisions of rule XXII, Members have until the hour of 1:30 today in order to file timely amendments to S. 25. In addition to the cloture vote on the pending amendment, a cloture vote may occur on Tuesday on the underlying campaign finance reform bill.

On Friday, a cloture motion was also filed on the Mack-Graham amendment on immigration to the D.C. appropriations bill. So it may be necessary to have a cloture vote during Tuesday's session on that also if an agreement is not reached. The Senators are working together. I have spoken with them and I am still hopeful that an agreement can be worked out.

There are some other pending amendments on the D.C. appropriations bill, but we think maybe we will be able to reach a conclusion on those if we can get the immigration amendment by Senator MACK worked out. Therefore, it is possible that we could complete action on the D.C. appropriations bill tomorrow.

This week, the Senate will also be considering other available appropriations conference reports. I talked to the chairman, Senator STEVENS, on Friday. We think maybe there could be as many as three that would be ready in the next couple of days that we can bring up for consideration. We intend, also, to begin consideration of the ISTEA transportation infrastructure legislation, and we hope to be able to go to that on Wednesday or Thursday and spend the remainder of the week, except for interruptions for votes on the conference reports, on that.

I believe we will be in session on Friday and will probably have votes up until around noon. But we will get more information on that as the day progresses.

I yield the floor.

RESERVATION OF LEADER TIME

The PRESIDING OFFICER (Mr. KYL). Under the previous order, leadership time is reserved.

BIPARTISAN CAMPAIGN REFORM ACT OF 1997

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of S. 25, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 25) to reform the financing of Federal elections.

The Senate resumed consideration of the bill.

Pending:

Lott amendment No. 1258, to guarantee that contributions to Federal political campaigns are voluntary.

Lott amendment No. 1259 (to amendment No. 1258), in the nature of a substitute.

Lott amendment No. 1260 (to amendment No. 1258), to guarantee that contributions to Federal political campaigns are voluntary.

Lott amendment No 1261, in the nature of a substitute.

Lott amendment No. 1262 (to amendment No. 1261), to guarantee that contributions to Federal political campaigns are voluntary.

Motion to recommit the bill to the Committee on Rules and Administration with instructions to report back forthwith, with an amendment.

Lott amendment No. 1263 (to instructions of motion to recommit), to guarantee that contributions to Federal political campaigns are voluntary.

Lott amendment No. 1264 (to amendment No. 1263), in the nature of a substitute.

Lott amendment No. 1265 (to amendment No. 1264), to guarantee that contributions to Federal political campaigns are voluntary.

Mr. REID addressed the Chair.

The PRESIDING OFFICER. The Senator from Nevada is recognized.

Mr. REID. Mr. President, I have to applaud the opponents of campaign finance reform. They have done a great job. They set out to confuse and distract from the real issue of campaign reform, and they have succeeded. They have diverted attention from the fact that raising money becomes one of the essential items and activities of those of us who serve in Congress just to remain competitive. They have done this by focusing on extraneous matters like who made phone calls, where did they make them from?

We have not focused, as we should, on the continued increased cost of the media in campaigns. Consultants have become more controlling. Self-financing has become the norm. Opponents, Mr. President, of real campaign finance reform are focused on anything to divert attention from the fact that campaigns are very expensive and too long. The Governmental Affairs Committee hearing has clearly shown, at least in this Senator's opinion, that both parties need more constraints, more controls, and more attention.

We must bring attention back to what the real issues are in campaign finance—that is, the fact that Senators and Representatives spend large amounts of their time and their efforts simply raising money in order to pay for escalating media costs. As I have said, we have the never-ending, it seems, self-financing of candidates. Take a small State like the State of Nevada or one like the Presiding Officer's State of Arizona, $4 million, which has a relatively small campaign fund in this modern era, sadly. To raise that much money, you have to raise about $13,000 or $14,000 a week every year. You don't take a week off for Christmas. If you do, you have to raise more money. If you do that 52 weeks a year for 6 years, you can raise enough to be competitive in a race; you will raise about $4 million. As we know, in some States it takes a lot more money. In those States, you have to raise twice that much or three times or four times that much. Instead of raising $13,000 or $14,000 a week, people have to raise $50,000 a week. That is what we should be focusing on, Mr. President—the fact that these campaigns are very expensive.

Eleven years ago, I came to the Senate floor and talked about this campaign I had been through, a campaign where corporate money was used. Complaints had been filed with the Federal Election Commission. It is 11 years now, and a number of those complaints have still never been disposed of by the Federal Election Commission. They are still pending. I thought to myself, I can't believe there would be another election with the same rules in effect. We haven't had one election since then; we have had six since then where the same rules applied to Members of Congress. I, personally, will begin my third campaign using these same rules. In fact, I have to say they are not identical rules; they are worse, because in the early part of this century Congress decided it wasn't appropriate to have corporate money used in campaigns. The Supreme Court came back last year and said, oh, well, you can use corporate money in campaigns. State parties can virtually use the money any way they want. So corporate money is now back into elections for the first time in 85 or 90 years. Now corporate money is important.

I guess we have to be satisfied that there is a debate. I extend my appreciation to the majority leader for allowing this debate to take place; a debate about campaign financing. I have to say, though, Mr. President, that we started out saying, well, McCain-Feingold doesn't do it all, but it is not a bad bill. That is why I joined as a sponsor of that legislation. But now we are here before the Senate, the original McCain-Feingold is long gone, and we are now talking about a mini McCain-Feingold, which we are now happy that we have, that even though the original bill was lacking in many elements, now we are congratulating ourselves for going with a slimmed-down version of McCain-Feingold, which we probably won't get a chance to vote on because of all the extracurricular, extraneous matters being debated in this.

This watered-down version, I hope, can be passed. But because opponents of campaign finance reform have taken it upon themselves to expand a Supreme Court decision, the Beck case, I am not sure we are going to be able to. I have come to the floor today to remind my colleagues that we are not debating campaign finance reform to find out if the President had made phone calls from an inappropriate place or whether he should have gone to his home. Think about that; he could not do that because that is on Federal property. Maybe he should have taken Secret Service agents with him and found a pay phone to make those calls.

The fact is, we should be debating that campaigns take too much time and campaigns are far too long and take too much money. Since 1992, we have had a $900 million election cycle. In 1996, there was a 70-percent increase, in just those 4 years. In the last 20 years, congressional races have increased their spending by some 700 percent. Both political parties, Democrats and Republicans, know that the cost of campaigns is the problem. So I think we should bring back the focus on the real issue of campaign finance reform, which is that there is too much money being spent and campaigns are too long.

I see my friend from Kentucky on the floor. I have to say to him that I appreciate his honesty in this campaign debate. From the very first time that he took this as a campaign issue, he hasn't minced any words. He has said basically that he is opposed to it. We have a lot of people, Mr. President, who don't have the—I won't say courage, but that is a decent word—ability to get up and call things the way he sees them. I disagree with my friend from Kentucky, but he is willing to debate the issues as they stand. He has been willing to do this from the first time it was brought up when Senator BYRD was majority leader and when Senator Mitchell was majority leader. He doesn't hide how he feels about campaign finance reform. I appreciate his approach. Many people are hiding between the nuances of campaign finance reform and side issues. I say to my friend from Kentucky that I appreciate his approach. He says he is against campaign finance reform, and he has never hidden that fact; he has spoken out openly and has been very candid about it. I appreciate his approach to it.

I do say, however, that I wish that there were others like my friend from Kentucky who would stand up and debate the issue. McCain-Feingold, for example, let's debate it, and if there are enough votes to pass it, fine. If not, let's go on to another issue. We don't need filibusters on either side. We need to debate whether or not we need campaign finance reform. We need to go forward.

I personally believe that campaigns, I repeat, are too long, too costly, and we owe an obligation to the American public to do something about that.

Mr. MCCONNELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Kentucky is recognized.

Mr. MCCONNELL. Mr. President, this would be a good time, in the beginning of the debate, to thank my colleague from Nevada for his kind words. I appreciate that very much. Also, Mr. President, I would like to insert a number of things into the RECORD with some explanation, just to make the Record complete, before we go to further debate later this afternoon. There are a number of Senators on my side of this issue who want to speak, and they will be coming over at various times during the course of the afternoon's debate.

First, Mr. President, I would like to submit a sampling of the opinion pieces I have authored in the past year. One is from January of this year, published by the Washington Times, in which I had a premonition that President Clinton, as his own campaign finance scandal deepened, would become campaign finance reform's No. 1 fan. Frankly, it's not that I am particularly clairvoyant, but rather that they are so predictable.

As the Clinton administration and the Democratic National Committee have sunk in a scandalous quicksand of their own making, the more they publicly thrashed around groping for a campaign finance bill as if it were a life preserver. Unfortunately for America, the President and Vice President GORE seek to save themselves from their own embarrassing malfeasance in raising money from foreigners and the

other episodes which have been so much in the newspapers. They want to save themselves at the expense of core constitutional freedoms for all Americans.

Mr. President, I ask unanimous consent that an article I wrote for the Washington Times be printed in the RECORD at this point.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Washington Times, Jan. 30, 1997]

KEEP CAMPAIGN REFORM LEGAL

(By Mitch McConnell)

''Offense is the best defense'' is a cliche and a frequently employed political tactic. Diversion, skillfully applied, also can have great utility in politics. President Clinton is hoping both work for him in deflecting attention from the waves of campaign finance scandals lapping up on the White House lawn. That is why Mr. Clinton strives to become campaign finance reform's No. 1 fan.

Mr. Clinton's newfound zeal for campaign finance reform is transparent and dangerous. The McCain-Feingold bill around which he belatedly rallies is a convenient fig leaf. It is also a tremendous threat to political freedom, as it would restrict political speech and participation. The president's party hopes it will prevent collateral damage arising from the latest Clinton scandals. They contend, wrongly, that the campaign finance shenanigans making today's headlines merely illustrate a systemic problem solvable only through comprehensive ''reform.'' Never mind that the foreign contributions and contribution-laundering reportedly done on behalf of the Clinton reelection campaign are illegal, under current law.

Mr. Clinton's ''reform'' agenda, while a clever diversionary tactic, is unconstitutional. It is that element which should disturb us most of all.

The Constitution's First Amendment is America's premier political reform. It should be the touchstone for campaign finance reform. But the McCain-Feingold bill and the president instead treat it as an impediment to be undermined, circumvented, even diminished. The McCain-Feingold bill, with its coerced campaign spending limits and restrictions on independent speech, is a square peg reformers try in vain to pound into the First Amendment's round hole. In tacit recognition of this, the Democrats' House and Senate leaders recently endorsed a constitutional amendment to narrow the First Amendment so that the unconstitutional (the McCain-Feingold bill) could, thus, become constitutional. Audacious, to say the least.

The Supreme Court has for years ruled, in no uncertain terms, that campaign spending is protected by the First Amendment because communication with voters costs money. Hence, spending limits are speech limits which Congress cannot constitutionally mandate. Congress must also tread lightly on the ability of private citizens and groups to participate in campaigns and affect elections via independent expenditures.

Regrettably, while striking down mandatory spending limits, the court ruled two decades ago that the government could pay candidates large sums from the U.S. Treasury in exchange for candidates' agreeing to forgo their First Amendment right to unlimited spending (i.e., speech). However, the spending limit system must be purely voluntary. That is the state of play in the billion-dollar presidential campaign finance system, where every major candidate except John Connally and the circa-1992 Ross Perot (in 1996, Perot's campaign received $30 million from the taxpayers) has opted into the taxpayer-financed spending limits program. Have the tax dollars limited spending or so-called ''special interests''? No. Like a rock on Jello, the spending limits merely redirect the spending into other, unlimited, channels—including party and labor ''soft'' money. Spending limits promote subterfuge, which the 1996 Clinton reelection campaign may have taken to new lows (or highs, depending on your perspective).

Just as it seized upon the Keating Five scandal seven year ago, so does Washington's reform industry now exploit the emerging Clinton campaign finance scandal. The media-anointed reformers seek to complete a job they started 20 years ago—that is, to put (via the McCain-Feingold bill) the discredited presidential model of spending limits on congressional campaigns. It is an absurd proposition, but reform groups and politicians reap gains—including fawning editorials—from the battle. They are adept at massaging the press with snappy soundbites and voluminous ''studies'' to build a case for creating a bureaucratic regulatory regime of extraordinary proportion to micromanage and ration the speech of candidates and millions of private citizens. Why? Because, they contend that: 1) campaigns spend too much; 2) ''legalized bribery'' is rampant; and 3) special interests influence is pervasive.

The truth is, Americans spend far more on yogurt than political campaigns, bribery is illegal and the U.S. always has been and will be a teeming cauldron of ''special interests.'' It is government that is pervasive. It is little wonder that virtually every American has a host of ''special'' interests in their government.

In his State of the Union speech, Mr. Clinton will call for campaign finance reform, specifically, the McCain-Feingold bill. He may be so audacious as to bemoan ''special interest'' influence, leaving unspoken his own culpability in rewarding contributors with White House access and nights in the Lincoln bedroom. It will take great restraint on the part of Congress and the country not to hoot and howl during this brazenly hypocritical call for systemic reform.

President Clinton can do much to restore confidence in the political process by cleaning up his own act. That is why on the subject of campaign finance I have two words of advice for the president: Reform yourself.

Mr. MCCONNELL. Mr. President, I ask unanimous consent that an op-ed of mine which appeared in the Boston Globe in a somewhat altered form on Sunday, September 7, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

As with a Rorschach test, different people can view the same campaign finance data and come away with wildly divergent conclusions. Supporters of the McCain-Feingold campaign finance ''reform'' scheme look upon the record spending in the 1996 election cycle and profess to be horrified—hysterically seeing malevolent ''special'' interests at every turn, poised to plunder our democracy. I look upon that same election as the culmination of a fierce, and healthy, philosophical battle over how best to ensure a prosperous future for our nation.

Where I see a vibrant democracy-in-action, the ''reform'' agitators see chaos crying out for a big government remedy. In the 1996 election cycle, the liberal status quo came roaring back from the 1994 elections in which they had been so profoundly rejected. The conservative insurgents of 1994 responded in-kind, fighting to prevail in the 1996 elections with their recently acquired power intact, and the addition of a Republican-held White House. With Democrats desperate to regain control of Congress, Republicans having (after four memorable decades in minority exile) savored majority status, and momentous decisions to be made about the role of government in our society, you may be assured that the next few elections will be similarly boisterous. This political energy should be applauded, not condemned, and certainly not reformed away.

McCain-Feingold proponents have long believed that there is ''too much'' campaign spending, a notion that finds, at first blush, a receptive audience in cynical times. What makes the task of limiting spending so daunting for the reformers and so dangerous for our nation is that, as the Supreme Court has repeatedly ruled, in political campaigns spending limits function as speech limits of the most undemocratic and nefarious sort. Ergo, what the campaign finance reform debate is really about are First Amendment freedoms of speech, association and the right to petition the government. In our modern society, exercising these freedoms is an expensive endeavor. That is why McCain-Feingold's convoluted provisions to limit the speech of private citizens, groups, candidates and parties would surely be struck down as unconstitutional.

The Supreme Court has emphatically rejected the goals of McCain-Feingold's proponents. On whether government can intervene to limit spending, the court has said: ''The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive or unwise.'' As to the reformer contention that campaign spending breeds corruption, the Court held that there is ''nothing invidious, improper or unhealthy'' in campaigns spending money to communicate. And on the reformers' appealing argument that McCain-Feingold would help ''level the playing field,'' the Court is contemptuous: ''. . . 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.''

In addition to failing the constitutional test, McCain-Feingold cannot, as a practical matter, achieve its stated aims. Level the playing field? What is a famous family name worth? What is the value of incumbency? Spending limits do not take such non-monetary factors into account. Reduce ''special'' interest influence? The reformers cannot even define ''special'' interests (the truth is everyone has ''special'' interests), let alone shoo them out of a democracy. Banish ''legalized bribery?'' That is an oxymoron. Bribery is illegal, period. Restore confidence in government? That is a tall order for any ''reform'' and unlikely to be achieved by a measure such as McCain-Feingold which would necessitate a huge bureaucracy to regulate the political speech of private citizens, groups, parties and thousands of candidates in every election.

To illustrate the absurdity of the McCain-Feingold approach to reform, consider its bizarre spending limit formula. For Senate general elections, reformer nirvana is achieved by limiting campaigns to spending an amount equal to: 30 cents times the number of the state's voting-age citizens up to four million, plus 25 cents times the number of voting-age citizens over four million, plus $400,000. However, if you are running in New Jersey, 80 cents and 70 cents are substituted for 30 and 25. The formula notwithstanding, for all states, regardless of population, the minimum general election limit would be $950,000 and the maximum, $5,500,000. The primary election limit is set at 67 percent of the

general and runoffs are limited to 20 percent. In the unlikely event this atrocity was deemed constitutional, it would be a mess to administrate, a nightmare to comply with, and a blight on the Republic.

To propel their effort to have the government ration political speech, McCain-Feingold proponents have seized upon the White House-Democratic National Committee campaign finance scandal which centers on violations of existing law. They exploit legitimate outrage over illegal foreign contributions in order to restrict political speech and participation by American citizens. It is a brazen and despicable strategy.

Curiously, those most associated with the First Amendment—the news media—display a callous disregard for the political freedom of private citizens, groups, candidates and parties in McCain-Feingold's cross hairs. Newspapers spew forth reams of editorials endorsing McCain-Feingold. Television's talking heads pontificate on the dire need to limit the political speech of non-media political participants. Why is the media an eager accomplice in advancing this unconstitutional and undemocratic ''reform'' agenda? One might reasonably conclude that media poobahs see an opportunity to fill the void left when the political speech of every other player in the political process is limited by McCain-Feingold. Newspaper editorials and articles, not to mention television, exert tremendous influence on elections. Most media outlets are subsidiaries of corporate conglomerates (i.e. ''special'' interests), yet they would not be limited by McCain-Feingold. On this one point alone is McCain-Feingold sensitive to the First Amendment.

That there is no media conspiracy to snuff out competitors in the political sphere makes this confluence of support for a legislative assault on their core First Amendment freedom no less lamentable. Those in the media should consider that they are but one ''loophole'' away—a special exemption under the Federal Election Campaign Act—from having their product regulated by the Federal Election Commission (FEC). Assuming, of course, that the Courts did not intervene. Perhaps some experience with the FEC speech police would sensitize editorial writers, reporters and TV talking heads to the insidious effects of regulating election-related speech.

The Supreme Court astutely observed six decades ago that First Amendment freedom of speech is the ''matrix, the indispensable condition, of nearly every other form of freedom.'' Recognizing this, an extraordinary alliance of citizens groups has coalesced to oppose the McCain-Feingold bill. Ranging from the American Civil Liberties Union and the National Education Association on the left, to the Christian Coalition, National Right to Life and the National Rifle Association on the right, this coalition has little in common except a determination to preserve these core political freedoms for all Americans. In fighting the McCain-Feingold juggernaut, they are doing America a great public service.

No one is arguing that the current campaign finance system is ideal but like so many things in life, ''reform'' is in the eye of the beholder. I believe the current scandal-ridden presidential system of squandered taxpayer funding and illusory spending limits should be repealed. Circa-1974 contribution limits should be updated to make fundraising less time-consuming for all candidates and less formidable for challengers who usually do not have a large base of contributors from which to draw support. All contributions should be purely voluntary which is why union members' compulsory dues should not be diverted to politicking. And more citizens should be encouraged to participate in campaigns through volunteer activities and financial contributions to the candidates and causes of their choosing. Campaign contributions are a laudable and honorable means of participation in campaigns and so long as they are publicly disclosed and continue to be scrutinized by the media, voters can judge for themselves what is appropriate.

Mr. MCCONNELL. Mr. President, this is a piece I authored and which appeared in the National Review in its June 30 edition. This op-ed starts out with the observation that proponents of spending limits are stuck between a rock and a hard place: The Constitution and reality.

It is my hope that some of the signatories to the Project Independence petition drive will read this, and particularly paying attention to the McCain-Feingold bill's absurd spending limits formula—and refrain from signing such a misleading and shallow document in the future.

I ask unanimous consent that it be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

THE MONEY GAG

(By Mitch McConnell)

Proponents of campaign-spending limits are stuck between a rock and a hard place: the Constitution and reality.

It is impossible constitutionally to limit all campaign-related spending. The Supreme Court has been quite clear on this matter, most notably in the 1976 *Buckley* v. *Valeo* decision: ''The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.''

For those who do not at first blush see the link between the First Amendment and campaign spending, the Court elaborates: ''A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.''

The reformers do not care or, in some cases, cannot accept that spending limits limit speech. They believe that spending limits are justified and necessary to alleviate perceived or actual corruption. But the Court slapped that argument aside, holding that there is ''nothing invidious, improper, or unhealthy'' in campaigns spending money to communicate. The reformers cannot that spending limits are essential because campaign spending has increased dramatically in the past two decades, a woefully lame premise the Court easily dispatched: ''The mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending.'' Appealing to Americans' instinct for fairness, the reformers passionately plead for spending limits to ''level'' the political playing field. The Court was utterly contemptuous of this ''level playing field'' argument. ''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.''

There you have it. The reformers cannot achieve their objectives statutorily. To realize the reformers' campaign-finance nirvana would require essentially repealing the First Amendment—blowing a huge hole in the Bill of Rights—via a constitutional amendment. Frightfully undemocratic? Yes. Out of the question? No; 38 United States senators voted to do just that on March 18, 1997. These 38 senators voted, in the name of ''reform,';' for S.J. Res. 18, a constitutional amendment to empower Congress and the states to limit contributions and spending ''by, in support of, or in opposition to, a candidate.'' Thus would the entire universe of political speech and participation be subjected to limitation by congressional edict, and enforcement by government bureaucrats.

This wholesale repeal of core political freedom registered barely a ripple in the nation's media. Perhaps reporters and editorial writers do not appreciate that their campaign coverage could be construed as spending ''by, in support of, or in opposition to, a candidate'' and, therefore, could be regulated under a Constitution so altered. It is not a stretch. The television networks and most major newspapers are owned by corporate conglomerates (a/k/a ''special interests'' and the blurred distinction is already acknowledged in federal campaign law, which currently exempts from the definition of expenditure ''any news story, commentary, or editorial'' unless distributed by a political party, committee, or candidate.

I do not advocate regulating newspaper editorials, articles, and headlines. I do not believe that government should compensate candidates who are harmed by television newscasts or biased anchors. However, the political playing field can never be ''level'' without such regulation, and it is the only area of political speech upon which the vaunted McCain-Feingold bill is silent. McCain-Feingold has provisions to enable candidates to counteract independent expenditures by every ''special interest'' in America, except the media industry. This ''loophole'' is the only one which editorial writers are not advocating be closed by the government.

Such regulation of the media may strike one as an absurd result of the campaign-reform movement, but it is a logical extrapolation of McCain-Feingold's regulatory regime. The McCain-Feingold bill's spending-limit formula for candidates is itself ludicrous. For Senate general elections: 30 cents times the number of the state's voting-age citizens up to 4 million, plus 25 cents times the number of voting-age citizens over 4 million, plus $400,000. However, if you are running in New Jersey, 80 cents and 70 cents are substituted for 30 and 25 because of the dispersed media markets. Moreover, the formula notwithstanding, for all states the minimum general election limit is $950,000 and the maximum $5,500,000. McCain-Feingold sets the primary-election limit at 67 per cent of the general-election limit and the runoff limit at 20 per cent of the general-election limit.

Reading the Clinton-endorsed McCain-Feingold bill, one can only conclude that the era of big government is just beginning. The Courts have repeatedly ruled that communications which do not ''expressly advocate'' the election or defeat of a candidate (using terms such as ''vote for,'' ''defeat,'' ''elect'') cannot be regulated, yet McCain-Feingold would have the Federal Election Commission policing such ads if ''a reasonable person'' would ''understand'' them to advocate election or defeat. Out of 260 million Americans,

just which one is to be this ''reasonable person''?

The McCain-Feingold bill seeks to quiet the voices of candidates, private citizens, groups, and parties. Why? Because, it is said, ''too much'' is spent on American elections. The so-called reformers chafe when I pose the obvious question: ''Compared to what?''

In 1996—an extraordinarily high-stakes, competitive election in which there was a fierce ideological battle over the future of the world's only superpower—$3.89 per eligible voter was spent on congressional elections. May I be so bold as to suggest that spending on congressional elections the equivalent of a McDonald's ''extra value'' meal and a small milkshake is not ''too much?''

The reformers are not dissuaded by facts. Their agenda is not advanced by reason. It is propelled by the media, some politicians, and the recent infusion of millions of dollars in foundation grants to ''reform'' groups. Fortunately, the majority of this Congress is not ideologically predisposed toward the undemocratic, unconstitutional, bureaucratic finance scheme embodied in McCain-Feingold. Further, a powerful and diverse coalition has coalesced to protect American freedom from the McCain-Feingold juggernaut.

Ranging from the American Civil Liberties Union and the National Education Association on the left to the Christian Coalition, the National Right to Life Committee, and the National Rifle Association on the right, the individual members of the coalition agree on little except the need for the freedom to participate in American politics. There is perhaps no better illustration of the Supreme Court's observation in 1937 that freedom of speech ''is the matrix, the indispensable condition, of nearly every other form of freedom.'' These groups understand that the First Amendment is America's greatest political reform.

Where do we go from here? After ten years of fighting and filibustering against assaults on the First Amendment advanced under the guise of ''reform,'' I am heartened by the honest debate in this Congress. In the House of Representatives, John T. Doolittle's bold proposal to repeal government-prescribed contribution limits and the taxpayer-financed system of (illusory) presidential spending limits has more co-sponsors than McCain-Feingold's companion bill, the Shays-Meehan speech-rationing scheme. In the Senate, McCain-Feingold's fortunes cling pathetically to the specter that the Government Affairs investigation into the Clinton campaign-finance scandal will fuel public pressure for reform.

My goal is to redefine ''reform,'' to move the debate away from arbitrary limits and toward expanded citizen participation, electoral competition, and political discourse. McCain-Feingold is a failed approach to campaign finance that has proved a disaster in the presidential system. McCain-Feingold would paper over the fatal flaws in the presidential spending-limit system and extend the disaster to congressional elections. Experience argues for scuttling it entirely.

The best way to diminish the influence of any particular ''special interest'' is to dilute its impact through the infusion of new donors contributing more money to campaigns and political parties. Those who get off the sidelines and contribute their own money to the candidates and parties of their choice should be lauded, not demonized. The increased campaign spending of the past few elections should be hailed as evidence of a vibrant democracy, not reviled as a ''problem'' needing to be cured.

My prescription for reform includes contribution limits adjusted, at the least, for inflation.

The $1,000 individual limit was set in 1974, when a new Ford Mustang cost just $2,700. The political parties should be strengthened, the present constraints on what they can do for their nominees, repealed. These would be steps in the right direction.

Mr. MCCONNELL. Mr. President, this is also an op-ed which I did for USA Today—a publication whose word limits its force you to distill your arguments.

I ask unanimous consent that it be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

BEWARE SO-CALLED FIXES

(By Mitch McConnell)

The First Amendment of the Constitution is America's premier political reform. To reformers, it's a ''loophole.'' The Supreme Court has repeatedly ruled that because communication with voters costs money, campaign spending is protected by the First Amendment and cannot be rationed by the government. That does not stop the so-called reformers from trying.

The presidential system of campaign finance is the monument to reform excess. Thanks to the Democratic National Committee's apparent penchant for illegal foreign contributions, it is also scandal-ridden. A post-Watergate ''reform,'' the presidential system gives candidates tax dollars for which, in exchange, they agree to campaign spending limits. But like a rock placed on Jello, the spending limits merely shift the money into other channels—notably party and union ''soft'' money.

Political parties, unions and newspapers have a constitutional right to spend as much as they choose to affect elections. Some newspapers want to neuter the political parties under the guise of ''reform.'' The parties are vital components of the electoral process, the only entities that will consistently support challengers—of all ideological stripes. Their only litmus test is party affiliation. They do not have a vote in Congress. They are a buffer between so-called ''special interests'' and government.

The presidential system of taxpayer-funded spending limits is a disaster that should be repealed. But so-called reformers instead want to extend that debacle to congressional elections and exploit the Democrats' scandal to justify eviscerating the political parties.

Rather than admit spending limits have failed, the reformers want to add even more layers of bureaucracy to police American political speech and participation by candidates, political parties, private citizens and groups. Why? The reformers say ''too much'' is spent on elections. Americans spend more on yogurt. The reformers bemoan ''legalized bribery,'' an oxymoron. Bribery is illegal, period. They say special-interest influence is pervasive. Yet they cannot define ''special interest.''

Disclosure—not arbitrary, bureaucratic limits—should be the linchpin of reform. Voters can decide for themselves what is appropriate. Taxpayers should not be called upon to fund a campaign-finance scheme in which the First Amendment is regarded as a ''loophole,'' and so long as America is a democracy, the spending limits can never be more than a facade.

Mr. MCCONNELL. Mr. President, further, I submit for the RECORD four illuminating documents from the American Civil Liberties Union. Say what you will about this organization—one that Members on my side, including me, are infrequently aligned with—they take some gutsy positions. It is tough for a liberal group—a label usually given to the ACLU—to go against the liberal grain, particularly on an issue this high-profile, as this one which we are debating today.

Particularly, Mr. President, I want to single out Laura Murphy, director of the ACLU's Washington office, and no doubt others in that organization, have taken a lot of grief for their brave and resolute position in defense of political freedom for all Americans—liberals, conservatives, and every ideological shade in between. I cannot say enough good things about the work that Laura, Joel Gora, Ira Glasser, and other folks in the ACLU have done on this issue. Their effort against McCain-Feingold has been truly heroic. Two-hundred and sixty million American beneficiaries of the first amendment owe these people a debt of thanks.

With a few notable and admirable exceptions, I have been sorely disappointed by the willingness of liberal groups to walk off a cliff for this blatantly unconstitutional reform effort. I'm told some have made the calculated decision that if the McCain-Feingold bill passed, liberal causes would benefit.

I think they are right on that score but it is shameful that so many would eagerly jettison 200 years of core political freedom—which benefits all citizens and makes America a uniquely free country—in order to stick it to conservatives and anyone else who does not support the liberal agenda.

These liberal, Democrat-leaning groups know McCain-Feingold is outrageous—that its issue advocacy provisions, to name just a few, are unconscionable assaults on the first amendment right of all Americans to petition the government as individuals, and as groups, and to weigh in on public issues. But still some actively promote McCain-Feingold, more simply look the other way—acquiescing on the sidelines of this critical debate over core constitutional freedoms they get paid to exercise.

Perhaps they believe, correctly I might add, that Republicans will save the Nation from McCain-Feingold. I predict that will be the outcome.

Mr. President, I will now read into the RECORD some highlights of the ACLU's most recent denunciation of the McCain-Feingold bill, dated October 1, 1997:

> Ever since the very first version of the various McCain-Feingold campaign finance bills was introduced in the Senate, the ACLU has gone on record to assert that each version was fatally and fundamentally flawed when measured against settled First Amendment principles. Now the Senate is debating a new ''revised'' incarnation of the bill. While we are pleased that the sponsors of the new version have abandoned some of the more egregious provisions that appeared in earlier versions, the ''pared down'' bill still cuts to the core of the First Amendment. We once again urge you to reject McCain-Feingold's unconstitutional and unprecedented assaults on freedom of speech and association.
>
> Although the bill has a number of constitutional flaws, this letter focuses on those

that impose restrictions primarily on issue advocacy. It is important to note at the outset that the recent letter from 126 law professors, commenting on McCain-Feingold, was silent on the issue advocacy restrictions in the bill, which are the subject of this letter.

1. The unprecedented restrictions on issue advocacy contained in the McCain-Feingold bill are flatly unconstitutional under settled First Amendment doctrine.

Last week there was a lot of discussion of a law professor named Burt Neumann at the Brennan Center of New York. I believe it is interesting that everyone believes Brennan wrote the Buckley case, one of the ironies of this debate. Mr. Neumann for 24 years had said the Buckley decision was wrong. And he is free to say that. He wishes it were otherwise. But his position and the position of the man he presumably admires the most, William Brennan, not only prevailed in the Buckley case but has been further elaborated on in 21 years of litigation. Thus, the ACLU says under settled first amendment doctrine:

What we are talking about here is not the law as some wish it were but the law as it is. And that is what the ACLU is referring to.

Further, in another place in the letter, Mr. President, they say:

The unprecedented and sweeping restraints on the ''soft money'' funding of issue advocacy and political activity by political parties raise severe first amendment problems.

At another point in the letter, the ACLU says, ''The same principles that protect unrestrained issue advocacy by issue groups safeguard issue advocacy and activity by political parties.''

So, if issue advocacy has been well laid out by 21 years of court cases for groups, the same thing applies for political parties.

By the way, Mr. President, this letter was signed by Ira Glasser, executive director; Laura Murphy, director, Washington office; Joel Gora, professor of law at Brooklyn Law School.

I might just say a word about Joel Gora. He was cocounsel in the Buckley case. So my side in this argument is that they didn't have to go out and find somebody to certify that they wish the law were what it isn't. These folks know what the law is, were involved in litigating these cases, and are simply certifying as to their opinion based upon deep experience in this field as to the constitutionality of the measure before us.

So, here is what they say at the end of the letter.

Accordingly, we submit that McCain-Feingold's sweeping controls on the amount and source of soft money contributions to political parties and disclosure of soft money disbursements by other organizations continue to raise severe constitutional problems. Disclosure, rather than limitation, of large soft money contributions to political parties, is the more appropriate and less restrictive alternative.

McCain-Feingold's labyrinth of restrictions on party funding and political activity can have no other effect but to deter and discourage precisely the kind of political party activity that the First Amendment was designed to protect.

. . . While reasonable people may disagree about the proper approaches to campaign finance reform, this bill's restraints on political party funding and issue advocacy raise profound First Amendment problems and should be opposed. The bill has a number of other severe flaws, some old, some new, which we will address in a future communication. But we wanted to take the opportunity to share our assessment of two of the most salient problems with the bill now.

So, Mr. President, there it is from America's experts on the first amendment, one of whom was one of the lawyers in the Buckley case. These are people who are experts on this kind of litigation, and that is their opinion about the constitutionality of McCain-Feingold, as revised.

Now, Mr. President, a September 25, 1997, letter from the Christian Coalition. It says:

DEAR SENATOR: The Christian Coalition has long supported campaign finance reform that encourages citizen participation and nonpartisan voter education. Any reform of our system of campaign financing should allow for educational tools such as nonpartisan voter guides, issue advertising, congressional scorecards and newsletters. Christian Coalition vigorously opposes the McCain-Feingold legislation which unconstitutionally restricts these types of issue advocacy.

I will just read one other sentence, Mr. President, from this particular letter. This organization says:

Voter education should be encouraged, not discouraged. An informed electorate is part of the solution, not part of the problem.

I could not agree more.

I ask unanimous consent that that letter be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

CHRISTIAN COALITION,
CAPITOL HILL OFFICE,
Washington, DC, September 25, 1997.

SUPPORT FIRST AMENDMENT—FREE SPEECH OPPOSE MCCAIN-FEINGOLD CAMPAIGN FINANCE BILL

DEAR SENATOR: The Christian Coalition has long supported campaign finance reform that encourages citizen participation and non-partisan voter education. Any reform of our system of campaign finance should allow for educational tools such as non-partisan voter guides, issue advertising, congressional scorecards, and newsletters. Christian Coalition vigorously opposes the McCain-Feingold legislation which unconstitutionally restricts these types of issue advocacy.

Issue advocacy is constitutionally protected free speech. Expressing opinions on issues and informing voters where candidates stand on the issues are constitutionally protected free speech, so long as the election or defeat of a candidate is not ''expressly advocated.'' For over 20 years, the Supreme Court has repeatedly ruled that the test must be objective, not subjective. ''Express advocacy'' is defined by using such words as, ''vote against,'' and ''oppose.'' The McCain-Feingold bill imposes an unconstitutional subjective test.

Voter education should be encouraged, not discouraged. An informed electorate is part of the solution, not part of the problem. Without voter education efforts, our supporters would be forced to rely entirely on slick political advertising and the news media. In fact, newspapers and other media outlets express opinions and even expressly advocate the election or defeat of candidates through editorials. While the media is totally unregulated, as it should be under the First Amendment, some want to prohibit and heavily regulate issue organizations from exercising similar free speech.

Restrictive speech provisions will not withstand constitutional challenge. Therefore we oppose any proposals which attempt to bring constitutionally protected issue advocacy under the regulatory control of the federal government. Thank you for considering our views.

Sincerely,

HEIDI H. STIRRUP,
Director, Government Relations.

(Mr. GORTON assumed the chair.)

Mr. MCCONNELL. Mr. President, I will read just a few of the highlights from the cover letter. This is dated October 3, 1997.

DEAR SENATOR MCCONNELL: Thank you for requesting our comments on the revised McCain-Feingold campaign finance bill. . . .

Much of what the Cato Institute and similar nonprofit research and public policy corporations do could no longer be done or, done only if we are comfortable having research publications, public policy forums, city seminars, conferences and the like classified as ''contributions.'' In this bizarre scenario, these ''contributions'' would have to be paid for out of our ''PAC'' (which, of course, we would never have), and, probably, could not be done at all since much of the ''anything of value'' we produce often costs more than the $5,000 limit on contributions.

Here is a group, Mr. President, not in politics. They do not go out and create a PAC, they do not do voter guides, and they think that the most recent version of McCain-Feingold is going to make it hard for them to function.

The Cato Institute goes on:

For example, if we published a study on the flat tax, or tax reform and ever discussed the issue with Representative Dick Armey—or, heaven forbid, held a policy forum or city seminar with Dick Armey, Steve Forbes, Reps' Paxon, Tauzin, Archer, or any of the other leading proponents of tax reform—under the new McCain-Feingold, these could become contributions.

I guess the good news is, as Bob Levy says, that ''the September 29 version of McCain-Feingold reduces the first amendment to scrap''—so blatantly unconstitutional that it will never become law. As Bob also says, ''McCain-Feingold is an insidious and destructive piece of legislation. It deserves an ignominious burial. To be blunt, either it dies, or we do.''

Mr. President, I ask unanimous consent that the communication from the Cato Institute be printed in the RECORD, along with another letter from the National Taxpayers Union.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

CATO,
Washington, DC, October 3, 1997.

Hon. MITCH MCCONNELL,
U.S. Senate,
Washington, DC.

DEAR SENATOR MCCONNELL: Thank you for requesting our comments on the revised McCain-Feingold campaign finance bill. A copy of Bob Levy's detailed analysis is attached (Bob is a senior fellow in constitutional studies here at Cato.) I think you will find the first two and closing paragraphs succinct and to the point.

In summary, much of what the Cato Institute and similar non-profit research and public policy corporations do, could no longer be done or, done only if we are comfortable having research publications, public policy forums, city seminars, conferences and the like classified as ''contributions.'' In this bizarre scenario, these ''contributions'' would have to be paid for out of our ''PAC'' (which of course, we would never have), and, probably, could not be done at all since much of the ''anything of value'' we produce often costs more than the $5,000 limit on contributions. And, of course, if you know anything at all about the Cato Institute and our president, Ed Crane, the last thing we would ever do is allow ourselves to be in a situation that could be interpreted as making contributions to political candidates.

For example, if we published a study on the flat tax, or tax reform and ever discussed the issue with Rep. Dick Armey—or, heaven forbid, held a policy forum or city seminar with Dick Armey, Steve Forbes, Reps. Paxon, Tauzin, Archer, or any of the other leading proponents of tax reform—under the new McCain-Feingold, these could become ''contributions.''

I guess the good news is, as Bob Levy says, that ''the September 29 version of McCain-Feingold reduces the First Amendment to scrap''—so blatantly unconstitutional that it will never become law. As Bob also says, ''McCain-Feingold is an insidious and destructive piece of legislation. It deserves an ignominious burial. To be blunt, either it dies, or we do.''

We hope the above and attached is helpful.

Sincerely,

PEGGY J. ELLIS.

Attachment.

NATIONAL TAXPAYERS UNION,
Alexandria, VA, October 6, 1997.

Attention: Campaign Finance Reform Aide.

DEAR SENATOR: When you took your oath of office you said:

I, (name), do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I well and faithfully discharge the duties of the office on which I am about to enter: So help me God (5 U.S.C. 3331.)

S. 25, the campaign finance bill by Senators McCain and Feingold, is blatantly unconstitutional under the First Amendment, which says in part that ''Congress shall make no law–.–.–.–abridging the freedom of speech, or of the press; or the right to the people peaceably to assemble, and to petition the Government for a redress of grievances.'' You cannot ''support the Constitution'' by trying the patience of the Courts. Therefore, we believe that every Senator has a constitutional obligation to vote against passage of this bill.

The restrictions are so absurd that, if the bill were law, it would be illegal for any organization to energetically lobby for or against any legislation within 60 days of any election unless it excluded the names of their lawmakers. So for at least four months of every other year, groups could not pay for ''any paid advertisement that is broadcast by a radio broadcast station or television broadcast station'' if they identified the name of a local lawmaker. If the Congress wants such silly rules, then it should also arrange to be out of session during these 60-day periods, and require that all state congressional primaries he held on the same day.

The bill also proposes to ban, year-round, so-called express advocacy while going far beyond the Supreme Court's definition of express advocacy. The definitions are so vague that candidates could complain to the Federal Election Commission that many criticisms of their views constitute ''illegal'' activity. Since there would be no cost to complain, complain they will.

The sponsors of this legislation may claim it would have no cost to taxpayers. We strongly disagree. Since the proposal is so vague and so far-reaching in its application and attempt to regulate speech and political activity, it would take an enormous and costly expansion of the FEC to administer our newly regulated ''free-speech'' rights. Therefore, we will count a vote against this bill as a pro-taxpayer vote in our annual Rating of Congress.

One final note. As a taxpayer organization, we know a thing or two about complex and vague laws such as our tax code. But if this bill becomes law, many of our tax laws will be a model of clarity compared to the election law. And the tax laws will have one advantage. Audits are not set in motion by the frivolous complaints that would be the rule under this legislation.

Sincerely,

DAVID KEATING,
Executive Vice President.

Mr. MCCONNELL. Preferring substance to petitions, I have a couple of constitutional analyses to have printed in the RECORD. I understand from the Government Printing Office that it will cost approximately $12,000 to print this material in the RECORD.

The first is an outstanding dissertation on the constitutional implications of campaign finance reform by law professor and renowned legal scholar Lillian R. BeVier of the University of Virginia, and again I will just read some of the highlights for the information of those listening to the debate.

Professor BeVier appeared before the Rules Committee on several occasions. Her report of September 4, 1997, says:

The shortcomings of current ''reform'' proposals are no small matter, given the First Amendment's crucial historical role in protecting our right to self-government and its sustaining liberty. For the proposals to pass constitutional muster, the First Amendment would have to be itself ''amended'' by judicial fiat.

And that, Mr. President, sums up I think quite well what Professor BeVier goes on to point out in some greater detail and I ask unanimous consent that that dissertation be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

CAMPAIGN FINANCE ''REFORM'' PROPOSALS—A FIRST AMENDMENT ANALYSIS

(By Lillian R. BeVier)

EXECUTIVE SUMMARY

In the wake of recent reports of questionable campaign finance practices have come ever more draconian proposals to ''reform'' the campaign finance system. Those proposals pose a disturbing threat to the individual political freedom guaranteed by the Constitution. Under current precedents, none of them could survive a First Amendment challenge.

In *Buckley v. Valeo* (1976), the Supreme Court affirmed that giving money to and spending money on political campaigns is a core First Amendment activity. Accordingly, regulations of political contributions and expenditures will not be sustained unless justified by a compelling state interest and crafted to achieve their objective by the least restrictive means.

Current proposals to regulate campaign finance practices cannot survive the kind of scrutiny that the First Amendment requires. This study demonstrates that the ban on political action committees, the PAC ban fallback provisions, the ''voluntary'' spending limits, the restrictions on soft money, the regulation of issue advocacy, and the proposals to expand the enforcement powers for the Federal Election Commission all substantially infringe on core First Amendment freedoms, but none serves a compelling interest with the least restrictive means. And the proposal that broadcasters be required to provide free TV time to federal candidates is constitutionally insupportable.

The shortcomings of current ''reform'' proposals are no small matter, given the First Amendment's crucial historical role in protecting our right to self-government and in sustaining liberty. For the proposals to pass constitutional muster, the First Amendment would have to be itself ''amended'' by judicial fiat.

INTRODUCTION

Since the 1996 elections, campaign finance practices have dominated the news. Reports of unpalatable fundraising strategies, such as renting out the Lincoln bedroom to major donors and using White House telephones to solicit contributions, have appeared with distressing frequency on the nightly news. The media tend to portray those actions not as straightforward individual ethical or legal lapses but as self-evidently symptomatic of the need for stringent new campaign finance ''reforms.'' President Clinton, who claims to have played by the rules in his reelection campaign, also claims to strongly favor ''reform.'' Recently, for example, in a ''stop-me-before-I-kill-again'' move, he petitioned the Federal Election Commission to ban political parties from accepting the ''soft-money'' contributions that provided so much of the fuel for the 1996 presidential contest.

A chorus of those who advocate increased regulation of the political process is always available to chant the reform mantras, and the mainstream press appears credulously willing to broadcast them: ''Well-heeled [unequivocally self-serving and never public-regarding] special interests'' dominate the political process; challengers and incumbents alike, consumed by the need to raise money for their campaigns, spend ''most of their time . . . scrounging for funds.''[1] A *Washington Post* headline declared, ''The System Has Cracked under the Weight of Cash.''[2] ''[F]renized fund-raising and freewheeling spending . . . [of] torrents of cash'' now rule the day, and election contests are conducted principally via expensive ad campaigns that saturate the airwaves.[3] Money—dollars contributed to candidates, given to political parties, and spent on election campaigns—undermines the integrity of and ''defeat[s] the democratic process''[4]—or so it is said.

Despite the overheated rhetoric of dysfunctionality and doom, the debate about the nature of the changes that ought to be made in the present system of campaign finance regulations is often framed as though short-term political advantage were the only thing at stake.[5] Republicans, it is said, are against restricting campaign contributions and expenditures—but only because they are richer and better at raising money. Democrats, on the other hand, favor restrictions—but only because they wish to counter the perceived Republican money-raising advantage. Because Republicans control the present Congress, stringent new giving and spending regulations are thought unlikely.

And finally, it is said that because the incumbents of both parties are ''beneficiaries'' of the present system, political reality suggests that those incumbents are unlikely to change the system in any way that might threaten their reelection.

For all the rhetoric, however, the debate over campaign finance regulation raises issues that genuinely transcend the short run, issues of fundamental and permanent significance that cry out to be acknowledged. Indeed, though they come to us in the benign guise of ''reform,'' many of the campaign finance regulations that have recently been proposed would require us to renege on a central premise of our representative democracy—the individual political freedom our Constitution guarantees.

This study will examine the constitutionality of current campaign finance regulatory proposals. It will also strive to bring the stakes in the campaign finance debate into the sharpest possible focus—to provide a full accounting of regulation's cost to political freedom so that, if they find themselves tempted to adopt a short-term fix to the campaign finance ''mess,'' legislators will not fatally underestimate the price.

THE REGULATORY AGENDA

On the agenda of today's proponents of reform are a number of specific, often shifting legislative proposals. Rather than treat each of those proposals in detail, I will proceed in more generic terms, focusing on the broad outlines of the most frequently recurring—and thus most prominent—individual suggestions for ''reform.'' I will consider the following proposals:

The PAC ban: Eliminate political action committees (PACs) from federal election activities by banning all expenditures by and contributions to them for purposes of influencing elections for federal office, broadly defined, except those contributions and expenditures made by political parties and their candidates.

The PAC ban fallback: If the complete ban if found unconstitutional, lower the permissible amount of PAC contributions to single candidates from the present $5,000 to $1,000 and prohibit any candidate from receiving any PAC contribution that would raise that candidate's PAC receipts above a given percentage (say, 20 percent) of applicable expenditure ceilings; ban the ''bundling'' of individual contributions; ban the receipt by a candidate of PAC monies that exceed 20 percent of the particular election's campaign expenditure ceilings; redefine independent expenditures so as to turn more activities into ''coordinated'' expenditures (thus subjecting them to the contribution limitations); and broaden the definition of ''express advocacy'' so as essentially to prohibit generic partisan communications of any kind (by defining express advocacy to include any ''expression of support for or opposition to a specific candidate, to a specific group of candidates, or to candidates of a particular political party'' and to include suggestions ''to take action with respect to an election * * * or to refrain from taking action'').

Spending limits and communication discounts: Impose ''voluntary'' spending limits for candidates in House and Senate races and prohibit spending of personal funds in excess of 10 percent of that limit; provide to candidates who agree to be bound by the limits certain amounts of free television time, plus the right to purchase additional time at reduced rates, and give them a reduced rate for mailing to state voters; limit their receipt of out-of-state contributions by requiring them to receive 60 percent of the contributions to their campaign from individuals in their own states or districts; and prohibit candidates who do not agree to be bound by the spending limits from receiving PAC contributions, require them to pay full rates for broadcasting and postage, raise the limits on contributions to their opponents from $1,000 to $2,000, and raise the expenditure limits of their opponents by 20 percent.

Restrictions on soft money: Bar federal officeholders, candidates, and national political parties from accepting unregulated contributions; subject all election-year expenditures and disbursements by political parties, including state and local parties that ''*might affect* the outcome of a federal election''—including those for voter registration, get-out-the-vote drives, generic campaign activities, and any communication that identifies a federal candidate—to the full panoply of Federal Election Campaign Act (FECA) restrictions and compliance and regulatory rules.

Controls on ''issue advocacy'': Regulate communications that do not contain words of ''express advocacy'' as defined by the Supreme Court in *Buckley v. Valeo* (i.e., communications that do not ''in express terms advocate the election or defeat of a clearly defined candidate for federal office'').[6] Define ''issue advocacy'' to include a broader range of communications than does ''express advocacy''; regulate it by subjecting groups funding issue advocacy communications to FECA disclosure requirements and controlling the content of issue advocacy communications by requiring disclosure of funding sources and disclaimers of candidate advocacy.

Free TV: In exchange for, and as a ''public service'' condition of, the allocation to them of spectrum space, require broadcasters to provide substantial amounts of free air time to all candidates for federal office. Require candidates to appear in person in the free time provided to them and to speak for themselves.

Expand Federal Election Commission enforcement powers: Grant broad new enforcement powers to the Federal Election Commission, including the right to go to court to seek an injunction against potential offenders on the ground that there is a substantial likelihood that a violation is about to occur.

FIRST AMENDMENT ANALYSIS: GENERAL PRINCIPLES

The Buckley Framework

To be constitutional, the proposals outlined above must not violate principles of political freedom and free political speech as protected under the First Amendment. The cornerstone of the Supreme Court's First Amendment jurisprudence in this area is *Buckley*. In that case the Court decided several challenges to the FECA amendments of 1974.[7] FECA was at that time Congress's most ambitious effort at election campaign reform. According to its defenders, the act was designed to equalize access to and purify the political process by ridding it of corruption and the appearance of corruption. Among other things, the plaintiffs in *Buckley* challenged the act's stringent limitations on the amounts of money individuals could contribute to and spend on campaigns for federal office and the act's provisions for public funding of presidential candidates who agreed to abide by spending limits during their campaigns. The Court sustained the provisions for public funding of presidential campaigns and the contribution limitations. It invalidated the expenditure limitations.

In resolving the *Buckley* challenges, the Court correctly took as its central premises that ''a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs'' and that contribution and expenditure limitations ''operate in an area of the most fundamental First Amendment activities.''[8] Pursuant to conventional canons of First Amendment review, that meant that contributions and expenditure limitations would be subject to ''strict scrutiny'' by the Court and would not survive unless they were found to serve a ''compelling state interest'' using the ''least restrictive means.'' Due to differences it perceived in the relative magnitudes of the First Amendment interests, the Court distinguished between limits on *contributions* of money to politicians or their campaigns and limits on campaign *expenditures* by citizens and candidates. A contribution limit, said the Court, ''entails only a marginal restriction upon the contributor's ability to engage in free communication,''[9] because ''the transformation of contributions into political debate involves speech by someone other than the contributor.''[10] Hence, such limits could presumably be evaluated using a slightly more lenient standard of review.[11] Limits on expenditures, on the other hand, ''represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.''[12]

Thus, whereas the Court strongly suggested that limitations on expenditures may well run afoul of the First Amendment regardless of the context or the purported justification for their imposition, it held that limitations on contributions are constitutional if their purpose is the compelling one of preventing corruption (i.e., ''the attempt to secure a political quid pro quo from current and potential officeholders'')[13] or the appearance of corruption. Of particular importance to today's debate, the Court rejected equalization of political power as even a permissible, much less a compelling, justification for restrictions on either contributions or spending, observing that ''the concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.''[14]

Buckley has proven remarkably robust and has provided the doctrinal framework for all seven of the major campaign finance cases that the Court has since decided. In each of those cases (briefly summarized in the Appendix), the Court has remained committed to *Buckley*'s major conclusions. That is not to say that the *Buckley* framework has gone unchallenged within the Court itself.[15] Still, taken as a whole, *Buckley* and its progeny stand foursquare for the following doctrinal generalizations. Because they represent governmentally imposed constraints on political activity,

Restrictions on political contributions and expenditures infringe on rights of speech and association. Therefore, the Court will strictly scrutinize such restrictions, even when they are directed at corporations instead of at individuals or groups.

Limits on independent expenditures by individuals and political groups are likely to be unconstitutional regardless of the context or the purported justification.

Preventing corruption or the appearance of corruption remains the ''single narrow exception to the rule that limits on political activity'' are contrary to the First Amendment.[16]

Since a ballot measure offers no opportunity to corrupt elected officials with either contributions or expenditures, the First Amendment probably prohibits restrictions on both contributions and expenditures in the context of ballot-measure elections: both kinds of restrictions infringe on First Amendment rights without countervailing benefit since ''there is no significant state or public interest in curtailing debate and discussion of a ballot measure.''[17]

Equalization of political influence is not a permissible justification for restrictions. The Court has never wavered in its view that government may not restrict the speech of some to enhance the relative voice of others.

Applying Buckley: In General

How do the campaign finance regulations that are presently being debated fare when subjected to analysis in light of the *Buckley* framework and the First Amendment foundation upon which it rests? The first step in the calculus of constitutionality is to determine the extent to which each proposal infringes on established First Amendment rights. That step is doctrinally uncontroversial, its analytical path clearly marked, for *Buckley* and its progeny unequivocally establish that regulations of campaign contributions and expenditures operate upon fundamental First Amendment rights to free speech and free association.

Cynically claiming that that central premise of *Buckley* represents nothing more than capitulation to the idea that ''money talks,'' advocates of regulation mock and demean the premise. In doing so, they miss the point entirely. *Buckley* was not written on a blank First Amendment slate. Rather, it was firmly grounded upon, and thus was the natural outgrowth of, a long line of cases that affirmed that the core principles of the First Amendment protected citizens' right to speak, to publish, and to associate for political causes, free from government interference or control. Contributing to and spending money on political campaigns—whether to advocate the election of particular candidates or to take positions with respect to particular issues—was protected in *Buckley* not because money talks but because the central purpose of the First Amendment is to guarantee political freedom. The amendment ensures that individual citizens may exercise that freedom by speaking, discussing, publishing, advocating, and persuading and that they may enhance their individual voices by joining together in groups, organizations, associations, and societies. The specific rights of citizens to contribute to and spend money on political campaigns are merely necessary corollaries of their more general rights to speak freely and to associate with one another to advocate causes in which they believe.

Having established that regulations of campaign contributions and expenditures impinge on fundamental First Amendment rights, the Court will then apply ''strict scrutiny'' and sustain the regulations only if it finds that they serve a compelling government interest and use the least restrictive means to do so. The analytical task implicit in those second and third steps in the constitutional calculus is the identification and evaluation of the government interests that supposedly support regulation and the appraisal of the means deployed to serve those interests.

Performing that task is not as easy as its doctrinal formulation suggests. Although the Court has clearly commanded that strict scrutiny is required, it has not always adhered to the implications of that command by engaging in rigorous examination of both proffered ends and the means chosen to achieve them. In fact, the Court has occasionally been highly deferential and credulous in its assessments of ends and means, making prediction in the present case an uncertain undertaking. Still, if the integrity of First Amendment principles is to be preserved, it is critically important that both legislators and judges take great care that rhetoric and assertion not substitute for the careful analysis that truly strict scrutiny requires. For that reason, the analysis that follows will attempt not merely to summarize but to examine skeptically the arguments and the rhetorical strategies of the advocates of regulation.

Applying Buckley: Specific Proposals

The PAC Ban

In *Buckley*, the Supreme Court held that the only legitimate and compelling government interest in restricting campaign contributions and expenditures is to prevent corruption or the appearance of corruption. And the Court defined corruption precisely and narrowly as entailing a financial quid pro quo: dollars for political favors.

Despite that, advocates of the PAC ban offer justifications unrelated to preventing corruption as the Court defined it in *Buckely*. Instead, such justifications as they offer are directed, in vague terms, at reforming ''an unresponsive government and a political process that has grown increasingly mean-spirited''—a view reformers seem to believe is universally shared. Regarding contribution prohibitions, reformers condemn unspecified ''elected officials who listen more to big money and Washington lobbyists than to their own constituents''; they decry the ''influence-money culture'' and claim that ''our political system is rigged to benefit campaign contributors and incumbent office-holders at the great expense of citizens''; and they see an ''inherent problem''—the nature of which they do not define—''with a system in which individuals and groups with an interest in government decisions can give substantial sums of money to elected officials who have the power to make those decisions.''[18] At bottom, the justification they offer seems to be that special-interest PAC contributions are a dominant force in the financing of federal election campaigns, that members of Congress are dependent on them and influenced by them, that the giving of PAC money is linked to the particular PAC's legislative agenda, and that PAC money goes overwhelmingly to incumbents. Thus, they justify the PAC expenditure ban not with reference to preventing corruption but on the ground that it is a loophole-closing measure: if independent PAC expenditures continue to be permitted for ''purposes of influencing any election for Federal office,'' they will undermine the ability of the contribution prohibitions to achieve their purpose of preventing PACs from wielding influence.

Buckley and its progeny signal quite clearly that those ''justifications'' for the PAC contributions and expenditure ban are neither legitimate nor compelling. The rhetorical parade of horribles cited by the advocates of increased regulation simply does not amount to corruption as the Court has defined it; thus, curing the system of them is not corruption prevention. Even if ridding the political system of the influence of big money and Washington lobbyists were somehow transformed into legitimate ends of government, a total ban on PAC contributions could not survive, for it is grossly over inclusive. Eliminating all political committee activity is not narrowly tailored, nor is it the least restrictive means of ridding the system of the influence of the money culture.

Unless the advocates of increased regulation truly intend to denounce *all* political alliances—regardless of whether they be ideological, issue driven, or public spirited—on the ground that they are *all*, in the very nature of things, bound to represent special interests, and unless they think that *all* attempts by individuals to maximize their political voices by joining together with others of like mind present an inherent problem, it is impossible to imagine how they could justify such a draconian measure as a total ban on PAC giving and spending. Cutting the heart out of the freedom of political speech and association, and conferring what would amount to a permanent monopoly on political parties, is neither necessary nor a narrowly tailored means for attaining even the ill-defined—and probably illegitimate—goal of eliminating the influence of big money and Washington lobbyists.

The PAC Ban Fallback. The fallback provision—which would lower the permissible amount of PAC contributions from $5,000 to $1,000 per election and would go into effect if or, more accurately, when the total ban on PAC contributions was declared unconstitutional—allegedly serves the same interest as the total ban. Since it aims to reduce rather than prohibit permissible contributions, the fallback provision might appear on its face to be less problematic than the total ban. That appearance is deceptive. Although the Court stated in *Buckley* that contribution limits are easier to defend than expenditure limits, it held that strict scrutiny was appropriate for both. Thus, the contribution limits of the fallback provision must run the same strict scrutiny gauntlet, and their chances of surviving are slim to none.

First, note again that the advocates have not claimed during the course of recent debates that the interest being served by reducing the contribution limit from $5,000 to $1,000 is that of preventing corruption in the *Buckley* sense. It seems quite implausible to assert that any politician would be corrupted—or even appear to be corrupted—in the quid pro quo sense by a single contribution of even $5,000. Instead, the interest that the contribution reduction would serve is, again, the diffuse one of ending the ''dominance'' and ''influence'' of PACs. Thus, the problem the fallback limitation confronts at the outset is that, even if precisely defined, it serves an interest that has never been held to be either legitimate or compelling. And second, instead of being narrowly tailored, the limitation appears quite ill-suited to serve the interest asserted for it. Indeed, it is difficult to identify *any* interest that would be served by making it so much more difficut than it presently is for candidates to raise money: candidates will hardly be less distracted by fundraising if they have to raise money from even greater numbers of people because of the smaller amounts that any one individual or PAC may contribute.

Both the contribution ban and the fallback treat all PACs alike, as though whatever cause they espouse and however great (or limited) their resources, they all pose precisely the same danger—and the same degree of danger—of undermining the integrity of our political process. But given the enormous range and diversity of interests that PACs represent, treating them all alike makes little sense—and certainly fails the narrowly tailored, least restrictive means test. Moreover, it is important to note that even while it was sustaining the particular contribution limits in *Buckley*, the Court ''cautioned . . . that if the contribution limits were too low, the limits could be unconstitutional.''[19] Thus, contribution limits so low as significantly to impair the regulated party's ability to exercise First Amendment rights (as a $1,000 limit on PAC contributions would surely do) or so unreasonably below an amount that would give legitimate rise to a perception that the contributor was acquiring ''undue influence'' (as the $1,000 limit would surely be) are constitutionally vulnerable.

The only interest served by the fallback provision's ban on the bundling of small individual contributions to PACs would be that of preventing evasion of the contribution limitation. The bundling ban, however, represents a different sort of burden on First Amendment rights than does the constitutionally doubtful contribution limitation, which it supposedly serves as a backstop. For the bundling ban directly burdens the associational rights of individual PAC contributors. The Supreme Court recognizes that the right to associate is a ''basic constitutional freedom''[20] and has stated repeatedly that ''the practice of persons sharing

common views banding together to achieve a common end is deeply embedded in the American political process.''[21]

Advocates of the bundling ban claim that it is necessary to forestall PACs' evading the contribution limitations. Thus, whether the ban serves a compelling state interest will depend upon whether the interest served by the contribution limitations survives review and, if so, whether the ban is narrowly tailored—whether the Court sanctions a one-size-fits-all prohibition. Since the contribution limitations are unlikely to survive review, and since the one-size-fits-all prohibition is a clumsy solution in any event, the bundling ban is likely to be even more vulnerable than the contribution limitation it serves.

The fallback's prohibition of PAC contributions that raise any candidate's PAC receipts above 20 percent of campaign expenditure ceilings would also, to a large extent, stand or fall with the contribution limitations themselves, since the prohibition is defended in terms of its ability to strengthen the contribution limitations. The First Amendment burden of the 20-percent-of-expenditure limitation is more onerous than first appears, however, for after the 20 percent limit is reached the so-called limitation has the effect of a total ban. How such a limit would serve a corruption-prevention objective, moreover, is very difficult to discern. Corruption arises when large contributions are exchanged for particular political favors. If PAC contributions are not individually large enough to create a risk of corruption or its appearance, the fact that a candidate receives many of them—even were he to receive 100 percent of his campaign funding from them—simply does not increase the risk that he will be corrupted. Thus, the 20-percent-of-expenditure limitation not only is not narrowly tailored to serve a compelling state interest in preventing corruption or its appearance but also is not tailored to serve any identifiable or legitimate interest at all.

Finally, the attempt to redefine ''independent expenditure''—and, in particular, to redefine ''express advocacy'' so as to include any and all partisan communications—runs flatly counter to the *Buckley* Court's explicit effort to immunize issue advocacy from regulation or restriction: ''So long as persons or groups eschew expenditures *that in express terms advocate the election or defeat of a clearly identified candidate,* they are free to spend as much as they want to promote the candidate and his views.''[22]

''Voluntary'' Spending Limits

The proposals for voluntary spending limits keyed to relevant voting age populations are said to serve the interest in curbing excessive and even obscene campaign spending. Spending limits will hold down the costs of running for office and thus prevent one candidate from having an excessive advantage over another by reason of spending more. The limits are also touted for their supposed ability to redress the present imbalance in favor of incumbents (who have a grossly unfair advantage in fundraising because most PAC money goes to them).

Mandatory spending limits confront an impenetrable constitutional wall. The Supreme Court said in *Buckley* that expenditure limits simply do not serve to prevent corruption or the appearance of corruption in the electoral process, which is the only justification that the Court has ever accepted for limiting political expression. Indeed, the Court went further. It explicitly denounced the other justifications for spending limits that proponents had offered in *Buckley,* namely equalizing speech resources and stemming the rising cost of political campaigns. Because it represents such an unequivocal endorsement of freedom from government as the underlying conception of the First Amendment, the Court's aversion to restricting the voices of some in order to enhance the voices of others is worth emphasizing. Moreover, because it represents such a clear and definite rejection of the paternalism of those who think they know how much is too much to spend on political campaigning, it is worth quoting the Court's confirmation that ''the mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns . . . In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.''[23]

It is, of course, because mandatory spending limits are so clearly unconstitutional that advocates of the proposed spending limits insist that they be voluntary. The transparent objective is to fit the limits into the safe harbor that the *Buckley* Court provided when it qualified its rejection of expenditure limitations by the following footnote:

''Congress may engage in public funding of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.''[24]

For a number of reasons, all reflecting the magnitude of the benefits and burdens attached to accepting or not accepting the limits, it is pure fiction to call them voluntary. They simply do not fit the *Buckley* proviso. To be specific, significant benefits are promised to those who accept the voluntary limits: candidates become eligible for free and reduced-rate television time[25] and reduced mailing rates while their opponents who do not accept the voluntary limits receive neither free time nor reduced rates. Moreover, candidates who agree to voluntary contribution limits when their opponents do not get an added benefit—their contribution limits and expenditure ceilings are raised. But burdens come with the benefits as well: candidates who volunteer to comply with the spending limits must demonstrate a threshold level of support (by raising 10 percent of the limit) before becoming eligible for the benefits; they must agree to raise 60 percent of their funds from individuals who reside in their own states or districts; and they must agree to limit the use of their own resources. In addition, they cannot use their free air time for commercials of less than 30 seconds in length.

When the Court in *Buckley* sustained the exchange of a presidential candidate's right to make unlimited expenditures in his own behalf for the right to receive public funding, it did so because it concluded that the purpose of public funding ''was not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process.''[26] The purpose of the current proposals to impose voluntary spending limitations along with their accompanying burdens and benefits, however, is quite different.

In the first place, the limits are not imposed in exchange for receipt of public funding and thus could not be defended as necessary to protect the integrity of a government-funded program. Second, the effect of the proposed expenditure limitations—whether they are deemed voluntary or not—will be to reduce substantially the quantity of campaign speech. Indeed, that must be their purpose, since the restrictions are explicitly motivated by the objective of reducing excessive spending. As the Eighth Circuit Court of Appeals recently noted when evaluating analogous provisions of state campaign finance restrictions, one is ''hard-pressed to discern how the interests of good government could possibly be served by campaign expenditure laws that necessarily have the effect of limiting the quantity of political speech in which candidates for public office are allowed to engage.''[27]

The spending limitations also do not serve the posited goal of creating a level playing field between incumbents and challengers because the limitations fail to dissipate the already significant advantages of incumbency. Incumbents begin every electoral race with important advantages; equalizing the amount of money that incumbents and challengers can spend would simply make permanent the incumbent advantages that already exist. When the spending limits are combined with the proposed new restrictions on contributions and the increasingly complicated system of fundraising for challengers, they appear narrowly tailored not to level the playing field for challengers but instead to transform a challenger's initial disadvantage into a practically insurmountable barrier. That is the reason the proposals are so susceptible to the charge of being incumbent-protection measures.

Limits on Soft Money

Advocates of increased regulation of campaign finance often assert that soft money is the most dangerous and destructive money in the political system today. Soft money is money contributed by individuals, corporations, unions, and the like to the national and state parties for party-building activities, voter registration and get-out-the-vote drives, and generic issue- (rather than candidate-) oriented advertising. It is not subject to contribution limitations imposed by FECA because it is not used to advocate expressly the election of any clearly identified candidate. Reformers want to ban soft money because they believe that even though it does not go to support particular candidates it nevertheless has the unseemly propensity to influence elections. Thus, it invites wholesale evasion of the contribution limits now in place.

The reformers are right, of course: soft money *does* influence elections. But the resort to soft-money contributions is exactly what one would expect when people are prohibited from giving more directly.

Yet a ban on soft-money contributions would amount to an unprecedented restriction on political activity, one whose justification is not compelling and whose scope far exceeds what the First Amendment allows. Advocates of a soft-money ban defend it as a contribution-limitation-loophole-closing device: corporations and unions that would not otherwise be permitted to contribute to candidates' campaigns make large soft-money donations to political parties; and individuals often contribute soft money in excess of the amount they would be entitled to contribute to particular candidates. Such arguments assume, of course, that contribution limitations represent an appropriate and inviolable ceiling on the amount of money that individuals, corporations, and unions should be allowed to contribute to the political process *whether or not the contribution funds speech that creates a risk of quid pro quo corruption of particular candidates.* Thus, supporters of the ban make no pretense of establishing a link between soft-money contributions and the appearance or reality of candidate corruption that alone

provides a constitutional predicate for regulation.[28]

Calling the soft-money contribution ban a contribution-limit-loophole closure does not change the basic fact, however: soft money does not fund speech that ''in express terms advocate[s] the election or defeat of a clearly identified candidate for federal office,'' which is the *only kind* of speech for which the Court has held that contributions may be constitutionally restricted.[29] To regulate contributions for speech that is other than express advocacy of the election of particular candidates, the Court said, would create intractable vagueness problems and cause unacceptable chilling of protected, issue-oriented political speech. It would, in other words, thwart speech debating the merits of government policies and addressing the public issues that are at stake in an election—the very kind of speech that the First Amendment was written primarily to protect. Thus, because a ban on soft money aims directly and indiscriminately at core political activity, and because its proponents have not made their case that soft-money contributions pose a danger of quid pro quo corruption, the ban could not pass muster as a finely tuned means of achieving a compelling state interest.

Also bearing on the First Amendment implications of a ban on soft money is the Court's recent decision in *Colorado Republican Federal Campaign Committee v. FEC,* which held limits on independent expenditures by political parties—expenditures not coordinated with any candidate—to be unconstitutional. The independent expression of a political party's views, the Court affirmed, is core First Amendment activity, and limits on it cannot be justified with reference to a corruption-prevention rationale. Indeed, although the majority of the Court did not reach or address the issue, four justices expressed the further view that, given the practical identity of interests between party and candidate during an election, the corruption-prevention rationale for sustaining limitations on contributions did not support *any* limits on party spending, whether coordinated with the candidate or not. Although present law makes coordinated spending illegal, Justice Thomas pointedly questioned its rationale: ''What could it mean for a party to 'corrupt' its candidate or to exercise 'coercive' influence over him?''[30] If the Court were to decide, when squarely facing the issue, that party spending on political activity cannot be limited, whether or not coordinated, then contributions to the party to make those expenditures would likewise seem to be protected from regulation. In sum, from constitutional perspective, restrictions on soft money are among the least defensible proposals for campaign finance reform. Indeed, arguments purporting to support such restrictions serve only to raise questions about limits on direct contributions.

Issue Advocacy

Insofar as they entail broadening the reach of campaign speech regulation to include speech that does not ''in express terms advocate the election or defeat of a clearly identified candidate for federal office,'' proposals to control issue advocacy are constitutionally inform for the same reason that the soft-money ban is constitutionally infirm: they would regulate—and thus unacceptably chill—core political speech about the merits of policies and the proper resolution of public issues without a corruption-prevention rationale for doing so. Proponents of controls on issue advocacy claim that controls are necessary to prevent the acquisition of undue influence by advocates of particular issues. There is, however, no constitutional warrant or means for calibrating what constitutes ''undue'' influence, for the Constitution does not permit, nor does it provide, a metric for discerning how much influence is enough. We have no constitutional Goldilocks to say when the amount of influence possessed by advocates of particular positions is ''just right.'' The inherent payoff for political participation in a democracy is the acquisition of influence, and it is the function of the First Amendment to protect efforts to acquire it, not to limit or constrain them.[31]

The constitutionality of proposals for regulation, insofar as they require disclosure by groups engaging in issue advocacy, is seriously jeopardized by *McIntyre* v. *Ohio Electrons Commission*.[32] In *McIntyre,* the Court had before it an Ohio statute that prohibited the distribution of anonymous campaign literature. Because the statute was a regulation of core political speech, the Court subjected it to strict scrutiny; and, because the statute did not serve a compelling state interest using the least restrictive means, the Court proceeded to strike it down. Unpersuaded that the ban was justified by Ohio's asserted interests either in preventing fraudulent and libelous statements or in providing voters with relevant information, the Court also could find no support for the statute in either *First National Bank of Boston* v. *Bellotti*[33] or in arguably relevant portions of *Buckley*.

In *Bellotti,* the Court invalidated a state law that prohibited corporations from spending money on speech designed to influence the outcome of referenda. In the course of doing so, the Court commented in dicta on the possibility that a requirement that the sponsor of corporate advertising be identified might be thought to be permissible on account of its ''prophylactic effect.'' The *McIntyre* Court realized that the context of the *Bellotti* statement—expenditures by corporations—was not the same as the context of the Ohio statute, which purported to regulate independent expenditures by an individual. And whereas in *Buckley* the Court sustained mandatory reporting of independent expenditures in excess of a threshold level, the justices noted in *McIntyre* that the independent expenditures to which the disclosure requirement applied had been construed to mean only those expenditures that expressly advocate the election or defeat of a clearly identified candidate.[34] Thus, in *Buckley* there was a corruption-prevention rationale to support the expenditure-disclosure requirement. Such a rationale would lend only the most tenuous possible support to required disclosures of issue advocacy.

McIntyre does not purport completely to foreclose disclosure or reporting requirements with respect to independent expenditures. It does, however, reaffirm the Court's commitment to scrutinize strictly such requirements in order to preserve the right to engage in issue advocacy unencumbered by regulations that burden speech without producing a reciprocal benefit in corruption prevention.

Free TV

The proposals to require broadcasters to provide ''free'' TV time to federal candidates do not come under the *Buckley* rubric. Instead, insofar as they apply to broadcasters, their constitutionality is a function of the unique First Amendment jurisprudence that the Court has developed for the electronic media. That jurisprudence had its beginnings in *Red Lion Broadcasting Co.* v. *FCC*,[35] in which the Court, pointing to ''spectrum scarcity,'' upheld the Federal Communication Commission's rule that those attacked editorially by the broadcast media had a right of reply. Thus it denied the broadcasters' First Amendment claim that such an obligation impinged on their editorial freedom.

It is clear beyond peradventure that Congress could not constitutionally compel the *print* media to provide free space to similarly situated political candidates.[36] *Red Lion* sanctioned a different set of First Amendment rules for the broadcast media because the Court was persuaded that the scarcity of broadcast spectrum warranted content regulation of spectrum licensees' programming in the interests of diversity and fairness.

Many commentators questioned the rationality of the spectrum scarcity argument even at the time *Red Lion* was decided.[37] Regardless of whether it provided a plausible rationale at that time, however, spectrum scarcity has been rendered obsolete by the advent of cable and other technological advances. And courts, too, have increasingly criticized the argument as a justification for government control of the content of broadcast programming.[38]

There is no longer a factual foundation for the argument that spectrum scarcity entitles the government, in the public interest, to control the content of broadcast speech. Without the spectrum scarcity rationale to support it, the attempt to control broadcasters' speech by requiring them to provide *free* TV time to candidates for office would seem doomed to constitutional failure. Even were the spectrum scarcity rationale still viable, the Court has never held that *Red Lion* sanctioned ''government regulations that impose specifically defined affirmative programming requirements on broadcasters.''[39] The Court has been suspicious of any government action that ''requires the utterance of a particular message favored by the Government,'' and it has been alert to guard against the ''risk that Government seeks not to advance a legitimate regulatory goal but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.''[40]

With respect to all speakers except the broadcast media, and most certainly with respect to candidates for political office, it goes almost without saying that any attempt by the government to dictate the format or control the content of speech is constitutionally suspect. In addition to commanding broadcasters to donate time so that political candidates may speak, the free TV proposals contemplate requiring candidates themselves, and not any surrogates, to speak in the donated time, thus dictating the format of their speech; and several suggestions have been made that the candidates must not engage in ''negative'' campaigning if they are to receive the free time, thus controlling the content of their entire speech. Those highly questionable aspects of the free TV proposals cannot be defended on the ground that the government, in pursuit of the public interest, is subsidizing certain candidate speech—thus conditioning receipt of its funds on the candidates' agreement to respect the contours of the government program. Such was the rationale that underlay the Court's holding in *Rust v. Sullivan*,[41] where the Department of Health and Human Services' ''gag rule'' prohibited recipients of federal family planning funds from providing abortion information. The *Rust* rationale could not support the format and content controls envisaged by the free TV proponents for the simple reason that the speech would be subsidized not by the taxpayers but by the broadcasters.[42]

In fact, what the free TV time proposals contemplate seems to be a bold end-run around traditional and well-established First Amendment principles. The broadcasters have no First Amendment right to resist compliance, proponents say, because spectrum scarcity permits the government to

regulate their editorial judgments in the public interest. And the candidates have no First Amendment right to resist compliance with format or content controls because they are being permitted to speak for free. As the analysis above has demonstrated, the First Amendment stands as a more effective defense of freedom than the proponents imagine, and the Supreme Court would surely have little difficulty detecting the constitutional shell game that the free TV proposals epitomize.

Expanded Federal Election Commission Enforcement Powers

Many of the proposals for increased regulation of campaign finance envision a hugely enlarged enforcement role for the already overburdened and generally ineffectual Federal Election Commission.[43] The wisdom of imposing such a monumental burden on any federal agency, much less on this particular one, is questionable; but whether the enforcement mechanisms that Congress devises for implementing particular regulatory strategies are feasible or not does not usually raise First Amendment issues.

One enforcement proposal does raise such issues, however: the proposal to give the FEC power to seek to enjoin potential offenders on the ground that ''there is a substantial likelihood that a violation is about to occur.'' The proposal is vulnerable to two different First Amendment challenges. The first involves vagueness. Many of the proposed substantive violations are themselves vague, and the ''substantial likelihood'' criterion for FEC action is also vague. The threat of FEC action based on either vague element of that ground would *not* only have an unacceptable chilling effect on many activities that are not violations; more significantly, it would also invite precisely the kind of arbitrary exercise of government power that the vagueness doctrine is designed to forestall.[44]

The second First Amendment challenge to giving the FEC power to enjoin campaign activity involves prior restraint on speech. Prior restraints are the ''most serious and the least tolerable infringement of First Amendment rights,''[45] and they will not be sustained unless the Court is convinced that ''the gravity of the evil, discounted by its probability, justifies such invasion of free speech as is necessary to avoid the danger.''[46] It seems unlikely that the Court would hold that the mere possibility of violating campaign finance regulations poses the kind of threat to the national interest that would justify imposing prior restraints on speech, especially since the kind of speech put at risk by such an injunction—political speech during the course of an election campaign—lies at the very core of the First Amendment.

THE FIRST AMENDMENT ACCORDING TO THE REGULATORS

When one looks at Supreme Court precedents—in particular at *Buckley* and its progeny—the First Amendment case against current proposals for more stringent campaign finance regulations appears impregnable. But, given the vehemence and surety with which those proposals are advocated, perhaps it is well to look more closely both at the precedents for *Buckley* and related cases and at the conception of the First Amendment the reformers embrace and how that conception differs from the First Amendment that is presently embodied not only in our democratic traditions but in our supreme law.

An important question to ask is to what extent the precedents—which stand as barriers to so-called reform efforts—are rooted in traditions and ideas of freedom that we wish to preserve. *Buckley* may be the cornerstone of the Supreme Court's modern campaign finance jurisprudence, but it is important to appreciate that it was not a novel, isolated case. Rather, it was laid upon an already existing, solidly constructed First Amendment foundation. Thus, to appreciate its true significance, and understand what is at stake in the present debate, it helps to see *Buckley* as sustaining a First Amendment tradition that was already deeply embedded at the time the case was decided. *Buckley* was one in a long and continuing line of cases that have articulated and upheld, in a wide variety of contexts, the principles of free political speech and individual political freedom that lie at the very heart of the First Amendment.

The Constitution is the fundamental charter of our representative democracy, the embodiment of our right to self-government and of all our corollary liberties. The First Amendment's specification that ''Congress shall make no law . . . abridging freedom of speech or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances'' plays a crucial role in determining the character of our democracy. ''A major purpose of [the] Amendment was to protect the free discussion of governmental affairs.''[47] Accordingly, it guarantees that individual citizens may speak, publish, and join together in groups to engage in political activity to try to achieve the substantive ends they deem desirable.[48] They may attempt to persuade others and to acquire political influence, and the government may not interfere with, punish, repress, or otherwise impede their efforts.[49]

That conception of the First Amendment is fleshed out in Supreme Court opinions that both pre- and post-date *Buckley*. Those opinions make it clear that implicit in the First Amendment guarantee of freedom from government control over what citizens may say and with whom they may associate as participants in the political process is the important corollary that citizens may freely contribute or expend the resources at their command—their intellect, their time, their talent, their organizational or rhetorical skills, their money—to or on political activity.[50] The government may not interfere in their efforts to persuade their fellow citizens of the merits of particular proposals or of particular candidates,[51] nor may it disrupt the free communication of their views,[52] nor penalize them for granting or withholding their support from elected officials on the basis of the positions those officials espouse.[53] Government may neither prescribe an official orthodoxy,[54] require the affirmation of particular beliefs,[55] nor compel citizens to support causes or political activities with which they disagree.[56] Government may neither punish its critics nor impose unnecessary burdens on their political activity.[57] Those are the bedrock principles of political freedom with which *Buckley* and its progeny are consistent; those are the principles that impelled the *Buckley* Court's conclusion that government may not restrict independent political expenditures and may limit political campaign contributions only in the name of preventing corruption.

To remain faithful to those principles, one must be vigilant to detect the costs to freedom lurking in reform proposals that come dressed as benign efforts to achieve a healthy politics. In the course of explaining why the First Amendment should be amended, House Minority Leader Richard Gephardt (D-Mo.) baldly stated that formal amendment was needed so that Congress could enact new and stringent campaign finance restrictions because ''[w]hat we have is two important values in direct conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy. You can't have both.''[58] That breathtaking assertion performs a real service. It alerts us to the fact that, in the eyes of advocates of reform, freedom as we know it cannot survive an ambitious program of campaign finance regulations. Of equal importance, it begs the all-important questions about what a ''healthy democracy'' would look like and why a healthy democracy is not *by definition* one, like ours at present, in which freedom of speech reigns.

Nevertheless, the regulatory proposals that have recently been placed on the legislative agenda do claim to embody a First Amendment vision of sorts. Based not on legal precedent but crafted by legal scholars and judges who adumbrated it in the pages of scholarly journals and treatises, the conception of the First Amendment that animates proposals for campaign finance regulation bears almost no resemblance to the freedom-oriented conception that actual First Amendment doctrine embodies. Indeed, it distorts our traditional understandings of what the very words of the amendment mean and imparts an extraordinary and unprecedented significance to the phrase ''freedom of speech.'' Precisely because it animates the present reform agenda, however, it warrants a brief summary.

The conception of the First Amendment that underlies the regulatory agenda of proponents of campaign finance reform is best understood as a rejection of the traditional understanding that freedom of speech necessarily implies individual political liberty and the absence of substantive or qualitative regulation of political debate. Proponents of reform do not perceive that they utter a contradiction when they assert that freedom of speech can be ''enhanced,''[59] its purposes ''furthered, not abridged,''[60] by legislation that regulates and restricts political speech. That is because the proponents of regulation believe that freedom is a quality of political life that can be regulated into existence rather than an aspect of democracy that government regulation necessarily and by definition destroys. They think that the guarantee of freedom of speech is in fact *a grant of power to,* rather than *a withholding of power from,* the government. With such power, government can control the content of political debate and fix the political process so that ''political reason-giving'' will prevail. Political influence will be distributed equally among groups so that ''people who are able to organize themselves in such a way as to spend large amounts of cash [will] not [be] able to influence politics more than people who are not similarly able.''[61] Then money will no longer play a role in our politics.

The regulators appear to distrust deeply the American people. They unselfconsciously express the concern that ''completely unregulated [i.e., free] political campaigns will degenerate in such a way that the electorate would be divested of its power to make a reasoned choice among the candidates.''[62] In other words, they believe that the American people cannot be trusted with the choices and political responsibilities entailed in a free political system; instead, the government must regulate the political process in order to help the people to make appropriate decisions.

In the First Amendment context, three aspects of the regulators' conception deserve particular emphasis. The first has already been mentioned: the regulators' conception perverts the meaning of the word ''freedom.''

Second, while decrying the polluting effect of wealth on the democratic process and celebrating spending and contribution restrictions purporting to keep the voices of individual citizens from being drowned out, reformers exempt the press from their reform proposals. In the recent debate, of

course, the press has largely bemoaned the vices of the current system, and ''its myth-making has been especially important in the shaping of mass opinion about reform.''[63] Simply by virtue of their ability to influence the public agenda, the media distort debate, and the distortion of the political process that results from media treatment of particular candidates or issues is likely to be significant.[64] The Supreme Court has explicitly eschewed defining the rights of the press more broadly than speech rights of ordinary citizens.[65] Yet under the reformers' conception of the First Amendment, the media and media corporations enjoy privileges not enjoyed by ordinary citizens.

The third noteworthy aspect of the reformers' conception of the First Amendment is that the agenda that conception is used to promote is neither premised on empirical analysis, nor derived from established postulates, nor defended in terms of predictions about testable results. Rather, it rests on pejorative and highly charged rhetoric, is formulated in ill-defined but evocative terms, and is defended with extravagant claims about benign effects. Yet upon analysis, the picture the regulators paint—both of political reality and of the goals of reform—is so vague that it begs all the important questions.

Thus, when the late Judge Skelly Wright, long in the reform camp, surveyed the political process, he was dismayed to find ''the polluting effect of money in election campaigns.'' He worried that ''[c]oncentrated wealth . . . threaten[ed] to distort political campaigns and referenda,'' and he announced that ''[t]he voices of individual citizens are being drowned out'' by the ''unholy alliance of big spending, special interests, and election victory.''[66] Similarly, Professor Cass Sunstein of the University of Chicago more recently asserted that '''[m]any people think that the present system of campaign financing distorts the system of free expression, by allowing people with wealth to drown out people without it. . . . [C]ampaign finance laws might be thought to promote the purpose of the system of free expression, which is to ensure a well-functioning deliberative process among political equals.''[67]

What do all those words mean? What does the ''pure political process''—the one that is being ''polluted''—actually look like? How rich are ''people with wealth''? How poor are ''people without it''? Apart from one person, one vote, what does it mean to be a ''political equal''? If it means that one cannot legitimately attempt to acquire any more political influence than anyone else has, what point is there in participating in even a ''well-functioning deliberative process''? And why isn't the individual political freedom that is guaranteed by present First Amendment doctrine the best means of securing a ''well-functioning'' democracy?

The reason questions like those are important is that the Supreme Court engages in strict scrutiny of legislation that restricts campaign giving and spending. That requires the Court to analyze carefully the asserted relationships between ends and means—a process that can hardly go forward when the ends of the legislation cannot be precisely defined and the means can be rhetorically invoked but not actually spelled out. Moreover, since campaign finance reforms have so often turned out to have unintended—indeed perverse—consequences for the political process, and since past reforms, far from having leveled the political playing field, have only entrenched incumbents, it appears doubly important that the goals of proposed new regulations be precisely specified and that the means chosen to achieve them be persuasively shown to be well targeted and genuinely likely to hit their mark.

CONCLUSION

In conclusion, current proposals for new regulation of federal election campaign finance practices are constitutionally indefensible. In their general conception, they are nothing short of a practically complete rejection of the individual and associational rights of expression and political participation that the First Amendment guarantees. In their specifics, the governmental interests they claim to serve are neither compelling nor even legitimate. And the means they deploy are neither the least restrictive nor finely tailored. If they were to be enacted, and were challenged in court and subjected to genuinely strict scrutiny, none of the proposed regulations could survive review. They could survive only if the Supreme Court decided to amend the First Amendment by judicial fiat.

APPENDIX: BUCKLEY'S PROGENY

Bellotti, widely known as the ''corporate speech'' case, invalidated a Massachusetts law that prohibited banks and business corporations from making expenditures to influence the vote on ballot referenda that did not materially affect their business, property, or assets. The Court strictly scrutinized the state interests asserted in behalf of the statute and the relationship between those interests and the spending limitations alleged to be the means of securing them and rather easily concluded that there was an insufficient means-end relationship to justify the limitations.

Sustaining FEC limits on the amount of money that an unincorporated association is permitted to give to a multicandidate political committee, the Court in *California Medical Association v. Federal Election Commission* engaged in lenient review. Contributions are ''speech by proxy,'' the Court declared, so limiting them did not ''restrict the ability of individuals to engage in protected political advocacy.''[68]

Insisting that ''there is no significant state or public interest in curtailing debate and discussion of a ballot measure,'' the Court in *Citizens against Rent Control v. City of Berkeley*[69] strictly scrutinized a limitation on contributions to committees formed to support or oppose ballot measures. It invalidated the limitation.

Federal Election Commission v. National Right to Work Committee was a challenge to a section of FECA that limited the National Right to Work Committee to solicitation of ''members.'' Declaring that it would not ''second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared,''[70] the Court narrowly construed the section and, as so construed, sustained it against a First Amendment challenge.

But in the next case, *Federal Election Commission v. National Conservative Political Action Committee*,[71] the Court reasserted its intention and authority strictly to scrutinize corruption-prevention justifications, at least when they were offered in support of limitations on expenditures. The decision invalidated §9012(f) of the Presidential Election Campaign Fund Act, which prohibited political committees from making independent expenditures in excess of $1,000 to support the election of a presidential candidate who had opted to receive public funding. ''When the First Amendment is involved,'' then-Justice Rehnquist said, a ''rigorous'' standard of review is called for and deference to a legislative judgment is appropriate only ''where the evil of potential corruption had long been recognized.''[72]

Federal Election Commission v. Massachusetts Citizens for Life[73] was the next major campaign finance reform case. Massachusetts Citizens for Life, a nonprofit, nonstock corporation organized to ''foster respect for human life and to defend the right to life of all human beings . . . through . . . political . . . activities,'' violated FECA restrictions on independent spending by corporations when it financed a special edition of its newsletter in which it identified and advocated the election of ''pro-life'' candidates. The Court held, however, that as applied to MCFL's expenditure in this case FECA was unconstitutional. First, it burdened the right of the organization to make independent expenditures—''expression at the core of our electoral process and of the First Amendment freedoms.''[74] Second, because ''it was formed to disseminate political ideas, not to amass capital,''[75] MCFL did not pose a threat of ''unfair deployment of wealth for political purposes,'' nor did it ''pose [a] danger of corruption.''[76] Thus the ''concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL.''[77] The commission's argument that it needed a broad prophylactic rule like the one the Court had sustained in *National Right to Work Committee* did not persuade the Court. *National Right to Work Committee* involved restrictions on solicitation for a political committee that made *contributions* to candidates, whereas the regulation at issue in *MCFL* was a restriction on *independent expenditures*; moreover, the administrative convenience of a bright-line rule is of insufficient weight to count as a compelling interest in treating two unlike entities—business corporations and groups like MCFL—alike.

The particular restrictions on independent expenditures at issue in *MCFL* were held unconstitutional. On the way to reaching that result, however, the Court appeared to suggest that if MCFL had been an ''ordinary'' corporation—one that posed a threat of corruption by ''*unfair* deployment of wealth for political purposes'' instead of one formed for the particular purpose of engaging in political advocacy—the case might have come out differently.

That suggestion bore fruit in *Austin v. Michigan Chamber of Commerce*,[78] in which the Court sustained a state law prohibiting the use of corporate treasury funds to make independent expenditures in support of or in opposition to candidates in elections for state office. The state defended the expenditure prohibition on the ground that ''the unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption.'' Justice Marshall's majority opinion upholding the restriction accepted that formulation of the corruption-prevention rationale and in doing so seemingly embraced a conception of legislative power to define and prevent ''corruption'' different from, more expansive than, and much less precise than that which the *Buckley* court had endorsed. *Buckley* and its progeny had limited legislative power to define corruption by focusing on corruption's deleterious effect on the integrity of elected officials. Corruption that legislatures may prevent occurs only when ''[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors.''[79] The *Austin* opinion implied that legislatures could choose to define ''corruption'' to include imprecisely defined untoward effects that spending might have not just on the behavior of elected officials but also on the electoral process itself.[80]

Although it may signal a departure from *Buckley*'s limiting principles, the precise extent to which *Austin* undermines *Buckley*'s

constraints on legislative power to define corruption remains unclear for at least two reasons. First, the *Austin* Court made much of the fact that the restriction at issue there was imposed on corporate expenditure of treasury funds, thus hinting that had the prohibition applied to independent expenditures by individuals, or even by separate segregated corporate political action committees, the result would have been different and the prohibition would have been struck down. Second, Justice Marshall's opinion is obscure about the meaning it ascribes to the term ''corruption.'' Although the opinion is larded with prejorative and evocative references to the ''influence of political war chests''[81] and the ''corrosive and distorting effects of immense aggregations of wealth,''[82] it does not describe a normative baseline of legitimacy that would permit a disinterested observer to detect a genuine threat of ''corruption'' in any particular campaign finance practice. The most the opinion does in that regard is to suggest that the distortion that is a permissible target of the legislature's concern stems from the fact that ''the resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas.''[83] Unfortunately, the opinion fails to explain the First Amendment principle that gives that fact the power to transform the most highly protected category of core political speech into an activity subject to complete legislative proscription.

The Supreme Court's most recent pronouncement on the constitutionality of campaign finance regulations came in the 1996 case of *Colorado Republican Federal Campaign Committee,* in which the Court held seven to two that independent expenditures by political parties cannot constitutionally be limited by Congress. Two justices, Stevens and Ginsburg, dissented. They signaled that they were prepared to retreat from *Buckley;* they would have held that any spending by a political party represents a contribution to a candidate and can accordingly be limited, and they were prepared to defer to Congress's judgment that measures to level the political playing field were necessary and that there was too much spending on political campaigns. The other justices stayed well within the *Buckley* framework, and four of them would have gone further to safeguard the First Amendment than did Justice Breyer's opinion for the Court. Justice Kennedy, for example, got the support of Chief Justice Rehnquist and Justice Scalia for his position that spending by political parties, even if it is coordinated with candidates, cannot be restricted pursuant to the First Amendment because to restrict party spending is to stifle what parties exist to do. Justice Thomas, in a strongly argued opinion, endorsed abandoning *Buckley's* dichotomy between contributions and expenditures and advocated treating contribution and expenditure limitations the same for First Amendment purposes, subjecting both to strict scrutiny and not permitting broad prophylactic corruption-preventing measures.

NOTES

1. John V. Lindsay, ''Free TV for Political Candidates? Yes, to Cleanse the System,'' *New York Daily News,* February 20, 1996.

2. Ruth Marcus and Charles R. Babcock, ''The System Cracks under the Weight of Cash: Candidates, Parties and Outside Interests Dropped a Record $2.7 Billion,'' *Washington Post,* February 9, 1997, p. A1.

3. Ibid, pp. 20–21.

4. Frank J. Sorauf, ''Politics, Experience, and the First Amendment: The Case of American Campaign Finance,'' *Columbia Law Review* 94 (1994): 1350 (citing the amicus brief of Common Cause that was filed in *Buckley v. Valeo*).

5. Helen Dewar and Guy Gugliotta, ''In Campaign Finance, One Party's 'Level Playing Field' Is Another's Shaky Ground.'' *Washington Post,* April 7, 1997, p. A6.

6. *Buckley v. Valeo,* 424 U.S. 1, 44–45 (1976) (per curiam).

7. Pub. L. no. 93–443, 88 Stat. 1263 (1974).

8. *Buckley* at 14 (quoting *Mills v. Alabama,* 384 U.S. 214, 218 (1966)).

9. Ibid. at 20.

10. Ibid. at 21. The different treatment accorded to contributions and expenditures has been subjected to scathing criticism both on and off the Court, most recently in *Colorado Republican Federal Campaign Committee v. Federal Election Commission,* 116 S. Ct. 2309, 2325 (1996) (Thomas, J., concurring in the judgment and dissenting in part).

11. *Buckley* at 25 (Contribution limitations may be sustained if the state demonstrates a sufficiently important interest and deploys means closely drawn to avoid unnecessary abridgment).

12. Ibid. at 19.

13. Ibid. at 26.

14. Ibid. at 48–49.

15 The Appendix to this study contains a more detailed analysis of how the cases decided since *Buckley* have implemented the *Buckley* framework.

16 *Citizens against Rent Control v. Berkeley,* 454 U.S. 290, 296 (1981).

17 Ibid. at 299.

18 Ann McBride, president of Common Cause, Testimony before the Senate Rules Committee, February 1, 1996. See also, to the same effect, Joan Claybrook, president of Public Citizen, Testimony before the Senate Rules Committee; and Becky Cain, president of the League of Women Voters, Testimony before the Senate Committee on Rules and Administration, March 13, 1996.

19 *Carver v. Nixon,* 72 F.3d 633, 637 (1995) (citing *Buckley* at 30).

20 *Kusper v. Pontikes,* 414 U.S. 51, 57 (1973).

21 *Citizens against Rent Control* at 294.

22 *Buckley* at 45.

23 Ibid. at 57.

24 Ibid. at 57n. 65.

25 ''Free'' in the sense of no cost to them, but not free in the sense of ''costless.'' The cost would be borne by the broadcasters.

26 *Buckley* at 92–93.

27 *Shrink Missouri Government PAC v. Maupin,* 71 F.3d 1422, 1426 (8th Cir. 1995).

28 People who favor increased regulation indulge in a rhetorical strategy that implicitly equates big money with corruption and undue influence. It is thus important to recall that seeking to influence policy is what political activity—and free speech—is all about. We have no metric to tell us when influence is undue. And the Court has squarely held that *only* activities that create a danger of *quid pro quo corruption* can be constitutionally regulated.

29 *Buckley* at 44–45.

30 *Colorado Republican Federal Campaign Committee* at 2330–31 (Thomas, J., concurring in the judgment and dissenting in part).

31 See Douglas Johnson and Mike Beard, '''Campaign Reform': Let's Not Give Politicians the Power to Decide What We Can Say about Them,'' Cato Institute Briefing Paper no. 31, July 4, 1997.

32 *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995).

33 *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978).

34 *McIntyre* at 445.

35 *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969).

36 See *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974).

37 See, for example, David Lange, ''The Role of Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment,'' *North Carolina Law Review* 52 (1973): 1. See also Scot Powe, ''Or of the [Broadcast] Press,'' *Texas Law Review* 55 (1976): 39.

38 See, for example, *Turner Broadcasting System Inc. v. FCC,* 512 U.S., 622, 637–38 (1996) (noting that both courts and commentators have questioned the validity of the scarcity rationale for disparate treatment of broadcast and print media); *Telecommunications Research & Action Center & Media Access to Project v. FCC,* 801 F.2d 501 (DC Cir. 1986).

39 Rodney A. Smolla, ''The Culture of Regulation,'' *CommLaw Conspectus* 5 (1997): 193, 199.

40 *Turner Broadcasting* at 641.

41 *Rust v. Sullivan,* 500 U.S. 173 (1991).

42 Cf. *CBS, Inc. v. FCC,* 453 U.S. 367 (1981), in which the Supreme Court sustained the FCC's reading of §312(a)(7) of the Communications Act of 1943, to the effect that the section created an affirmative, promptly enforceable right of reasonable access to the use of broadcast stations for individual candidates seeking federal office. *CBS v. FCC* provides no comfort to the proponents of free TV, however, since §312(a)(7) required only that networks provide access *for which candidates were willing and had offered to pay.*

43 Benjamin Weiser and Bill McAllister, ''The Little Agency That Can't: Election Law Enforcer Is Weak by Design, Marginalized by Division,'' *Washington Post,* February 12, 1997, p. A1.

44 See, for example, *Smith v. Goguen,* 415 U.S. 566, 572–73 (1974) (The vagueness doctrine ''requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.'') (Citation omitted.)

45 *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976). See also *New York Times Co. v. U.S.,* 403 U.S. 713 (1971) (''Any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity.'')

46 *Nebraska Press Association* at 561. (Citations omitted).

47 *Mills v. Alabama,* 384 U.S. 213, 218 (1966).

48 *NAACP v. Button,* 371 U.S. 415 (1963); *NAACP v. Alabama,* 357 U.S. 449 (1958).

49 *Hague v. CIO,* 307 U.S. 496 (1939).

50 *Meyer v. Grant,* 496 U.S. 414 (1988).

51 *Pickering v. Board of Education,* 391 U.S. 563 (1968).

52 *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977).

53 *Elrod v. Burns,* 427 U.S. 347 (1976).

54 *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943).

55 *Wooley v. Maynard,* 430 U.S. 705 (1977).

56 *Communication Workers of America v. Beck,* 487 U.S. 735 (1988); *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977).

57 *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980).

58 Quoted in Nancy Gibbs, ''The Wake-Up Call: Clinton Makes Serious Noises about Campaign Reform, But That May Not Be Enough to Change a Cozy System That Loves Special Interest Money,'' *Time,* February 3, 1997, p. 22.

59 Laurence H. Tribe, *American Constitutional Law,* 1st ed. (Mineola, N.Y.: Foundation Press, 1978), §13–27, pp. 802–3.

60 Daniel Hays Lowenstein, ''Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory, and the First Amendment,'' *UCLA Law Review* 29 (1982): 581–82.

61 Cass R. Sunstein, ''Political Equality and Unintended Consequences,'' *Columbia Law Review* 94 (1994): 1392.

62 Tribe, §13–26, p. 798.

63 Frank J. Sorauf, ''Politics, Experience, and the First Amendment: The Case of American Campaign Finance,'' *Columbia Law Review* 94 (1994): 1356.

64 Cf. Sanford Levinson, ''Electoral Regulation: Some Comments,'' *Hofstra Law Review* 18 (1989): 412 (''I am unpersuaded by any analysis that expresses justified worry about the impact of money on the behavior of public officials and, at the same time, wholly ignores the power of the media to influence these same public officials in part through the media's ability to structure public consciousness.'')

65 Cf. *Pell v. Procunier,* 417 U.S. 817, 834 (1974) (''The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally.'')

66 Skelly Wright, ''Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?'' *Columbia Law Review* 82 (1982): 614, 622.

67 Cass R. Sunstein, *The Partial Constitution* (Cambridge, Mass.: Harvard University Press, 1993), p. 84.

68 *California Medical Association v. Federal Election Commission,* 453 U.S. 182, 196, 199n. 20 (1981).

69 *Citizens against Rent Control* at 291.

70 *Federal Election Commission v. National Right to Work Committee,* 459 U.S. 197, 210 (1982).

71 *Federal Election Commission v. National Conservative Political Action Committee,* 470 U.S. 480 (1985).

72 Ibid. at 500.

73 *Federal Election Commission v. Massachusetts Citizens for Life,* 479 U.S. 238 (1986).

74 Ibid. at 251 (citations omitted).

75 Ibid. at 259.

76 Ibid. at 260.

77 Ibid. at 263.

78 *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990).

79 *Federal Election Commission v. National Conservative Political Action Committee* at 497.

80 *Austin* at 659–60.

81 Ibid. at 659 (quoting *Federal Election Commission v. National Conservative Political Action Committee* at 500–501).

82 Ibid. at 660.

83 Ibid. at 659 (quoting *Federal Election Commission v. Massachusetts Citizens for Life* at 258).

Mr. MCCONNELL. Mr. President, I will ask to have printed in the RECORD an excellent treatise on campaign finance reform and the Constitution by Professor of Law Kathleen M. Sullivan of Stanford which was recently published in the law journal published by the University of California at Davis.

Professor Sullivan examines and dismisses what she terms the reformers' ''Seven Deadly Sins'' of political money. This is must reading for anyone desiring a better understanding of the first amendment's role in this debate.

Mr. President, I ask unanimous consent that that treatise be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the University of California, Davis Winter Law Review, 1997]

POLITICAL MONEY AND FREEDOM OF SPEECH

(By Kathleen M. Sullivan)

[Stanley Morrison Professor of Law, Stanford University. This Essay was originally the Edward L. Barrett, Jr. Lecture on Constitutional Law, delivered at the University of California, David School of Law on February 13, 1997. The author is grateful for the hospitality of Dean Bruce Wolk and the Law School on that occasion. For helpful comments, the author thanks Alan Brownstein, Floyd Feeney, and participants in a GALA workshop organized by Sanford Kadish at the University of California, Berkeley. For research assistance, the author thanks Matthew Shors.]

INTRODUCTION

There is much talk about political money in the wake of the 1996 election. Some find the sheer volume of money spent impressive: an estimated $3 billion on all elections, $660 million on electing the Congress, and $1 billion on the presidential election. Others focus on the questions raised about alleged fund-raising activities that are forbidden by existing laws, such as contributions to political parties by foreign nationals. Still others focus on ''loopholes'' in the existing laws that allow their nullification as a practical matter. Nearly all focus on the presumed special influence of large contributors on political outcomes.[1]

Against this backdrop has arisen a hue and cry for campaign finance reform. Senators McCain and Feingold have revived a proposed Senate campaign finance reform bill that withered under filibuster in the 104th Congress;[2] Representatives Shays and Mechan have introduced comparable bipartisan legislation in the House. President Clinton has endorsed those bills.[3] Newly retired Democratic Senator Bill Bradley has called the McCain-Feingold proposal timid and advocates more sweeping reforms; he favors a constitutional amendment to overrule *Buckley v. Valeo*,[4] the 1976 Supreme Court decision holding that some campaign finance limits violate the right of free speech.[5] Other prominent advocates of the overrule of *Buckley* include twenty-six legal scholars led by Ronald Dworkin,[6] and twenty-four state attorneys general who argue that political money threatens the integrity of elections that it is their job to defend.[7] Countless newspaper editorial pages have opined that the time is ripe—while public outrage is high—to finally do something about campaign finance reform. Voters in states such as California and Oregon have adopted ballot measures imposing limits on the financing of state election campaigns.[8]

In short, the view that political money should be limited has become mainstream orthodoxy. Against this formidable array of thoughtful opinion, I offer here a contrary view. This Essay first lays out briefly the current law of political money and the current landscape of proposals for its reform. It then offers a critical guide to the reformers' arguments by examining the political theories that more or less explicitly underlie them. It concludes that the much belittled constitutional case against campaign finance limits is surprisingly strong, and that the better way to resolve the anomalies created by *Buckley v. Valeo* may well be not to impose new expenditure limits on political campaigns, but rather to eliminate contribution limits.

I. The law of political money

In our political system, political campaigns are generally funded with private money—the candidates' own resources plus contributions of individuals, political parties, and organized groups. The presidential campaign is an exception, funded publicly since the 1976 campaign.[9] In our system, candidates also communicate primarily through entities that are privately owned—the print and electronic press that provide candidates free news coverage and opportunities for paid political advertisements. One could imagine alternate systems, such as public funding of parties and candidate elections or public ownership of the communications media, but such systems are not our own, nor likely to be our own any time soon.

In the 1976 *Buckley* decision, the Court held that restrictions on political spending implicate freedom of speech. Invalidating some portions of the post-Watergate amendments to the Federal Elections Campaign Act but upholding others, the Court held that *contributions* to a candidate could constitutionally be limited, but *expenditures* could not, except as a condition of receiving public funds.[10] Thus, after *Buckley*, candidates may spend all they want, unless they are presidential candidates who have taken public money; so may political parties, individuals, and organized groups such as political action committees (PACs)—as long as they act independently of the candidate.[11] But direct donations to a candidate's campaign may be limited in amount. Under current federal law, an individual is limited in each election to contributing one thousand dollars to a candidate, five thousands dollars to a PAC, and twenty thousand dollars to a national party, and must keep the grand total to twenty-five thousand dollars. PACs may give only five thousand dollars to a candidate, five thousand dollars to another PAC, and fifteen thousand dollars to a national party.[12] Political parties, too, face spending limits when they contribute to the campaigns of their candidates, though these are higher than those for PACs.[13]

The split regime of *Buckley* thus authorizes government to limit the *supply* of political money, but forbids it to limit *demand*. Why the distinction? *Contributions*, the Court said, implicate lesser speech interests; they merely facilitate or associate the contributor with speech. They also raise the specter of ''corruption'' or the appearance of corruption—that is, the danger of a quid pro quo.[14] *Expenditures*, the Court said, are more directly expressive, and involve no corruption—a candidate cannot corrupt herself, and those who spend independently of the candidate's campaign cannot reasonably expect a pay-back.[15] Nor, held the Court, could spending limits be justified by the alternative rationale of equalizing political speaking power, because that rationale, the Court said, is ''wholly foreign to the First Amendment.''[16] Thus, the Court held, the only way government may bring about political expenditure limits is through a quid pro quo of its own: government may induce a candidate to accept expenditures limits in exchange for public subsidies.

Various cogent criticisms have been leveled at the contribution/expenditure distinction. First, both contributions and expenditures may equally express political opinions. As Justice Thomas wrote last summer:

''Whether an individual donates money to a candidate or group who will use it to promote the candidate or whether the individual spends the money to promote the candidate himself, the individual seeks to engage in political expression and to associate with likeminded persons. A contribution is simply an indirect expenditure.''[17]

This argues for protecting both expenditures and contributions alike. Second, an ''independent'' expenditure may inspire just as much gratitude by the candidate as a direct contribution. This argues for regulating them both alike. Finally, it has been objected, it is unclear why expenditure limits may be induced with carrots if they may not be compelled with sticks.[18] This argues for precluding private expenditure limits even as a condition of public subsidies.

These inconsistencies arise from the *Buckley* Court's attempt to solve an analogical crisis by splitting the difference. *Buckley* involved nothing less than a choice between two of our most powerful traditions: equality in the realm of democratic polity, and liberty in the realm of political speech. The Court had to decide whether outlays of political money more resemble voting, on the one hand, or political debate, on the other. The norm in voting is equality: one person, one vote. The norm in political speech is negative liberty: freedom of exchange, against a backdrop of unequal distribution of resources (it has been said that freedom of the press belongs to those who own one[19]). Faced with the question of which regime ought to govern regulation of political money, the Court in effect chose a little of both. It treated campaign contributions as more like voting, where individual efforts may be equalized, and campaign expenditures as more like speech, where they may not.

II. Leading reform proposals

Currently on the table are three type of reform proposals to impose new restrictions on political money. One advocates further limiting campaign contributions. The second proposes more conditioning of benefits upon corresponding ''voluntary'' limits on private spending. The third would place outright restrictions on campaign expenditures. The first two seek to operate within the *Buckley* framework; the third would overrule *Buckley* in part.

The first type of reform proposal would ''close loopholes'' in the existing regulatory scheme by extending the reach of contribution limits. For example, there are currently no restrictions on contribution ''bundling'' by intermediaries. One political entrepreneur may collect several individual contributions of one thousand dollars each and turn over the entire sum to the candidate, PAC, or party—taking political credit for a much larger amount than she personally could have contributed. Some reform proposals, such as McCain-Feingold, would treat such ''bundled'' contributions as contributions by the intermediary, and therefore subject to the otherwise applicable contribution limits.[20] In other words, no more bundling.[21]

Other such proposals would impose contribution limits on so-called ''soft money''—

[1] Footnotes at end of article.

those sums that now may be given without limit by individuals, PACs, and even corporations and labor unions (who are forbidden to give directly to candidates) to political parties for purposes of grass-roots ''party-building'' activities. Since the 1988 campaign, use of soft money to finance de facto campaign advertisements has proliferated. Advertisements celebrating one's party, its stand on issues, or the accomplishments of its leadership, after all, do serve to build party loyalty; but to the untutored eye, they may be difficult to distinguish from campaign ads. The same is true of soft money ads attacking the other party. The amount of soft money raised by the two major parties combined has increased from $89 million in 1992 to $107 million in 1994 to roughly $250 million in 1996.[22] Some reform proposals, again including McCain-Feingold, would limit soft money contributions.[23] The Democratic National Committee has announced its intention to limit annual soft money contributions from an individual, corporation, or union to one hundred thousand dollars, and President Clinton said that the Democratic Party would stop taking any soft money if the Republicans would do the same.[24]

Would such new contribution limits be constitutional under the *Buckley* regime? Any limit on party *expenditures* of soft money would likely be struck down by the current Court in light of its recent decision that political parties may make unlimited independent expenditures on behalf of a particular candidate.[25] But limits on contributions, under *Buckley,* are another matter. The Court has previously upheld ceilings on individual contributions to PACs on the ground that such restrictions prevent end runs around limits on contributions to candidates.[26] Bundling and soft money contribution limits might be defended along similar lines, although they also raise novel and questionable burdens on the right of association.[27]

The second category of reform proposal would find new means to use public funds or other public benefits to induce candidates to agree to ''voluntary'' spending limits—a practice that *Buckley* held constitutional, at least as to full public financing of presidential campaigns. Extending full public funding with attached spending limits from presidential to congressional campaigns would be the most obvious version of such reform, but is probably politically infeasible. Some proposals seek to offer smaller carrots, including ones that would not directly incur public expense. For example, the McCain-Feingold Senate bill would extract from broadcasters free and discounted broadcast time. The bill would in turn give the time, as well as postage discounts, to those Senate candidates who complied with specified spending limits.[28] California's Proposition 208 would give free space in the ballot statement and allow higher contributions to candidates who adopted spending limits.[29]

Such proposals too raise First Amendment questions despite the public funding ruling in *Buckley*. For example, while a private funding ban might reasonably further the goal of full public financing of an election—in order to level the playing field—it is hardly clear that private spending limits are equally justified by the relatively trivial communications subsidies proposed in these bills. And of course, the broadcasters might object to the extraction of ''free'' air time as an unconstitutional compulsion of speech.[30]

The third, most dramatic type of proposal would overrule the expenditure holding in *Buckley* and permit spending limits outright. Since the current Court seems quite uninterested in overruling *Buckley,* the most plausible vehicle for such a reform would be some type of constitutional amendment. Most advocates of such a reform support an amendment authorizing Congress to reimpose expenditure limits as under the pre-*Buckley* status quo, while leaving the authority to impose contribution limits intact.

III. The political theory of campaign finance reform, or the supposed seven deadly sins of political money

What political theory supports arguments for campaign finance reform? Arguments for greater limits on political contributions and expenditures typically suggest that any claims for individual liberty to spend political money ought yield to an overriding interest in a well-functioning democracy. But what is meant by democracy here? The answer is surprisingly complex; several distinct arguments that democracy requires campaign finance limits are often lumped together. I will try to disaggregate them and critically assess each one. The reformers might be said to have identified seven, separate, supposedly deadly sins of unregulated political money.

A. Political inequality in voting

The first argument for campaign finance limits is that they further individual rights to political equality among voters in an election. This argument starts from the principle of formal equality of suffrage embodied in the one person, one vote rule that emerged from the reapportionment cases.[31] Each citizen is entitled to an equal formal opportunity, ex ante, to influence the outcome of an election. Moreover, each person's vote is inalienable; it may not be traded to others for their use, nor delegated to agents. Literal vote-buying is regarded as a paradigm instance of undemocratic conduct. We no longer countenance gifts of turkeys or bottles of liquor to voters on election day, nor the counting of dead souls. These qualities of voting distinguish the electoral sphere from the marketplace, where goods and services, unlike votes, are fungible, commensurable, and tradeable.

Reformers often proceed from the premise of equal suffrage in elections to the conclusion that equalization of speaking power in electoral campaigns is similarly justifiable in furtherance of democracy. The most radical of such proposals would bar expenditures of private campaign funds altogether, and limit candidates to spending public funds allocated to each voter equally in the form of vouchers that could be used solely for election-related speech.[32] The principle here would be one person, one vote, one dollar.[33]

More commonly, however, the analogy to voting is meant to be suggestive, not literal; few go so far as to say that campaign finance limits are constitutionally compelled, as equipopulous districts are. Nor do most advocates of campaign finance reform argue for literal equality in electoral expenditures; the asserted right to equal political influence on the outcome of electoral campaigns is usually depicted as aspirational. But reformers argue that the goal of equal citizen participation in elections at least helps to justify campaign finance limits as constitutionally permissible.[34] On this view, campaign finance amounts to a kind of shadow election, and unequal campaign outlays amount to a kind of metaphysical gerrymander by which some votes count more than others in that shadow election.

Such arguments from formal equality of the franchise to campaign finance restrictions, however, often fail to articulate a crucial intermediate step: that political finance sufficiently resembles voting as to be regulable by the equality norms that govern voting. There is an alternative possibility: that political finance more resembles political speech than voting. That is the analogy drawn by the *Buckley* Court, at least with respect to expenditures. The choice of analogy is crucial. In the formal realm of voting—like other formal governmental settings, such as legislative committee hearings and trials in court—speech may be constrained in the interest of the governmental function in question. For example, at a town meeting, Robert's Rules of Order govern to ensure that orderly discussion may take place; at a trial, witnesses testify not to all they know but to what they are asked about, subject to rules of evidence and the constraints of relevant rights of the parties. Likewise, one voter does not get ten votes merely because he feels passionately about a candidate or issue.

By contrast, in the informal realm of political speech—the kind that goes on continuously between elections as well as during them—conventional First Amendment principles generally preclude a norm of equality of influence. Political speakers generally have equal rights to be free of government censorship, but not to command the attention of other listeners. Under virtually any theory of the justification for free speech, legislative restrictions on political speech may not be predicated on the ground that the political speaker will have too great a communicative impact, or his competitor too little. Conventional First Amendment norms of individualism, relativism, and antipaternalism preclude any such affirmative equality of influence—not only as an end-state but even as an aspiration. Indeed, such equality of participation as speakers in political debate is foreign even under the more collectivist approach to political speech outlined by Alexander Meiklejohn, who famously noted that the First Amendment ''does not require that, on every occasion, every citizen shall take part in public debate. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said.'' [35]

A few perceptive reform advocates have noticed this problem and sought to fill in the missing step—the analogy between political finance and voting that would make equality norms relevant to both. For example, Ronald Dworkin, who largely accepts arguments for unfettered political speech in other contexts, rests his argument for campaign finance limits on the proposition that the right to equal participation as voters must be understood to entail a corollary right to equal participation as advocates in the electoral campaigns that precede and determine the vote:

''Citizens play two roles in a democracy. As voters they are, collectively, the final referees or judges of political contests. But they also participate, as individuals, in the contests they collectively judge: they are candidates, supporters, and political activists; they lobby and demonstrate for and against government measures, and they consult and argue about them with their fellow citizens. . . . [W]hen wealth is unfairly distributed and money dominates politics, . . . though individual citizens may be equal in their vote and their freedom to hear the candidates they wish to hear, they are not equal in their own ability to command the attention of others for their own candidates, interests, and convictions.[86]

In other words, formal equality of voting power implies a corollary right to equality in the opportunity to speak out in politics—at least in the particular subset of political speech that is made in connection with electoral campaigns.[87]

But what are the boundaries of an electoral campaign? Dworkin does not suggest that equalization of speaking power is a satisfactory justification for limitations of political speech in other contexts. Yet his own examples belie any easy distinction between

the formal realm of electoral discourse, which he would regulate, and the informal realm of ongoing political discourse, which he presumably would not. For example, he lists ''lobbying'' and ''demonstrations'' as examples of relevant forms of citizen participation. But lobbying and demonstrations could not, without great alteration in ordinary First Amendment understandings, be regulated on the ground that their leaders had amassed too many resources. Further, elections are seamlessly connected to the informal political debates that continue in the periods between them. The more electoral campaign speech is continuous with such ordinary informal political discourse, the less campaign finance resembles voting, and the more it partakes of a realm of inevitable inequality.[88]

The reformers might answer that the equality principle could be confined to speech made expressly by candidates or their committees during formal electoral campaigns, defined by reference to some particular period in relation to elections. But now practical difficulties arise even as analytical difficulties subside. Such an approach would leave unregulated advocacy that redounds to the benefit of candidates by persons, parties, and organizations independent of them. To the extent such independent speech operates as a substitute for express candidate speech—even if an imperfect one—the principle of equality of voter participation advanced by the limits on formal campaign expenditures will be undermined.

An alternate response by reformers might be to question conventional First Amendment principles generally, and to assert political equality as a justification for regulating a wide range of informal political discourse. Such an approach raises large questions that go beyond the topic here. The key point for now is simply that, short of major revision of general First Amendment understandings, campaign finance reform may not be predicated on equality of citizen participation in elections unless electoral speech can be conceptually severed from informal political discourse. But formal campaign speech has so many informal political substitutes that this proposition is difficult to sustain.

B. Distortion

A second argument against unregulated private campaign finance is related to the first, but focuses less on individual rights than on collective consequences. This argument says that the unequal deployment of resources in electoral campaigns causes the wrong people to get elected, distorting the true preferences of voters.[89] Good candidates who cannot surmount the high financial barriers to entry never get to run, and the choice among those who do is influenced by spending power that is not closely correlated to the popularity of the candidate's ideas. On this view, unequal funding leads both candidates and voters to misidentify the electorate's actual preferences and intensities of preference.

The Supreme Court has accepted such an argument as sufficient to justify some administrative burdens on the deployment of political money. In *Austin v. Michigan Chamber of Commerce,*[40] the Court upheld a state requirement that corporations (except nonprofit corporations organized solely for ideological purposes[41]) make political expenditures solely from separate segregated political funds, not from their general treasuries.[42] The Court reasoned that the government's interest in preventing the ''distortion'' of the apparent strength.[43] A corporation that spent, for political purposes, money raised for investment purposes, would make it appear that there was more enthusiasm for the ideas it backed than was warranted. Funds raised for expressly political purposes and segregated in a separate political fund or corporate PAC, by contrast, would represent a more accurate proxy for the popularity of the ideas they supported.

Campaign finance reformers would extend this antidistortion principle beyond the particular problems of the corporate form at issue in *Austin*. They suggest that the ability to amass political funds in general does not correlate closely with voter preferences. Rather, the unequal distribution of campaign resources leads to misrepresentation of constituents' actual preferences and intensities of preference. The wealthy (or those who are good at fund-raising) can spend more money on a candidate they care relatively little about than can the poor (or those who are inept at fundraising) on a candidate to whom they are passionately committed. To the extent such ''distorted'' campaign speech influences voting, candidates will be elected and platforms endorsed that differ from what voters would otherwise choose.

This argument has both practical and conceptual difficulties. First, a candidate's ability to attract funds is at least to some extent an indicator of popularity.[44] Money may flow directly in response to the candidate's ideas or indirectly in response to the candidate's popularity with others as reflected in poll numbers and the like.[45] To the extent that fundraising accurately reflects popularity, the reformers exaggerate the degree of distortion. Second, there are limits to how far private funding can permit a candidate to deviate from positions acceptable to the mass of noncontributing voters; the free press will to some extent correct information provided in the candidate's advertisements, and polls will discipline the candidate to respond to preferences other than those of his wealthiest backers.[46]

A third and deeper problem is that the concept of ''distortion'' assumes a baseline of ''undistorted'' voter views and preferences. But whether any such thing exists exogenously to political campaigns is unclear. Popular attitudes about public policy do not exist in nature, but are formed largely in response to cues from political candidates and party leaders. Moreover, the institutional press—itself owned by large corporations commanding disproportionate power and resources—plays a large role in shaping public opinion. Any attempt to equalize campaign spending would still leave untouched any ''distortion'' from the role of the press.[47]

C. Corruption, or political inequality in representation

A third argument for limiting political contributions and expenditures is often made under the heading of fighting political ''corruption.'' This is a misnomer. Properly understood, this argument is a variation on the political inequality argument.[48] But unlike the first argument above, it focuses not on the unequal influence of voters on elections, but on the elected legislators' unequal responsiveness to different citizens once in office. The charge against unregulated political money here is that it makes citizens unequal not in their ability to elect the candidates of their choice, but in their ability to affect legislative outcomes.[49]

The Court in *Buckley* held contribution limits permissible to prevent ''corruption'' or the appearance of corruption of legislators by contributors of significant sums. Popular rhetoric about political money often employs similar metaphors: polls show substantial majorities who say that Congress is ''owned'' by special interests or ''for sale'' to the highest bidder. It is important to note, however, that the ''corruption'' charged here is not of the Tammany Hall variety. There is no issue of personal inurement; the money is not going into candidates' pockets but into television advertisements, the earnings of paid political consultants, and various other campaign expenses that increase the chances of election or reelection. This is true a fortiori for expenditures made independent of the candidate's campaign.

The claimed harm here is not, as the term ''corruption'' misleadingly suggests, the improper treatment of public office as an object for market exchange, but a deviation from appropriate norms of democratic representation. Officeholders who are disproportionately beholden to a minority of powerful contributors, advocates of finance limits say, will shirk their responsibilities to their other constituents, altering decisions they otherwise would have made in order to repay past contributions and guarantee them in the future. Thus, properly understood, the ''corruption'' argument is really a variant on the problem of political equality; unequal outlays of political money create inequality in political representation.

Again, the difficulties with the argument are both practical and conceptual. First, political money is not necessarily very effective in securing political results. The behavior of contributors provides some anecdotal support: Many corporate PACs, to borrow Judge Posner's phrase, are ''political hermaphrodites'';[50] they give large sums to both major parties. This hedging strategy suggests a weak level of confidence in their ability to obtain results from any particular beneficiary of their contributions.

President Clinton captured the same point at a press conference where he said that he gives major donors an opportunity for a ''a respectful hearing'' but not a ''guaranteed result.''[51] While this comment might elicit skepticism, the proposition that campaign donations are a relatively unreliable investment has empirical support. Various studies of congressional behavior suggests that contributions do not strongly affect congressional voting patterns, which are for the most part dominated by considerations of party and ideology.[52] Of course, such evidence may be countered[53] by noting that contributors may be repaid in many ways besides formal floor votes—for example, by relatively invisible actions in agenda-setting and drafting in committees. Furthermore, the few votes that are dominated by contributions may occur when there is the greatest divergence between contributors' and other constituents' interests. Still, the case that contributions divert representative responsiveness is at best empirically uncertain, and not a confident basis for limiting political speech.

A second and deeper problem with the ''corruption'' argument, once it is properly recast as an argument about democratic representation, is conceptual. The argument supposes that official action should respond to the interests of all constituents, or to a notion of the public good apart from the aggregation of interests, but, in any event, not to the interests of a few by virtue of their campaign outlays. But legislators respond disproportionately to the interests of some constituents all the time, depending, for example, on the degree of their organization, the intensity of their interest in particular issues, and their capacity to mobilize votes to punish the legislator who does not act in their interests. On one view of democratic representation, therefore, there is nothing wrong with private interest groups seeking to advance their own ends through electoral mobilization and lobbying, and for representatives to respond to these targeted efforts to win election and reelection.[54] It is at least open to question why attempts to achieve the same ends through amassing campaign

money are more suspect, at least in the absence of personal inurement.[55]

But the question whether disproportionate responsiveness to contributors is ultimately consistent with democratic representation need not be answered to see the problem with the reformers' argument. That problem is that selecting one vision of good government is not generally an acceptable justification for limiting *speech*, as campaign finance limits do. Rather, what constitutes proper representation is itself the most essentially contested question protected by freedom of speech. The ban on seditious libel, the protection of subversion advocacy, and the general hostility to political viewpoint discrimination illustrate that free speech, under current conceptions, protects debates about what constitutes proper self-government from ultimate settlement by legislatures. To be sure, legislatures are often permitted or compelled to select among democratic theories, or to privilege one version of representation over its competitors in setting up the formal institutions of government. ''One person, one vote,'' for example, privileges egalitarian conceptions over various alternatives—such as the inegalitarian representation provided by the United States Senate. But the right to speak—and, it might be added, to petition—includes the right to challenge any provisional settlement a legislature might make of the question of what constitutes appropriate democratic representation.

In other words, the ''anticorruption'' argument for campaign finance reform claims the superiority of a particular conception of democracy as a ground for limited speech. As a result, it runs squarely up against the presumptive ban on political viewpoint discrimination.[56] Campaign finance reformers necessarily reject pluralist assumptions about the operation of democracy and would restrict speech, in the form of political money to foster either of two alternative political theories. First, they might be thought to favor a Burkean or civic republican view, in which responsiveness to raw constituent preferences of any kind undermines the representative's obligation to deliberate with some detachment about the public good. Alternatively, they might be thought to favor a populist view in which the representative ought be as close as possible to a transparent vehicle for plebiscitary democracy, for the transmission of polling data into policy. Either way, they conceive democracy as something other than the aggregation of self-regarding interests, each of which is free to seek as much representation as possible.[57] But surely the endorsement of civic republicanism or populism—or any other vision of democracy—may not normally serve as a valid justification for limiting speech. Legislators may enforce an official conception of proper self-government through a variety of means, but not by prohibiting nonconforming expression.

Campaign finance reformers might object that, after all, campaign finance limits in no way stop would-be pluralists from *advocating* pluralism, but only from practicing it. The utterances being silenced are performative, not argumentative. Such a response, however, is in considerable tension with a long tradition of First Amendment protection for symbolic and associative conduct.[58] A further objection might be that this argument extends only to legislative campaign finance reform, and not to a constitutional amendment such as Senator Bradley and others have proposed.[59] That is surely correct, as an amendment could obviously revise the existing First Amendment conceptions on which the argument rests. But, apart from general reasons to tread cautiously in amending the Constitution, it might well be thought especially risky to attempt by amendment to overrule a constitutional decision that is part of the general fabric of First Amendment law, as the anomaly created by the new amendment might well have unanticipated effects on other understandings of free speech.[60]

D. Carpetbagging

A fourth strand of the reform argument is a variant of the third, with special reference to geography. Except in presidential elections, we vote in state or local constituencies. The fundamental unit of representation is geographic. But money travels freely across district and state lines. Thus, political money facilitates metaphysical carpetbagging. Contributions from or expenditures by nonconstituent individuals and groups divert a legislator's representation away from the constituents in his district and toward nonconstituents, whether they are foreign corporations or national lobbies. Various reform proposals seek to limit carpetbagging by localizing funding: McCain-Feingold, for example, would require candidates not only to limit expenditures but also to raise a minimum percentage of contributions from residents of their home state in order to receive public benefits, such as broadcast and postage discounts.[61]

Again, this seeks to decide by legislation a question of what constitutes proper representation. To some, it might be legitimate for a legislator to consider the views of national lobbies. For example, those lobbies might share strong overlapping interests with her own constituents. Or the legislator might conceive her obligation as running to the nation as well as a particular district. For the reasons just given, a privileged theory of what constitutes proper political representation cannot serve as an adequate ground for limitation of speech, for free speech is itself the central vehicle for debating that very question.

E. Diversion of legislative and executive energies

A fifth critique of the current role of political money, made often by politicians themselves and sometimes elaborated as an argument for campaign reform, is that fundraising takes too much of politicians' time.[62] Many think that incumbents spend so much time fundraising that governance has become a part-time job.

This argument supposes a sharp divide between the public activity of governing and the private role of fundraising. But this distinction is hardly clear. The ''marketing'' involved in fundraising consists principally of conveying and testing response to information about past and future policy positions. How this differs from the standard material of all political campaigning is unclear, and it may well be continuous with governing. If the need for fundraising were eliminated, legislators would still have to nurture their constituencies in various ways between elections. Some might think that nurturing grass roots is a more wholesome activity than nurturing fat cast; but in that case, the diversion of energies problem simply collapses back into the problem of inequality in political representation discussed earlier.[63] To the extent the candidate makes secret promises to PACs or wealthy individuals that would be unpopular with the mass of the electorate, there are strong practical limits to such strategies, such as the danger of press exposure and constituent retaliation.

However serious the problem of incursion on the candidate's time might be, one thing is clear: the split regime of *Buckley* exacerbates it. Contribution limits mean that a candidate has to spend more time chasing a larger number of contributors than she would have to do if contributions could be unlimited in amount. Concern about time, therefore, may involve a tradeoff with concern about disproportionate influence.

F. Quality of debate

A sixth critique of the unregulated outlay of political money arises on the demand side rather than the supply side. The problem, in a word, is television. Where does all this political money go? The biggest expense is the cost of purchasing advertising time on television (though increasingly, political consultants take a hefty share). The critics regard repetitious, sloganeering spot advertisements as inconsistent with the enlightened rational deliberation appropriate to an advanced democracy. It is not clear what golden age of high-minded debate they hark back to; the antecedent of the spot ad is, after all, the bumper sticker. Nonetheless, these critics clearly aspire to something wiser and better. Ronald Dworkin's lament is representative: ''The national political 'debate' is now directed by advertising executives and political consultants and conducted mainly through thirty-second, 'sound bite' television and radio commercials that are negative, witless, and condescending.''[64] Political expenditure limits, some suggest, would cut off the supply of oxygen to this spectacle and force candidates into less costly but more informative venues such as written materials and town hall debates.

To the extent this rationale for campaign finance reform is made explicit, it would appear flatly precluded by conventional First Amendment antipaternalism principles. Permitting limitations on speech because it is too vulgar or lowbrow would wipe out a good many pages of *U.S. Reports.* Surely a judgment that speech is too crass or appeals to base instincts is a far cry from Robert's Rules of Order or other principles of ordered liberty consistent with government neutrality toward the content of speech.

In any event, the indirect means of limiting expenditures may not do much to solve this problem. Why not directly ban political advertising on television outright? Then everyone could campaign on smaller budgets. British politicians, for example, are barred from taking out paid spots on the airwaves. But Britain has strong parties and small districts; we have neither. Banning television advertising in our political culture would impair politicians', especially challengers', ability to reach large masses of the electorate. Banning television advertisements might make us more republican, but it is hardly clear that it would make us more democratic. Moreover, the special First Amendment dispensation the Court has shown for broadcast regulation is increasingly tenuous, and has not been extended to other, increasingly competitive media. To be fully effective, a ban on television advertising might have to extend to cable and the internet, where the constitutional plausibility of regulation is even more dubious.

G. Lack of competitiveness

Finally, a last argument would locate the key problem in current campaign finance practices in the advantage it confers on incumbents over challengers. Here the claim is that a healthy democracy depends on robust political competition and that campaign finance limits are needed to ''level the playing field.'' The reformers contend that unfettered political money confers an anticompetitive advantage upon incumbents. This advantage arises because incumbents participate in current policymaking that affects contributors' interests. Thus, they enjoy considerable fundraising leverage

while in office, and indeed, incumbents received on average four times as much in contributions than challengers in the 1996 congressional election.[65] This incumbent advantage, reformers argue, limits turnover and makes challengers less effective at monitoring and checking incumbents' responsiveness. It is no accident that, for such reasons, some prominent supporters of campaign finance reform, such as Republican Senator Fred Thompson of Tennessee, a cosponsor of the McCain-Feingold bill, are also prominent supporters of term limits.

But there is some practical reason to think this argument gets the competitiveness point backwards. Campaign finance limits themselves may help to entrench incumbents in office.[66] Incumbency confers enormous nonfinancial advantages: name recognition, opportunity to deliver benefits, publicity from the free press, and the franking privilege. To offset these advantages, challengers must amass substantial funds. Challengers' lack of prominence may make it more difficult for them to raise funds from large numbers of small donations. They may therefore depend more than incumbents on concentrated aid from parties, ideologically sympathetic PACs, or even wealthy individual private backers.[67] Of course, once again, contribution limits under the split regime of *Buckley* exacerbate the problem, as incumbents are more likely to be able to raise a large number of capped contributions than challengers can.

The effect of regulation or nonregulation on the competitiveness of elections is a difficult empirical question.[68] But any prediction that campaign regulation will increase electoral competitiveness and turnover is, by virtue of its very empirical uncertainty, at least a questionable ground for limiting political speech.

CONCLUSION

The discussion to this point has sought to disentangle the separate elements of the campaign finance reformers' arguments about the evils of unregulated political money and to suggest why the proposed cure for the seven deadly sins might be worse than the disease, even on the reformers' own assumptions.[69] I have sought also to show why limits on political money are in deeper tension with current First Amendment conceptions than is often supposed. *Buckley*'s declaration of the impermissibility of redistribution of speaking power has been widely criticized;[70] the effort here has been to show alternative reasons why the justifications for campaign finance reform might trigger First Amendment skepticism. These reasons include the inseverability of campaign speech from ordinary political discourse and the viewpoint basis inherent in campaign finance reform's selection of one conception of democratic representation over its competitors as a basis for curtailing speech.

If these alternative reasons have any force, then it is easier to see why campaign finance reform is especially prone to following the law of unintended consequences: for example, limits on individual contributions helped to increase the number of PACs; limits on hard money contributions stimulated the proliferation of soft money contributions; and limits on contributions generally spurred the growth of independent expenditures.[71] The reason is not just that the demand for political money is peculiarly inelastic and thus, like the demand for other addictive substances, likely to create black markets in the shadow of regulation. The reason is that grim efforts to close down every ''loophole'' in campaign finance laws will inevitably trench unacceptably far upon current conceptions of freedom of political speech. Even if formal campaign expenditures and contributions are limited, the reformers' justifications attenuate as the law reaches the informal political speech that serves as a partial substitute for formal campaign speech. Without altering conventional free speech norms about informal political discourse, there are outer limits on the ability of any reform to limit these substitution effects.

What scenario are we left with if both political expenditure and contribution limits are deemed unconstitutional? Will political money proliferate indefinitely, along with its accompanying harms? Not necessarily, provided that the identity of contributors is required to be vigorously and frequently disclosed. Arguments against compelled disclosure of identity, strong in contexts where disclosure risks retaliation,[72] are weaker in the context of attempts to influence candidate elections, as the *Buckley* decision itself recognized in upholding the disclosure requirements of the 1974 FECA amendments.[73] Weekly disclosure in the newspapers, or better, daily reporting on the internet, would be a far cry from earlier failed sunshine laws. If the lists of names and figures seemed too boring to capture general attention, enterprising journalists could ''follow the money'' and report on any suspect connections between contributions and policymaking.

Under this regime—in which contributions and expenditures were unlimited, but the identities of contributors were made meaningfully public—there would be at least three reasons for modest optimism that the harms the reformers fear from unlimited political money would in fact be limited.

A. Increased supply

If contributions, like expenditures, could not be limited in amount, the total level of contributions might be expected to increase as there might be a net shift from expenditures to contributions. The supply of political money to candidates would be increased. This might be expected to lower the ''price'' to the candidate of a political contribution. With more quids on offer, a politician has less reason to commit to any particular quo. In this politicians' buyers' market, concerns about unequal political influence that arise under the misleading ''corruption'' heading would arguably attenuate, and contributors might curtail their outlays in response to their declining marginal returns.

B. Decreased symbolic costs from subterfuge

If contributions could be made in unlimited amounts, would-be contributors would not have to resort to the devices of independent advertisements or party contributions as substitutes. Public perception of a campaign finance system gone out of control rests at least in part on the view that politicians, parties, and donors skirt existing laws by exploiting evasive ''loopholes.'' To the extent that all functional contributions are made as explicit contributions, the symbolic costs of the current split regime of *Buckley* would decrease.

C. Voter retaliation

With contributions fully disclosed and their effects on political outcomes subject to monitoring by the free press, voters would be empowered to penalize candidates whose responsiveness to large contributors they deemed excessive. Voters could do retail what campaign finance reform seeks to do wholesale: encourage diversification in the sources of campaign funding. Political challengers could capitalize on connections between political money and incumbents' official actions. A striking demonstration of this point arose in the 1996 presidential election, when the Dole campaign's attack on alleged Democratic fund-raising scandals drove President Clinton's poll numbers into a temporary freefall.[74] Political money would itself be an election issue; a candidate would have to decide which was worth more to her—the money, or the bragging rights to say that she did not take it.

Of course, the harms of political money cannot be expected to be entirely self-limiting. The deregulation outlined here is only partial; compelled disclosure avoids a regime of absolute laissez-faire. Even this partial deregulation might have unintended consequences. Some of the reformers' goals are widely shared and might require market intervention. For example, achieving adequate competitiveness in elections might require some public subsidies for challengers who can demonstrate certain threshold levels of support—floors but not ceilings for political expenditures.[75] But the possibilities outlined here at least suggest some hesitation before deciding which way the split regime of *Buckley* ought to be resolved.

FOOTNOTES

[1] *See generally* David E. Rosenbaum, *In Political Money Game, the Year of Big Loopholes,* N.Y. Times, Dec. 26, 1996, at A1 (discussing amounts of money on political campaigns).

[2] *See* Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. (reintroducing proposed measures to reform campaign financing); Senate Campaign Finance Reform Act of 1996, S. 1219, 104th Cong. (proposing measures for campaign finance reform).

[3] *See Excerpts From the First News Conference of Clinton's Second Term,* N.Y. Times, Jan. 29, 1997, at B6 [hereinafter *Press Conference Excerpts*].

[4] 424 U.S. 1 (1976).

[5] *See id.* at 143; Bill Bradley, *Congress Won't Act, Will You?,* N.Y. Times, Nov. 11, 1996, at A15 [hereinafter Bradley, *Congress Won't Act*]; Bill Bradley, *Perspectives on Campaign Finance; Money in Politics, Ants in the Kitchen,* L.A. Times, Jan. 31, 1997, at B9.

[6] *See* Leslie Wayne, *After the Election: Campaign Finance; Scholars Ask Court to Backtrack, Shutting Floodgates on Political Spending,* N.Y. Times, Nov. 10, 1996, at §1, 30 (describing scholars' letter advocating demise of *Buckey v. Valso*).

[7] *See* David Stout, *State Attorneys General Urge Limits on Campaign Spending,* N.Y. Times, Jan. 28, 1997, at A14 (stating that campaign spending threatens integrity of elections).

[8] California's 1996 ballot measure is under court challenge. *See* California Political Reform Act of 1996, Proposition 208, Cal. Gov't Code §85600 (West Supp. 1997). Many provisions of Oregon's 1995 ballot measure, Measure 9, including contributions limits, were invalidated under the free expression provision on the Oregon Constitution in *Vannatta v. Keisling,* No. SC 542506, 1997 Ore. LEXIS 5, at *42*53 (Or. Feb. 6, 1997).

[9] Some states have also experimented with public funding of state elections. *See generally* Kenneth R. Mayer & John M. Wood, *The Impact of Public Financing on Electoral Competitiveness: Evidence from Wisconsin, 1964–1990,* 20 Legis. Stud. Q 69 (1995) (finding that Wisconsin's public subsidies did not increase electoral competitiveness).

[10] *See Buckley,* 424 U.S. at 145–11 (sustaining individual contribution limits but invalidating limits on campaign expenditures).

[11] *See* FEC v. National Conservative Political Action Comm., 470 U.S. 480, 501 (1985) (invalidating limits on independent expenditures by PACs); Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309, 2310–20 (1996) (invalidating limits on independent expenditures by political parties).

[12] *See* Federal Election Campaign Act of 1971, 2 U.S.C. §§431–455 (1994) (defining campaign contribution limits).

[13] For explication of campaign expenditure limitations on political parties, see *Colorado Republican,* 116 S. Ct. at 2313–14.

[14] *See Buckley,* 424 U.S. at 26 (discussing potential corruption that large contributions may bring).

[15] *See id.* at 46–48 (stating that independent expenditures are not as likely to lead to abuse as large contributions).

[16] *See id.* at 49.

[17] *Colorado Republican,* 116 S. Ct. at 2327.

[18] *See* Daniel D. Polsby, Buckley v. Valeo; *The Special Nature of Political Speech,* 1976 Sur. Ct. Rev. 1, 26–31 (arguing that ''the Court made a mistake in allowing expenditure ceilings to ride in on the coattails of public financing'').

[19] *See, e.g.,* Mark Tushnet, *Corporations and Free Speech,* in The Politics of Law 253, 256–57 (David

Kairys ed., 1982) (discussing free-speech rights available to powerful and, most specifically, corporations).

[20] *See* Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. §231 (providing for treatment of bundled contributions).

[21] For a critique of bundling, see Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy,* 94 Colum. L. Rev. 1126, 1140–42, 1155–56 (1994). Note that the ultimate antibundling measure would be a ban on PAC contributions to political campaigns. However, even ardent reformers regard such a measure as a probable infringement of the right of association. *See id.* at 1155.

[22] *See* Rosenbaum, *supra* note 1, at Al (reporting statistics on campaign expenditures).

[23] *See* S. 25, §§211–213 (limiting soft money contributions).

[24] See James Bennet, *Clinton Announces New Limits on Fund-Raising by Democrats,* N.Y. Times, Jan. 22, 1997, at AI.

[25] *See* Colorado Republican Campaign Comm. v. FEC, 116 S. Ct. 2309, 2317 (1996) (invalidating limits on independent expenditures by political parties).

[26] *See* California Med. Ass'n v. FEC. 453 U.S. 182, 197–98 (1981) (upholding $5000 limit on contributions to multi-candidate committees because without such limits, contribution limits upheld in *Buckley* ''could be easily evaded'').

[27] *See, e.g.,* NAACP v. Alabama *ex rel.* Patterson, 457 U.S. 449, 460–61 (1958) (holding that freedom of association is indispensable aspect of liberty protected by Fourteenth Amendment), *rev'd,* 360 U.S. 240 (1959).

[28] *See* S. 25, §§101–104 (setting forth benefits for political candidates who limit their campaign expenditures).

[29] *See* CAI. Gov't Code 85600 (West Supp. 1997). Section 85600 was enacted by the California Political Reform Act of 1996, Proposition 208.

[30] Compelled carriage of unwanted speech normally triggers strict First Amendment scrutiny. *See* Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1 20–21 (1986) (invalidating forced inclusion of environmentalist statements in public utility's billing envelope). The Court does not apply strict scrutiny where the government's reason for the compulsion bears no relation to the content of the compelled speech. *See* Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 641–42 (1994) (reviewing content-neutral law requiring cable operators to carry unwanted broadcast stations under intermediate scrutiny). Broadcasters, however, have been held subject to compelled carriage requirements that would be unconstitutional if applied to non-broadcast speakers. *Compare* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400–01 (1969) (upholding mandatory reply obligations applicable to broadcasters), *with* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256 (1974) (invalidating mandatory reply obligations applicable to newspapers). With the obsolescence of the spectrum scarcity argument on which *Red Lion* was premised, it is unclear whether broadcasters would have a compelled-speech objection to the extraction of free or discounted air time for candidates as a condition of their receipt of public licenses.

[31] *See* Reynolds v. Sims, 377 U.S. 533, 561–68 (1964) (holding that state's legislative apportionment scheme violates Equal Protection Clause); Baker v. Carr, 369 U.S. 186, 208–37 (1962) (concluding that such claims of equal protection violations are jusiticiable).

[32] *See* Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance,* Am. Prospect, Spring 1993, at 71, 72 (stating that voucher is an alternative to campaign finance reform).

[33] *See* generally Edward B. Foley, *Equal-Dollar-Per-Voter: A Constitutional Principle of Campaign Finance,* 94 Colum. L. Rev. 1204 (1994) (arguing that each voter should be constitutionally guaranteed equal financial resources for expenditures on electoral speech).

[34] *See, e.g.,* David A. Strauss, *Corrpution, Equality, and Campaign Finance Reform,* 94 Colum, L. Rev. 1369, 1383 (1994) (suggesting that ''one person, one vote' is indeed the decisive counterexample to the suggestion that the aspiration [of equalizing political speech] is foreign to the First Amendment''); Cass R. Sunstein, *Political Equality and Unintended Consequences,* 94 Colum. L. Rev. 1390, 1392 (1994) (stating that ''the 'one person-one-vote' rule exemplifies the commitment to political equality'' and that ''[l]imits on campaign expenditures are continuous with that rule'').

[35] Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 25 (1948).

[36] Ronald Dworkin, *The Curse of American Politics,* N.Y. Rev. Books, Oct. 17, 1996, at 19, 23.

[37] For a similar argument by an advocate of the overrule of *Buckley* and campaign finance reform, *see* C. Edwin Baker, *Limits on Campaign 'Speech' Are Just an Extension of Existing Rules,* Philadelphia Inquirer, Jan. 28, 1997, at A11. Baker distinguishes between the aspects of politics, such as voting, that are ''legally created and structured'' and ''specially designed to fairly achieve certain results,'' in which speech may be limited, and the realm of informal political debate and dialogue that ''occurs as much between elections as during them,'' in which speech ought to be ''unbounded.'' *See id.* Like Dworkin, Baker allocates political finance to the formal rather than the informal realm, and hence regulable by norms of equality. *See id.* But like Dworkin, Baker does not explain how campaign speech may be severed for informal political speech.

[38] *See, e.g.,* Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction?,* Mich L. Rev. 939, 945–48 (1985) (book review) (noting financial inequalities in political influence, including disproportionate political influence of media conglomerates); *id,* at 948–49 (noting nonfinancial inequalities in campaign resources, including leisure time and celebrity status); *see also* Lillian R. BeVier, *Campaign Finance Reform: Specious Argument, Intractable Dilemmas,* 94 Colum. L. Rev. 1258, 1267 (1994) (catalouging nonfinancial inequalities in campaigning).

[39] *See generally* Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted,* 18 Hofstra L. Rev. 301 (1989) (proposing reform package for legislative general elections).

[40] 494 U.S. 652 (1990).

[41] *See* FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 256–65 (1986) (invalidating funding segregation requirement for ideological corporations formed for political purposes).

[42] Similar federal requirements govern corporations and labor unions. Since 1907, corporations have been barred from spending corporate treasury funds in federal election campaigns, and, since 1947, so have labor unions. *See* 2 U.S.C. §441b (1994) (prohibiting use of general funds). Thus, separate political funds are their only vehicle for contribution. *See id.* (allowing use of segregated funds). Since enactment of the 1974 FECA amendments, even government contractors have been permitted to form segregated political funds. *See id.* §441c(b) (permitting government contractors to establish and use separate funds).

[43] *See Austin,* 494 U.S. at 657–60 (examining reasons behind state regulation of corporate expenditures).

[44] *See, e.g.,* Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency Is Complex,* 33 Am. J. Pol. Sci. 1, 19–20 (1989) (concluding that in most cases, PACs do not substantially affect candidates' actions in office, absent popular approval); *see also* Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform,* 1995 U. Chi. Legal F. 111, 127 (noting that money signals intensity of support in ways voting cannot).

[45] *See* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform,* 105 Yale L.J. 1049 1065 (1996) (stating that ''[t]he ability to raise money is evidence of political prowess and popularity that would normally translate into votes, regardless of spending'').

[46] *See* Grenzke, *supra* note 44, at 20 (stating that PACs do not ''distort'' politics because politicians primarily act based on popularity of legislation).

[47] See Sanford Levinson, Frameworks of Analysis and Proposals for Reform: A Symposium on Campaign Finance: Electoral Regulation: Some Comments, 18 Hofstra, L. Rev. 411, 412–13 (1989) (criticizing campaign finance reformers' lack of attention to role of press).

[48] See David A. Strauss, What Is the Goal of Campaign Finance Reform?, 1995 U. Chi. Legal F. 141, 144 (noting that ''once inequality is removed,'' corruption argument has little independent merit).

[49] Cf. Pamela S. Karlan, The Rights To Vote: Some Pessimism About Formalism, 71 Tex. L. Rev. 1705, 1712–18 (1993) (distinguishing voting as aggregation of preferences for candidates in an election from voting as means of controlling ongoing governance).

[50] LaFalce v. Houston, 712 F.2d 292, 294 (7th Cir. 1983), cert. denied, 454 U.S. 1044 (1984).

[51] See Press Conference Excerpts, supra note 3, at B6.

[52] See, e.g., Grenzke, supra note 44, at 19–20 (observing that while money gives PACs access to legislators, it is insufficient to garner support for legislation absent popular approval); John R. Wright, Contributions, Lobbying and Committee Voting in the U.S. House of Representatives, 84 Am. Pol. Sci. Rev. 417, 433–35 (1990) (finding that lobbying, not money, affects committee behavior).

[53] For a review and critique of this evidence, see Lowenstein, supra note 39, at 306–35.

See generally Frank J. Sorauf, Inside Campaign Finance: Myths and Realities (1992) (discussing history of campaign finance reform); Frank J. Sorauf, Money in American Elections (1988) (exploring methods of election campaign financing).

[54] See Cain, supra note 44, at 115–16 (conducting that so-called ''inappropriate motives,'' such as desire to be reelected, are both permissible and necessary in modern elections).

[55] See Strauss, supra note 34, at 1371–75 (discussing relationship between campaign finance and other techniques of legislative influence).

[56] Indeed, the mere fact that campaign contributions may be consistent with some notions of democratic theory clearly demonstrates the content basis of campaign finance laws. *See* Cain, *supra* note 44, at 120–40 (examining private contributions under procedural view of democracy).

[57] On the distinctions between these pluralist, populist, and Burkean (or civic republican or trustee) models of political influence in the campaign finance context, see BeVier, *supra* note 38, at 1269–76 (1994); Cain, *supra* note 44, at 112–22; Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform,* 18 Hofstra L. Rev. 215, 232–37 (1989); Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics,* 32 UCLA L. Rev. 784, 805–42, (1985).

[58] *See generally* United States v. O'Brien, 391 U.S. 367 (1968) (addressing draft-card burning); NAACP v. Button, 371 U.S. 415 (1963) (addressing constitutionality of Virginia statute limiting litigation rights).

[59] See Bradley, *Congress Won't Act, supra* note 5, at A15 (noting that reform will depend on concerned citizens).

[60] *See generally* Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever,* 17 Cardozo L. Rev. 691, 691–704 (1996) (discussing reasons why Congress should hesitate before proposing constitutional amendments).

[61] *See* Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. §101 (1997).

[62] *See* Vincent Blasi, *Free Speech and the Widening Gye of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All, 94 Colum.* L. Rev. 1281, 1281 (1994) (stating that candidates spend too much time fund-raising).

[63] See Strauss, supra note 48, at 156–57 (concluding that time-diversion argument has little force independent of inequality argument).

[64] Dworkin, *supra* note 36, at 19.

[65] *See* Rosenbaum, *supra* note 1, at Al (comparing historical campaign fund amounts with those of 1996).

[66] *See* Lillian R. BeVire, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform.* 73 Cal. L. Rev. 1045, 1069–78 (1985) (arguing that, given legislators' inherent interest in maintaining incumbency advantages, courts should be suspicious of campaign finance reform adopted purportedly to equalize speech opportunities).

[67] *See generally* Gottlieb, *supra* note 57, at 232–37 (discussing inequality in election campaigns between incumbents and challengers).

[68] *See* Grenzke, *supra* note 44, at 19–20 (concluding that contributions generally reflect preexisting support for candidates): Gary C. Jacobson, *Campaign Finance and Democratic Control: Comments on Gottlieb and Lowenstein's Papers,* 18 Hofstra L. Rev. 369, 371–74 (1989) (discussing arguments that campaign finance regulation hurts competitiveness): Gary C. Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence of Old Arguments,* 34 Am. J. Pol. Sci. 334, 356–58 (1990) [hereinafter Jacobson, *House Elections]* (concluding that, in determining electoral outcomes, amounts raised by challengers are far more important than amounts raised by incumbents); Mayer & Wood, *supra* note 9, at 70 (concluding that public financing had ''no effect at all'' on competitiveness of elections in Wisconsin).

[69] For further argument that campaign finance reform may be ineffective in promoting its own asserted goals, see Smith, *supra* note 45, at 1071–86.

[70] *See, e.g.,* Sunstein, *supra* note 34, at 1397–99 (arguing that *Buckley* may be modern analogue of discredited case of *Lochner v. New York,* 198 U.S. 45 (1905)).

[71] *See id.,* at 1400–11 (cataloguing such efforts).

[72] *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462–54 (1958) (shielding NAACP membership lists from compelled disclosure to prevent economic and physical retaliation against its members), *rev'd,* 360 U.S. 240 (1959); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342–43 (1995) (invalidating Ohio's ban on anonymous campaign literature).

[73] *See* Buckley v. Valeo, 424 U.S. 1, 60–84 (1976) (discussing reporting and disclosure requirements).

[74] *See Dole Cuts Clinton Lead in One Poll,* Orange County Reg., Nov. 2, 1996, at A27 (stating Clinton dropped in polls because of Dole's attacks on his campaign financing methods).

[75] *See* Jacobson, *House Elections, supra* note 68, at 356–58 (concluding that, because amounts raised by challengers are more important than those raised by incumbents, once threshold requirement of popularity has been met, floors without ceilings might increase competitiveness).

Mr. MCCONNELL. Mr. President, no discussion of the issue advocacy provisions in the McCain-Feingold bill can be complete without the input of James E. Bopp, Jr., who is perhaps the most experienced lawyer in America in this area of the law and the bane of the FEC's irresponsible battalion of lawyers who have made it their mission in life to harass citizen groups. For that worthy accomplishment, Mr. Bopp deserves special commendation.

I ask unanimous consent to have printed in the RECORD Jim Bopp's recent law review article entitled, ''The First Amendment Is Not the Loophole,'' which he coauthored with Richard E. Coleson.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[Reprinted from University of West Los Angeles Law Review, Volume 28, 1997]

THE FIRST AMENDMENT IS NOT A LOOPHOLE: PROTECTING FREE EXPRESSION IN THE ELECTION CAMPAIGN CONTEXT

(By James Bopp, Jr.* and Richard E. Coleson**)

''Congress shall makes no law. . . abridging the Freedom of Speech. . . .''[1]

INTRODUCTION

The First Amendment plainly states that Congress is to ''make no law'' which would ''abridg[e] the freedom of speech,''[2] yet Congress enacted the Federal Election Campaign Act of 1971 (FECA), as amended in 1974,[3] precisely to abridge certain forms of speech in election campaigns. In the landmark case of *Buckley v. Caleo*,[4] the United States Supreme Court struck down many FECA provisions on free expression grounds.

For the two decades since *Buckley*, the Federal Election Commission (FEC) has fought to close the perceived loopholes created by *Buckley* in the federal election laws, so that the agency could regulate all speech relating in any way to federal elections. Throughout this period, the Supreme Court has repeatedly proclaimed that the First Amendment is not a loophole—free expression must be protected amidst the rush to impose campaign finance restrictions.

Undeterred, the FEC has created new theories in an attempt to bypass Supreme Court holdings and pursued regulation of constitutionally-protected expression. On June 26, 1996, the United States Supreme Court decided the case of *Colorado Republican Federal Campaign Committee v. FEC (Colorado Republican)*,[5] again rejecting the FEC's creative efforts to regulate political speech protected by the First Amendment. This article discusses the *Colorado Republican* case in its historical context of conflict between federal court protection of free expression and attempts, by the FEC and various states, to regulate protected expression in the name of campaign finance reform.

The article is written from a practical perspective, i.e., what the courts have held, not what certain theoreticians would like the courts to hold.[6] In Part I, ''A Primer on Protected Political Expression,'' the authors will summarize briefly some of the key theoretical debates, but will primarily focus on the principles undergirding free political expression, discuss some terms of art, and explain the sorts of activity over which litigation usually arises. The robust First Amendment protection of issue advocacy will be the topic of Part II, ''Supreme Court Defense of Issue Advocacy Through *Buckley*,'' and Part III, ''FEC Efforts to Stifle Issue Advocacy.'' Part IV will focus on ''Other Protection for Free Political Expression,'' discussing (1) MCFL-type organizations, (2) members, (3) anonymous literature, (4) caps on contributions and expenditures, (5) political committees, (6) burden of proof, and (7) prior restraint of speech. In Part V, ''A Proposal for Speech-Enhancing Campaign Reform,'' the article will conclude with a proposal for constitutionally-permissible campaign finance reforms which would enhance, rather than suppress, the free flow of speech about candidates and issues of public concern which is essential to our democratic Republic.

I. A PRIMER ON PROTECTED POLITICAL EXPRESSION

Our political system is based on the model of an open and free marketplace of ideas. The Framers of our Constitution believed that good ideas will triumph over bad ideas if the People are free to debate and to champion the ideas they find convincing. Free speech is not only valuable intrinsically as a personal liberty, but it is a necessary prerequisite for limited representative government, particularly in free elections.[7] This has been well stated by the District of Columbia Circuit: ''If popular elections form the essence of republican government, free discourse and political activity formed the prerequisite for popular elections. As Madison wrote, a government which is 'elective, limited and responsible' to the people requires 'a greater freedom of animadversion' than one not so structured.''

In our day, the Supreme Court has recognized that ''debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution.'' Because the electoral process plays so central a role in our conception of a free government, ''it can hardly be doubted that the constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office.''[8]

* * * * *

This effort goes by the innocuous name of campaign finance reform. While ''reform'' is generally considered a salutary goal, ''reform'' is not good when it is a euphemism for silencing the voice of the People at election time.

The Supreme Court and lower courts have repeatedly had to protect the First Amendment rights of the People against misguided ''reform'' efforts which impinge on essential liberties.[24] Truly beneficial ''reform'' would enhance the power of the People to communicate and promote their ideas, not repress it. Proper reform would return power to the People, not enhance the power of media elite, wealthy candidates, and Washington insiders to influence elections—which is the ultimate outcome if the People's voice through their political parties and political committees is muffled or silenced.[25]

Bopp writes that this fight against unconstitutional political speech restrictions advanced under the guise of ''reform'' is bipartisan. That may be the case in the outside world but, regrettably, that is not the situation in the Senate where it appears Democrats are going to join hands in delivering a crushing blow to First Amendment freedom that Americans have savored for two hundred years.

The battle to preserve free speech rights in the election context is bi-partisan and non-ideological, as evidenced by the existence of the Free Speech Coalition. This Coalition is co-chaired by Ellie Smeal of the Fund for the Feminist Majority and David Keene of the American Conservative Union and is made up of approximately 50 public interest advocacy groups ranging ideologically from the left to the right, from environmental activist groups to pro-business organizations, and from gun control enthusiasts to the National Rifle Association. The broad-based agreement on protecting free expression rights in the election context was symbolized recently when James Bopp, Jr., General Counsel for the National Right to Life Committee (*NRLC*) and co-author of the present article, presented testimony on behalf of the Free Speech Coalition before the U.S. Senate Committee on Rules and Administration considering campaign finance reform.[26] These public policy groups agree on little else, but they agree that the First Amendment protects their right to advocate on issues on public concern. This is the marketplace of ideas at work, with opposing groups vying for the blessing of public opinion on their issue. It is America working at its best.[27]

This battle for First Amendment liberty is being fought over several types of activities. It will be helpful to consider some of them briefly and note some terms of art.

A ''political action committee'' (PAC) (also sometimes known as a ''political committee'' in statutes) is nothing more than individuals uniting to promote issues and candidates more effectively than they could do on their own.[28] A PAC may lawfully engage in ''express advocacy,'' i.e., expressly advocate the election or defeat of a clearly identified candidate,[29] and make contributions to candidates. First Amendment rights do not diminish in any way because persons associate to advocate for their cause more effectively; in fact, the right of citizens to band together in PACs is specifically protected by the First Amendment's freedom of association protections.[30] Thus, pejorative references to PACs as ''special interests'' which need to be stifled are actually misguided attacks on the core First Amendment rights of free political expression and association. The marketplace-of-ideas response to a PAC message one opposes is not to silence PACs but to form one's own association of persons to advocate an opposing message in the marketplace.[31] The cacophony of competing communications may sometimes be deafening and disquieting, but that is the way of liberty. The road to serfdom is the quiet and quiescent road. Recognizing free speech as an inherent good and the necessity of free political debate and association in a democratic republic, the Supreme Court has permitted only limited regulation of PACs.[32]

Litigation often arises over the scope of a state's definition of a political committee or PAC. Often states try to channel all individuals and groups, who advocate on issues in a manner which would in any way ''influence'' an election, into the political committee category so that they will have to register and report as if they were a political committee.[33] However, an organization cannot constitutionally be required to register and report as a political committee unless it ''major purpose'' is the nomination or election of candidates. Imposing the relatively burdensome reporting requirements which may be imposed on PACs on issue-advocacy groups is simply too heavy a burden on free expression to be permitted.[34] There is no compelling governmental interest to justify such a burden on First Amendment rights.

An ''independent expenditure'' is an expenditure made for a communication which contains ''express advocacy'' and is made without any prior consultation or coordination with a candidate. An entity which makes an independent expenditure may be required to report that expenditure, even if it is not required to register and report as a political committee.[35]

See footnotes at end of article.

''Issue advocacy'' is advocacy of issues without engaging in express advocacy.[36] For example, if a pro-life group publishes a newletter on the eve of an election describing Candidate D as pro-life and Candidate C as pro-abortion rights in an article about the two candidates, that is issue advocacy, not express advocacy, because there have been no explicit words expressly advocating the election or defeat of a clearly identified candidate for public office.[37] The candidates have been clearly identified, they are running for public office, but saying that Candidate D is pro-life is not express advocacy, it is issue advocacy. This is so even though the statement is made in a pro-life newsletter, in a discussion of candidates, on the eve of an election.[38]

A ''voter guide'' is a table showing the positions of candidates on various issues. If it does not expressly advocate the election or defeat of any of the identified candidates, the voter guide is pure issue advocacy and may not be regulated by the FEC or any state. The voter guide may even indicate what is the response preferred by the organization publishing the guide, e.g. by indicating a favorable answer (from the perspective of the publisher) with a (+) and an unfavorable response with a minus (−). Or the voter guide can word the questions in such a way that a candidate giving favored responses will have a ''yes'' answer for every question, while a candidate giving disfavored responses will have all ''no'' answers.[39] These voter guides may be paid for and distributed by any individual or organization.[40]

Because they discuss candidates, are distributed at election time, and may actually influence elections, voter guides have been the target of intense efforts by the FEC,[41] state legislatures,[42] and the Democrat Party[43] in an effort to force voter guide activity into the definition of express advocacy and, thereby, prohibiting citizens groups which publish them from doing so unless they register and report as political committees. Such efforts have been repeatedly rejected as courts have followed the bright-line express advocacy test set out by the United States Supreme Court to protect issue advocacy.

Advocates of McCain-Feingold cling to a groundless belief that the Supreme Court is going to do a 180 and suddenly retreat on decades of jurisprudence blasting such gross government intrusion into First Amendment speech. A notion Bopp dispels.

II. SUPREME COURT DEFENSE OF ISSUE ADVOCACY THROUGH BUCKLEY

The United States Supreme Court has long and carefully watched over efforts to regulate political speech in order to ensure that the guarantees of the First Amendment[44] are not denied. This is because such restrictions ''limit political expression 'at the core of our electoral process and of First Amendment freedoms.' ''[45] All political speech, including communications which expressly advocate election or defeat of Supreme Court has declared: ''[T]he First Amendment right to 'speak one's mind . . . on all public institutions' includes the right to engage in ''vigorous advocacy' no less than 'abstract discussion.' '' Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.''[46]

Not only has the Court afforded strong constitutional protection for political speech in general, but it has afforded exceptionally strong constitutional protection for issue-oriented speech. As a result, the Court has repeatedly given a narrowing construction to statutes regulating political speech, so as to permit regulation of only express advocacy, in order to shield the statutes from constitutional attack. Moreover, the Supreme Court has established two bright-line tests to protect the advocacy of issues in the election context: (1) the ''express advocacy test'' and (2) the ''major purpose test.''[47] These will be discussed in turn.

A. THE BRIGHT-LINE EXPRESS ADVOCACY TEST

In a series of cases, the United States Supreme Court has drawn a distinction between express advocacy, which may be regulated, and issued advocacy, which may not be regulated. As shall be seen, both enjoy full First Amendment protection, but the compelling interest in preventing corruption (or its appearance) in the election process is only sufficiently compelling to warrant some regulation of express advocacy.[48] No governmental interest is sufficiently compelling to regulate issue advocacy.

In 1948, the Supreme Court considered the case of *United States v. Congress of Industrial Organizations (C.I.O).*[49] *C.I.O.* concerned a federal statute prohibiting a corporation or labor organization from making ''any expenditure in connection with a federal election.''[50] Under this provision, an indictment was returned against the C.I.O. and its president for publishing, in The CIO News, a statement urging all members of the C.I.O. to vote for a particular candidate for Congress in an upcoming election.[51] In affirming a dismissal of the indictment, the Court observed: ''If §313 were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.''[52]

A lengthy footnote appended to this statement set forth several passages from case law wherein the Court had declared the specially protected nature of free speech concerning public policy and political matters:

''Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve. *Penekamp v. Florida*, 328 U.S. 331, 345 [(1946)].

''The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. *Thomas v. Collins*, 323 U.S. 516, 529–30 [(1945)].

''For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow, *Bridges v. California*, 314 U.S. 252, 263 [(1941)].''[53]

In 1976, the Supreme Court considered a successor statute to the one discussed in *C.I.O.*, the Federal Election Campaign Act of 1971, as amended in 1974.[54] This new statute was reviewed in *Buckley* v. *Valeo*.[55]

Buckley dealt, inter alia, with a provision which limited ''any expenditure . . . relative to a clearly identified candidate.''[55] The provision placed a limit on the amount of an independent expenditure on behalf of a candidate. However, this provision was considered to be unconstitutionally vague.[57] Therefore, the Court construed it with another provision of the same statute to require '''relative to' a candidate to be read to mean 'advocating the election or defeat of' a candidate.''[58]

However, as the *Buckley* Court noted, this construction merely refocused the vagueness problem. The real problem, the Court noted, as that: ''the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are often intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.[59]

Because of the problem described, the Supreme Court settled on the express advocacy test as marking the line of demarcation between the permitted and the forbidden. This test is constitutionally mandated because only a statute regulating the express advocacy of a clearly identified federal candidate has a sufficiently bright line of distinction to make it constitutionally defensible. The Supreme Court, in *Buckley*, explained the problem with a quotation from *Thomas* v. *Collins:* ''[W]hether words intended and designed to fall short of invitation would miss the mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.[60]''

Thus, the Supreme Court, in *Buckley*, said that ''[t]he constitutional deficiencies described in *Thomas* v. *Collins* can be avoided only by reading §608(e)(1) [placing a ceiling on independent expenditures] as limited to communications that include explicit words of advocacy of election or defeat of a candidate.''[61]

Without such a clear line of demarcation, then, a speaker is forced to ''hedge and trim'' comments made on issues of public importance for fear he will be charged with forbidden electioneering. This is too heavy a burden on First Amendment Rights to be constitutionally permitted.[62]

The *Buckley* Court concluded that ''[t]he constitutional deficiencies'' of such unclear statutory language could only be cured by reading the statute ''to apply to expenditures for communications that in express terms advocate the election of a clearly identified candidate for a public office.''[63] The Court added that ''[t]his construction would restrict the application of §608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.' ''[64]

The *Buckley* Court then proceeded to determine whether the statute, ''even as thus narrowly and explicitly construed, impermissibly burdens the constitutional right of free expression.''[65] The Court determined that the government could not advance an interest in support of the statute sufficient to ''satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.''[66]

In sum, the Court established the express advocacy test as a bright-line rule to distinguish political advocacy, which could be regulated, from issue advocacy, which may not.

B. THE BRIGHT-LINE MAJOR PURPOSE TEST

In *Buckley*, the Supreme Court also established the bright-line ''major purpose'' test. In practical application, this test means that government may not require an organization which makes contributions and independent expenditures to register and report as a political committee unless the ''major purpose'' of the organization is the election or nomination of candidates for political office.[67] Government may, however, require that the independent expenditures be reported by the organizations making them and that contributions be reported by the candidate receiving them. However, there is no sufficiently compelling interest to justify imposing the onerous burdens imposed on a political committee on an issue advocacy group.[68]

This test was set forth in the *Buckley* Court's discussion of 2 U.S.C. §434(e), which required ''[e]very person (other than a political committee or candidate) who makes contributions or expenditures'' aggregating over $100 in a calendar year ''other than by contribution to a political committee or candidate'' to file a statement with the Commission. Unlike the other disclosure provisions, this section does not seek the contribution list of any association. Instead, it requires direct disclosure of what an individual or group contributes or spends.''[69]

''In considering this provision,'' the Court wrote, ''we must apply the same strict standard of scrutiny, for the right of associational privacy developed in *NAACP v. Alabama* derives from the rights of the organization's members to advocate their personal points of view in the most effective way.''[70]

The Court continued:

''When we attempt to define 'expenditure' . . . . [a]lthough the phrase, 'for the purpose of . . . influencing' an election or nomination, differs from the language used in §608(e)(1), it shares the same potential for encompassing both issue discussion and advocacy of a political result. The general requirement that 'political committees' and candidates disclose their expenditures could raise similar vagueness problems, for 'political committee' is defined only in terms of amount of annual 'contributions' and 'expenditures,' and could be interpreted to reach groups engaged in purely issue discussion. . . . To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the *major purpose of which is the nomination or election of a candidate.* Expenditures of candidates and 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

''But when the maker of the expenditure is not within these categories—when it is an individual other than a candidate or a group other than a 'political committee'—the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach of §434(e) is not impermissibly broad, we construe 'expenditure' for purposes of that section in the same way we construed the terms of §608(e)—to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.''[71]

So construed, the reporting of independent expenditures is justified by the substantial governmental interest in ''sched[ding] the light of publicity on spending that is unambiguously campaign related,''[72] i.e., an interest in preventing corruption in the political process.

After the Supreme Court's 1976 *Buckley* decision, the express advocacy test and the major purpose test were clearly deployed as twin defenses against governmental encroachment on issue advocacy. However, as shown in the next section, the FEC and some state legislatures have spent the next two decades trying to evade the Court's pronouncements.

Before proceeding, however, comment needs to be made on the recent case of *Akins v. FEC*.[73] That case held that the major purpose test applied when an organization engaged in independent expenditures, but not when it made contributions. The decision, however, was wrongly decided because the court did not engage in the most basic First Amendment analysis, which would have led to a different result.

The case involved a complaint to the FEC that the American Israel Public Affairs Committee (*AIPAC*) was a ''political committee'' subject to the broad disclosure requirements and limits imposed on political committees. The FEC dismissed the complaint because the Committee did not met its definition for a political committee. The definition required that a committee (1) meet the $1,000 expenditure threshold and (2) have as its major purpose the nomination or election of candidates. The FEC ''determined that AIPAC likely had made campaign contributions exceeding the $1,000 threshold, but concluded that there was not probable cause to believe AIPAC was a political committee because its campaign-related activities were only a small portion of its overall activities and not its major purpose.''[74] The FEC argued that *Buckley* required it to include a major purpose exception for such contributions in its rules implementing 2 U.S.C. §431(4)(A) (the definition of ''political committee'').[75] Ironically, as the FEC properly followed and defended the *Buckely* major purpose test in this instance, it was overruled.

The D.C. Circuit's analysis reviewed the language of *Buckley* and decided that the major purpose test was only established by the Court in the context of expenditures.[76] The *Akins* court similarly dismissed the language about the major purpose test in *MCFL*[77] as only applying in the context of independent expenditures, so that ''the Court's rationale in *MCFL* and *Buckely* is simply inapplicable to the present case.''[78] The *Akins* court proceeded with some policy arguments about how the FEC's interpretation ''would . . . allow a large organization to contribute substantial sums to campaign activity, as long as the contributions are a small portion of the organization's overall budget, without being subject to the limitations and requirements imposed on political committees.''[79] Of course, that is so and is as it should be. The very idea of the major purpose test is that the heavy limits and disclosure requirements imposed on political committees are too great a burden on the First Amendment rights of organizations whose major purpose is not campaign advocacy. It is sufficient that the details of each independent expenditure or contribution to a candidate be disclosed to the FEC as matters of public record.

What was glaringly absent from the *Akins* opinion was a constitutional analysis.[80] A proper constitutional analysis would have begun with the strong First Amendment protection for all forms of political expression, including contributions. Next, the analysis would have asked whether there was any compelling governmental interest sufficient to override the First Amendment's protection. A proper analysis would have noted that the only interests found sufficiently compelling by the Court are the interests in preventing corruption and its appearance in the political process. The analysis would have then asked whether contributions to candidates from an organization whose major purpose is education and lobbying posed such a threat of corruption to the political system that is could only be cured by imposing on the organization the heavy burdens imposed on PACs. The answer, of course, would be that fully disclosed contributions, which are a small fraction of an organization's activities, pose not credible threat of corruption or the appearance thereof. Therefore, imposing the limitations and broad disclosure requirements, which are placed on political committees, on an organization whose major purpose is not the nomination or election of candidates would violate the First Amendment in the same way that the Constitution is violated in the context of such organizations making independent expenditures.

It may safely be assumed that, at such a time as the United States Supreme Court has the opportunity to review the issue raised in *Akins*, the major purpose test will be reasserted in the context of contributions, as well as independent expenditures. Meanwhile, it is clearly in force with respect to independent expenditures and with respect to contributions in all but the D.C. Circuit. The FEC filed a petition for a writ of certiorari on April 7, 1997.[81]

III. FAILED FEC EFFORTS TO STIFLE ISSUE ADVOCACY

The FEC apparently did not like the answers the Supreme Court gave in *Buckley*[82] because it soon began challenging the decision with enforcement actions and rulemaking that did not follow the express advocacy and major purpose tests. This resulted in a long string of litigation, traced below, highlighted by judicial rebuffs and rebukes.

In this twenty-year effort to suppress political speech by circumventing *Buckley*, the FEC has treated the First Amendment as a loophole in the Federal Election Campaign Act which it is the FEC's duty to close, and the FEC has treated United States Supreme Court decisions against it as inconveniences to be overcome. As a result, the FEC has engaged in a sustained and unprecedented assault on the First Amendment, consuming enormous FEC resources. Rather than enforce the many uncontroversial and clearly constitutional provisions of the FECA, the FEC has used its limited resources to launch a series of regulatory changes and enforcement actions with the intent of expanding its powers to regulate free speech. This effort has resulted in a series of court cases striking down these regulations[83] and defeating the FEC's enforcement actions.[84]

The courts have, therefore, frustrated the unlawful efforts of the FEC to impinge on free speech, but at an enormous cost in taxpayer funds and in attorney fees for successful victims of the FEC's enforcement actions. The cost to the free speech of those intimidated by the heavy hand of the FEC, however, cannot be calculated. Instead of enforcing the important and uncontroversial provisions of the Act, the FEC has focused its attention on ''grassroots groups and citizens who want to take part in the political debate, too—groups far less well-funded and less capable of extricating themselves from the tangle of FEC regulations.'' Thus, the FEC has functioned ''more and more as a censor of political expression, especially by issue-oriented, grassroots activists.''[85] Some of the most significant cases are reviewed below.

A. FEC V. AFSCME (1979)

In *FEC v. American Federation of State, County and Municipal Employees (AFSCME)*,[86] the District of Columbia district court rejected the FEC's contention that a poster qualified as express advocacy because it contained a clearly identified candidate, ''may have tended to influence voting,'' and ''contain[ed] communication on a public issue widely debated during the campaign.''[87] The AFSCME union had printed a

poster with a caricature of President Ford wearing a button reading ''Pardon Me'' and embracing President Nixon, but it did not report the expenditure as express advocacy. The district court held that this was issue advocacy, not express advocacy, because it contained no express words urging the election or defeat of a clearly identified candidate.[88] The *AFSCME* court noted that ''[t]he *Buckley* analysis of the limits of political activity is based on long recognized principles: (1) political expression, including discussion of candidates, is afforded the broadest protection under the first amendment; and (2) discussion of public issues which are also campaign issues unavoidably draws in candidates and tends to inexorably exert influence in voting at elections.''[89]

B. FEC V. CLITRIM (1980)

Undeterred, the FEC brought suit against the Central Long Island Tax Reform Immediately Committee for the Organization's failure to report funds expended to publish and distribute a leaflet advocating lower taxes and smaller government. The Second Circuit, in *FEC v. Central Long Island Tax Reform Immediately Committee (CLITRIM)*,[90] adhered to the express advoacy test set forth in *Buckley* and, therefore, ruled against the FEC.

The first provision at issue required ''any 'person . . . who makes contributions or independent expenditures *expressly advocating* the election or defeat of a clearly identified candidate''' in excess of one hundred dollars to file a report with the FEC.[91] The second provision required ''any person who 'makes an expenditure for the purpose of financing communications *expressly advocating* the election or defeat of a clearly identified candidate' . . . through media, advertising or mailing to state whether the communication is authorized by a candidate. . . .''[92]

The *CLITRIM* court noted ''the broad protection to be given political expression,''[93] as indicated by the Supreme Court in *Buckley*, and observed that: ''[t]he language quoted from the statutes was incorporated by Congress in the 1976 FECA amendments to conform the statute to the Supreme Court's holding in *Buckley v. Valeo* that speech not by a candidate or political committee could be regulated only to the extent that the communications ''expressly advocate the election or defeat of a clearly identified candidate.''[94]

The court further observed that limiting the statutes to reach only express advocacy ''is consistent with the firmly established principle that the right to speak out at election time is one of the most zealously protected under the Constitution.''[95]

The *CLITRIM* court held that: ''[t]he history of §§434(c) and 441d thus clearly establish that, contrary to the position of the FEC, the words ''expressly advocating'' mean[ ] exactly what they say. The FEC, to support its position, argues that '[t]he TRIM bulletins at issue here were not disseminated for such a limited *purpose*' as merely informing the public about the voting record of a government official. Rather the purpose was to unseat 'big spenders.' Thus, the FEC would apparently have us read 'expressly advocating the election or defeat' to mean for the purpose, express or *implied*, of encouraging election or defeat. This would, by statutory interpretation, nullify the change in the statute ordered in *Buckley v. Valeo* and adopted by Congress in the 1976 amendments. The position is totally merit-less.''[96]

From the *CLITRIM* decision, it seemed clear that the express advocacy test was firmly ensconced as black-letter constitutional law. Nevertheless, the FEC continued its campaign to eliminate freedom of speech on issues at election time.

C. FEC. V. NCPAC (1985)

In 1985, the Supreme Court considered *FEC v. National Conservative Political Action Committee (NCPAC)*.[97] This case involved a declaratory judgment action seeking to have a provision of the Presidential Election Campaign Fund Act[98] declared constitutional. It was originally initiated by the Democrat National Committee in hopes that it could prevent *NCPAC* and another conservative PAC (Fund For A Conservative Majority) from implementing their expressed intent to spend large sums of money to aid the 1984 reelection of President Ronald Reagan.[99]

The disputed provision made it a criminal offense for an independent political committee ''to expend more than $1,000 to further [a] . . . candidate's election,'' if the ''Presidential candidate elects public financing.''[100] The Supreme Court declared the $1,000 cap on independent expenditures unconstitutional because such independent expenditures enjoyed full First Amendment protection and there was no compelling state interest to override this right of free expression.[101]

In *NCPAC*, the Supreme Court stated the only interest sufficiently compelling to justify regulation of political speech in the form of contributions and expenditures:

''We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances. . . .

''Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favor.''[102]

The Court went on to state that: ''The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political message paid for by PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.''[103]

The implication of these statements should have been clear, even to the FEC. For years the FEC has maintained the position that it ought to be able to regulate issue advocacy in the form of voter guides which tell where candidates stand on issues, on the theory that issue-advocacy groups were actually engaging in express advocacy or making a contribution to the candidates who favored their issues.[104] Voter guides might have the effect, the argument would go, or persuading candidates to support the organization's views on an issue.

However, if the only compelling interest for restricting speech at election time is corruption (or its appearance), and if persuading politicians to a different viewpoint of advocacy of issues is not corruption, then there can be no compelling governmental interest which would permit restriction of issue advocacy. If this is true of PACs, then a fortiori there can be no corruption or appearance of corruption resulting from issue advocacy by any issue advocacy groups. Undeterred, the FEC rejected the clear teaching of the Supreme Court in *Buckley*, *CLITRIM*, and *NCPAC* and continued its efforts to attempt to regulate issue advocacy.

D. FEC V. MCFL (1986)

In 1986, the Supreme Court again considered the constitutional protection afforded issue advocacy in the case of *FEC v. Massachusetts Citizens for Life (MCFL)*,[105] The FEC had brought an enforcement action against MCFL, alleging that the organization had violated 2 U.S.C. §441b, a ban on corporate expenditures ''in connection with any election,'' by publishing a voter guide.

The voter guide, published by MCFL, was contained in a ''Special Edition' newsletter which encouraged readers to ''Vote Pro-Life'' and identified the pro-life candidates.[106] A complaint was filed with the FEC alleging that MCFL had violated the ban on corporate expenditures found at 2 U.S.C. §441b.[107] The Supreme Court decided that this ''Special Edition'' did not qualify for the newspaper exemption found in the FECA,[108] and that MCFL had engaged in express advocacy, but that the First Amendment required a special exemption from §441b's prohibitions for MCFL-type corporations.[109]

Under the FECA, ''expenditure'' means to provide anything of value ''for the purpose of influencing any election for Federal office.''[110] This ''influencing'' language was the same terminology construed by the Supreme Court in *Buckley* to mean only express advocacy, in order to save a different provision of the FECA from unconstitutionality for sweeping issue advocacy within its ambit.

In *MCFL*, the Supreme Court considered the contention of MCFL ''that the definition of an expenditure under §441b necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates,'' relying on *Buckley*.[111] The FEC argued that the express advocacy test should not be extended to this provision barring corporate expenditures.

The *MCFL* Court held, however, that the express advocacy rationale must be extended to restrictions on expenditures by corporations.[112] The Court said that, if a ceiling on independent expenditures, at issue in *Buckley*, had to be construed to apply only to express advocacy of the election or defeat of a clearly identified candidate (in order to eliminate the constitutional deficiencies described in *Buckley*), ''this rationale requires a similar construction of the more intrusive provision [at issue in *MCFL*] that directly regulates independent spending.''[113]

The Supreme Court rejected the FEC's argument that extending the express advocacy protection to corporations and labor unions ''would open the door to massive undisclosed political spending.''[114] Nevertheless, the FEC continued to treat constitutionally-protected issue advocacy as a loophole which ought to be closed because it limited the FEC's ability to regulate anything that might possibly influence an election.[115]

E. FEC V. FURGATCH (1987)

In 1987, the United States Court of Appeals for the Ninth Circuit decided the case of *FEC v. Furgatch*.[116] This case contained obiter dicta suggesting that the court was applying a broadened express advocacy test to the FECA's requirement that independent expenditures by an individual over $250 must be reported to the FEC[117] and must contain a disclaimer.[118]

Buckley held that only ''explicit words'' ''expressly advocating the election or defeat of a clearly identified candidate,'' constitute express advocacy.[119] However, the Ninth Circuit wrote that a court could look beyond the explicit words of the communication to consider the context in which the words were communicated.[120] *Furgatch* considered newspaper advertisements which made a number of allegations about President Jimmy Carter followed by the phrases, ''And we let him,'' ''And we let him do it again,'' ''We are letting him do it,'' and following paragraphs:

''He continues to cultivate the fears, not the hopes, of the voting public by suggesting the choice is between 'peace and war,' 'black or white,' 'north or south,' and 'Jew vs. Christian.' His meanness of spirit is divisive and reckless McCarthyism at its worst. And from a man who once asked, 'Why Not the Best?'

''It is an attempt to hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherences, ineptness and illusion, as he leaves a legacy of low-level campaigning.

''DON'T LET HIM DO IT.''[121]

Noticeably absent from this communication are any words of express advocacy. Nowhere does the communication contain explicit words such as ''vote for'' or ''defeat.'' The Ninth Circuit, however, decided that the context should be consulted: ''We conclude that speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidates.''[122]

Applying its contextual standard, the Ninth Circuit determined that Mr. Furgatch had engaged in express advocacy.

Four key facts should be noted about *Furgatch*. First, although the *MCFL* decision was issued on December 15, 1986, and the *Furgatch* decision was issued just days later on January 9, 1987, *Furgatch* made no mention of the newly announced *MCFL* decision, which clearly reaffirmed the bright-line *Buckley* approach. Second, as discussed below, the *Furgatch* contextual approach has not been followed by other courts and has, in fact, been expressly repudiated by some.[123]

Third, the broader test was employed in a case which involved only a failure to report an expenditure to the FEC.[124] Fourth, the Fourth Circuit has recently demonstrated in a careful exegesis of *Furgatch* that the Ninth Circuit did not go to the extreme to which the FEC has tried to stretch it and that the actual holding of *Furgatch* conforms quite closely to *Buckley* and *MCFL*.[125]

Thus, the *Furgatch* test was decided in, and only logically applies to, the very narrow context of disclosure provisions. The *Furgatch* court noted the Supreme ''Court's directive that, where First Amendment concerns are present, we must construe the words of the regulatory statute precisely and narrowly, only as far as is necessary to further the purposes of the Act.''[126] The court then devoted a full page to discussing the importance of disclosure, the purposes served thereby, and the minimal burden imposed by disclosure.[127] Because it concluded that disclosure ''serves an important Congressional policy and a very strong First Amendment interest,'' and, because the burden imposed would be ''minimally restrictive,'' the Ninth Circuit adopted a totality of the circumstances test.[128] Therefore, if *Furgatch* is good law, it should be limited to its context.

Moreover, as mentioned, the Fourth Circuit's careful analysis has demonstrated that the core *Furgatch* holding closely conforms to the *Buckley* and *MCFL* express advocacy test and that any more broadly worded language was both dicta and contrary to Supreme Court precedent,[129] a fact the FEC clearly understood at the time.[130] In fact, the Fourth Circuit has recently excoriated the FEC, and awarded attorneys' fees against it, for bad faith prosecution in duplicitous reliance on a broad interpretation of *Furgatch* when the FEC had demonstrated its clear understanding of the true narrowness of the *Furgatch* holding in its *Brief for Respondent in Opposition* to Mr. Furgatch's petition for a writ of certiorari to the U.S. Supreme Court.[131] The Fourth Circuit's censure of the FEC for its duplicity and dissembling with regard to *Furgatch* is discussed at greater length below.

Nevertheless, energized by its success in opposing Supreme Court review of *Furgatch* and preserving the broadly-worded *Furgatch* dicta, which was useful for expanding FEC power, the FEC launched a campaign to apply its totality-of-the-circumstances ''express advocacy'' test in a wide range of contexts.

F. FEC V. NOW (1989)

In the case of *FEC v. National Organization for Women (NOW)*,[132] the FEC again brought an enforcement action employing its broadly defined express advocacy test. The FEC charged that membership solicitation letters discussing issues to pay inequality, abortion, and the Equal Rights Amendment (ERA) constituted express advocacy. The letters at issue expressly criticized the Reagan Administration and the Republican Party, including the following phrase which the FEC found damming: ''Politicians listen when they think an organized group of citizens can help elect or defeat them.'' Another letter criticized by name Senators Helms, Hatch, and Thurmond and spoke of ''a renewed effort now being launched by New Right reactionary groups in preparation for the 1984 elections,'' which phrase the FEC condemned as electioneering. A third letter made the case for the ERA and condemned President Reagan and named several senators ''up for reelection in 1984,'' who ''must be made to understand that failure to pass the ERA will result in powerful campaigns to defeat them''[133] As a result of these statements, the FEC claimed that NOW has violated the corporate prohibition on candidate-related speech.

The *NOW* court referred to both the *Buckley* test[134] and the *Furgatch* ''broad test.''[135] However, the *NOW* court held that there simply was no express advocacy under any test,[136] tying its holding explicitly to the *Buckley* principles: ''At issues in this case is political speech, which lies at the core of the First Amendment. Discussion of public issues and the qualifications of candidates for public office is integral to a system of government in which the people elect their leaders. In order to make informed choices about its leaders, the citizenry needs to hear the free exchange of ideas. The First Amendment affords the broadcast protection to such political expression.''[137]

G. FAUCHER V. FEC (1991)

It should have been clear to the FEC that the Supreme Court meant what it said in *Buckley* about issue advocacy being sacrosanct when the Court reaffirmed the test in a new context in MCFL. However, the FEC continued to press ahead with its efforts to regulate issue advocacy. Included in its effort was the promulgation of new rules regulating voter guides.

In *Faucher v. FEC*,[138] the First Circuit struck down the Federal Election Commission's regulations of voter guides as being beyond the authority of the FEC under 2 U.S.C. §441b as interpreted by the Supreme Court in *MCFL*. The regulation at issue, 11 C.F.R. §114.4(b)(5), required that a voter guide by ''nonpartisan,'' which the FEC defined by reference to six factors. These factors included whether ''the wording of their questions presented . . . suggest or favor any position on the issues covered'' and whether ''the voter guide expressed (any) editorial opinion concerning the issues presented.''[139]

The United States District Court for the District of Maine struck the regulations down for trespassing upon constitutionally protected issue advocacy and for reaching beyond the authority of the Federal Election Commission under §441b, which bars corporate political speech.[140] The First Circuit affirmed the decision of the District Court,[141] declaring that ''[t]he first amendment lies at the heart of our most cherished and protected freedoms. Among those freedoms is the right to engage in issue-oriented political speech.''[142]

The First Circuit expressly applied the ''bright-line'' test of *Buckley* in accordance with the speech-protective rationale of that case: ''In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the Court sought to avoid by adopting the bright-line express advocacy test in *Buckley*.''[143]

H. FEC V. SURVIVAL EDUCATION FUND (1994)

In *FEC v. Survival Education Fund*,[144] the U.S. District Court for the Southern District of New York rejected an FEC attempt to broaden the express advocacy test of *Buckley* and *MCFL*. The case involved letters sent four months before an election by Dr. Benjamin Spock that were hostile to President Reagan and condemned his policies. The FEC argued that the letters constituted express advocacy and, therefore, were prohibited political communications by a corporation. The court, however, pointed to the ''express words'' formula in *Buckley* and held that: ''It is clear from the cases that expressions of hostility to the positions of an official, implying that that official should not be re-elected—even when the implication is quite clear—do not constitute the express advocacy which runs afoul of the statute. Obviously, the courts are not giving a broad reading to this statute.''[145]

I. FEC V. CHRISTIAN ACTION NETWORK (1995)

In *FEC v. Christian Action Network*,[146] a Virginia district court considered advertisements, run during the 1992 election campaign, which the FEC considered to be express advocacy of the defeat of presidential candidate Clinton. Because the ads did not contain ''explicit words or imagery advocating electoral action,'' the court held that they constituted protected issue advocacy and not electioneering.[147] The Court followed the ''strict interpretation'' of the express advocacy test: ''In the nineteen years since the Supreme Court's ruling in *Buckley v. Valeo*, the parameters of the 'express advocacy' standard have been addressed by several federal courts in a variety of circumstances. * * * Acknowledging that political expression, including the discussion of public issues and debate on the qualifications of candidates enjoys extensive First Amendment protection, the vast majority of these courts have adopted a strict interpretation of the 'express advocacy' standard.''[148]

On August 2, 1996, the United States Court of Appeals for the Fourth Circuit issued a brief per curiam opinion affirming the district court.[149]

J. FEC V. GOPAC (1996)

FEC v. GOPAC,[150] the FEC's much ballyhooed enforcement action against GOPAC (which Newt Gingrich served as chairman), amply demonstrates the FEC's refusal to recognize the constitutional protection afforded issue advocacy by the bright-line express advocacy test and the major purpose test. Despite the fact that GOPAC did not have as its major purpose the election or nomination of candidates for federal office, the FEC pushed for a test that would make an organization a political committee if it ''engage[s] in 'partisan politics' or 'electoral activity.' ''[151] The court rejected this approach and granted GOPAC summary judgment because the test proposed was not that of the Supreme Court in *Buckley*.[152]

K. NEW FEC REGULATIONS (OCTOBER 5, 1995)

After the *Faucher* decision in 1991, which struck down FEC regulations prohibiting voter guides from expressing a position on an issue,[153] the FEC needed to revise or delete its regulation dealing with voter guides. All that was needed to bring the regulation into compliance with the First Amendment was a

small excision in the definition of ''nonpartisan,'' so that the factors for what constituted ''nonpartisan'' would not include whether a question is worded in a way that supports the position of a candidate on the issue covered.[154]

The FEC took from 1991 to late 1995 to promulgate its new rules.[155] When the new rules were published, there was no mere excision or minimal editing to fix the First Amendment problem with issue advocacy. Rather, the new FEC regulations were an expansive effort to bypass the First Amendment jurisprudence of the federal courts. The rules were a transparent attempt to incorporate the FEC's interpretation of the *Furgatch* totality of the circumstances test into the FEC rules in the hope that the FEC could sell the federal courts on the notion that deference should be granted to the agencies interpretation in federal law in this area.[156]

If such deference were forthcoming, the FEC would have accomplished by rulemaking what it had failed in years of litigating enforcement actions to achieve, i.e., imposing its broad interpretations of the *Furgatch* test in place of the Supreme Court's bright-line express advocacy test. As shall be seen, the deference was not forthcoming.

The FEC issued its copious new post-*Faucher* rules in two sets in late 1995. The first set was to take effect on October 5, 1995. The revision of the FEC voter guide regulations necessitated by *Faucher* four years before occurred in a later set of rules to take effect March 13, 1996.

The October 5 set of rules contained a new definition of express advocacy, tracking the FEC's broad interpretation of *Furgatch*:

''Expressly advocating means any communication that—

''(a) uses phrases such as 'vote for the President,' 're-elect your Congressman,' 'support the Democratic nominee,' 'cast your ballot for the Republican challenger for U.S. Senate in Georgia,' 'Smith for Congress,' 'Bill McKay in 94,' 'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, 'vote against Old Hickory,' 'defeat' accompanied by a picture of one or more candidate(s), or communications of campaign slogan(s) which in context can have no other reasonable meaning than to encourage the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter 76,' 'Reagan/Bush' or 'Mondale!'; or

''(b) when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

''(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

''(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.[157]''

While the first part of subsection (a) generally followed *Buckley*, specifying explicit and express words of advocacy in the communication itself, the second part of subsection (a) added a contextual factor, relying on *Furgatch*. Subsection (b) was wholly patterned after the FEC's broad interpretation of *Furgatch*. Of course, such a definition of express advocacy would leave the speaker uncertain whether the FEC would find a communication to constitute express advocacy, consequently chilling protected speech. Such a definition would abandon the bright-line test *Buckley* said was essential to safeguard protected issue advocacy in this arena, and it would afford the FEC great latitude in its enforcement.[158]

L. MAINE RIGHT TO LIFE COMMITTEE V. FEC (1966)

The FEC's new express advocacy definition took effect on October 5, 1995. On November 22, 1995, Maine Right to Life (also a plaintiff in the *Faucher* case) filed a complaint and motions seeking declaratory and injunctive relief.[159] On February 13, 1996, the United States District Court for the District of Maine declared the latest regulations of the FEC seeking to define express advocacy[160] to be ''invalid as not authorized by the Federal Election Campaigns Act of 1971, as interpreted by the United States Supreme Court in *Massachsuetts Citizens for Life*, and by the United States Court of Appeals for the First Circuit in *Faucher*, because it extends beyond issue advocacy.''[161] The district court struck down a definition of ''[e]xpressly advocating,''[162] which ''comes directly from'' *Furgatch*.[163] The district court relied on the fact that, contrary to the Ninth Circuit's decision in *Furgatch*, the Supreme Court in *Buckley* and *MCFL* created a bright-line protection of issue advocacy, ''even at the risk that it is used to elect or defeat a candidate.''[164]

On October 18, 1996, the First Circuit issued a brief per curiam opinion affirming ''for substantially the reasons set forth in the district court opinion.''[165]

The FEC, however, has obstinately taken the position that these regulations are still in effect in all other jurisdictions than the First Circuit, even though the action was brought under the Administrative Procedure Act and the First Circuit held that the FEC was without authority to promulgate these regulations and, thus, they are void.[166]

M. NEW FEC REGULATIONS (MARCH 13, 1996)

After releasing the regulations which were struck down in *Maine Right to Life Committee*, the FEC next released revised rules setting forth the FEC's requirements for ''voter guides'' and ''voting records.''[167] They became effective on March 13, 1996.[168] Under the new voter guide regulation,[169] the amount of contact that a corporation had with a candidate regarding the voter guide severely affected the content of the voter guide.

First, if the corporation had any oral communications with a candidate regarding the voter guide, the publication of the voter guide was absolutely prohibited. A prohibited oral communication would even include contacting the candidate to clarify a candidate's position on an issue.[170] As a result of the oral communication, the publication of the voter guide was considered by the FEC to be an in-kind contribution to the candidate and, thus, a prohibited corporate contribution under §441b.

However, if the corporation had no oral or written contact with the candidate,[171] the corporation retained its right to state a position on the issues of the voter guide (a First Amendment right recognized in the *Faucher* case). Of course, it is very difficult to prepare a voter guide without sending a written questionnaire to the candidates asking them to state their positions on the issues, so written questionnaires are the common practice.[172] Because the use of a questionnaire is so important to an effective voter guide, most organizations would feel compelled to at least contact the candidate in writing, resulting in severely limiting their issue advocacy.

If an organization had written contact with the candidate,[173] the content of the voter guide was severely restricted.[174] First, ''all of the candidates for a particular seat or office shall be provided an equal opportunity to respond . . . .''[175] Second, ''no candidate may receive greater prominence in the voter guide, than other participating candidates, or substantially more space for responses.''[176] Voter guides shall not contain an ''electioneering message.''[177] Finally, the regulation mandates that a ''voter guide and its accompanying materials shall not score or rate the candidates' responses in such a way as to convey an electioneering message.''[178] Thus, to do a voter guide after written contact with a candidate, the corporation had to surrender its constitutionally-protected right to engage in issue advocacy in voter guides.

Having been repeatedly frustrated by the courts in its attempt to regulate voter guides as expenditures because of the express advocacy test, the FEC based its new voter guide regulations on a new ''contribution'' theory. This theory attempted to avoid the express advocacy test by labeling[179] expenditures for a voter guide as ''in-kind contributions'' to the candidate, which are also prohibited by corporations under §44lb. The FEC's hope was that, if an expenditure for a communication was labeled as an ''in-kind contribution,'' then the courts would not require that the communication contain express advocacy but merely influence an election. Furthermore, this theory took a very expansive view of when an expenditure was requested by or coordinated with a candidate, which is an essential element to make an expenditure into an ''in-kind contribution.'' In both respects, however, the FEC violated existing court precedents.

The FECA made it unlawful for any corporation or union ''to make a contribution or expenditure in connection with any election''[180] The FECA defines ''contribution or expenditure'' to include ''any direct or indirect payment, . . . or gift of money, or services, or anything of value . . . to any candidate . . . in connection with any election.''[181] Of course, it was this language that the Court in *MCFL* held must contain ''express advocacy,'' if an expenditure were to be considered an independent expenditure. However, the FEC is shifting from the word ''expenditure'' to the word ''contribution,'' which encompasses both direct and indirect contributions. A direct contribution is made by actually giving money to the candidate. An in-kind contribution occurs when something of value (like a mailing list) is given to the candidate or when a person pays, at the request of the candidate or an agent of his campaign, for an expense that the campaign itself would otherwise pay (like a billboard) in lieu of a direct contribution to the candidate. However, Congress did not intend for ''in-kind contributions'' to be a broad category. In adopting the concept of an ''in-kind contribution,'' the Senate Report described an ''in-kind contribution'' as ''the use of an individual's resources to aid a candidate in a manner indistinguishable in substance from the direct payment of cash to a candidate.''[182]

Thus, an ''in-kind contribution'' has two elements. The first element is the nature of the expenditure. According to the courts, an expenditure for a communication must contain ''express advocacy'' to be an independent expenditure. The logic of the courts' analysis suggests that this extends to in-kind contributions. According to the FEC, however, an in-kind contribution may exist where there is only issue advocacy. The second element is whether it is made with the consent or in coordination with the candidate. Here, the FEC also has a very expansive view of coordination.

Ironically, the FEC had previously adopted the correct position that express advocacy is necessary in order to transform a protected expenditure into a prohibited contribution. In *Orloski v. Federal Election Commission*,[183] a political opponent of an incumbent Congressman challenged the FEC's failure to

find ''reason to believe'' that the Act had been violated. The case concerned a senior citizens' picnic at which the Congressman spoke and to which several corporations had provided food and services such as transportation.

At issue was the FEC's interpretation of what constituted a corporate contribution under §441b(a). The FEC had previously ''interpreted the Act to mean the corporate funding of events sponsored by congressmen who are candidates for reelection is not prohibited by §441(b)(a) if those events are non-political.''[184] In order to determine whether an event is non-political, the FEC adopted the following test: ''An event is non-political if (1) there is an absence of any communication expressly advocating the nomination or election of the congressman appearing or the defeat of any other candidate, and (2) there is no solicition, making, or acceptance of a campaign contribution for the congressman in connection with the event.'' [185]

Because the FEC found that there was no express advocacy at the picnic in question, it found that the event was ''non-political'' and, thus, that it did not entail a violation of the corporate contribution prohibition of §441b. As the *Orloski* court explained: ''the mere fact that corporate donations were made with the consent of the candidate does not mean that a 'contribution' within the meaning of the Act has been made. Under the Act this type of 'donation' is only a contribution if it first qualifies as an 'expenditure' and, under the FEC's interpretation, *such a donation is not an expenditure unless someone at the funded event expressly advocates the reelection of the incumbent or the defeat of an opponent . . .*''[186]

In its new regulations, however, the FEC now sought to repudiate its former, reasonable position that corporate expenditures are not political contributions which can be prohibited under §441(b) unless they involve express advocacy. The new regulations governed the ''electioneering message'' of voter guides on the porported authority derived from converting expenditures for voter guides into contributions.

The new regulations also adopted an expansive view of what constitutes ''coordination.'' The FEC apparently has two theories: (1) the contact coordination theory, and (2) the presumed coordination theory.[187] The contact coordination theory was employed in the new voter guide regulations. As the structure of the voter guide regulation made clear, the FEC viewed any contact between the corporation publishing the voter guide and a candidate to constitute coordination of the voter guide and the greater the contact the greater the taint. Thus, oral communications resulted in an absolute prohibition on publishing a voter guide; written communication forfeited the corporation's right to engage in issue advocacy in their voter guide.

N. CLIFTON V. FEC (1996)

In response to these newly-issued FEC regulations restricting voter guides, Maine Right to Life Committee[188] again filed suit under the Administrative Procedure Act to have the regulations declared beyond the authority of the FEC under 2 U.S.C. §441(b), as construed by the Supreme Court in *MCFL*.[189] The case, *Clifton v. FEC*,[190] challenged the regulations,[191] which ''restrict(ed) contact or coordination between a corporation and a candidate when the corporation publishes candidate voting records or voter guides.'' [192]

On May 20, 1996, the district court granted Plaintiffs' request for a declaration that the regulations were void as beyond the statutory authority of the FEC. The district court found that the voter guide regulation restricted not only ''express advocacy'' but also ''issue advocacy.'' As the Court stated, ''[t]he new regulations go far beyond the language of section 441(b) as interpreted by *MCFL*. Under the provisions for voter guides, the FEC test is not whether a corporation is engaging in issue advocacy 'on behalf of a candidate' (a test which *MCFL* would support), but whether it has had any 'contact' with the candidate. The regulations permit unrestricted issue advocacy only if there is *no* contact, oral or written in connection with a voter guide. Any oral contact concerning the content of a voter guide—questions to clarify a candidate's position for example—results in outright prohibition of corporate issue advocacy through use of the guide. Even written contact with candidates results in severe constraints on issue advocacy otherwise entitled to broad First Amendment protection under the teachings of *Buckley* and *MCFL*.'' [193]

Also under the ostensible statutory authority of 2 U.S.C. §441(b), the FEC promulgated 11 C.F.R. §114.4(c)(4) which purported to govern corporate preparation and distribution of the ''voting records'' of Members of Congress to the general public. That regulation provided that ''the decision on content and the distribution of voting records shall not be coordinated with any candidate, group of candidates or political party.''

The district court agreed with Plaintiffs' contention that the ''voting record'' regulation also impermissibly restricted issue advocacy. Noting that the regulation provided that the decision on ''content'' could not be ''coordinated'' with a candidate, the Court asked: ''Does that prohibit discussion with the candidate of what a particular vote meant and a summary of the outcome in the published voting record? If there are three apparently inconsistent votes and the MRLC asks the candidate for a explanation in the publication, is that prohibited coordination of a decision on content? These are exactly the types of issue advocacy undertaken by the MRLC and, as I understand the FEC's counsel at oral argument, such activities are indeed prohibited by the new regulations.'' [194]

Because the district court found that both regulations restricted issue advocacy, not just express advocacy, it held that they were invalid under *Faucher, MCFL* and *Buckley:* ''It is equally clear after *Buckley* and *MCFL* that corporate expenditures in connection with a federal election or primary *cannot* constitutionally be limited except when they are devoted to express advocacy of the election or defeat of a particular candidate or candidates.'' [195]

The FEC has appealed the decision to the First Circuit.[196]

O. COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE V. FEC

While there has been a great deal of ongoing litigation in state and federal courts over election laws, the 1996 case of *Colorado Republican Federal Campaign Committee v. FEC*[197] is significant as the most recent word from the Supreme Court on election law issues. The case revealed steadfast support on the Court for protecting First Amendment rights in the election law context.

Significantly, the case completely undercut the FEC's presumed coordination theory. *Colorado Republican* did not involve §441(b) (barring corporate campaign expenditures and contributions), but its rejection of the presumed coordination theory is a clearly transferable concept relevant to the FEC's efforts to regulate corporate political speech under §441(b).[198] Moreover, the opinions in the case revealed strong support for the express advocacy test in this context as well.

The case involved FEC allegations that the Colorado Republican Party had exceeded FECA limits on what a party could spend to promote a candidate in a U.S. senatorial race.[199] The case arose as a result of advertisements purchased in April 1986 by the Federal Campaign Committee of the Colorado Republican Party. The radio advertisements attacked Democrat Timothy Wirth, who was then a U.S. Congressman and the most likely Democrat candidate for the open Senate seat.[200] He had announced in January 1986 that he would run for the Senate.[201] At the time of the advertisements, the Republican Party had not chosen its nominee from among the three persons competing for the nomination.[202]

The record revealed how the expenditure for the advertisements was made. The GOP state chairman arranged for the script on his own initiative.[203] He approved it without input from others.[204] In sum, he did not actually coordinate the expenditure with any candidate. It was what normally would be considered an independent expenditure.

However, the FEC argued that, because of the relationship between a party and its candidates, ''coordination with candidates is presumed,'' [205] even though there was factually none in this case.[206] The lead opinion of Justice Breyer, joined by Justices O'Connor and Souter, rejected this presumed coordination approach, declaring that, because ''the record shows no actual coordination as a matter of fact,'' [207] ''we therefore treat the expenditure, for constitutional purposes, as an 'independent' expenditure, not an indirect campaign contribution.'' [208] This rejection of presumed coordination in the context of expenditures by a political party to attack an opposing candidate for office makes it highly unlikely that a presumption of coordination will be permitted in situations where there is less basis for a presumption. Coordination will have to be actual before an expenditure will be considered a contribution.[209]

Because Justices Breyer, O'Connor, and Souter rejected the notion of presumed coordination, they also rejected the notion that the expenditures at issue were actually contributions. Therefore, they decided it would be prudential not to reach the issue of whether a cap on coordinated expenditures by a political party is constitutional, as urged by the Colorado Republican Party. However, an opinion by Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, opined that the party contribution limit to candidates was unconstitutional on its face, but concurred in a judgment vacating the court of appeals decision and remanding the case,[210] as did Justice Thomas.[211]

From the *Colorado Republican* case, it seems clear that any theory that presumed coordination can convert independent expenditures into contributions must fail. Only actual coordination will achieve such a result. Of course, this is also true where a voter guide merely contains issue advocacy.

FEC v. Christian Action Network

After the Fourth Circuit affirmed the district court's dismissal of FEC charges in *FEC v. Christian Action Network*,[212] the Christian Action Network filed a petition for attorneys' fees and costs under the Equal Access to Justice Act, which permits fee awards for enforcement actions that are not ''substantially justified.'' [213] The Fourth Circuit determined that the FEC's enforcement in reliance on its broad interpretation of *Furgatch* was not ''substantially justified,'' but was in ''bad faith.'' [214]

The Fourth Circuit cataloged the reasons why the express advocacy test, as set forth in *Buckley* and *MCFL*, was so clear that failure to follow it constituted bad faith.[215] The court focused especially on the *Furgatch* decision, on which the FEC had based its authority to prosecute the Christian Action

Network.[216] After carefully analyzing *Furgatch*, the Fourth Circuit summarized the holding of that case: ''Indeed, the simple holding of Furgatch was that, in those instances where political communications do include an explicit directive to voters to take some course of action, but that course of action is unclear, 'context'—including the timing of the communication in relation to the events of the day—may be considered in determining whether the action urged is the election or defeat of a particular candidate for public office.''[217]

The fourth Circuit then pointed out that the FEC had fully understood that explicit words expressly advocating the election or defeat of a clearly identified candidate were essential to ''express advocacy'' when it opposed Supreme Court review of the *Furgatch* case:

''That the commission knows well the Court's holdings in *Buckley* and *MCFL* is further confirmed by the agency's subsequent action in *Furgatch*. . . . Because *Furgatch*, despite its narrow holding, does include broad dicta which can be read (or misread) to support the FEC's expansive view of its authority, the agency vigorously opposed certiorari in the case.

''Wishing to have the opinion preserved intact, the Commission in its submissions there, in contrast to its submissions before this court, quoted *Buckley* as 'requir[ing] ''explicit words of advocacy of election or defeat of a candidate.''' The Commission even took the position that *Furgatch* did . . . interpret the Federal election Campaign Act's corporate disclosure statutes as 'narrowly limited to communications containing language ''susceptible to no other reasonable interpretation but as an exhortation to vote'' ' . . . .

''Moreover, the FEC argued to the Supreme Court that *Furgatch* was fully consistent with *Buckley* and *MCFL* precisely because the opinion focused on the specific language of Furgatch's advertisement and concluded that express advocacy existed only because the advertisement 'explicitly exhorted' voters to defeat then-President Carter. Thus, there is no doubt the Commission understands that its position that no words of advocacy are required in order to support its jurisdiction runs directly counter to Supreme Court precedent.''[218]

The fourth Circuit took the FEC to task for ''dissembling before th[e] court'' for ''quot[ing] the very sentence from page 80 of *Buckley* in which the Court uses the phrase 'express advocacy,''' but leaving out ''the sentence's footnote 108'' (which defined express advocacy ''to mean 'express words of advocacy,'') without ''any reference, by parenthetical or otherwise to the fact that footnote 108 appears in that sentence.[219]

The Fourth Circuit concluded that the FEC had acted in bad faith by bringing an enforcement action against the Christian Action network in the face of absolutely clear precedent on the express advocacy test: ''In the face of the unequivocal Supreme Court and other authority discussed, an argument such as that made by the FEC in this case, that 'no words of advocacy are necessary to expressly advocate the election of a candidate,' simply cannot be advanced in good faith (as the disingenuousness in the FEC's submissions attests), much less with 'substantial justification.'''[220]

The Fourth Circuit further concluded that, even if the precedent were not unequivocally clear, the court ''would bridle at the power over political speech that would reside in the FEC under'' the FEC's interpretation of the express advocacy test.[221] The FEC's interpretation, said the court boils down to ''an argument that the FEC will know 'express advocacy' when it sees it.''[222] The court summarized the clarity of the precedent and the danger of FEC's overreaching as follows: ''[T]he Supreme Court has unambiguously held that the First Amendment forbids the regulation of our political speech under such indeterminate standards. 'Explicit words of advocacy of election or defeat of a candidate,' 'express words of advocacy,' the Court has held, are the constitutional minima. To allow the government's power to be brought to bear on less, would effectively be to dispossess corporate citizens of their fundamental right to engage in the very kind of political issue advocacy the First Amendment was intended to protect—as this case well confirms.''[223]

In summary, as this section has shown, there has been a long and relentless effort by the FEC to close what it has perceived to be a loophole with respect to issue advocacy—the First Amendment. The Supreme Court's express advocacy test and major purpose test remain as the twin bulwarks against this encroachment of liberty.

IV. OTHER PROTECTION FOR FREE POLITICAL EXPRESSION

In addition to its zealous safeguarding of issue advocacy in the election context, the United States Supreme Court has provided safeguards for other forms of speech related to political matters. The seven key protections have to do with (1) *MCFL*-type organizations, (2) members, (3) anonymous literature, (4) caps on contributions and expenditures, (5) political committees, (6) the burden of proof, and (7) prior restraint of speech. These topics will be dealt with in turn.

A. MCFL-TYPE ORGANIZATIONS

In *FEC* v. *Masschusetts Citizens for Life*,[224] the Supreme Court did two important things: (1) it reasserted the bright-line express advocacy test for protecting issue advocacy, and (2) it also created an exemption to the ban on corporate express advocacy found in 2 U.S.C. §441b for nonprofit, nonstock, ideological corporations. Other cases have refined this test for *MCFL*-type organizations. As would be expected, the FEC has attempted to overrule the case law with new regulations, which have promptly been declared unconstitutional. These developments will be considered in turn.

Section 441b of the Federal Election Campaign Act of 1971 prohibits corporations from making ''expenditures'' in connection with a federal election.[225] The United States Supreme Court, however, has limited the scope of §441b's corporate expenditure prohibition. In *MCFL*, the Supreme Court held that the prohibition on corporate expenditures could not constitutionally be applied to certain nonprofit ideological membership corporations because they did not pose a threat of corruption to the political system.[226]

Specifically, the ''*MCFL* exemption'' from the prohibition on corporate political speech applies to those nonprofit corporations which were established to promote political ideas, have no shareholders or members with economic disincentives to disassociate with the corporation if they disagree with its position on an issue, were not established by a business corporation or labor union, and do not act as ''conduits'' for funneling money from such organizations into the political marketplace.[227]

In *Day* v. *Holahan*,[228] the Eighth Circuit held that the *MCFL* exemption applied to Minnesota Citizens Concerned for Life (MCCL), despite the face that the organization received some corporate contributions. The court held that MCCL was the type of corporation which did not pose a threat of corruption to the political marketplace and, therefore, under the Constitution, was entitled to the *MCFL* exemption. As a result, the Eighth Circuit held that a Minnesota state statute that narrowed the *MCFL* exemption to such an extent that it did not apply to MCCL was unconstitutional. This case, therefore, established a de minimis test with respect to *MCFL*-type organizations which receive some minimal corporate contributions.

Subsequent to *Day*, the FEC promulgated regulations at 11 C.F.R. §114.10, purporting to define the circumstances under which the *MCFL* exemption is available to nonprofit ideological corporations under the FECA. In it's ''Explanation and Justification'' for the regulation, the FEC explicitly admitted that its regulation was in direct conflict with *Day v. Holahan*: ''In that case, the Eighth Circuit decided that a Minnesota statute that closely tracked the Supreme Court's three essential features was unconstitutional as applied to a Minnesota nonprofit corporation. The Commission believes the Eighth Circuit's decision, which is controlling law in only one circuit, is *contrary to the plain language used by the Supreme Court in MCFL, and therefore is of limited authority*.''[229]

Thus, the FEC promulgated 11 C.F.R. §114.10 despite its recognition that the regulations would directly violate the Eighth Circuit's holding in *Day*.

The FEC's regulations disallowed an exemption unless, inter alia, each of the following criteria were met: (1) the corporation's ''only express purpose is the promotion of political ideas,''[230] (2) the corporation ''cannot engage in business activities,''[231] (3) the corporation has ''[n]o persons who are offered or who receive any benefit that is a disincentive for them to disassociate themselves with the corporation on the basis of a political issue.''[232] and (4) the corporation can ''demonstrate through accounting records'' that it ''does not . . . accept donations or anything of value from business corporations'' or that it ''has a written policy against accepting donations from business corporations. . . .''[233]

The FEC regulations further required[234] that a corporation which is not a political committee file a certification that it complied with the provisions of the regulations[235] and, therefore, was eligible for an exemption from the prohibition on corporate expenditures. The regulations also required that ''[w]henever a qualified nonprofit corporation solicits donations, the solicitation shall inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates.''[236]

The FEC's new regulations were clearly unconstitutional. They constituted another transparent effort by the FEC to expand its power and to limit political speech, as set out below.

1. MCFL's Test for an Exemption from §441b Must Be Read in the Context of That Case's Protection of Free Speech

The Supreme Court's decision in *MCFL* is essentially a speech-protective holding. The Court's fashioning of the ''*MCFL* exemption'' was rooted in the very principles of public policy and governance which animate the First Amendment, and which bear brief reiteration. The Court stated that ''[f]reedom of speech plays a fundamental role in a democracy. . . .''[237] As the Court had previously stated in *Buckley*: ''Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.''[238]

Freedom of speech, particularly *political* speech, is thus necessary to the functioning of a representative democracy. As such, it is also ''the matrix, the *indispensable condition* of every other form of freedom.''[239] That is, because freedom of speech protects our very form of government, it necessarily plays a pivotal and essential role in protecting the other freedoms which are safeguarded by the Constitution. Finally, as the *MCFL* Court pointed out, ''First Amendment speech is not necessarily limited to such an instrumental role.''[240] In other words, the First Amendment protects speech not only because it fosters free government, but because it fosters the development of the individual by protecting freedom of thought and conscience. Quoting Justice Brandeis, the Court stated: ''Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. *They valued liberty both as an end and as a means.*''[241]

Thus, free speech plays a vital role in protecting democracy itself, thereby making possible the other freedoms we enjoy and allowing people to develop their faculties to the fullest extent possible.

Given the centrality of free speech, it is not surprising that the Supreme Court has been extremely solicitous to protect it. The *MCFL* Court explained that, because free speech is fundamental, ''we must be as vigilant against the modest diminution of speech as we are against the mode3st diminution of speech as we are against its sweeping restriction.''[242] The Court's solicitude for free speech, in turn, caused it to fashion the fundamental principle which both mandates and explains the Court's holding in *MCFL:* ''Where at all possible, government must curtail speech *only to the degree necessary* to meet the particular problem at hand, and *must avoid infringing on speech that does not pose the danger that has prompted regulation.*''[243]

The quoted statement is, in reality, a reformulation of the ''strict scrutiny'' test (i.e., speech regulation must be narrowly tailored to serve a compelling state interest) which the Supreme Court applies in all cases where a regulation is challenged as a content-based restriction on speech.[244] In essence, the Court was saying that, because as a Nation we value free speech so highly, our government is permitted to regulate it *only* where the government's interest is *compelling* and *only* to the extent *absolutely necessary* to achieve that interest.

The burden of demonstrating the existence of such an interest is squarely on the government. As the Supreme Court explained in *First National Bank v. Bellotti,* ''where, as here, as a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, the State may prevail only upon showing a subordinating interest which is compelling and the burden is on the Government to show the existence of such an interest. Even then, the State must employ means closely drawn to avoid unnecessary abridgement. . . .''[245]

The *MCFL* Court pointed out the danger which looms whenever speech is sought to be regulated, i.e., the incremental loss of freedom which may begin when we first allow speech to be restricted in pursuit of other governmental goals. ''Our pursuit of other governmental ends, however, may tempt us to accept in small increments a loss that would be unthinkable if inflicted all at once.'' Thus, courts should, wherever possible, avoid the slippery slope of speech regulation altogether—for although a particular restriction on speech may appear to be ''modest,'' no restriction of speech is ever ''minor.''

The import of the above discussion is that the specific legal rules which the Supreme Court has developed (such as the *MCFL* exemption) have not been fashioned in a vacuum. Rather, they have a discernible origin in the public policies which inform the First Amendment. Those policies, in turn, are determinative of the rationales upon which the specific holdings are based.

However, in fashioning its ''*MCFL* exemption'' regulations, the FEC read *MCFL* as if those policies and rationales did not give meaning to its holdings. The FEC, therefore, justified its regulation almost completely by reference to the eight sentences toward the end of the *MCFL* opinion which contain a summary of the Court's specific holding,[247] while largely ignoring the lengthy discussion of the rationale for the holding which comprises the previous eight pages. However, it is rudimentary that ''black letter law'' cannot be understood without reference to the judicial reasoning which undergirds it.

In sum, the FEC sought a ''modest diminution'' in speech based on ''government ends'' other than the protection of free speech. However, the FEC has been unable to meet its heavy burden of demonstrating that its asserted interests are compelling and that its speech restriction is narrowly tailored.

2. The Scope of Each of the MCFL *Features Was Determined by the Rationales Which Underlaid It*

The Court in *MCFL* identified ''three features essential'' to its holding that MCFL could not be prohibited from independent political spending: ''*First,* it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. *Second,* it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. *Third,* MCFL was not established by a business corporation or labor union, and it is its policy not to accept contributions from such entities.''[248]

As will be seen, the FEC took these ''essential features'' literally and provided in its regulations that, if a corporation did not have these identical features, it was denied the ''*MCFL* exemption.'' As will be demonstrated, however, each of these features was explicitly tied to a rationale which both explained the feature and defined its scope.

a. The first MCFL *feature assured that political resources reflected political support*

The first feature which mandated an exemption from §441(b) was that the corporation in question was ''formed for the express purpose of promoting political ideas, and cannot engage in business activities.''[249] As the Supreme Court stated, this feature ''ensures that political resources reflect political support.''[250] The underlying reason for this concern was ''to protect the integrity of the marketplace of political ideas'' from ''the corrosive influence of concentrated corporate wealth.''[251]

In fashioning this feature, the Court was concerned that ''[d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the *political* marketplace.''[252] As the Court later clarified in *Austin* v. *Michigan Chamber of Commerce,* the danger was not simply the infusion of money into the political marketplace, but infusion of funds amassed in the economic marketplace which were unrelated to support for the corporation's political ideas.[253]

However, as the FEC's broad prohibition of ''business activities''[254] demonstrated, the FEC misconstrued this rationale as prohibiting any business income by the corporation. The FEC regulation reached ''any provision of goods or services which results in income to the corporation'' and which is not ''expressly described'' as donations for political purposes, as well as any ''advertising or promotional activity which results in income to the corporation.''[255] The Supreme Court, however, was concerned solely with the impact on the political marketplace caused by the use of funds which are *unrelated* to the corporation's political ideas.[256]

The *MCFL* Court recognized that §441b took account of this distinction by allowing corporations to make political expenditures through a separate segregated fund or PAC. Expenditures by a PAC are permitted precisely because they come from voluntary contributions and, therefore, *reflect political support:* ''the money collected is that intended by those who contribute to be used for political purposes and not money diverted from another source.''[257] The FEC failed to recognize that, just as PACs do not pose the problem sought to be addressed by §441b, i.e., ''that substantial general purpose treasuries should not be diverted to political purposes,''[258] neither do ideological corporations such as MCFL.

As the *MCFL* Court explained, ''the power of a corporation may be no reflection of the power of its ideas.''[259] Unlike business corporations, however, the resources of which ''are not an indication of popular support,'' the resources available to corporations such as MCFL exist precisely because of their political support, i.e., the fact that the ideas that they propound are considered to be important to those who, for example, patronize its bake sales.

The Supreme Court could not have been clearer about its rationale in this regard: ''[r]egulation of corporate political activity thus has reflected concern *not about the use of the corporate form per se, but about the unfair deployment of wealth for political purposes.* Groups such as MCFL do not pose that danger of corruption.''[260]

In its ''Explanation and Justification'' for the challenged regulation, the FEC demonstrated its complete misunderstanding of the above-quoted language: ''[i]n order to pose no such threat, a corporation must be free from resources obtained in the economic marketplace. Only those corporations that cannot engage in business activities are free from these kinds of resources.''[261] However, as demonstrated, the Court's rationale in this regard did not constitute a condemnation of the political use of ''resources obtained in the economic marketplace''; rather, it was only concerned with the diversion of funds acquired in the economic marketplace to the political marketplace *where those funds were acquired in a manner which was unrelated to the political purposes of the corporation.*

Groups such as MCFL, however, do not pose a threat of the danger that funds *unrelated* to the corporation's political goals will be funneled into the political marketplace of ideas. This is so because ''[t]he resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace.''[262] Contributors give money to such groups precisely because they wish to further the groups' political goals, i.e., ''because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction.''[263] Likewise, a person who engages in ''business activities'' with such an organization does so with the same underlying motivation. He does not spend money at a bake sale or a flower sale primarily to get cookies or carnations. Rather, he does so to benefit the organization and to further its political goals, which he realizes are better served by concerted action than by his individual efforts. Thus, the money which changes hands is *directly related* to the political purposes of the

organization and does not come within the permissible rationale for restricting all corporate expenditures.

The FEC, however, ignored the distinction between business activities which are unrelated to political ideas and those which are related to political ideas in their regulations. Through its denial of the exemption to any corporation which engages in any ''business activities'' (so broadly defined as to include such insensibly politically-motivated transactions as purchases made at bake sales and sales of an ad in a newsletter), the FEC had extended its regulation to ''speech that does not pose the danger that has prompted regulation.''[264]

b. The Second MCFL Feature Assured That Members Would Not Have a Disincentive to Disassociate With a Corporation With Which They Disagree

The second *MCFL* feature was that a corporation ''has no shareholders or others associated so as to have a claim on its assets or earnings.''[265] Like the other *MCFL* features, this one cannot be understood apart from the rationale for its formulation. The Supreme Court explained that the absence of such persons ''ensures that persons connected with the organization will have no disincentive for disassociating with it if they disagree with its political activity.''[266] In developing this feature, the Supreme Court was concerned with situations which may arise with respect to the ordinary business corporation or labor union. It is conceivable that people who are associated with such entities would not want their dues or investment funds used for political purposes. As the Court explained: ''such persons . . . contribute investment funds or union dues for economic gain, and do not necessarily authorize the use of their money for political ends. Furthermore, because such individuals depend on the organization for income or for a job it is not enough to tell them that any unhappiness with the use of their money can be redressed simply by leaving the corporation or the union.''[267]

Based on this reasoning, the *MCFL* Court concluded that, although it was reasonable for Congress to require the establishment of separate segregated funds to which such persons could make voluntary contributions, ''[t]his rationale for regulations is not compelling with respect to independent expenditures by [MCFL].''[268] This is because, as explained above, MCFL had no stockholders or members who could share in the corporation's assets or earnings.

In fashioning its new regulation, however, the FEC again failed to take account of the underlying rationale and how it affects the scope of the feature. In denying the exemption to corporations who offer any benefit, no matter how de minimis to its members,[269] the FEC failed to recognize that the primary purpose of the feature was to protect those who ''depend on the organization for income or for a job,'' that is, those who may have a ''claim on its assets or earnings.''[270] Thus, as with the first *MCFL* feature, the scope of this feature can only be understood by reference to the rationale for its creation.

c. The Third MCFL *Feature Assured That Exempt Corporations Did Not Act as Conduits for the Type of Spending That Created a Threat to the Political Marketplace*

The third *MCFL* feature concerned the fact that ''NCFL was not established by a business corporation or labor union, and it was its policy not to accept contributions from such entities.''[271] In *Austin,* the Court described this feature as ensuring ''the organization's *independence* from the influence of business corporations.''[272] The rationale for this feature is that such independence ''prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.''[273]

In its regulation, however, the FEC not only required that corporations be in fact independent of the influence of business corporations, but also that they either have a policy against accepting any donations from business corporations or do not accept, either directly or indirectly, donations from business corporation. As the Second Circuit recognized in *FEC v. Survival Education Fund (SEC),*[274] however, the rationale of this feature does not depend on whether a corporation has a policy against accepting corporate donations, but upon whether it is, in fact, independent of the influence of corporate donations. That Court explained:

''To be sure, an express policy against accepting corporate or union contributions is clear proof that no such danger exists, as the Court in *MCFL* duly found. But a nonprofit political advocacy corporation, which in fact receives no significant funding from unions or business corporations, does not surrender its First Amendment freedoms for want of such a policy.

''Under *MCFL,* a nonprofit political advocacy corporation having no shareholders or members with financial disincentives to disassociate from the corporation if they disagree with its views is exempt from §441b as long as it is independent in fact from significant business or labor influence. The existence of a policy against accepting contributions from business corporations or unions is relevant to, but not dispositive of, the issue of independence.''[275]

In addition, it is not necessary that the corporation receives no business contributions. As the court in *Day v. Holahan* found, ''the key issue here is the *amount* of for-profit corporate funding a nonprofit receives, rather than the establishment of a policy not to accept significant amounts.''[276]

Thus, the Eight Circuit in *Day* recognized, like the Second Circuit in *SEF,* that ''the factual findings of *MCFL* [did not] translate into absolutes in legal application.''[277] The scope of each of these features can be understood only by understanding the particular evil that the Supreme Court in *MCFL* sought to avoid. For that reason, governmental regulation is permissible only to the extent ''necessary to meet the particular problem at hand,''[278] However, the FEC overstepped the zone of permissible regulation and has sought to regulate speech which is protected by a proper understanding of the purposes and rationales which account for the *MCFL* exemption.

3. Minnesota Citizens Concerned for Life v. FEC Held the FEC's New MCFL Regulations Unlawful

A challenge, under the Administrative Procedures Act, to the new FEC regulations of *MCFL*-type organizations was brought in the Eighth Circuit case of *Minnesota Citizens Concerned for Life v. FEC.*[279] The district court declared the new regulations void as beyond the statutory authority of the FEC as construed by the federal courts.

The court based its rejection of the regulations on the ''functional interpretation'' of *Day* rather than the ''formal interpretation'' of the FEC.[280] In examining the regulations, the District Court specifically found that the ''prohibition against any 'business activities'' and the ''prohibition against the receipt of corporate donations [are], unquestionably, too restrictive.''[281]

In addition, the district court also implied that the third and fourth provisions were of questionable validity under the approach taken by the Eight Circuit in *Day.* As the district court states, ''*Day* rejected a 'bright-line' approach to implementing the *MCFL* exemption, and instead looked to the particular characteristics of the nonprofit as they relate to the purpose of §441(b) and the members' First Amendment rights. Thus, *Day* casts serious doubt on §114.10(c)(1)'s requirement that a qualified nonprofit's 'only' express purpose be the expression of political ideas and §114.10(c)(3)(ii)['s] requirement that a qualified nonprofit not have members which receive 'any' benefit which is disincentive to associate themselves from the corporation.''[282]

The FEC appealed the decision to the Eighth Circuit, which decided *Day,* apparently on the hope that the circuit would change its mind about its understanding of the *MCFL* exemption.[283] On May 7, 1977, the Eighth Circuit affirmed the decision of the district court.[284]

B. MEMBERS

Another protection for speech about political matters by organizations is the First Amendment guarantee that organizations may communicate with their members unencumbered by governmental regulation. This protection was recognized in 1948 by the Supreme Court in *United States v. Congress of Industrial Organizations (CIO).*[285] As noted earlier in this article, this case involved a prohibition on ''any expenditure in connection with a federal election'' by a corporation or labor organization.[286] Charges were brought against the *CIO* for publishing in its membership newsletter a statement urging members to vote for a particular federal candidate.[287] The Court cited several authorities about the sacrosanct nature of free expression and dismissed the indictment, stating that: ''If §313 were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.''[288]

In 1982, the Supreme Court revisited the subject in *FEC v. National Right to Work Committee (NRWC).*[289] This case involved solicitation by NRWC to ''some 267,000 persons for contributions to a separate segregated fund [a PAC] that it sponsored.''[290] NRWC was a nonstock corporation.[291] The issue was whether NRWC had limited its solicitations to ''members'' within the meaning of 2 U.S.C. §§441b(b)(4)(A) and (C), which provide that a nonstock corporation may solicit contributions to its PAC only from ''members'' of the corporation.[292] The organic documents of NRWC stated that it would have no members.[293] Although NRWC had mailed millions of letters promoting its opposition to compulsory unionism and soliciting donations, none mentioned membership.[294] When NRWC created its PAC (because corporations could not contribute to candidates under 2 U.S.C. §441(b)), it solicited persons who had made donations to NRWC. Upon examining the brief legislative history of §441(b), the Supreme Court decided that the congressional intent was ''that some relatively enduring and independently significant financial or organizational attachment is required to be a 'member' under §441b(b)(4)(C).''[295] As a consequence, the Court held that NRWC did not have members ''under any reasonable interpretation of the statute.''[296] The Court reiterated the high constitutional protection accorded associational rights,[297] holding that, in this case, ''the associational rights asserted by respondents may be and are overborne by the interests Congress has sought to protect in enacting §441(b).''[298]

Not content with the statutory definition of ''member,'' with the new gloss of *NRWC,*

the FEC set about to define ''member'' in new regulations. As usual, the FEC pursued a speech and association suppressing approach, attempting to define ''member'' as narrowly as possible in order to limit as much as possible the class of persons to whom the corporation may communicate its political messages and from whom it may solicit PAC funds.

An older definition of ''member'' had been promulgated by the FEC in 1976. The regulation defined the term as: ''all persons who are currently satisfying the requirements for membership in a membership organization, trade association, cooperative, or corporation without capital stock. . . . A person is not considered a member under this definition if the only requirement for membership is a contribution to a separate segregated fund.'' [299]

The new definition of ''member,'' promulgated in 1993, defined the term much more restrictively:

''*Members* means all persons who are currently satisfying the requirements for membership in a membership association, affirmatively accept the membership association's invitation to become a member, and either:

''(i) Have some significant financial attachment to the membership association, such as a significant investment or ownership stake (but *not* merely the payment of dues);

''(ii) Are required to pay on a regular basis a specific amount of dues . . . and are entitled to vote directly either for at least one member who has fully participatory and voting rights on the highest governing body of the membership association, or for those who select at least one member . . .; or

''(iii) Are entitled to vote directly for all those on the highest governing body of the membership association.'' [300]

The U.S. Chamber of Commerce and the American Medical Association were both affected by the new regulation and ''ceased making their traditional political solicitations'' to persons they had considered their members.[301] They filed suit seeking a declaration that the FEC had violated their First Amendment rights by ignoring the disjunctive ''or'' in the Supreme Court's statement quoted above,[302] treating it rather as a conjunctive ''and.'' [303]

The United States Court of Appeals for the District of Columbia Circuit found fatal flaws in the new FEC regulations. The court faulted the notion that dues to a nonstock corporation were less of a financial attachment to the organization than was ownership of a single share of stock in a public corporation.[304] The court also faulted the requirement that a ''member'' who paid dues must vote directly for a member of the highest governing body, noting that this excluded without justification many hierarchical organizations.[305] As a result, the court declared the regulations void under the Administrative Procedures Act.

Based on the case law, therefore, to be a ''member'' of a nonstock organization to receive a corporation's or labor union's political communications and to be solicited for PAC purposes, one must have some financial connection with the organization (usually done with dues payments) and have a right to vote at least at a local level for persons who will chose the voting representative of a local organization to the larger governing body of the organization (typically done by allowing local members to vote for the local delegate to the state-wide governing body of the organization.[306]

C. ANONYMOUS LITERATURE

In *McIntyre v. Ohio Election Commission*,[307] the United States Supreme Court declared that a broadly worded requirement that there be a mandated disclaimer identifying the author or any writing intended to ''influence'' an election is unconstitutional. Indeed, the Supreme Court upheld the right of an individual or organization to publish anonymously concerning the advocacy of political causes.

In *McIntyre*, the Court considered an Ohio election practices statute in the context of an enforcement action against a woman, Margaret McIntyre, who distributed flyers generated on a home computer and printed at her own expense relating to a referendum on a proposed school tax levy.[308] Some of her handbills identified her as the author, while others contained the identifier ''CONCERNED PARENTS AND TAX PAYERS.'' [309] Margaret was fined $100 by the Ohio Election Commission for failure to use the required disclaimer.[310] On appeal of the case, the U.S. Supreme Court struck down the Ohio statute imposing a state-mandated disclaimer on literature intended to ''influence the voters in any election.'' [311]

Noting that the statute was a content-based ''limitation on political expression'' at ''the core of the protection afforded by the First Amendment,'' the Court applied ''exacting scrutiny.'' [312] The Court noted that in addition to ''exacting scrutiny'' such a restriction on ''core political speech'' must be ''narrowly tailored to serve an overriding state interest.'' [313]

Ohio asserted two interests to justify its disclaimer: (1) an ''interest in preventing fraudulent and libelous statements'' and (2) an ''interest in providing the electorate with relevant information.'' [314] The High Court noted that free expression includes the right to release what information one desires and that the name of a private citizen would be meaningless to most readers anyway with regard to the reader's ability to evaluate the message.[315] The Court dismissed the interest in informing the public as ''plainly insufficient to support the constitutionality of its disclosure requirements.'' [316]

The Court gave more weight to Ohio's interest in preventing fraud and libel, noting that this interest ''carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large.'' [317] The Court, noted, however, that Ohio had a statute setting forth penalties for false statements during political campaigns, so that the disclaimer provision was ''not its principal weapon against fraud.'' [318] The Court noted that the disclaimer provision served as an ''aid to enforcement'' and a ''deterrent to the making of false statements by unscrupulous prevaricators,'' but these ''legitimate'' benefits did not justify the ''extremely broad'' disclaimer mandate.[319]

This is so the Court said, inter alia, because the broad prohibition ''encompasses documents that are not even arguably false or misleading. It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources. . . .'' [320]

The Court distinguished its upholding in *Buckley* of a requirement that expenditures in excess of a certain amount be *reported* to the FEC, declaring that the Ohio disclaimer requirements is ''more intrusive than the *Buckley* disclosure requirement'' and ''rests on different and less powerful state interests.'' The Court noted that the FECA ''regulates only candidate elections, not referenda or other issue-based ballot measures; and we construed 'independent expenditures' to mean only those expenditures that 'expressly advocate the election or defeat of a clearly identified candidate.' '' [321]

Reporting requirements, like disclaimers, are a *type* of disclosure mechanism.[322] *Buckley* approved reporting requirements for express advocacy; it did not approve disclaimers on this type of speech. Indeed, *McIntyre* recognized that *Buckley* did not even address the issues of disclaimers or anonymous speech: ''Ohio vigorously argues that our opinions in *First National Bank of Boston v. Bellotti*, . . . and *Buckley v. Valeo*, . . . amply support the constitutionality of its disclosure requirements [i.e., disclaimer]. Neither case is controlling: . . . [*Buckley*] concerned mandatory disclosure of campaign-related expenditures [i.e., reporting requirements]. Neither case involved a prohibition of anonymous campaign literature.'' [323]

McIntyre went on to recognize that *Buckley* upheld reporting requirements for express advocacy, and unlike disclaimers, such requirements advance the interest in obtaining information without unduly impinging upon protected speech: ''True, in another portion of [*Buckley*] we [approved] a requirement that even independent expenditures in excess of a certain threshold level be reported. * * * But that requirement entailed nothing more than an identification * * * of the amount and use of money expended in support of a candidate [through a report]. Though such mandatory reporting undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled self-identification [i.e., disclaimers] on all election-related writings.'' [324]

The Court concluded that ''the Ohio statute's infringement on speech [disclaimers,] [is] more intrusive than the *Buckley* disclosure requirement [reporting].'' [325] Both means provide the State with information; however, reporting requirements are more narrowly tailored to do so.[326]

D. CONTRIBUTION & EXPENDITURE CAPS

Another protection afforded political speech by the First Amendment and recognized by the United States Supreme Court is the limitation on the extent to which government may place caps on contributions and expenditures. While the Court permits some caps on contributions, there are limits as to how low the caps may go. No caps are permitted on independent expenditures.

Buckley's point of departure is the principle that any restriction of the amount of money that can be spent in campaigns is suspect. The Supreme Court stated that [a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.[327]

Thus, a regulation which seeks to regulate political spending is subject to a presumption of invalidity. In *Buckley*, the Supreme Court did, however, enunciate a constitutional distinction between ''expenditures'' and ''contributions.'' The Court stated that: ''although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditures ceilings impose significantly more severe restrictions on protected freedoms of political expression than do its limitations on financial contributions.'' [328]

Expenditures could not be regulated unless they constituted ''express advocacy'' of the election or defeat of a clearly identified candidate (and if they were ''independent expenditures'' they could not be limited even if they did constitute express advocacy).[329] On the other hand, contributions were, under the reasoning of *Buckley*, more susceptible of regulation.

The Court's reasons for making a distinction of constitutional dimension in this regard were essentially twofold. First, the Court found that contribution limitations

did not place significant burdens on protected speech and associational freedoms. Second, the Court found that contributions could be limited because, unlike expenditures, they posed the danger of quid pro quo corruption (and the appearance thereof) to the political system. Unless both of these rationales are satisfied, contributions cannot be limited.

I. Contributions Can Only be Limited Because They Threaten Corruption to the Political System

As noted above, the *Buckley* Court began its analysis with the proposition that limits on spending in connection with campaigns are presumptively invalid. It did, however, permit the government to limit contributions to candidates or campaigns. One of the two fundamental rationales for allowing such restrictions was that, unlike expenditures, contributions pose a threat of corruption to the political system. The Court stated that ''[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.'' [330]

In addition, the Court was concerned with ''appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.'' [331] Therefore, the Court permitted governmental limitations on contributions [332] because of the governmental interest ''in the prevention of corruption and the appearance of corruption spawned by the real or imagined influence of large financial contributions on candidates' positions and on their actions if elected to office.'' [333]

The Supreme Court in *Buckley* then proceeded to approve an aggregate contribution cap of $1,000 for each election by any person to any candidate for federal office.[334] The Court found that the interest in limiting ''the actuality and appearance of corruption resulting from *large* individual financial contributions'' justified ''the limited effect upon First Amendment freedoms caused by the $1000 contribution ceiling.'' [335] More precisely, the Court found that in 1976 a $1,000 limit on contributions was sufficiently high to be narrowly tailored to limit corruption, while allowing individuals and organizations to assist to a ''substantial extent in supporting candidates and committees with financial resources.'' [336]

However, contribution caps are not one of those things where, if a little is good, more is better. Efforts to set lower limits have been routinely struck down. In several post-*Buckley* decisions, courts have upheld contribution limits above $1,000,[337] but have struck down those below it. In *Carver v. Nixon*,[338] the Eighth Circuit struck down a $300 limit on direct contributions in state elections on the ground that it was not narrowly tailored to advance the state's interest in combating corruption.[339] It noted that *Buckley* upheld a $1,000 limit twenty years ago because such a limitation focused precisely on the problem with *large* campaign contributions without unduly impinging on protected speech, i.e., it was narrowly tailored to achieve its goal.[340] Similarly, in *Day v. Holahan*,[341] the Eighth Circuit struck down a $100 limit on contributions to and from political committees.[342]

2. Expenditures, However, Cannot be Limited Because Doing So Imposes Restrictions on the Freedoms of Speech and Association That are Not Justified by a Compelling Interest

As the *Buckley* Court explained, independent expenditures are entitled to full constitutional protection: ''Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than discussion of political policy generally or advocacy of the passage or defeat of legislation.'' [343]

In contrast to contributions, however, ''expenditures'' which are not coordinated with a candidate or campaign do not pose a danger of corruption or its appearance. Thus, there is no compelling interest in their limitation. This is so because a candidate does not necessarily benefit from (and may well even be harmed by) an expenditure which is made independently of his campaign. As the Supreme Court recognized, ''[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.'' [344]

Thus, because as a practical matter the candidate may well not benefit from an expenditure made without coordination, the danger of quid pro quos is obviated. This results not only in alleviating the danger of corruption, but the appearance of corruption as well.

In addition, in contrast to limits on contributions that ''entail[s] only a marginal restriction on the contributor's ability to engage in free communication,'' [345] the Court reasoned that, ''because virtually every means of communicating ideas in today's mass society requires the expenditure of money,'' the ''expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.'' [346] Whereas a contribution to a candidate merely ''serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support,'' [347] ''a restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quality of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.'' [348]

As a result, the Court has struck down limits on independent expenditures by individuals [349] and political committees.[350]

E. POLITICAL COMMITTEES

As noted by the Court in *Buckley*,[351] ''the First Amendment protects political association as well as political expression.'' As a result, citizens have the ''freedom to associate with others for the common advancement of political beliefs and ideas.'' [352] ''Governmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'' [353]

Political action committees (PACs) are associations organized to enhance the political expression of citizens by joining individual contributions with those of others so that they may more effectively participate in political speech.[354] As a result, the Supreme Court has ''reject(ed) the notion that the PACs form of organization or method of solicitation diminishes their entitlement to First Amendment protection,'' [355] and expressly held that they are protected by the First Amendment freedom of association.[356] Furthermore, any disparate treatment of a political committee, such as lower contribution limits for PACs as opposed to individuals, would violate the PACs freedom of association.[357]

F. BURDEN OF PROOF

A final protection for free political speech and association is the burden of proof placed on legislatures which enact a ''law . . . abridging the freedom of speech.'' [358] Because free expression and association are such cherished American rights, they are protected as fundamental rights against infringement. To be valid, a law burdening or chilling these rights must serve a compelling interest and be narrowly tailored to effect only that interest.[359]

Once a plaintiff has demonstrated that a statute infringes the exercise of his or her First Amendment rights, the burden is on the state to justify this infringement. As the United States Supreme Court declared in 1978: ''The constitutionality of §8's prohibition of the 'exposition of ideas' [a ban on corporate contributions or expenditures to influence the outcome of a referendum] by corporations turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech. Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling' *'and the burden is on the Government to show the existence of such an interest.'* Even then, the State must employ means 'closely drawn to avoid unnecessary abridgment. . . .''' [360]

The state's effort to carry its burden must be done under ''the closest scrutiny.'' [361] As the U.S. Supreme Court has stated: ''When the government defends a regulation on speech . . . it must do more than simply ''posit the existence of the disease sought to be cured.'' . . . It must demonstrate that the recited harms are real, . . . and that the regulation will in fact alleviate these harms in a direct and material way.'' [362]

In *Carver v. Nixon*,[363] a case involving campaign contribution caps, the Eighth Circuit declared that the government must produce ''evidence to demonstrate that the limits were narrowly tailored to combat corruption or the appearance of corruption. . . .'' [364] ''The record is barren of any evidence of a harm or disease that needed to be addressed,'' the court proclaimed.[365]

In *Shrink Missouri Government PAC v. Maupin*,[366] the U.S. District Court for the Eastern District of Missouri observed that ''[d]efendants wholly failed to adduce any evidence of actual corruption taking place. . . . The harm that the defendants seek to eradicate must exist and its cure must specifically be directed toward the elimination of that harm. . . . . The defendants fail to point to one incident wherein a[n] . . . official . . . has cast a vote or agreed to influence a vote, during the general assembly's regular session, in exchange for a contribution. As for the appearance of corruption, the defendants' two witnesses testified in general terms of their belief that the public perceives the acceptance of contributions during the legislative session as ''inappropriate''. No factual basis was given for these witnesses' perception that the electorate believes that contributions accepted during the general assembly's regular session reflect corruptive deal-making.'' [367]

In sum, when the government makes a law abridging free speech, it has an extremely heavy burden of proof that there is a compelling interest, and this burden must be met with the clearest of facts carefully established, not with mere speculation about possible corruption. There are two obvious reasons for this.

First is the premier protection given to free speech and free association rights in our constitutional system. Because of the supreme importance of free political speech and association to the very democratic foundations of our Republic, government should

make no law abridging these expressly protected activities on the basis of unproven speculation about corruption.

Second is the fact that the legislation abridging political speech is being enacted by incumbent politicians. Justice Thomas in his concurrence in *Colorado Republican* put the matter well when he referred to the notion of according special deference to congressional judgments about campaign finance as ''letting the fox stand watch over the henhouse.'' [368] He added, ''What the argument for deference fails to acknowledge is the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it.'' [369]

This warning has been echoed by various commentators. For example, Lillian BeVier points out the importance of three scope-of-review issues in protecting constitutional rights in the political speech area: (a) courts must ''insist on a rigorous definition of 'corruption' as well as an intelligible description of both empirical counterparts of this corruption and the purified political order it hopes to attain'' [370]; (b) courts ''should adopt a 'premise of distrust' with respect to legislative means'' [371]; and (c) courts should take note of the realities of campaign finance reform—such as ''unintended consequences'' and ''at least temporary reallocations of political advantage'' and sanction ''only reforms that are practically guaranteed to achieve a clearly specified and unquestionably legitimate corruption-prevention goal.'' [372] Similar warnings have come from John Hart Ely [373] and Ralph Winter, [374] among others.

Thus, the burden is on the government to establish by clear evidence the compelling interest in corruption or its appearance which it proposes as supporting its decision to make a law abridging free expression in the vital realm of political speech.

G. PRIOR RESTRAINT OF SPEECH

The United States Supreme Court has long held that ''the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'' [375] This is particularly true with political speech since ''timing is of the essence . . . when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all.'' [376] Therefore, a prior restraint, even for ''a day or two'' may be intolerable when applied ''to political speech in which the element of timeliness may be important.'' [377]

As set forth above, the First Amendment protects, as political speech, both political contributions and political expenditures, including both issue advocacy and independent expenditures. Unfortunately, injunctions have been sought and, on occasion, issued by lower state courts for alleged ''violations'' of state election law. [378] These injunctions were sought to restrain the distribution of voter guides and were overturned on appeal, [379] but the damage to First Amendment rights still occurred.

V. A PROPOSAL FOR SPEECH-ENHANCING CAMPAIGN REFORM

While most efforts at campaign finance reform have been misguided and based on flawed assumptions, there is room for speech-enhancing reform. Key to any reform to be attempted is the need to protect and enhance constitutionally guaranteed free expression. The case law is clear that such speech is constitutionally protected, and, as set forth above, the United States Supreme Court has shown no sign whatsoever that it is prepared to back away from ensuring full First Amendment protection to the political speech involved in campaigns.

This section will summarize the flawed premises on which most efforts at campaign finance reform are based, and set out some proposals for speech-enhancing reform.

A. FAULTY PREMISES TO BE AVOIDED

Recent campaign finance proposals [380] in the U.S. Congress have been based on certain premises that have been thoroughly rejected by the United States Supreme Court in the seminal election law case of *Buckley*, [381] and its progeny. As a result of these faulty premises, the proposals themselves are fundamentally flawed and have diverted attention from reform measures that would survive constitutional scrutiny and that would correct current perceived problems in the political system. These faulty premises are as follows.

1. (Faulty Premise #1) The First Amendment Is a Loophole in the Federal Election Campaign Act (FECA) Which Should Be Narrowed or Closed

As set forth in detail above, the First Amendment protects political freedoms that are vital to our representative democracy. To limit these freedoms is to fundamentally undermine the ability of our citizens to freely select their representatives and to hold them accountable for their governance. As has been shown, there is no indication whatsoever that the courts are prepared to cooperate in any endeavor to limit First Amendment freedoms in this area. [382]

2. (Faulty Premise #2) The Political System Is Only about Elections, Not about Political Ideas and the Accountability of Elected Officials to the Public for Their Positions on Issues

The debate about campaign finance reform seems to focus only on elections on the assumption that the political process is only about elections. However, elections are only a part of the political process. More importantly, elections are simply a part of our system of democratic representative government which fundamentally depends on ''the free discussion of governmental affairs.'' [383] Thus, issue advocacy during an election, even though it may influence the election, is also about the discussion of issues of public concern and about holding public officials accountable for their positions on these issues. Representative government cannot survive without this ''free discussion of governmental affairs.''

3. (Faulty Premise #3) The Rising Cost of Political Campaigns Justifies Severe Government Restrictions on Campaigns

Some promoters of campaign finance reform assert that the rising cost of elections and the growing size of special interest donations has corrupted the democratic process. On that basis, they believe that severe limitations on campaigns imposed by government are justified.

However, the United States Supreme Court has made it clear that it is up to the people, not the government, to determine what is spent on political campaigns. As the Court stated in *Buckley:* ''In any event, the mere growth in the cost of federal election campaigns in and of itself provides no basis for government restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.'' [184]

4. (Faculty Premise #4) The Only Way to Redress the Balance Is to Stifle the Speech of Some Rather than to Enhance it for All

Some promoters of campaign finance reform believe that the system needs to change because it has eroded the power of individual voices and amplified the voices of special interests. In pursuit of equalizing speech, they take the approach of limiting, penalizing, and prohibiting speech of some in order to enhance it for others.

However, the United States Supreme Court has expressly rejected this proposition in *Buckley:* ''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.'' [385] Thus, this approach is fundamentally flawed.

But even more tragically, the ''solution'' of stifling speech diverts attention away from positive, constitutional measures which would redress the imbalance in the current system by enhancing the speech of citizens and issue advocacy groups. These speech enhancing measures would restore a proper balance between the voices of ''special interests'' and the voices of individual citizens.

Some campaign finance reform advocates believe that the only way that meaningful reform will be enacted is for members to put aside partisan differences and work together to make it happen. While this may be one necessary precondition to reform, it is not the fundamental one. For meaningful reform to occur, Congress must abandon the notion that it is empowered to limit free speech in order to redress any imbalance in speech and instead find ways to level the playing field by enhancing the speech of citizens and issue advocacy groups.

B. POSITIVE PROPOSALS FOR REFORM BY ENHANCING SPEECH

In contrast to the serious constitutional obstacles to efforts to curtail speech, Congress is free to adopt measures that will enhance and encourage speech. As the *Buckley* Court explained, in upholding the provision of the FECA providing public funds for elections: ''Although 'Congress shall make no law . . . abridging the freedom of speech, or of the press.' [public funding of elections] is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [the provision] furthers, not abridges, pertinent First Amendment values.'' [386]

But public funding of campaigns is only one way for Congress to ''facilitate and enlarge public discussion and participation in the electoral process.'' The best antidote to the ''undue influence of special interests'' is to encourage citizens to take a more active part, as individuals and in association with others, in the political process.

In addition, Congress should act to reign in the FEC's effort to expand its power and regulate issue advocacy. The incorporation of the Court's speech protective holdings in appropriate provisions of the FECA and the adoption of certain administrative reforms of the FEC itself are necessary to accomplish this task. The following measures are designed to do just that. [387]

1. Section 441b of the FECA Should Be Amended to Reflect the Protections of Issue Advocacy and of the Political Speech of Not-for-Profit Corporations

Section 441(b) of the FECA makes it unlawful for any corporation ''to make a contribution or expenditure in connection with any [federal] election.'' However, as set forth

above, the United States Supreme Court in *MCFL*,[388] imposed two significant limitations on this prohibition.

First, the Court interpreted §441b to be limited to expenditures for ''express advocacy.'' Second, the Court held that the prohibition on corporate expenditures was not applicable to certain not-for-profit corporations. These limitations should be incorporated by Congress in §441(b) by amending it.

After *Buckley*, Congress amended the FECA to incorporate changes in the statute required by the Court. For instance, Congress amended §434(c) to reflect that disclosure of expenditures by organizations that were not political committees were limited to ''independent expenditures'' and adopted a definition of ''independent expenditure'' in §431(17).

Similarly Congress should amend §441(b) to incorporate the holdings of *MCFL* by providing that it is unlawful for any corporation ''to make a contribution or to make an expenditure which expressly advocates the election or defeat of a clearly identified candidate.''

In addition, §441(b) should be amended to add a new subsection which provides that the prohibition on a corporation making an expenditure which expressly advocates the election or defeat of a clearly identified candidate does not apply to a not-for-profit membership corporation which (1) does not engage in substantial business activities, other than traditional fundraising activities of not-for-profit organizations, that are unrelated to the charitable, educational or political activities of the organization, (2) has no shareholders or other persons affiliated so as to have a claim on its assets or earnings, and (3) was not established by a business corporation or a labor union and does not receive a substantial portion of its contributions from such entities.

These changes would conform with the Court's decision in *MCFL*, and would signal the willingness of Congress to abide by this important issue advocacy protecting decision. Furthermore, incorporating these changes in the statute will make it readily apparent to all that this provision is narrow on its face; where now one has to read the United States Reports to know about this significant limitation.

2. The Definition of Contribution Should Be Amended to Clarify that It Does Not Apply to Issue Advocacy

The Federal Election Commission's effort to regulate and restrict issue advocacy by claiming that it is a contribution to a candidate and subject to the contribution limits if the expenditure for the issue advocacy was coordinated with a candidate should also be addressed. There is no justification for issue advocacy losing its protected status just because it has been communicated to a candidate.

This misguided attempt to circumvent the protection of issue advocacy in *Buckley* can be prevented by adding to those items listed in §431(8)(B) as not being included in the definition of ''contribution'' ''any expenditure for a communication which does not expressly advocate the election or defeat of a clearly identified candidate.''

3. The Definition of Political Committee Should Be Amended to Reflect the Court's Major Purpose Test

The Court in *Buckley* held that an organization cannot be considered a ''political committee'' unless the organization is ''under the control of a candidate or the major purpose of the organization is the nomination or election of a candidate.''[389] Unfortunately, when Congress amended the FECA after *Buckley*, this limitation was not included.

The effect of Congress's failure to modify the definition of ''political committee''[390] to meet *Buckley*'s requirements has been to encourage the FEC to run amuck trying to impose on issue advocacy groups the requirements for PACs in the FECA.[391] This has had the effect of chilling the legitimate issue-oriented activities of such groups and has imposed substantial costs on them in their efforts to resist such unconstitutional impositions. Congress should make this change now by amending §431(4)(a) by adding at the end ''and which is under the control of a candidate or the major purpose of which is the nomination or election of a candidate.''

4. Congress Should Allow Certain Not-for-Profit Corporations to Make Contributions to Federal Candidates

Since the Supreme Court held in *MCFL* that certain not-for-profit corporations do not pose any threat to corrupt the electoral process, because contributions to them are generated by their advocacy of political ideas, and they are thus free to make independent expenditures, there is no justification to prohibiting them from also making contributions to federal candidates.[392]

This change would expand the pool of possible contributors to candidates and, since these nonprofit organizations often promote important political ideas, rather than narrow economic interests, their addition to the pool of possible contributors would help offset these ''special interests.''

This change could be made by modifying the new subsection proposed for §441(b) in Section 1, supra, by providing that the prohibition on a corporation making a contribution or an expenditure which expressly advocates the election or defeat of a clearly identified candidate does not apply to the not-for-profit membership corporations described therein.

5. Certain Not-for-Profit Corporations Should Be Allowed to ''Bundle'' Individual Contributions to Candidates

Bundling of individual contributions to candidates is currently limited to PACs. Even if certain not-for-profit corporations are not allowed to contribute to candidates, Congress should allow them to solicit from their members individual contributions to candidates that are then ''bundled'' and given to the candidate. This could be accomplished by specifically allowing this activity in the amendment to §441(b) proposed above.

Providing this new method of encouraging individual contributions will enhance political giving by individual citizens, diminishing the relative influence of PACs and ''special interests.'' This ''bundling'' activity should be reported by amending §434(c) to so provide.

6. The Individual Contribution Limit Should be Increased to $2,500 and the Aggregate Limit to $100,000

The individual contribution limit of $1,000, found in §441(a)(a)(1) (A), and the aggregate contribution limit of $25,000, found in §441(a)(a)(3), has been in effect since 1974. While a $1,000 contribution represented a large contribution in 1974, it does not today.[393] Furthermore, allowing individuals to make larger contributions will enhance the ability of individual citizens to influence the political process while helping to offset the influence of ''special interests'' and PACs. The individual contribution limit should be raised to $2,500 and be indexed for inflation.

Furthermore, to accommodate the increase in individual contributions to candidates and to political parties, suggested below, the aggregate individual contribution limit, found in §441(a)(a)(3), should be increased to $100,000.

7. The Individual Contribution Limit to Political Parties Should Also Be Raised

Individual contributions to any national political party are limited to $15,000 per year by §441(a)(a)(2)(B). This limitation has diminished the relative influence of political parties and encouraged them to seek soft money. Increasing the individual contribution limit to $50,000 would help strengthen parties that can provide an effective counterweight to ''special interests.''[394] Furthermore, most agree that political parties serve a beneficial mediating role in the political process that should be enhanced. Both of these benefits would be derived by increasing the contribution limit to political parties.[395]

8. The Amount Political Parties Can Spend in Coordinated Expenditures with Federal Candidates Should Also Be Increased

With the increase in the individual contribution limit to political parties, Congress should increase the coordinated expenditure limits provided in §441(a)(d). These limits have also been in existence since 1974 and were not indexed for increases in the consumer price index as were the expenditure limits on presidential campaigns.[396] Because of the increase in the cost of federal campaigns, the influence of political parties has diminished. Congress should restore this balance and also index the new limits to inflation.[397]

9. The FEC Should be Mandated, in its Regulatory Activities, to Observe the Limits Imposed by the First Amendment

Since the admonitions of the courts have left the FEC unchastened in its regulatory efforts to contain issue advocacy, Congress should mandate that, in its regulatory activities, the FEC should act in a manner that will have the least restrictive effect on the rights of free speech and association protected by the First Amendment. To give this provision some teeth, a reviewing court should be authorized to hold unlawful and set aside any action of the Commission that did not use the least restrictive means available.

10. Reasonable Attorneys Fees Should Be Authorized by Congress if any Provision of the FECA of Action of the FEC Violates Constitutionally Protected Rights

The provisions of 42 U.S.C. §1988, authorizing an award of attorney fees to prevailing party who vindicates constitutional rights as against a state, are a substantial deterrent to states violating the guarantees of federal law. While federal law currently allows for an award of attorney fees against federal agencies in limited circumstances,[398] the broader guarantees provided in §1988 are justified in this case for two reasons.

First, the FECA uniquely involves the attempt by government to regulate vital First Amendment rights that are ''indispensable democratic freedoms.'' Particularly in light of the efforts by some to pass provisions know to be unconstitutional, a provision that allows an award of attorney fees for a successful effort to strike down a portion of the FECA is warranted.[399]

Second, the FEC has a sorry history of repeated attempts to unconstitutionally expand its powers to regulate issue advocacy. A significant deterrent to such intransigence, and a justified effort to compensate the victims of it, would be to award attorney fees to those private parties that prevail in FEC enforcement actions or against new FEC regulations.

11. The Act Should Establish Term Limits for FEC Commissioners, Staff Director, and General Counsel

The six commissioners of the FEC are currently appointed for six year terms and are

eligible for reappointment.[400] The FEC is administered by a staff director and general counsel appointed by the Commission.[401] Because of the strong institutional bias toward regulating free speech in the FEC, fresh blood is needed at the higher echelons of the Commission. This could be established by providing term limits for the Commissioners, staff director, and the general counsel.

12. The Tax Credit for Small Political Contributions Should Be Restored

The 1974 amendments to the FECA contained a 50% individual tax credit for political contributions up to $100. This tax credit provided a substantial incentive for small political contributions. This incentive should be restored to encourage small contributions from a greater number of citizens.

13. Limits on Issue Advocacy for Tax Exempt Groups in the Internal Revenue Code Should Be Eliminated

The Internal Revenue Code imposes limits on issue advocacy for tax exempt organizations. Specifically, the Internal Revenue Code prohibits groups exempt under §501(c)(3) from ''participat[ing] in, or interven[ing] in [including the publishing or distributing of statements], any political campaign on behalf of any candidate for public office.'' Organizations that are exempt under §501(c)(4) may engage in political activity but such activity must be ''insubstantial'' and is subject to a tax under §527.

Unfortunately, the Internal Revenue Service has given this provision a very expansive interpretation which clearly encompasses issue advocacy. For instance, in Revenue Ruling 78–248, the IRS interpreted this provision to include voter guides, even though they only contained issue advocacy and did not contain any ''express advocacy.'' As a result, not-for-profit groups have been chilled in the exercise of their constitutional right to issue advocacy.

Congress should correct this clear violation of First Amendment speech by bringing this provision into compliance with *Buckley*. This provision should be amended to read that this exemption is available to §501(c)(3) organizations that ''do not contribute to any political candidate, political committee, or political party and do not make any expenditures expressly advocating the election or defeat of a clearly identified candidate for political office.'' Furthermore, Congress should make it clear in the statute that §501(c)(4) organizations are not subject to a tax except on any contribution to a political candidate, committee, or party and on any independent expenditure expressly advocating the election or defeat of a clearly identified federal candidate.

CONCLUSION

As the U.S. Congress considers campaign finance reform, it has a unique opportunity to make significant changes that will improve our electoral process. There are two paths that beckon. One to limit, stifle, punish and penalize speech is doomed to failure at the doorstep of the United States Supreme Court. The other to encourage, promote and enhance speech will not only pass constitutional muster but will restore the balance that many believe is critically needed.

Moreover, the FEC must be reigned in to protect the constitutional rights of the people. The FEC is an agency out of control. Instead of carrying out its legitimate administrative role, it has expended considerable resources seeking to restrict, stifle and punish constitutionally protected free speech. Congress has an urgent duty to reorder the priorities of the FEC in order to protect citizens and grassroots organizations from the heavy hand of the censors at the FEC. Until the FEC has demonstrated a proper sensitivity for First Amendment rights, it should not be entrusted with further authority to intrude into the vital workings of our representative democracy.

FOOTNOTES

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1. U.S. CONST. amend. 1.

2. *Id.*

3. Federal Election Campaign Act of 1971, 2 U.S.C. §431 *et seq.* (amended 1974).

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

5. Colorado Republican Federal Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996).

6. The authors are practicing attorneys who have been heavily engaged in litigation against misguided campaign reform efforts (on constitutional and Administrative Procedure Act grounds) since their seminal victory against the FEC in Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991), *cert. denied sub nom.* FEC v. Keefer, 112 S. Ct. 79 (1991). Throughout the article, note will be taken of cases in which the authors and other members of the law firm of Bopp, Coleson & Bostrom are or have been engaged.

7. Free speech is both an end and a means, as stated by the United States Supreme Court in FEC v. Massachusetts Citizens for Life (*MCFL*):

''[w]hile this market metaphor has guided congressional regulation in the area of campaign activity, First Amendment speech is not necessarily limited to such an instrumental role. As Justice Brandeis stated in his discussion of political speech in his concurrence in Whitney v. California, 274 U.S. 357, 375 . . . (1927):

''Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means.'' *MCFL*, 479 U.S. 238, 257 n. 10 (1986) (emphasis added) (internal citation omitted). ''It is the fact of participation in the political process that the First Amendment protects, not [merely] its qualities of sanity and objectivity.'' West Virginians for Life v. Smith, 919 F. Supp. 954, 958 (S.D.W. Va. 1996) (quoting Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 317 (1978)).

8. FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 389 n. 17 (D.C. Cir. 1981) (quoting *Buckley*, 424 U.S. at 14-15 and Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971)).

9. The Federalist No. 10 (James Madison) (setting forth the principle that in our federal system the ambition of one group was to be checked and balanced by other groups, as all argued for public support of their positions). The Supreme Court has always held that certain categories of speech did not have First Amendment protection, *e.g.*, slander, libel, fraud, fighting words, obscenity, criminal conspiracy or incitement, treason, and communicating national security secrets. *See e.g.*, John E. Nowak, Ronald D. Rotunda & J. Nelson Young, Constitutional Law 827 (3d ed. 1986) (Chapter 16, Freedom of Speech).

* * * * *

24. Most notable among these has been *Buckley* itself, which struck down several provisions of the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93–443, 88 Stat. 1263.

25. Bradley Smith makes a convincing case that campaign finance reform as it has been practiced has led to undemocratic consequences by entrenching the status quo, promoting influence peddling, reducing accountability, and empowering social elites (such as news reporters and wealthy candidates) at the expense of grass-roots, populist efforts. Bradley A. Smith, 105 YALE L.J. at 1071–84. In *Day v. Holahan*, the United States Court of Appeal for the Eighth Circuit noted one example of incumbent self-protection: ''It appears that the legislators who enacted the $100 limit on contributions to political committees and funds, and the governor who signed the limit into law, approved limits on election-year contributions to themselves that were many times higher than the $100 limit on contributions to committees and funds.'' Day v. Holahan, 34 F.3d 1356, 1365 N.8 (8th Cir. 1994).

26. Campaign Finance Reform: Hearings before the United States Senate Committee on Rules and Administration (Mar. 13, 1996). The proposals in Section V of this article are largely based on the recommendations made in this testimony.

27. Similarly, in the November 1996 election, national labor unions spent $35 million dollars (by their own account) in the weeks before the November 1996 election for advertisements attacking targeted U.S. congressional candidates on various issues. Apart from questions raised about the accuracy of some of the advertisements (some have been refused by broadcasters on accuracy grounds) and the voluntariness of the use of union member's dues for pro-Democrat attack ads, such issue advocacy is an appropriate part of the American political system. The present authors and the First Amendment strongly support the right of the labor unions to engage in robust issue advocacy, even at election time. The solution for those opposed to such issue advocacy is not to silence the labor unions but to mount an effective counter-attack. However, concomitant efforts by the FEC to intimidate the Christian Coalition (and thereby similar groups) from advocating essentially opposing issues through voter guides, is abhorrent to First Amendment principles.

28. ''Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.'' *MCFL*, 479 U.S. at 264 (quoting NAACP v. Alabama, 357 U.S. 449, 460 (1958)).

29. Express advocacy consists of explicit words of advocacy, such as ''vote for Candidate X'' or ''defeat Candidate Y.'' *Buckley*, 424 U.S. at 44.

30. Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480 (1985).

31. The public policy struggle over abortion rights is a good example of the checks and balances in the free marketplace of ideas. Abortion-rights advocates promote their favored candidates by making donations through PACs such as Emily's List, while pro-life advocates contribute to PACs such as the National Right to Life Political Action Committee.

32. The Court, for instance, has approved statutory requirements that PACs register and report their financial activities. *Buckley*, 424 U.S. at 60–68.

33. *See e.g.*, West Virginians for Life v. Smith, 919 F. Supp. 954 (S.D.W.V. 1996). Co-author James Bopp, Jr. was lead counsel representing the Plaintiffs in this case.

34. The heavy burden imposed on PACs was well-described with respect to federal PACs in FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 392 (D.D.C. 1981), *cert. denied*, 454 U.S. 897 (1981), which noted that, once an organization is labelled a ''political committee,'' it must ''then submit to an elaborate panoply of FEC regulations requiring the filing of dozens of forms, the disclosing of various activities, and the limiting of the group's freedom of political action to make expenditures or contributions.''

35. *Buckley*, 424 U.S. at 74–82.

36. *Id.*

37. Of course, if the pro-life newsletter were to combine in its election issue the words ''vote pro-life'' and the words ''Candidate D is pro-life,'' the communication contains express advocacy. *MCFL*, 479 U.S. at 249–50. This is based on the unremarkable algebraic formula that, if a=b and b=c, then a=c.

38. This is so because the Supreme Court has insisted that the bright-line express advocacy test must govern any effort to bar or restrict communications about candidates, parties, and ideas in the election context. The Court has done so because America believes in free expression on issues of the day, even at election time, or, more correctly, especially at election time. What good would a First Amendment be if it did not protect communicators at precisely the time when free speech would be most effective and is most important? The fact that issue advocacy might affect an election is constitutionally inconsequential because the First Amendment right of issue advocacy must be preserved. In fact, to the Framers of the Constitution and the First Amendment, the constitutional protection of free expression was precisely to protect the advocacy of issues and ideas in the political context. ''Freedom of speech plays a fundamental role in a democracy . . . [I]t 'is the matrix, the indispensable condition of nearly every other freedom.'' *MCFL*, 479 U.S. at 264 (quoting Palko v. Connecticut, 302 U.S. 319 (1937)). ''[T]he right of free public discussion

. . . [is] a fundamental principle of the American form of government.'' New York Times v. Sullivan, 376 U.S. 254, 274 (1964) (paraphrasing James Madison, 6 Writings of James Madison 341 (G. Hunt ed. 1908)).

39. *Faucher,* 928 F.2d 468.

40. A voter guide may be distributed by any individual or organization, including churches and nonprofit entities organized under 501(c)(3) and 501(c)(4) of the Internal Revenue Code.

41. *See infra* Section III.

42. *See e.g., West Virginians for Life,* 919 F. Supp. 954 (permanently enjoining a state statute which defined the distribution of a voter guide within 60 days of an election to constitute express advocacy of the election of a candidate).

43. Virginia Society for Human Life v. Caldwell, 906 F. Supp. 1421, 1073–74 (W.D. Va. 1995) (recounting cases brought by the Virginia Democrat Party to enjoin the distribution of voter guides by Concerned Women for America and The Family Foundation). Co-author James Bopp, Jr. is lead counsel representing Plaintiffs in this case.

44. ''Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.'' U.S. Const. amend. I.

45. *Buckley,* 424 U.S. at 39 (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)).

46. *Id.* at 48 (citations omitted) (ellipsis in original).

47. *Buckley,* 424 U.S. at 44, 79.

48. *Id.* At 45.

49. United States v. Congress of Industrial Organizations (C.I.O.). 335 U.S. 106 (1948).

50. *Id.* at 106–107 n.1.

51. *Id. at 108.*

52. *Id. at 121.*

53.* * *

54. 2 U.S.C. 431 *et seq.*

55. *Buckley,* 424 U.S. 1.

56. *Buckley,* 424 U.S. at 41 (quoting 12 U.S.C. §608(e)(1)).

57. *Id.* at 41.

58. *Id.* at 42.

59. *Id.* at 42.

60. *Buckley,* 424 U.S. at 43 (Quoting *Collins,* 323 U.S. at 535).

61. *Id.* The *Buckley* court also quoted approvingly the comments of the United States Court of Appeals for the District of Columbia, which it affirmed: ''Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.'' *Id.* at 42 n.50 (quoting, *Buckley,* 171 U.S. App. D.C. 172, 226, 519 F.2d 821, 875 (D.C. Cir. 1975)).

62. There are strong arguments that a person wishing to express an opinion on any candidate to print and distribute flyers opposing or supporting candidates, or to give a donation to a campaign, should not have to think at all about possible laws restricting his or her speech in America. That is the spirit of the First Amendment, which says that ''Congress shall make *no* law . . . abridging the freedom of speech . . . .'' U.S. Const. amend. I (emphasis added). That one could today suffer penalties for political speech which is not libelous or fraudulent would, no doubt, be astounding and disconcerting to the Framers of the First Amendment.

However, the Supreme Court has said that, at a minimum, one should not have to think twice about speaking out on issues of public concern for fear of violating some law. The result of laws which limit speech in the campaign arena is to chill speech by individuals and grassroots citizen groups and to enhance the speech of organized advocacy interests who can afford to hire lawyers to watch over all their publications and expenditures. Bradley A. Smith, 105 Yale L.J. at 1077. This reality runs exactly counter to the populist rhetoric of most campaign finance reformers.

63. *Buckley,* 424 U.S. at 44.

64. *Id.* at 44 n.52.

65. *Id.* at 44.

66. *Id.* at 44–45.

67. *Buckley,* 424 U.S. at 79. The U.S. Court of Appeals for the District of Columbia has recently decided that the major purpose test does not apply to contributions, but only to independent expenditures. Akins v. FEC, 101 F.3d 731 (D.C. Cir. 1996). This case will be analyzed infra.

68. These burdens include not only detailed recordkeeping and reporting requirements for all of the organizations financial activities but also disclaimer requirements on their publications and limits on the contributions that may be received by the organization. *See* FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 392 (D.C. Cir. 1981).

69. *Buckley,* 424 U.S. at 74–75 (footnotes omitted). The threshold amount for reporting independent expenditures has been increased to $250. 2 U.S.C. §434(c)(1).

70. *Id.* at 75.

71. *Id.* at 79–80 (emphasis added).

72. *Id.* at 81.

73. *Akins,* 101 F.3d 731.

74. *Id.* at 734.

75. *Id.* at 735.

76. *Id.* at 742.

77. *MCFL,* 479 U.S. 238.

78. *Akins,* 101 F.3d at 742.

79. *Id.* at 743.

80. From the opinion, it would appear that the FEC did not make a vigorous First Amendment defense. Rather, it appears to have relied on interpretation of precedent, statutory interpretation, and a plea for deference to its interpretation of the statute in its regulations. *Id.* at 740–44.

81. Akins v. FEC, 101 F.3d 731, *petition for cert. filed,* 65 U.S.L.W. 3694 (U.S. Apr. 7, 1997) (No. 96–1590).

82. The Fair Government Foundation's special report, The FEC's Express War on Free Speech 18 (1996), sums up some of the evidence of the FEC's hostility to the Supreme Court's bright-line protection of issue advocacy in *Buckley and MCFL*:

''That the Commission dragged its feet in revising its rules to conform them with the Supreme Court rulings suggests that the FEC sought to prolong its concession to the Supreme Court in the hope of changing the high court's mind. . . . During an open meeting of the FEC, Commission chairman Trevor Potter . . . expressed concern whether the Commission was remaining faithful to Supreme Court precedent. Potter questioned whether 'enforcing the law in specific matters and then in drafting a definition in general, is consistent with the very narrow language' of *Buckley*. [End note: 'Federal Election Commission Open Meeting (Aug. 11, 1994) (taped transcript available at Commission).']

''In the end, the Commission simply would not accept the plain meaning of the *Buckley* decision because it so conflicted with a majority of commissioners' fervently held regulatory beliefs. Beliefs that were less a product of the FECA or court cases than a personal philosophical disposition.

''Comments of the FEC's chairman during consideration of the proposed rules reveal what in retrospect must seem like inadvertent candor, as they demonstrate a willful disregard of the Supreme Court's commands. Chairman Trevor Potter, who cast the decisive fourth vote to approve the revised rules, unabashedly revealed that the Commission is 'close to being on a different planet from the Supreme Court in terms of what we are looking at.' In Chairman Potter's mind, 'the [Supreme] Court doesn't understand[.]' as its rulings are 'directly contrary to what the Commission understands the purpose of the Act [FECA] to be . . . . ' *Id.*

''Commissioner Danny Lee McDonald, who also voted for the revised rules, was similarly dismissive of the Supreme Court's edicts. He concluded that 'the Court just didn't get it.' ''*Id.*

83. *See e.g.,* 11 C.F.R. §114.4(b)(5) (invalidated in Faucher v. FEC, 928 F.2d 468); 11 C.F.R. §114.1(e)(2) (invalidated in Chamber of Commerce v. FEC, 69 F.3d 600 (D.C. Cir. 1995)); 11 C.F.R. §100.22 (invalidated in Maine Right to Life Committee v. FEC, 914 F. Supp. 8 (D. Me. 1996), *aff'd,* 98 F.3d 1 (1st Cir. 1996)); 11 C.F.R. §114.10 (invalidated in Minnesota Citizens Concerned for Life v. FEC, 936 F. Supp. 633 (D. Minn. 1995)); and 11 C.F.R. §114.4(c)(4) & (5) (invalidated in Clifton v. Federal Election Commission, 927 F. Supp. 493 (D. Me. 1996)). Co-author James Bopp, Jr. was lead counsel for Plaintiffs in all of these cases except for *Chamber of Commerce.*

84. *See e.g.,* FEC v. AFSCME, 471 F. Supp. 315 (D.D.C. 1979); FEC v. CLITRIM, 616 F.2d 45 (2d Cir. 1980); Machinists Non-Partisan Political League, 655 F.2d 380; FEC v. Phillips Publishing, 517 F. Supp. 1308 (D.D.C. 1981); *MCFL,* 479 U.S. 238; FEC v. NOW, 713 F. Supp. 428 (D.D.C. 1989); FEC v. GOPAC, 871 F. Supp. 851 1466, 917 F. Supp. (D.D.C. 1994); FEC v. Survival Education Fund, 65 F.3d 285 (2nd Cir. 1995); FEC v. Christian Action Network, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd,* 92 F.3d 1178 (4th Cir. 1996); and *Colorado Republican,* 116 S. Ct. 2309. These enforcement actions, however, are only the tip of the iceberg since many enforcement actions never progress beyond the administrative level. Such administrative investigations, however, can be equally chilling on free speech. *See e.g.,* MUR 4203 regarding U.S. Term Limits; MUR 4204 regarding Americans for Tax Reform; Colorado Republican Federal Campaign Committee v. FEC, 116 S. Ct. 2309 (1996); and FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997) (awarding attorneys' fees against FEC for bad faith prosecution).

85. Susan Hayward & Allison R. Hayward, *Gagging on Political Reform,* REASON 20 (Oct. 1996).

86. FEC v. American Federation of State, County and Mun. Employees, 471 F. Supp. 315 (D.D.C. 1979) (*AFSCME*).

87. *Id.* at 317.

88. *Id.*

89. *Id.*

90. FEC v. Central Long Island Tax Reform Immediately Committee, (*CLITRIM*) 616 F.2d 45 (2d Cir. 1980) (en banc) (*per curiam*).

91. *Id.* at 52 (quoting 2 U.S.C. §434(e)) (emphasis supplied by court.

92. *Id.* (quoting 2 U.S.C. §441d) (emphasis supplied by court).

93. *Id.* at 53.

94. *Id.* (citations omitted).

95. *Id.* (citations omitted).

96. *Id.* (citations omitted) (emphasis in original).

97. FEC v. Nat'l Conservative Political Action Comm. (*NCPAC*) 470 U.S. 480 (1985).

98. 26 U.S.C. §9001 *et seq.*

99. *NCPAC,* 470 U.S. at 483.

100. *Id.* at 482 (citing 26 U.S.C. §9012(f)).

101. *Id.* at 493–501.

102. *Id.* at 496.

103. *NCPAC* 470 U.S. at 497.

104. *See e.g., Faucher,* 928 F.2d 468; Clifton v. FEC, 927 F. Supp. 493 (D.Me. 1996).

105. *MCFL,* 479 U.S. 238.

106. *Id.* at 243.

107. *Id.* at 244.

108. 2 U.S.C. §431(9)(B)(i).

109. *MCFL,* 479 U.S. at 249, 251, 263.

110. 2 U.S.C. §431(9)(A)(i).

111. *MCFL,* 479 U.S. at 248.

112. *Id.* at 249.

113. *Id.*

114. *Id.* at 262.

115. As discussed infra in the treatment of *Faucher,* the FEC sought to dismiss the Supreme Court's application of the express advocacy test in MCFL to corporate expenditures as nonbinding obiter dictum.

116. FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987), *cert. denied* 484 U.S. 850 (1987).

117. 2 U.S.C. §434(c)(1).

118. 2 U.S.C. §441d.

119. *Buckley,* 424 U.S. at 42.

120. *Furgatch,* 807 F.2d at 864.

121. *Id.* at 858.

122. *Id.* at 864.

123. *See, e.g.,* Maine Right to Life Committee v. FEC, 914 F. Supp. 8, 13 (D. Me. 1996), *aff'd* 98 F.3d 1 (1st Cir. 1996) (*per curiam*).

124. *Furgatch,* 807 F.2d at 858.

125. FEC v. Christian Action Network, WL 157269 (4th Cir. 1997).

126. *Id.* at 861.

127. *Id.* at 862.

128. *Id.*

129. FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997).

130. *Id.* (citing the FEC's brief opposing U.S. Supreme Court review).

131. *Id.*

132. FEC v. National Organization for Women, 713 F. Supp. 428 (D.D.C. 1989), *appeal dismissed* (D.C. Cir.: Oct. 11, 1991).

133. *Id.* at 431–32.

134. *Id.* at 433–34.

135. *Id.* at 434.

136. *Id.* at 435.

137. *Id.* at 429.

138. Faucher v. FEC, 928 F.2d 468. The present authors were counsel for plaintiffs in this case.

139. 11 C.F.R. §114.4(b)(5)(i) (C) and (D).

140. *Faucher,* 743 F. Supp. 64.

141. *Id.* 928 F.2d 468.

142. *Id.* at 472.

143. *Id.*

144. FEC v. Survival Education Fund, 1994 WL 96 (S.D.N.Y. 1994), *aff'd in part and rev'd in part,* 65 F.3d 285 (2d Cir. 1995).

145. *Id.* at 3. The Second Circuit avoided the express advocacy issue by holding that Survival Education Fund was an MCFL-type organization so that it could do express advocacy, but that it was required to include disclaimers on its communications that solicit contributions that were to be used for its express advocacy. *Survival Education Fund,* 65 F.3d at 285.

146. FEC v. Christian Action Network, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd,* 92 F.3d 1178 (4th Cir. 1996) (*per curiam*).

147. *Id.* at 948.

148. *Id.* at 951.

149. *FEC v. Christian Action Network,* 92 F.3d 1178.

150. *FEC v. GOPAC,* 917 F. Supp. 851 (D.D.C. 1996).

151. *Id.* at 859.

152. *Id.* at 867.

153. *Faucher,* 928 F.2d 468.
154. 11 C.F.R. §114.4(b)(5)(i)(A)–(F).
155. The Fair Government Foundation's special report on The FEC's Express War on Free Speech includes the following succinct chronology of the FEC's rulemaking efforts to regulate express advocacy: Anatomy of a Rulemaking—The FEC's Twenty Year Struggle Over Express Advocacy:
1976—*Buckley v. Valeo* decided.
1976—FEC rule defining ''express advocacy'' adopted.
1986—*Massachusetts Citizens for Life* decided.
1987—Petition for Rulemaking filed.
1988—Advanced Notice of Proposed Rulemaking.
1988—FEC holds public hearing.
1990—Request for Further Comment.
1992—Notice of Proposed Rulemaking.
1992—FEC holds public hearing.
1994—FEC open meeting to consider proposed rule.
1995—FEC open meeting to consider Final Rule.
1995—Final Rule transmitted to Congress.
1995—Revised Express Advocacy rules take effect.
1996—Revised rules struck down; *Id.* at 16.
156. *See, e.g., Main Right to Life Committee* 914 F. Supp. at 12 (considering and * * * deference to the FEC's interpretation on which these new regulations were based).
157. 11 C.F.R. §100.22.
158. In this first set of 1995 regulation (released October 5), the FEC also tacked on a set of rules dealing with MCFL-type organizations as established by the United States Supreme Court in *MCFL,* 479 U.S. 238. This part of the regulations will be discussed, infra, under a separate heading.
159. James Bopp, Jr., co-author of this article, was lead counsel in the case.
160. 11 C.F.R. §100.22.
161. *Maine Right to Life Committee,* 914 F. Supp. at 13.
162. *Id.* at 10.
163. *Id.* at 11–12; *Furgatch,* 807 F.2d at 857 (citations omitted).
164. *Id.* at 13.
165. *Maine Right to Life Committee,* 98 F.3d at 1.
166. Petition for Rehearing and Suggestion for Rehearing in Banc at 8, Maine Right to Life Committee, No. 96–1532 (1st Cir. 1996).
167. 11 C.F.R. §114.4(c)(4) & (5). The new regulations also governed several other things, including candidates appearances at corporate meetings and use of corporate letter-head in relation to campaigns.
168. 61 Fed. Reg. at 10269.
169. The regulation, 11 C.F.R. §114.4(c)(5), was promulgated under the ostensible statutory authority of 2 U.S.C. §441b (the broad statutory prohibition on corporate ''expenditures'' and ''contributions'').
170. *Clifton,* 927 F. Supp. at 497.
171. 11 C.F.R. §114.4(c)(5)(i). Paragraph (c)(5)(i) provides that corporations ''shall not contact . . . the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide. . . .''
172. It is difficult to imagine how an organization could prepare a voter guide which would be helpful to the voters without contacting the candidates and asking for responses to a survey form. The organization would be left to glean candidate views from campaign literature, news accounts, and the like. Information from such sources would often be inaccurate, incomplete, or subject to the ''spin'' supplied by a campaign strategist or reporter. Questions framed by advocacy organizations elicit much truer pictures of candidates' positions than candidates often are willing to admit without such careful framing.
173. 11 C.F.R. §114.4(c)(5)(ii)
174. 11 C.F.R. §114.4(c)(5)(ii) (A) through (E). Paragraph (c)(5)(ii) provides that a ''corporation . . . shall not contact . . . the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide, except that questions may be directed in writing to the candidates included in the voter guide and the candidates may respond in writing. . . .''
175. 11 C.F.R. §114.4(c)(5)(ii)(B).
176. *Id.*
177. *Id.*
178. 11 C.F.R. §114.4(c)(5)(ii).
179. The Supreme Court, however, has repeatedly rejected the effort of government to ''foreclose the exercise of constitutional rights by mere labels.'' NAACP v. Button, 371 U.S. 415, 429 (1963).
180. 2 U.S.C. §441b(a).
181. 2 U.S.C. §441b(b)(2).
182. S. Rep. No. 94–677, 94th Cong., 2d Sess., 59 (1976), 1976 U.S.C.C.A.N. (90 Stat.) 974.
183. Orloski v. Federal Elections Commission, 795 F.2d. 156 (D.C. Cir. 1986).
184. *Id.* at 160.
185. *Id.* (emphasis added).
186. * * *
187. The presumed coordination theory will be discussed in context of the *Colorado Republican* case below.
188. Maine Right to Life Committee was also a plaintill in *Faucher,* 928 F.2d at 468, and in *Maine Rights to Life Committee,* 914 F. Supp. at 8. James Bopp, Jr., one of the present authors, was lead counsel in all three of these cases brought by Maine Right to Life against the FEC.
189. *MCFL,* 479 U.S. at 238.
190. *Clifton,* 927 F. Supp. at 493.
191. 11 C.F.R. §114.4(c)(4) & (5).
192. *Clifton,* 927 F. Supp. at 494.
193. *Id.* at 497.
194. *Id.* at 497–98.
195. *Id.* (citing Faucher) (emphasis in the original).
196. *Clifton,* 927 F. Supp. at 494, appeal docketed, No. 96–1812 (1st Cir. July 18, 1996) (oral argument conducted December 4, 1996).
197. Colo. Republican Federal Campaign Comm. V. FEC, 116 S. Ct. 2309 (1996).
198. For instance, the FEC has also adopted a regulation at 11 C.F.R. §109.1(b)(4)(i)(B) which states that the Commission will presume expenditures ''made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent'' to be coordinated. This regulation is also of doubtful validity as a result of the *Colorado Republican* decision.
199. Section 441a(d) of the FECA permits political parties to spend $20,000 or $.02 per person of voting age in the state, whichever is greater, adjusted for inflation since 1974. *Colorado Republican,* 116 S. Ct. at 2313–44 (lead opinion of Breyer, J., joined by O'Connor and Souter, JJ.). Thus, the Colorado Republican Party was permitted to spend in 1986 about $103,000 ''in connection with the general election campaign of a candidate for the United States Senate.'' *Id.* at 2314.
200. *Id.*
201. *Id.*
202. *Id.* at 2315.
203. *Id.* at 2315.
204. *Id.*
205. *Id.* at 2318 (citing FEC advisory opinion AO 1988–22).
206. *Id.* at 2315.
207. *Id.* at 2317.
208. *Id.* at 2315.
209. *Id.* at 2321.
210. *Id.* at 2323.
211. *Id.* at 2331.
212. *FEC v. Christian Action Network,* 894 F. Supp. 946 (W.D. Va. 1995), *aff'd,* 92 F.3d 1178 (4th Cir. 1996) (per curian). *See supra* Section III.I.
213. 28 U.S.C. §2412.
214. FEC v. Christian Action Network, 110 F.3d 1049, 1064 (4th Cir. 1997).
215. *Id.* at 1051–56, 1061–64.
216. *Id.* at 1052–55, 1069–61.
217. *Id.* at 1054.
218. *Id.* at 1063 (citations omitted) (footnotes omitted) (emphasis added).
219. *Id.* The FEC also failed to quote even once key footnote 52 of *Buckley,* although it quoted the sentence to which the footnote was attached. *Id.* at 1063.
220. *Id.* at 1064.
221. *Id.* at 1061.
222. *Id.* at 1057.
223. *Id.* at 1064.
224. *MCFL* 479 U.S. 238.
225. 2 U.S.C. §441b.
226. *MCFL,* 479 U.S. at 263.
227. *Id.* at 264.
228. Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994). Co-author James Bopp, Jr. was counsel for Plaintiff Minnesota Citizens Concerned for Life, Inc. in this case.
229. 60 Fed. Reg. 35292, 35297 (1995) (emphasis added).
230. 11 C.F.R. §114.10(c) (1).
231. 11 C.F.R. §114.10(c) (2).
232. 11 C.F.R. §114.10(c) (3) (ii).
233. 11 C.F.R. §114.10(c) (4) (ii) and (iii).
234. 11 C.F.R. §114.10(e)(1).
235. At 11 C.F.R. §114.10(c)(1)–(5).
236. 11 C.F.R. §114.10(f).
237. *MCFL,* 479 U.S. at 264.
238. *Buckley,* 424 U.S. at 14 (citations omitted).
239. *MCFL,* 479 U.S. at 264 (emphasis added).
240. *Id.* at 258.
241. *Id.* at 258 n.10 (quoting Whitney v. California, 274 U.S. 357, 375 (1927)) (emphasis added).
242. *Id.* at 265.
243. *MCFL,* 479 U.S. at 265 (emphasis added).
244. *Id.* at 251–52.
245. First National Bank v. Belloti, 435 U.S. 765, 786 (1978).
246. *MCFL,* 479 U.S. at 264–65.
247. *See id.* at 264.
248. *Id.* at 264.
249. *Id.* at 264.
250. *Id.* at 264.
251. *Id.* at 257.
252. *Id.* (emphasis added).
253. Austin v. Michigan Chamber of Commerce, 494 U.S. 657, 659 (1990).
254. The regulations defined the term ''business activities'' to include: (A) Any provision of goods or services that results in income to the corporation; and (B) Advertising or promotional activity which results in income to the corporation, other than in the form of membership dues or donations. 11 C.F.R. §114.10(b)(3)(i). Thus, business activities would encompass income directly related to the promotion of the corporations political ideas, such as advertising in its newsletter and sale of educational material, as well as unrelated business income.
255. 11 C.F.R. §114.10(b).
256. *MCFL,* 479 U.S. at 259.
257. *Id.* at 258.
258. *Id.*
259. *Id.*
260. *Id.* (emphasis added).
261. 60 Fed. Reg. 35292, 35299 (1995).
262. *MCFL,* 479 U.S. at 259.
263. *Id.* at 261.
264. *Id.* at 265.
265. *Id.* at 264.
266. *Id.* at 264.
267. *Id.* at 260.
268. *Id.*
269. The FEC regulations specifically included ''credit cards, insurance policies or savings plans,'' as well as ''training, education, or business information,'' in its list of disincentives to disassociate. 11 C.F.R. §114.10(c)(3)(ii)(A) and (B).
270. *MCFL,* 479 U.S. at 260, 264.
271. *Id.* at 264.
272. *Austin,* 495 U.S. at 664 (emphasis added).
273. *Id.*
274. FEC v. Survival Education Fund, 65 F.3d 285 (2d Cir. 1995).
275. *Id.* at 293.
276. *Day,* 34 F.3d 1356, 1364 (8th Cir. 1994) (emphasis in original).
277. *Id.* at 1363. *See also SEF,* 65 F.3d at 292 (''The Court's listing of the factors essential to its holding on the facts of a particular case does not impose a code of compliance that other nonprofit corporations must follow to the letter.'').
278. *MCFL,* 479 U.S. at 265.
279. Minnesota 936 F. Supp. 633 (D. Minn. 1995). James Bopp, Jr. was lead counsel in the case.
280. *Id.* at 638.
281. *Id.* at 642.
282. *Id.* at 643.
283. *MCFL,* 479 U.S. at 643, appeal docketed, No. 96–2612 MNST (8th Cir. 1996) (oral arguments held February 10, 1997).
284. 1997 WL 225120 (8th Cir. 1997).
285. United States v. Congress of Industrial Organizations (*CIO*), 335 U.S. 106 (1948).
286. *Id.* at 106–107 n.l.
287. *Id.* at 108.
288. *Id.* at 121.
289. FEC v. National Right to Work Committee, (*NRWC*) 459 U.S. 197 (1982).
290. *Id.* at 197.
291. *Id.*
292. *Id.* at 198.
293. *Id.* at 199.
294. *Id.* at 200.
295. *Id.* at 204.
296. *Id.* at 211.
297. *Id.* at 206–07.
298. *Id.* at 207.
299. 11 C.F.R. §114.1(e) (1977–1993).
300. 11 C.F.R. §114.1(e)(2) (emphasis in original).
301. Chamber of Commerce v. FEC, 69 F.3d 600, 602 (D.C. Cir. 1995).
302. ''[S]ome relatively enduring and independently significant financial or organizational attachment is required to be a 'member' under §441b(b)(4)(C).'' *NRWC,* 459 U.S. at 204 (emphasis added).
303. *Chamber of Commerce,* 69 F.3d at 604.
304. *Id.* at 605.
305. *Id.* at 606. Some hierarchical organizations had been given specific exemptions from this requirement in the regulations, but others had not received such treatment, leading the court to brand the regulations ''arbitrary and capricious.'' *Id.*
306. *See NRWC,* 69 F.3d 600.
307. McIntyre v. Ohio Election Commission, 115 S. Ct. 1511 (1995).
308. *Id.* at 1514.
309. *Id.*

310. *Id.*
311 Ohio Rev. Code Ann. §3599.09(A).
312. *McIntyre,* 115 S. Ct. at 1518–19 (citing *Buckley,* 424 U.S. at 14–15).
313. *Id.* at 1519.
314. *Id.*
315. *Id.* at 1520.
316. *Id.* at 1520 (citing *Buckley,* 424 U.S. at 14–15).
317. *Id.*
318. *Id.* at 1521.
319. *Id.*
320. *Id.* at 1521 (footnote omitted).
321. *Id.* at 1523. *See* Shrink Missouri Government PAC v. Maupin, 892 F. Supp. 1246 (E.D. Mo. 1995) (applying *McIntyre* analysis in materials relating to candidate elections), *holding not appealed in* 71 F.3d 1422 (8th Cir. 1995); State v. Moses, 655 So. 2d 779 (La Ct. App. 1995) (holding unconstitutional a ban on anonymous campaign literature).
322. *Buckley,* 424 U.S. at 75 (''disclosure provisions''); *McIntyre,* 115 S. Ct. at 1522 (rejecting contention that *Buckley* ''supports the constitutionality of its disclosure requirement,'' to wit, a disclaimer).
323. *McIntyre,* 115 S. Ct. at 1522 (emphasis added) (internal citation omitted).
324. *Id.* at 1523.
325. *Id.*
326. *Cf. Virginia Society for Human Life,* 906 F. Supp. 1071 (issuing a preliminary injunction against Virginia's disclaimer requirement on literature concerning state candidates or referenda).
327. *Buckley,* 424 U.S. at 19.
328. *Id.* at 23.
329. Nevertheless, states have made unsuccessful efforts to place a cap on independent expenditures. For example, a $1,500 cap on independent expenditures has been struck down by a federal district court in Georgia, Georgia Right to Life v. Reid, No. 1:94–CV–2744–RLV, slip. op. (N.D. Ga. Jan. 22, 1996) (unpublished decision), and a $1,000 per state election cap on independent expenditures by PACs in New Hampshire has been struck down by the First Circuit. New Hampshire Right to Life Political Action Committee v. Gardner, 99 F.3d 8 (1st Cir. 1996). James Bopp, Jr. was lead counsel in both of these cases.
330. *Buckley,* 424 U.S. at 26–27.
331. *Id.* at 27.
332. As noted above, however, this holding of *Buckley* is in jeopardy due to the recently expressed views of four members of the Supreme Court that contribution limits are also unconstitutional. *See Colorado Republican,* 116 S. Ct. 2323 (Rehnquist, C.J., and Kennedy and Scalia, JJ., concurring); *Colorado Republican,* 116 S. Ct. 2331 (Thomas, J., concurring.)
333. *Buckley,* 424 U.S. at 25.
334. *Id.* at 24–25.
335. *Id.* at 26–30 (emphasis added).
336. *Id.* at 29.
337. *See* California Med. Ass'n v. FEC, 453 U.S. 182 (1981) (upholding $5,000 annual limitation on contributions to political committees); Mintz v. Barthelemy, 722 F. Supp. 273, 281–282 (E.D. La. 1989, aff'd, 891 F.2d 520 (5th Cir. 1989) (upholding $5,000 contribution limitation for local mayoral election); Mott v. FEC, 494 F. Supp. 131 (D.D.C. 1980) ($5,000 contribution limitation upheld); Matter of Vandelinde, 366 S.E.2d 631, 636 (W. Va. 1988) (upholding $1,000 contribution limit); Florida v. Police Benevolent Ass'n v. Florida Election Comm'n, 430 So.2d 483 (Fla. Dist. Ct. App. 1983) ($1,000 contribution limitation upheld).
338. *Carver v. Nixon,* 72 F.3d 633 (8th Cir. 1995).
339. *Id.* at 633.
340. *Id.* at 638–43.
341. *Day v. Holahan,* 34 F.3d 1356 (8th Cir. 1994).
342. *See also* National Black Police v. Dist. of Col Bd. of Education, 924 F. Supp. 270, 282 (D.D.C. 1996) (striking down a contribution limit of $100).
343. *Buckley,* 424 U.S. at 48.
344. *Id.* at 47.
345. *Id.* at 21–22.
346. *Id.* at 19.
347. *Id.* at 21.
348. *Id.* at 19.
349. *Id.* at 23.
350. *National Conservative Political Action Committee,* 470 U.S. at 480. *See also* New Hampshire Right to Life Political Action Committee v. Gardner, 99 F.3d 8 (1st Cir. 1996).
351. *Buckley,* 424 U.S. at 15.
352. *Id.*
353. *Id.* at 25.
354. *Id.* at 22.
355. *Nat'l Conservative Political Action Comm.,* 470 U.S. at 494.
356. *Id.*
357. *See* Vote Choice v. DiStefano, 4 F.3d 26 (1st Cir. 1993).
358. U.S. Const. amend. 1.
359. *See e.g., Buckley,* 424 U.S. at 25–28; *MCFL,* 479 U.S. at 256.
360. First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978) (emphasis added) (footnote omitted) (citations omitted).
361. *Buckley,* 424 U.S. at 25.
362. United States v. Nat'l Treasury Employees Union, 115 S. Ct. 1003, 1017 (1995), quoting Turner Broadcasting System v. FCC. 114 S. Ct. 2445, 2470 (1994) (Kennedy. J., plurality). In *Colorado Republican,* the Court cited this passage in *Turner* after noting that the FEC did not ''point to record evidence or legislative findings suggesting any special corruption problems'' that would support its position. *Id.* 116 S. Ct. at 2317.
363. *Carver,* 72 F.3d 633.
364. *Id.* at 643.
365. *Id.*
366. Shrink Missouri Government PAC v. Maupin, 923 F. Supp. 1413 (E.D. Mo. 1996).
367. *Id.* at 1420–21.
368. *Colorado Republican,* 116 S. Ct. at 2330 n.9.
369. *Id.*
370. Lillian R. BeVier, 94 Col. L. Rev. at 1278.
371. *Id.* This is so because ''[s]uch legislation carries significant potential to achieve incumbent protection instead of enhancing political competition. It arouses the uncomfortable suspicion that the corruption-prevention banner is an all-too-convenient subterfuge for the deliberate pursuit of less savory or less legitimate goals.'' *Id.* at 1279.
372. *Id.*
373. John H. Ely, Democracy and Distrust 106 (1980).
374. Ralph Winter, *Political Financing and the Constitution,* 486 Annals Am. Acad. Pol. & Soc. Sci. 34, 40, 48 (1986).
375. Elrod v. Burns, 427 U.S. 347, 373 (1979).
376. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 163 (1969).
377. Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 182 (1968).
378. *See* Family Foundation v. Brown, 9 F.3d 1075 (1993); Virginia Society for Human Life v. Caldwell, 906 F. Supp. 1071 (W.D. Va. 1995) (reciting history of prior restraints in Virginia). Co-authors James Bopp, Jr. and Richard E. Coleson were both counsel for Plaintiffs in these two cases.
379. *Id.*
380. *See e.g.,* S. 25, 105th Cong., 1st Sess. (1997) (sponsored by Senators McCain and Feingold); H.R. 493, 105th Cong., 1st Sess. (1997) (sponsored by Representative Shays); H.R. 600, 105th Cong., 1st Sess. (1997) (sponsored by Representative Farr).
381. *Buckley,* 424 U.S. at 1.
382. In obvious recognition of this fact, various proposed constitutional amendments have been introduced in Congress that would overrule many of the speech-protecting rulings of the courts. *See e.g.,* S.J. Res. 2, 105th Cong., 1st Sess. (1997), reprinted in Cong. Rec. S.557 (daily ed. Jan. 21, 1997).
383. Mills v. Alabama, 384 U.S. 214, 218 (1966).
384. *Buckley,* 424 U.S. at 57.
385. *Id.* at 48–49.
386. *Id.* at 92–93.
387. It can be hoped that the FEC will be more willing to follow the enactments of Congress than they have been willing to respect the pronouncements of the United States Supreme Court.
388. *MCFL.,* 479 U.S. 238.
389. *Buckley,* 424 U.S. at 79.
390. 2 U.S.C. §431(4)(a).
391. *See e.g., GOPAC,* 917 F. Supp. 851.
392. In fact, a prohibition of contributions by certain not-for-profit corporations is currently being tested before the 6th Circuit Court of Appeals in Kentucky Right to Life v. King, No 95–6581 (6th Cir. 1996) (oral arguments conducted November 13, 1996). Co-author James Bopp, Jr. is lead counsel representing Plaintiffs in this case.
393. In fact, based on figures from the Consumer Price Index, $1,000 in 1974 was worth $2,604.57 in 1994.
394. *See e.g., Colorado Republican,* 116 S.Ct. at 2317 (''If anything, an independent expenditure made possible by a $20,000 donation (by an individual), but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor.'').
395. Efforts to limit soft money contributions to political parties have the opposite effect. If political parties must use hard money for administration, legal and accounting services, and generic, rather than candidate specific, voter registration and get-out-the-vote activities, then their relative influence with candidates is diminished and the influence of ''special interests,'' is increased.
396. *See* 2 U.S.C. §441a(c).
397. Indeed, Congress should index all expenditures and contributions limits to inflation in order to maintain the balance between them struck by Congress in any new law.
398. 28 U.S.C. §2411(d)(1)(A) allows for an award of attorneys fees against a federal agencies for its actions, ''unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.'' However, the amount of the attorneys fees is limited to $75 an hour and only private parties with modest assets are eligible for the award. *Id.* at §2411(d)(2)(A) and (B). There are no similar limitations on award of attorneys fees for prevailing private parties under §1988.
399. Current federal law does not allow an award of attorney fees against the United States for the striking down of a federal statute for violation of constitutional protections.
400. 2 U.S.C. §437c(a)(2).
401. 2 U.S.C. §437c(f).

Mr. MCCONNELL. I yield the floor.

Mr. MCCAIN addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Mr. President, I ask unanimous consent that Brad Vynalek, who is a legal intern on my staff, be granted full privilege of the floor during consideration of S. 25.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MCCAIN. Before Senator MCCONNELL leaves the floor, I want to thank him for again the dialog that has taken place during this debate, and I look forward to its finality.

I also urge his consideration, since he has included in the RECORD so many articles, the piece that was in the Washington Post yesterday by two fairly well known Americans, former Presidents Jimmy Carter and Gerald Ford, who have said:

In order to accomplish this goal—

Talking about it is particularly important now to seize this opportunity of reform now so that it can improve the next Presidential election.

In order to accomplish this goal, both parties must lay down their partisanship and rise to meet this challenge together. Leaders of both parties have demonstrated their ability to work together on crucial and contentious issues to do what is right for the country. There is another such issue where cooperation is the only road to results. It is impossible to expect one side to disarm unilaterally in this massive arms race for funds. Rather, both sides must agree that bilateral limits are the only rational course of action to preserve the moral integrity of our electoral system. One item that we should all agree on is a banning of so-called soft money for national parties and their campaign committees. Soft money was initially intended exclusively for party building activities but has metamorphosed into a supplemental source of cash for campaigns and candidates. It is one of the most corrupting influences in modern elections because there is no limit on the size of donations, thus giving disproportionate influence to those with the deepest pockets.

And they conclude, Mr. President, by saying:

We must demonstrate that a government of the people, by the people and for the people is not a thing of the past. We must redouble our efforts to assure voters that public policy is determined by the checks on their ballots rather than the checks from special interests.

Mr. President, I would note that although former President Bush's name is not on that op-ed piece, former

President Bush joined former President Carter and former President Ford in a letter asking for the outlawing of soft money.

Why should three former Presidents join in such an almost unprecedented statement?

Let me start from the beginning, in the 1991–92 election cycle. There was $85 million in the 1991–92 cycle—$85 million. In the 1995–96 election it is now up to $250 million. And the information that we have, disturbingly, is that it is growing exponentially, again, in the year 1997.

So here is the point. It is out of control, as I have said. And the second point is that it was not always like this. Campaigns were not always financed by these massive amounts of soft money. They were not. In fact, after we reformed the campaign system in 1974, there was a dramatic improvement.

Campaign spending by Presidential candidates, 1976–96, over the last 20 years. If you look down here, these total figures were a little over $100 million in 1976 and now are approaching $400 million in 1996. Remember that this was after we passed laws that were supposed to restrain the expenditures in a Presidential campaign. Let me just point out again, this far exceeds inflation—far, far exceeds inflation.

House and Senate campaign expenditures have followed roughly the same track, only more dramatically. From roughly $300 million in the total spent on House and Senate campaigns in 1976, there was a drop in the 1986 election but, aside from that, it has been an inexorable rise to well in excess of $700 million, nearly $800 million.

The soft money has grown and grown and grown and grown. In 1992, the Republican Party raised nearly $50 million in soft money; the Democrat Party, around $36 million. In 1994 it went up to the point where, in 1996, the Republican Party raised $138 million in soft money and the Democrat Party, $123 million in soft money—all of them exponential increases, only over a 4-year period.

Again, I want to emphasize for those who say the system has always been the same and we have always had to contend with these massive amounts of money, the figures do not indicate that. I might add, this does not indicate what, of course, labor did, which was very, very significant in the campaign of 1996.

Senate candidates, dollars raised, and here is the problem. Here is a significant problem because it shows, also, why it is going to be so difficult for Members of this body to vote to change this system. I want to emphasize, these numbers show why it is so difficult in the face of overwhelming numbers of Americans who want us to fix this system. In 1996, the incumbents in the Senate races raised $96 million in PAC funds. The challengers raised $43 million. In the House the numbers are dramatically more different, in fact dramatically, significantly more in favor of the incumbents, $282 million, with $97 million in PAC funds; in the case of challengers, $75 million they raised, and $14 million in PAC funds. So you had, in this present scheme, the present way that campaigns work—you had $282 million raised by incumbents, $75 million raised by challengers, and of course about a 5- or 6-to-1 advantage in PAC money as well.

Which of these statements comes closer to your point of view? Some campaign finance reform is needed? Mr. President, 77 percent of the American people; some campaign finance reform is not needed, 18 percent; and don't know, 5 percent. I have a more and more difficult time finding people who are in that 18 percent bracket. Because, as every scandal unfolds, as every new revelation is exposed to us in the morning paper and over radio and over television, there are more and more Americans who are joining that already huge 77 percent, who are saying we need to change the system.

I don't expect the American people to know the difference between hard money and soft money. I don't expect them to know how much money a PAC has raised versus that number, and I don't expect them to have read every fundraising letter that has gone out. I wish they had. I wish they had because then that 18 percent would literally disappear. But what they do know is that something is wrong. There is really something seriously wrong here and they believe, as I do, that it needs to be repaired and it needs to be repaired soon.

I want to go back to a recurring theme that I have articulated throughout—not only this debate but for the last couple of years. If you think, as 77 percent of the American people do, that we need to fix this system, then let's sit down and reason and talk together. Let's do that. OK? If you don't think so, then obviously we will engage in vigorous debate. But please don't use the excuse or the rationale that you are for campaign finance reform but not this kind. Because Senator FEINGOLD and I have made it very clear, we will discuss any aspect, any and all aspects of the campaign abuses that exist today and ways to fix them. We are willing to sit down and agree and compromise. That has been the path we have taken on numerous other reform issues ranging from the line-item veto to the gift money to Ramspeck repeal to putting Congress under the laws that apply to the American people, and a variety of other issues—repeal of the earnings test—many others. Please, let's not hear the excuse that, Yes, the system is broken. Yes, it needs to be fixed, but that is not my solution. If you have a better solution, let me hear it because I would love to join it.

A couple of months ago—in fact February 1997, more than a couple of months ago—there was a Fox poll, Fox News poll. It says the following, ''Which of the following phrases better describes most politicians?'' Mr. President, 36 percent, ''dedicated public servant,'' 36 percent of the American people believe that most politicians are dedicated public servants; 44 percent, ''lying windbag,'' lying windbag. Maybe there is a number of reasons why 44 percent of the people contacted in this poll believe that their politicians, their elected representatives, are lying windbags, and those reasons may be a little hard to define, all of them. And all of those reasons—at least some of those reasons may be in the eye of the beholder. But I don't think anybody could deny that one of the major reasons—the major reason why the American people have such a low opinion of their elected representatives is because of campaign finance reform and the system with which we elect our people, their representatives, and perhaps more important how their elected representatives behave once in office and what they do to stay in office.

All of us should be disturbed at polling numbers like this, all of us who believe, as we all do, public service is the most honorable of professions. All of us should be disturbed about it, try to find the reasons for it, and solve it. I would argue, again, that campaign finance reform is a way to solve it.

On ''Late Edition,'' in March 1997 a lady from Bartlesville, OK, described it best. She said, ''* * * I'm a Republican supposedly. I'm more Independent than anything else. But I want to ask you something. At $735 a month, how much freedom of speech do I have? I cannot contribute to these big campaigns.'' The lady from Bartlesville, OK, Mr. President, I think, described the problem in her own very compelling fashion.

I paid attention to Senator MCCONNELL, as I always do, and listened to him and saw the learned treatises that he put down by various special interest groups, most of them headquartered here in Washington, appealing why we can't abandon soft money, why we can't reform the system, why the status quo is the only constitutional path we could pursue. We have spent a lot of time on the floor here with dueling constitutional lawyers. I still think Senator FEINGOLD and I, with 126, have the overwhelming advantage.

And, you know, that is kind of fun. But the reality is no matter what we enact it will be challenged in the U.S. Supreme Court. It will be challenged even if all of us were in total agreement that whatever we enacted was constitutional. But the fundamental point here is that if the American people believe that $735 a month doesn't buy them much freedom of speech, then it seems to me we ought to do what we can to restore their confidence and their faith in their ability.

Mr. President, there is a book written by Mr. Michael Louis called ''Trail Fever.'' It is really an enlightening book. I enjoyed reading it very much. I commend it to anyone who is interested in the 1996 campaign.

Political ads fall broadly into two categories: those designed to inflate the candidate's appeal and those intended to destroy the candidate's opponent. The Clinton ads, which the president himself helped to write, were mainly of the second type. The bulk of them were directed at the elderly and designed to prey on their natural fear of abandonment. The message they conveyed could be summarized in a sentence: If you are over sixty years old and the Republicans gain control of the White House, you will lose your health care. Vote for your life! It was a wild and wonderful distortion of the truth—

* * * *

The press was the enemy that muddied the message you were trying to deliver. Morris argued that all the old nostrums about needing the media no longer applied, that Americans were so cynical about everything that they no longer believed in anything as naive as the Simple Truth. He believed, for instance, that voters did not distinguish in any meaningful way between paid ads and the free press. ''I don't think people are any more cynical about ads than they are about the press,'' he said. ''One is what the candidate wants you to know. The other is what the media want you to know.''

Really, it was an extraordinary turn of strategic thinking, especially for a sitting Democratic president, who might rightfully expect a little help from his soul mates in the newsrooms and on the editorial boards. It was one thing to speak through political ads; it was another to speak only through political ads. But that is exactly what Morris proposed, and Clinton accepted. ''Dick wanted to spend every * * * dollar on ads,'' said Harold Ickes. ''He thought TV was the only way to communicate.'' The more airtime Clinton bought, the less need he had to appear live before the cameras—and the more he could simply ignore the trail. With Morris's help Clinton created his own metaphysical trail. Right through to the Democratic convention and beyond, the Clinton campaign remained a specter, a flickering cathode ray in the suburbs of Albuquerque, New Mexico, and Toledo, Ohio.

I think that is an accurate description of what happened in 1996. I'm not saying that the outcome would have been any different, but none of that could have happened without soft money. And none of the things that happened—it funded many of the political campaigns, most of them negative—could have happened without soft money. I believe for us to allow this as well as other aspects of the system to careen further out of control, as it is now, is an abrogation of our responsibilities.

Mr. President, I will also gather up many documents and papers in support of Senator FEINGOLD's position, and my position. I do believe perhaps most Americans would pay attention to former Presidents of the United States, as I entered in the RECORD earlier, not just, with due respect, some pundits who either live inside the beltway or are called upon as well-known political analysts—by the way, whose views I respect. But the fact is, what this really boils down to is whether we are going to restore our credibility to the American people in this body and the way we are elected.

Finally—I see the distinguished Democratic leader on the floor, as well as my friend and colleague, Senator FEINGOLD—let me emphasize again, as I have throughout to the point where it is getting monotonous, we want to negotiate a reasonable settlement amongst both parties that is fair to both parties, that the American people believe is equitable, and that the American people believe is progress. We urge our colleagues on both sides of the aisle to enter into that dialog so we can reach some consensus and move forward so we can address the important issues facing the Senate, the Congress, and the people of the country.

I yield the floor.

The PRESIDING OFFICER. The Democratic leader.

Mr. DASCHLE. Mr. President, let me compliment the Senator from Arizona for his extraordinary statement, for his compelling speech just now, and for the statesmanship he has shown all the way through this debate. I also thank the Senator from Wisconsin for the partnership he has shown on this effort from the very beginning.

The New York Times, I thought, described it quite well today in articulating what most of us perceive about both of these Senators. They are bipartisan, they seek bipartisan solutions. They recognize the importance of working through these issues, not in a confrontational way, but in a way that builds consensus rather than tears it down. The last offer of the Senator from Arizona, once more, to work with both sides to find a way with which to deal with this issue constructively, is yet another example of that manner.

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close the debate on S. 25, as modified, the campaign finance reform bill:

> Thomas A. Daschle, Carl Levin, Joseph I. Lieberman, Wendell Ford, Byron L. Dorgan, Barbara Boxer, Jack Reed, Richard H. Bryan, Daniel K. Akaka, Christopher J. Dodd, Kent Conrad, Robert G. Torricelli, Charles S. Robb, Joe Biden, Dale Bumpers, Carol Moseley-Braun, John Kerry.

Mr. DASCHLE. Mr. President, it is our desire to offer a cloture motion each day this week in an effort to bring to closure the debate on this bill. Now, obviously, it is within the majority leader's right to pull the bill to avoid having the cloture votes on the legislation itself. That certainly is his prerogative. I have indicated that it would be our intention, should that occur, on those legislative vehicles that are not appropriations bills, that we would offer the McCain-Feingold bill to each and every one of them. It really doesn't matter what legislation comes before the Senate, that would be our intention.

So I want to put our colleagues on notice that it is our strong desire to finish this debate in a constructive and in a successful way, regardless of whatever pieces of legislation may be brought before the body.

Let me also reiterate an offer that I made last week. Last week, I said we would be prepared to take up S. 9, the Lott amendment, independent of this legislation. He has, in the parliamentary usage of the term, filled the tree. He has precluded our opportunity to offer amendments, to have a constructive and a real debate. All we have done so far is debated the overall concept of campaign reform without having had the opportunity to talk about the details and whether or not there may be ways in which to improve it or deal with it in whatever legislative capacity we may so choose. That, in my view, is the essence of a good debate. If you can't offer amendments, you can't really have a good debate about the bill. So we are denied that right.

So no one should be mistaken here; we are spending time on the bill, but we are not spending time on quality debate. We are not spending time in a way that will allow us to exchange views on issues that could be the subject of amendment, and until we are, we are forced into a position of having to amend this legislation in other forms and in other scenarios legislatively.

Again, I offer that same opportunity to the majority leader that I offered last week. Let's bring up the so-called Lott amendment freestanding. Let's have an opportunity to debate it. Let's offer amendments to it. We have offered that opportunity with the hope that we could break this logjam. We have offered a suggestion along with a promise not to filibuster, not to extend the debate on the so-called Lott amendment. We would be willing to schedule it at a time certain. So there should be no question that, if under those conditions our Republican colleagues choose not to allow us to go to the bill to offer amendments, everyone will see this amendment for what it really is; that is, a poison pill designed to kill campaign reform—nothing else.

The Senator from Kentucky has been very open about his willingness to kill the bill, his commitment to do that, and he has every right to employ this tactic. All I am saying is that there is a difference between winning the battle and winning the war.

Ultimately, if we spend time on nothing else than campaign finance reform for the remainder of this Congress, we will have other occasions to have a good and meaningful debate about campaign finance reform.

So, as I said, we would be voting on cloture now on Wednesday. If the bill is still pending, we will have a vote on Thursday, and we will determine the schedule for the remainder of the time we are in session at a later date. But there should be no mistake, we will continue to fight for this bill and continue to ensure that we reach out to our Republican colleagues to break the logjam in as meaningful a way as we can. I am hopeful that that effort will be successful, and I am hopeful that at

some point we can come to some understanding about how that gets done. I yield the floor.

Several Senators addressed the Chair.

The PRESIDING OFFICER (Mr. BOND). The Senator from Kentucky.

Mr. MCCONNELL. Mr. President, I am not the majority leader, but I wanted to make a couple observations about the comments of the Democratic leader. First of all, paycheck protection is not a poison pill; it is an important piece of legislation. It was in the top 10 pieces of legislation, I say to my friend from South Dakota, that we introduced at the beginning of this year on this side of the aisle. It has probably as many supporters as McCain-Feingold does. So it is curious to me that paycheck protection, when linked up with McCain-Feingold, is a poison pill but the converse apparently isn't true.

So, again, I am not the majority leader, but I will say it is my intent to bring up paycheck protection any time any effort was made to try to force through McCain-Feingold.

But what the majority leader has done here is offer an opportunity with a very good debate. I disagree with my friend from South Dakota; I think it is a good debate. I wish he had had a chance to listen to more of it. He might have changed his position. We are going to have a good debate this afternoon. A number of Senators want to speak.

Let me be very clear, at least as far as this one Senator is concerned, there is no campaign finance reform without paycheck protection. They are the Siamese twins, Mr. President, the Siamese twins of this discussion. So paycheck protection will, indeed, be back as well.

Mr. President, I yield the floor.

Mr. FEINGOLD addressed the Chair.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I first thank my leader, Senator DASCHLE, not only for his kind words but for his important reiteration of the offer he has made. It is an unusual offer. The offer is to have S. 9, the so-called Paycheck Protection Act, come up as its own bill and relinquishing the right that Senators always have, which the Senator from Kentucky knows very well, to filibuster. In other words, it would be guaranteed an up-or-down vote. I think that is a significant offer that raises the real issue of whether we are talking about something that is, in fact, an attempt to destroy this McCain-Feingold campaign finance reform bill, which I think it clearly is.

Mr. President, I would like to also put a few items in the RECORD, as the Senator from Kentucky has done. First of all, you see a lot of headlines when you work on an issue like this. Some are good; some are bad. Sometimes you see ''McCain-Feingold bill is dead.'' That was the litany for some time. Once in a while you see a headline you almost like, even though it isn't intended to be favorable. This one I like from The Hill, a Capitol Hill publication, of the other day, October 1, which informs us ''Most Lobbyists Oppose McCain-Feingold Bill.''

I ask unanimous consent that this article by Mary Lynn F. Jones be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Hill, October 1, 1997]

MOST LOBBYISTS OPPOSE MCCAIN-FEINGOLD BILL

(By Mary Lynn F. Jones)

As the Senate debates the McCain-Feingold campaign finance reform bill this week, Washington lobbyists are hoping that the deadlock will continue.

''The professional lobbying community, if they had their druthers, would do nothing,'' noted Ronald Shaiko, academic director of the Lobbying Institute at American University. Since they cannot actively oppose the bill, ''they hide behind the cause of the First Amendment.''

Lobbyist Timothy W. Jenkins, a partner at the lobbying shop of O'Connor & Hannan, agreed. ''It's definitely of interest to anyone with inside-the-Beltway'' issues, said Jenkins. ''It's a system we all participate in and lobbyists [donate] personal money and [many of] our companies are active'' in the political action committee (PAC) community.

Martin B. Gold an attorney at Johnson, Smith, Dover, Kitzmiller & Stewart, added, ''Once you open the subject of campaign finance, one never knows what kind of subjects will be raised.''

The bipartisan bill, sponsored by Sens. John McCain (R-Ariz.) and Russ Feingold (D-Wis.), would kill ''soft money'' contributions to political parties, require greater campaign finance disclosures, restrict parties from supporting candidates who bankroll their campaign with more than $50,000 of personal funds and allow union members to receive refunds for compulsory dues spent for political purposes.

Although most lobbyists are tracking the bill closely, those who represent unions and interest groups are particularly concerned, especially since Senate Majority Leader Trent Lott (R-Miss.) offered an amendment on Monday requiring unions to obtain prior permission from members before backing candidates financially.

And while PACs are limited to a $10,000 contribution per candidate per cycle, groups can circumscribe campaign finance laws by donating unrestricted money to political parties for get-out-the-vote drives, issues advertising and other activities that do not directly support a specific candidate.

''Ninety-five percent of the attention is going to issue advocacy and soft money,'' added O'Connor & Hannan's Jenkins, ''because that's where 95 percent of the dollars are.''

''PACs limit corporations and how much they spend in elections,'' said Shaiko of American University. ''Their loophole is soft money. If you take that out, it limits their voice in the electoral'' process.

In 1996, for example, the AFL-CIO spent about $35 million on issue advocacy advertising, according to an Annenberg Public Policy Center report, and a group of 32 businesses, called ''The Coalition,'' spent $5 million.

Jenkins said, ''Some people have the view that this is government regulating the most sacred of speech, that this shouldn't be about the candidates but about the public who wants to participate in elections.''

Issue advocacy and soft money raise difficult issues, primarily because of the Supreme Court's landmark 1976 decision, Buckley v. Valeo. The court equated money with free speech in that decision, ruling that campaign expenditures cannot be restricted.

By most lobbyists and analysts doubt the bill, which is staunchly opposed by Sen. Mitch McConnell (R-Ky.) and do not have enough votes to fend off an expected filibuster, will pass.

''The power of McConnell and others in the Senate to stymie it—you can't discount that,'' said Shaiko.

* * * * *

Mr. FEINGOLD. Mr. President, I guess I am delighted to see this kind of a headline, because I am not surprised. Most lobbyists do oppose campaign finance reform and the McCain-Feingold bill, because these folks are the folks I have come to regard, not as bad people, many of them are very good people, but as people who have basically become the Washington gatekeeper. They are the ones that control the campaign contributions now. If a local individual, if a local organization back home wants to contribute to your campaign or give you support, when they are part of this organization that has a lobbyist in Washington, they need to call Washington.

So it is no surprise that the lobbyists oppose our bill. They are one of the most important forces against our bill, besides the unfortunate fact, of course, that every single Member of the Congress was elected under the current system.

But even some of these groups that are represented by lobbyists have changed their minds. The Senator from Kentucky has made a great deal of the fact that the National Education Association, he has said, opposes McCain-Feingold. There was a time when their leadership did appear with Senator MCCONNELL and indicate some opposition to some aspects of the bill. But as Senator MCCAIN and I said from the beginning, we want to address various concerns of other Senators and organizations, and we have made some changes. Our bill is now supported by the National Education Association.

I would like to have printed in the RECORD a letter of October 1, 1997, from Bob Chase, the president of the National Education Association, in which he states:

> On behalf of the 2.3 million member NEA, we urge you to support real campaign finance reform and to reject legislative attacks on unions that are currently being presented in the guise of reform. NEA is supportive of the revised McCain-Feingold bill that was offered on the Senate floor on September 29.

Mr. President, I ask unanimous consent that that letter be printed in the RECORD.

The PRESIDING OFFICER. Is there objection to the unanimous-consent request?

Mr. MCCONNELL. No.

There being no objection, the letter was ordered to printed in the RECORD, as follows:

NATIONAL EDUCATION ASSOCIATION,
Washington, DC, October 1, 1997.

DEAR SENATOR: On behalf of the 2.3 million member National Education Association (NEA), we urge you to support real campaign finance reform and to reject legislative attacks on unions that are currently being presented in the guise of reform. NEA is supportive of the revised McCain-Feingold bill that was offered on the Senate floor on September 29. We are strongly opposed to the Lott amendment that would unfairly curb the advocacy rights of unions, including the NEA.

While NEA favors a broad package of reforms that would include voluntary spending limits coupled with partial public financing, the McCain-Feingold bill is an important first step. First and foremost, it would ban the unregulated and excessive ''soft money'' donations that have undermined the integrity of our political system. Further, it contains important provisions to ensure greater disclosure and stronger election laws. We are particularly pleased that the revised proposal drops any limitation on contributions by political action committees (PACs). NEA believes that small-donor PACs level the playing field and allow working Americans to have a more effective voice in politics.

NEA is supportive of full disclosure provisions affecting issue advertising. We do, however, have concerns about McCain-Feingold's provisions that would curb issue advertising in the 60 days prior to elections. These provisions are ill-defined and overly restrictive of legitimate legislative advocacy, and would inhibit the ability to speak freely on issues while they are being debated and decided in Congress. Despite this caveat, we believe that McCain-Feingold merits your support.

The Lott amendment is clearly intended not to advance the important cause of campaign finance reform, but to subvert it. The amendment is based on the false premise that members of unions do not join voluntarily; in fact, membership is voluntary. Further, unions in general, and the NEA in particular, operate under democratic decision-making processes. The annual NEA Representative Assembly, which determines the Association's policy and sets the legislative program, is the largest democratic decision-making body in the world.

On the other hand, the Lott amendment raises serious constitutional issues of free speech and association. It is a transparent attempt to curb the rights of unions to engage in not only political but legislative advocacy at the federal and state levels. The NEA strongly opposes this measure, since it would cripple our ability to advocate on behalf of our membership on the many important issues affecting children and education that come before Congress.

It is patently unfair for the Lott amendment to single out the voluntary dues of unions for this restrictive treatment, while allowing a host of other groups across the political spectrum (such as the Christian Coalition and the National Rifle Association) to continue to collect voluntary dues to fund their lobbying and advocacy efforts. The same double standard is applied to corporations, since the Lott amendment would not require businesses to effectively seek the approval of stockholders before using their funds for political activities.

In summary, we urge you to support McCain-Feingold and oppose the Lott amendment. This is an important turning point for the American political system, and it is critical that the congress take action that will foster, not hamper, the participation of working Americans in our democracy.

Sincerely,

BOB CHASE,
President.

Mr. MCCONNELL. Will the Senator yield?

Mr. FEINGOLD. I yield for a question.

Mr. MCCONNELL. I ask the Senator, is it not true in the letter—he is correct that the National Education Association, which opposed the PAC ban, has now written a letter saying they support the bill. But I refer my colleague from Wisconsin to the third paragraph of that letter. Is it not correct that they also say:

We . . . have concerns about McCain-Feingold's provisions that would curb issue advertising in the 60 days prior to elections. These provisions are ill-defined and overly restrictive of legitimate legislative activity, and would inhibit the ability to speak freely on issues while they are being debated and decided in Congress.

Am I reading that right?

Mr. FEINGOLD. Yes. The next sentence says:

Despite this caveat, we believe that McCain-Feingold merits your support.

The fact is, even though they have some concerns about this item, which I am sure any organization involved in this kind of ad may have, their conclusion, Mr. President, the conclusion I urge on the Senator from Kentucky, is that overall, they believe the bill merits support, which, of course, is the direct opposite of what the Senator from Kentucky has said for months, both on the floor and——

Mr. MCCONNELL. Will the Senator yield?

Mr. FEINGOLD. I yield.

Mr. MCCONNELL. Was it not the case prior to this letter NEA was opposing McCain-Feingold?

Mr. FEINGOLD. Of course, I am not suggesting the Senator is misrepresenting anything. I am showing a change in position by an organization which the Senator from Kentucky has placed great reliance on. I am not suggesting for 1 minute that the Senator has mischaracterized the position.

Mr. MCCONNELL. Did the Senator from Kentucky just say their principal reason for opposing the bill was the PAC ban and that when you dropped the PAC ban——

Mr. FEINGOLD. Yes, Mr. President. My point exactly. We have tried to adjust this bill to address the concerns of organizations and groups that the Senator from Kentucky has identified. That is our point. Senator MCCAIN and I don't believe we have all the answers. In fact, neither of us love the bill. That is how we were able to come up with a compromise. We heard the concerns of the NEA. We addressed their concerns. They support us now. They no longer support the Senator from Kentucky.

A further attempt that has been made on this issue is to suggest that the American people don't care about this issue, if you look at a poll or any other measure of public opinion that this isn't important to them that we change this big money system. The Senator from Arizona has already done a fine job today of helping to dispel that.

I ask unanimous consent to print in the RECORD a publication from the very conservative publication the Weekly Standard from September 22, 1997, entitled ''Republicans Get Some Very Bad News.''

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Weekly Standard, Sept. 22, 1997]

REPUBLICANS GET SOME VERY BAD NEWS

Republican senators got an unwelcome jolt last week at one of their usually uneventful Tuesday lunch meetings—a poll that showed they were in deep trouble. The poll, conducted by the Republican National Committee during the first week of September, gave the president his highest positive rating ever—almost 65 percent. For the first time in Clinton's presidency more Americans ''strongly approved'' of his performance than ''strongly disapproved.''

That was not the worst of it. For the first time this year, the numbers showed that more Americans wanted Democrats to control Congress than Republicans, and that Democrats were ahead on the ''generic ballot'' for November 1998. But what really rattled the senators was that, when asked what issues they cared most about, Americans had moved one new item into the first tier along with the old standbys of crime, education, and the like. The new issue: campaign-finance reform, which had moved from 2 or 3 percent in previous polls to double digits as the number one issue of concern.

With John McCain ready to force a confrontation on campaign reform in the Senate against the wishes of most of his GOP colleagues, there was a fair amount of senatorial murmuring about looking for a way to avoid being cast as simple defenders of the status quo. The politics of campaign-finance reform could be more interesting over the next few weeks than most pundits currently expect. And more damaging, considering that McCain's proposal is a constitutional catastrophe.

Mr. FEINGOLD. Thank you, Mr. President. I just want to highlight what was said in here. It indicates——

Mr. MCCONNELL. Will the Senator yield for one other question with regard to the Weekly Standard?

Mr. FEINGOLD. I yield for a question.

Mr. MCCONNELL. The Senator from Wisconsin referred to a statement in the Weekly Standard with regard to, what was it as he put it?

Mr. FEINGOLD. I was about to read into the RECORD the statement from the Weekly Standard which I wanted to highlight.

Mr. MCCONNELL. When the Senator is finished, I would like to have printed in the RECORD a letter from Jim Nicholson, chairman of the RNC, indicating that the polling data carried in that article is simply incorrect.

Mr. FEINGOLD. As soon as I am done, I will be happy to yield momentarily to let that happen.

Let me quote what was said by this publication that is certainly no friend of the McCain-Feingold bill and, frankly, no friend of campaign finance reform. The article indicated that:

Republican senators got an unwelcome jolt last week at one of their usually uneventful . . . lunch meetings—a poll that showed they were in deep trouble. The poll, conducted by

the Republican National Committee during the first week of September, gave the president his highest positive rating ever—almost 65 percent.

And then it goes on to state:

That was not the worst of it. For the first time this year, the numbers showed that more Americans wanted Democrats to control Congress than Republicans, and that Democrats were ahead on the ''generic ballot'' for November 1998.

The point I want to emphasize is the following statement:

But what really rattled the Senators was that, when asked what issues they cared most about, Americans had moved one new item into the first tier along with the old standbys of crime, education, and the like. The new issue: campaign-finance reform, which had moved from 2 or 3 percent in previous polls to double digits as the number one issue of concern.

Mr. President, I know that the Senator from Kentucky wants to dispel this poll. I will yield to him in a moment to do so. But I just want to emphasize, in addition to the more independent polls that the Senator from Arizona has already cited today, that even a poll that was presented to the Republican National Committee indicates that campaign finance reform is a matter of very top concern to the American people at this time.

Mr. MCCONNELL. Will the Senator yield for a question?

Mr. FEINGOLD. I will yield.

Mr. MCCONNELL. The question is, whether the Senator wants to—I am sure he does not want to put an item into the RECORD that is simply inaccurate. What I would hope the Senator would permit me to do, even though he has the floor and it is his insert, is to include into the RECORD a letter from Jim Nicholson, the chairman of the Republican National Committee, simply correcting that story. It was simply inaccurate. And obviously the Senator from Wisconsin has the floor.

It seems to me that for those who might be reading the CONGRESSIONAL RECORD it would be best to have the correct data inserted at this time. But I will be happy to do it later if the Senator from Wisconsin feels better.

Mr. FEINGOLD. Without conceding that the information from the Senator from Kentucky is the correct information, I have no objection to the letter of Mr. Nicholson being inserted at this time.

Mr. MCCONNELL. It was an RNC poll that the Weekly Standard was referring to. And the chairman of the national committee is simply referring to the poll that his organization took and clearing up the article that was in the Weekly Standard which was simply inaccurate. So I ask unanimous consent, Mr. President, that this letter from Jim Nicholson be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

REPUBLICAN NATIONAL COMMITTEE,
Washington, DC, September 30, 1997.

Senator MITCH MCCONNELL,
U.S. Senate,
Washington, DC

DEAR SENATOR MCCONNELL: I want to take this opportunity to clarify to you recent RNC polling data in light of misinformation reported in a September 22, 1997 Weekly Standard article entitled, ''Republicans Get Some Very Bad News.''

The Standard piece erroneously claimed that a recent RNC national poll illustrated that Americans were increasingly supportive of campaign finance reform, listing it as an issue of chief concern.

Let me be clear—the Weekly Standard was wrong. In fact, the September poll discussed never contained a direct question about campaign finance reform.

Here is a synopsis of what we have found in our polling to date:

In an open-ended question from our September survey of 1,000 likely voters, not one individual surveyed identified campaign finance reform as the most important problem facing the U.S. today.

In a question offering a short list of potential concerns from our June 1997 poll, only 2% of Americans said that ''the way political campaigns are financed'' would be the most important issue to them in deciding how to vote for congress.

In a recent Wall Street Journal/NBC News survey, only 5% surveyed found that ''reforming the way political campaigns are financed'' deserved the greatest attention from the Federal government at the present time (from a list of seven issues.)

I hope this information proves useful to you as the Senate continues debate on the McCain-Feingold bill.

Sincerely,

JIM NICHOLSON,
Chairman.

Mr. FEINGOLD. Mr. President, I understand that some would feel that the poll was inaccurate, and that is what the RNC says. I also know they would have a strong desire at this point to——

Mr. MCCONNELL. Will the Senator yield?

Mr. FEINGOLD. When the Senator from Kentucky was putting items in the RECORD, I was letting him go. I will be available for questions in a moment.

All I can say, Mr. President, is this is not the only measure we put in the RECORD. What is striking is that even the Weekly Standard believes that this issue has gone very high on the list of issues. Every measure that is being taken now does indicate a tremendous growth in the concern about this issue.

I would be fascinated to hear more about exactly why the RNC changed its data on this. I will try to take a look at it later. I do not know why they indicated that it was incorrect. Somehow the Weekly Standard got the impression that this issue was on the move. On that point they are right.

Mr. President, I would also like to note with regard to the statement of the Senator from Kentucky about the American Civil Liberty Union's position on this bill, yes, the American Civil Liberties Union has expressed concerns about the bill.

I want to remind the Senator from Kentucky that the ACLU was wrong when they litigated the Buckley versus Valeo case. They did not win all the points that they litigated in that case. In fact, some of the individuals that the Senator from Kentucky has just cited were among those who litigated that case and lost. So, yes, they litigated it. They had their day in court. And they were wrong.

In fact, the ACLU, an organization which sometimes I am criticized for agreeing with, happens to be dead wrong with regard to a release that they just put out entitled ''Revised McCain-Feingold Legislation Would Trample on Americans' First Amendment Rights.''

Mr. President, I would like to just quote a sentence from that release to show how reckless some people are being about describing this bill. The quote says this:

McCain-Feingold imposes a 2-month, 60-day blackout before any Federal election on any radio or television advertisement that mentions any candidates for Federal office.

Mr. President, that is not true. The bill does ask that certain rules apply during that 60-day period that do not apply outside of that period, and the rules are that you must use hard money limits and disclosure in order to do it, but there is no blackout, there is no prohibition.

Mr. President, there isn't a single advertisement that you could possibly come up with that is barred by this bill. That is not what the bright line test is. In fact, it is very troubling to see an organization for which I have such high regard in terms of their professionalism, in terms of their ability to mount legal arguments, to see somebody actually say that the bill does something it clearly does not do.

You cannot prohibit advertisements. You cannot say that people cannot say things. What you can do, I believe, and I believe the Supreme Court will support this, is during the electioneering period, which the Supreme Court has talked about, you can require that certain kinds of messages be disclosed in terms of who is making them and also that the money that is used and raised for it be under certain kinds of limits. That is all it does. I think the ACLU is in error with regard to that provision.

Mr. President, I would also like to place in the RECORD at this time Senate bill 143 from the 102d Congress. The other day there was a spirited conversation between my friend, the Senator from Kentucky, and the Senator from Arizona which centered around the fact that the Senator from Kentucky has cosponsored legislation that did a couple of things that he has now said on the floor are unconstitutional.

In particular, Mr. President, the point was made by the Senator from Arizona that the Senator from Kentucky had cosponsored a bill that bans soft money. The Senator from Kentucky responded by saying: Well, you know, sometimes you sign on to a bill that you're not comfortable with, and you want to participate in a joint effort.

I understand that. Some of that experience has occurred for me with regard

to this bill where I am not happy with every provision. But I do need to have printed in the RECORD, Mr. President, Senate bill 143. I ask unanimous consent that that be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 143

[102d Congress]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; AMENDMENT OF FECA; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Comprehensive Campaign Finance Reform Act of 1991''.

(b) AMENDMENT OF FECA.—When used in this Act, the term ''FECA'' means the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.).

(c) TABLE OF CONTENTS.—

TITLE I—REDUCTION OF SPECIAL INTEREST INFLUENCE

Subtitle A—Elimination of Political Action Committees From Federal Election Activities

SEC. 101. BAN ON ACTIVITIES OF POLITICAL ACTION COMMITTEES IN FEDERAL ELECTIONS.

(a) IN GENERAL.—Title III of FECA (2 U.S.C. 301 et seq.) is amended by adding at the end thereof the following new section:

''BAN ON FEDERAL ELECTION ACTIVITIES BY POLITICAL ACTION COMMITTEES

''SEC. 324. Notwithstanding any other provision of this Act, no person other than an individual or a political committee may make contributions, solicit or receive contributions, or make expenditures for the purpose of influencing an election for Federal office.''.

(b) DEFINITION OF POLITICAL COMMITTEE.—(1) Paragraph (4) of section 301 of FECA (2 U.S.C. 431(4)) is amended to read as follows:

''(4) The term 'political committee' means—

''(A) the principal campaign committee of a candidate;

''(B) any national, State, or district committee of a political party, including any subordinate committee thereof;

''(C) any local committee of a political party which—

''(i) receives contributions aggregating in excess of $5,000 during a calendar year;

''(ii) makes payments exempted from the definition of contribution or expenditure under paragraph (8) or (9) aggregating in excess of $5,000 during a calendar year; or

''(iii) makes contributions or expenditures aggregating in excess of $1,000 during a calendar year; and

''(D) any committee jointly established by a principal campaign committee and any committee described in subparagraph (B) or (C) for the purpose of conducting joint fundraising activities.''.

(2) Section 316(b)(2) of FECA (2 U.S.C. 441b(b)(2)) is amended by striking subparagraphs (B) and (C).

(c) CANDIDATE'S COMMITTEES.—(1) Section 315(a) of FECA (2 U.S.C. 441a(a)) is amended by adding at the end thereof the following new paragraph:

''(9) For the purposes of the limitations provided by paragraphs (1) and (2), any political committee which is established or financed or maintained or controlled by any candidate or Federal officeholder shall be deemed to be an authorized committee of such candidate or officeholder.''.

(2) Section 302(e)(3) of FECA (2 U.S.C. 432) is amended to read as follows:

''(3) No political committee that supports or has supported more than one candidate may be designated as an authorized committee, except that—

''(A) a candidate for the office of President nominated by a political party may designate the national committee of such political party as the candidate's principal campaign committee, but only if that national committee maintains separate books of account with respect to its functions as a principal campaign committee; and

''(B) a candidate may designate a political committee established solely for the purpose of joint fundraising by such candidates as an authorized committee.''.

(d) RULES APPLICABLE WHEN BAN NOT IN EFFECT.—For purposes of the Federal Election Campaign Act of 1971, during any period in which the limitation under section 324 of such Act (as added by subsection (a)) is not in effect—

(1) the amendments made by subsections (a) and (b) shall not be in effect; and

(2) it shall be unlawful for any person that—

(A) is treated as a political committee by reason of paragraph (1); and

(B) is not directly or indirectly established, administered, or supported by a connected organization which is a corporation, labor organization, or trade association,

to make contributions to any candidate or the candidate's authorized committee for any election aggregating in excess of $1,000.

Subtitle B—Ban on Soft Money in Federal Elections

SEC. 111. BAN ON SOFT MONEY.

Section 315 of FECA (2 U.S.C. 441a) is amended by adding at the end thereof the following new subsection:

''(i) BAN ON SOFT MONEY.—(1) It shall be unlawful for the purpose of influencing any election to Federal office—

''(A) to solicit or receive any soft money; or

''(B) to make any payments from soft money.

''(2) For purposes of paragraph (1), the term 'soft money' means any amount—

''(A) solicited or received from a source which is prohibited under section 316(a);

''(B) contributed, solicited, or received in excess of the contribution limits under section 315; or

''(C) not subject to the recordkeeping, reporting, or disclosure requirements under section 304 or any other provision of this Act.''.

SEC. 112. RESTRICTIONS ON PARTY COMMITTEES.

(a) DISCLOSURE OF INFORMATION BY POLITICAL COMMITTEE.—(1) Subsection (c) of section 302 of FECA (2 U.S.C. 432(c)) is amended by striking ''and'' at the end of paragraph (4), by striking the period at the end of paragraph (5) and inserting ''; and'', and by adding at the end thereof the following new paragraph:

''(6) each account maintained by a political committee of a political party (including Federal and non-Federal accounts), and deposits into, and disbursements from, each such account.''.

(2) Subsection (b) of section 304 of FECA (2 U.S.C. 434(b)) is amended by striking ''and'' at the end of paragraph (7), by striking the period at the end of paragraph (8) and inserting ''; and'', and by adding at the end thereof the following new paragraph:

''(9) each account maintained by a political committee of a political party (including Federal and non-Federal accounts), and deposits into, and disbursements from, each such account.''.

(b) ALLOCATION OF EXPENDITURES FOR MIXED ACTIVITIES.—Title III of FECA, as amended by section 101(a), is amended by adding at the end thereof the following new section:

''REQUIRED ALLOCATION OF CONTRIBUTIONS AND EXPENDITURES FOR MIXED ACTIVITIES BY POLITICAL PARTY COMMITTEES

''SEC. 325. (a) REGULATIONS REQUIRING ALLOCATION FOR MIXED ACTIVITIES.—Not later

than 180 days after the date of the enactment of this section, the Commission shall issue regulations providing for a method for allocating the contributions and expenditures for any mixed activity between Federal and non-Federal accounts.

''(b) GUIDELINES FOR ALLOCATION.—(1) The regulations issued under subsection (a) shall—

''(A) provide for the allocation of contributions and expenditures in accordance with this subsection; and

''(B) require reporting under this Act of expenditures in connection with a mixed activity to disclose—

''(i) the method and rationale used in allocating the cost of the mixed activity to Federal and non-Federal accounts; and

''(ii) the amount and percentage of the cost of the mixed activity allocated to such accounts.

''(2) In the case of a mixed activity that consists of a voter registration drive, get-out-the-vote drive, or other activity designed to contact voters (other than an activity to which paragraph (3) or (4) applies), amounts shall be allocated on the basis of the composition of the ballot for the political jurisdiction in which the activity occurs, except that in no event shall the amounts allocated to the Federal account be less than—

''(A) 33⅓ percent of the total amount in the case of the national committee of a political party; or

''(B) 25 percent of the total amount in the case of a State or local committee of a political party or any subordinate committee thereof.

''(3) In the case of a mixed activity that consists of preparing and distributing brochures, handbills, slate cards, or other printed materials identifying or seeking support of (or opposition to) candidates for both Federal offices and non-Federal offices, amounts shall be allocated on the basis of total space devoted to such candidates, except that in no event shall the amounts allocated to the Federal account be less than the percentages under subparagraph (A) or (B) of paragraph (2).

''(4)(A) In the case of a mixed activity by a national committee of a political party that consists of broadcast media advertising (or any portion thereof) that promotes (or is in opposition to) a political party without mentioning the name of any individual candidate for Federal office or non-Federal office, amounts allocated to the Federal account shall not be less than—

''(i) 50 percent of the total amount in the case of advertising in the national media market; and

''(ii) 40 percent in the case of advertising in other than the national media market.

''(B) In the case of a mixed activity by a State or local committee of a political party or any subordinate committee thereof that consists of broadcast media advertising (or any portion thereof) described in subparagraph (A), costs shall be allocated on the basis of the composition of the ballot for the political jurisdiction in which the activity occurs, except that in no event shall the amounts allocated to the Federal account be less than 33⅓ percent of the total amount.

''(5) Overhead and fundraising costs of a political committee of a political party for each 2-calendar year period ending with the calendar year in which a regularly scheduled election for Federal office occurs shall be allocated to the Federal account on the basis of the same ratio which—

''(A) the aggregate amount of receipts and disbursements of such political committee during such period in connection with elections for Federal office, bears to

''(B) the aggregate amount of receipts and disbursements of such political committee during such period.

''(c) MIXED ACTIVITY.—(1) For purposes of this section, the term 'mixed activity' means an activity the expenditures in connection with which are required under this Act to be allocated between Federal and non-Federal accounts because such activity affects 1 or more elections for Federal office and 1 or more non-Federal elections.

''(2) Activities under paragraph (1) include—

''(A) voter registration drives, get-out-the-vote drives, telephone banks, and membership communications in connection with elections for Federal offices and elections for non-Federal offices;

''(B) general political advertising, brochures, or other materials that include any reference (however incidental) to both a candidate for Federal office and a candidate for non-Federal office, or that urge support for or opposition to a political party or to all the candidates of a political party;

''(C) overhead expenses; and

''(D) activities described in clauses (v), (x), and (xii) of section 301(8)(B).

''(d) ACCOUNTS.—For purposes of this section—

''(1) the term 'Federal account' means an account to which receipts and disbursements are allocated to elections for Federal offices; and

''(2) the term 'non-Federal account' means an account to which receipts and disbursements are allocated to elections other than non-Federal offices.''.

SEC. 113. PROTECTION FOR EMPLOYEES.

(a) CONTRIBUTIONS TO ALL POLITICAL COMMITTEES INCLUDED.—Paragraph (2) of section 316(b) of FECA (2 U.S.C. 441b(b)(2)) is amended by inserting ''political committee,'' after ''campaign committee,''.

(b) APPLICABILITY OF REQUIREMENTS TO LABOR ORGANIZATIONS.—Section 316(b) of FECA (2 U.S.C. 441b(b)) is amended by adding at the end thereof the following new paragraph:

''(8)(A) Subparagraphs (A), (B), and (C) of paragraph (2) shall not apply to a labor organization unless the organization meets the requirements of subparagraphs (B), (C), and (D).

''(B) The requirements of this subparagraph are met only if the labor organization provides, at least once annually, to all employees within the labor organization's bargaining unit or units (and to new employees within 30 days after commencement of their employment) written notification presented in a manner to inform any such employee—

''(i) that an employee cannot be obligated to pay, through union dues or any other mandatory payment to a labor organization, for the political activities of the labor organization, including, but not limited to, the maintenance and operation of, or solicitation of contributions to, a political committee, political communications to members, and voter registration and get-out-the-vote campaigns;

''(ii) that no employee may be required actually to join any labor organization, but if a collective bargaining agreement covering an employee purports to require membership or payment of dues or other fees to a labor organization as a condition of employment, the employee may elect instead to pay an agency fee to the labor organization;

''(iii) that the amount of the agency fee shall be limited to the employee's pro rata share of the cost of the labor organization's exclusive representation services to the employee's collective bargaining unit, including collective bargaining, contract administration, and grievance adjustment;

''(iv) that an employee who elects to be a full member of the labor organization and pay membership dues is entitled to a reduction of those dues by the employee's pro rata share of the total spending by the labor organization for political activities;

''(v) that the cost of the labor organization's exclusive representation services, and the amount of spending by such organization for political activities, shall be computed on the basis of such cost and spending for the immediately preceding fiscal year of such organization; and

''(vi) of the amount of the labor organization's full membership dues, initiation fees, and assessments for the current year; the amount of the reduced membership dues, subtracting the employee's pro rata share of the organization's spending for political activities, for the current year; and the amount of the agency fee for the current year.

''(C) The requirements of this subparagraph are met only if, for purposes of verifying the cost of such labor organization's exclusive representation services, the labor organization provides all represented employees an annual examination by an independent certified public accountant of financial statements supplied by such organization which verify the cost of such services; except that such examination shall, at a minimum, constitute a 'special report' as interpreted by the Association of Independent Certified Public Accountants.

''(D) The requirements of this subparagraph are met only if the labor organization—

''(i) maintains procedures to promptly determine the costs that may properly be charged to agency fee payors as costs of exclusive representation, and explains such procedures in the written notification required under subparagraph (B); and

''(ii) if any person challenges the costs which may be properly charged as costs of exclusive representation—

''(I) provides a mutually selected impartial decisionmaker to hear and decide such challenge pursuant to rules of discovery and evidence and subject to de novo review by the National Labor Relations Board or an applicable court; and

''(II) places in escrow amounts reasonably in dispute pending the outcome of the challenge.

''(E)(i) A labor organization that does not satisfy the requirements of subparagraphs (B), (C), and (D) shall finance any expenditures specified in subparagraphs (A), (B), or (C) of paragraph (2) only with funds legally collected under this Act for its separate segregated fund.

''(ii) For purposes of this paragraph, subparagraph (A) of paragraph (2) shall apply only with respect to communications expressly advocating the election or defeat of any clearly identified candidate for elective public office.''.

SEC. 114. RESTRICTIONS ON SOFT MONEY ACTIVITIES OF TAX-EXEMPT ORGANIZATIONS.

(a) IN GENERAL.—Section 501 of the Internal Revenue Code of 1986 (relating to exemption from tax) is amended by redesignating subsection (n) as subsection (o) and by inserting after subsection (m) the following new subsection:

''(n) DENIAL OF TAX-EXEMPT STATUS FOR ACTIVITIES TO INFLUENCE A FEDERAL ELECTION.—An organization shall not be treated as exempt from tax under subsection (a) if such organization participates or intervenes in any political campaign on behalf of or in opposition to any candidate for Federal office.''.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to any participation or intervention by an organization on or after September 1, 1992.

SEC. 115. DENIAL OF TAX-EXEMPT STATUS FOR CERTAIN POLITICALLY ACTIVE ORGANIZATIONS.

(a) IN GENERAL.—Section 501 of the Internal Revenue Code of 1986 (relating to exemption from tax), as amended by section 114, is amended by redesignating subsection (o) as subsection (p) and by inserting after subsection (n) the following new subsection:

''(o) DENIAL OF TAX-EXEMPT STATUS FOR CERTAIN POLITICALLY ACTIVE ORGANIZATIONS.—

''(1) IN GENERAL.—An organization shall not be treated as exempt from tax under subsection (a) if—

''(A) such organization devotes any of its operating budget to—

''(i) voter registration or get-out-the-vote campaigns; or

''(ii) participation or intervention in any political campaign on behalf of or in opposition to any candidate for public office; and

''(B) a candidate, or an authorized committee of a candidate, has—

''(i) solicited contributions to, or on behalf of, such organization; and

''(ii) the solicitation is made in cooperation, consultation, or concert with, or at the request or suggestion of, such organization.

''(2) CANDIDATE DEFINED.—For purposes of this subsection—

''(A) IN GENERAL.—The term 'candidate' has the meaning given such term by paragraph (2) of section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. 431(2)).

''(B) MEMBERS OF CONGRESS.—The term 'candidate' shall include any Senator or Representative in, or Delegate or Resident Commissioner to, the Congress unless—

''(i) the date for filing for nomination, or election to, such office has passed and such individual has not so filed, and

''(ii) such individual is not otherwise a candidate described in subparagraph (A).''.

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years ending after the date of enactment of this Act, but only with respect to solicitations or suggestions by candidates made after the date of the enactment of this Act.

SEC. 116. CONTRIBUTIONS TO CERTAIN POLITICAL ORGANIZATIONS MAINTAINED BY A CANDIDATE.

(a) CONTRIBUTIONS BY PERSONS IN GENERAL AND BY MULTICANDIDATE POLITICAL COMMITTEES.—(1) Section 315(a)(1)(A) of FECA (2 U.S.C. 441a(a)(1)(A)) is amended by striking ''candidate and his authorized political committees'' and inserting ''candidate, a candidate's authorized political committees, and any political organizations (other than authorized committees) maintained by a candidate,''.

(2) Section 315(a)(2)(A) of FECA (2 U.S.C. 441a(a)(2)(A)) is amended by striking ''candidate and his authorized political committees'' and inserting ''candidate, a candidate's authorized political committees, and any political organizations (other than authorized committees) maintained by a candidate,''.

(3) Section 315(a) of FECA (2 U.S.C. 441a(a)), as amended by section 101(c), is amended by inserting at the end thereof the following new paragraph:

''(10) For the purposes of paragraphs (1)(A) and (2)(A), the term 'political organization maintained by a candidate' means any non-Federal political action committee, non-Federal multicandidate political committee, or any other form of political organization regulated under State law which is not a political committee of a national, State, or local political party—

''(A) that is set up by or on behalf of a candidate and engages in political activity which directly influences Federal elections; and

''(B) for which that candidate has solicited a contribution.''.

(b) CONTRIBUTIONS BY NATIONAL BANKS, CORPORATIONS, AND LABOR ORGANIZATIONS.—(1) Section 316(b)(2) of the FECA (2 U.S.C. 441b(b)(2)) is amended by striking ''candidate, campaign committee'' and inserting ''candidate, political organization (other than an authorized committee) maintained by a candidate, campaign committee,''.

(2) Section 316(b) of FECA (2 U.S.C. 441b(b)), as amended by section 113(b), is amended by inserting at the end thereof the following new paragraph:

''(9) For the purposes of paragraph (2), the term 'political organization maintained by a candidate' means any non-Federal political action committee, non-Federal multicandidate political committee, or any other form of political organization regulated under State law which is not a political committee of a national, State, or local political party—

''(A) that is set up by or on behalf of a candidate and engages in political activity which directly influences Federal elections; and

''(B) for which that candidate has solicited a contribution.''.

(c) DATE OF APPLICATION.—The amendments made by subsections (a) and (b) shall apply to contributions described in sections 315 and 316 of FECA (2 U.S.C. 441a and 441b) made in response to solicitations made after January _____, 1991.

SEC. 117. CONTRIBUTIONS TO STATE AND LOCAL PARTY COMMITTEES.

Section 315(a)(1) of FECA (2 U.S.C. 441a(a)(1)) is amended—

(1) by striking ''or'' at the end of subparagraph (B);

(2) by striking the period at the end of subparagraph (C) and inserting ''; or''; and

(3) by adding at the end thereof the following new subparagraph:

''(D) to the political committees established and maintained by a State or local political party, in connection with any activity that may influence an election for Federal office, in any calendar year which, in the aggregate, exceed the lesser of

''(i) $50,000; or

''(ii) the difference between $50,000 and the amount of contributions made by such person to any political committees established and maintained by a national political party.''.

Subtitle C—Other Activities

SEC. 121. MODIFICATIONS OF CONTRIBUTION LIMITS ON INDIVIDUALS.

(a) INCREASE IN CANDIDATE LIMIT.—Subparagraph (A) of section 315(a)(1) of FECA (2 U.S.C. 441a(a)(1)(A)) is amended by striking ''$1,000'' and inserting ''the applicable amount''.

(b) APPLICABLE AMOUNT DEFINED.—Section 315(a) of FECA (2 U.S.C. 441a(a)), as amended by section 116(a)(3), is amended by adding at the end thereof the following new paragraph:

''(11) For purposes of subsection (a)(1)(A)—

''(A) The term 'applicable amount' means—

''(i) $1,000 in the case of contributions by a person to—

''(I) a candidate for the office of President or Vice President or such candidate's authorized committees; or

''(II) any other candidate or such candidate's authorized committees if, at the time such contributions are made, such person is a resident of the State with respect to which such candidate seeks Federal office; and

''(ii) $500 in the case of contributions by any other person to a candidate described in clause (i)(II) or such candidate's authorized committees.

''(B) At the beginning of 1991 and each odd-numbered calendar year thereafter, the Secretary of Labor shall certify in the same manner as under subsection (c)(1) the percent difference between the price index for the preceding calendar year and the price index for calendar year 1989. Each of the dollar limits under subparagraph (A) shall be increased by such percent difference and rounded to the nearest $100. Each amount so increased shall be the amount in effect for the calendar year for which determined and the succeeding calendar year.''.

SEC. 122. POLITICAL PARTIES.

ITEMS NOT TREATED AS CONTRIBUTIONS OR EXPENDITURES.—(1) Section 301(8)(B) of FECA (2 U.S.C. 431(8)(B)) is amended—

(A) in clauses (x) and (xii), by inserting ''national,'' after ''the payment by a''; and

(B) in clause (xii), by inserting ''general research activities,'' after ''the costs of''.

(2) Section 301(9)(B) of FECA (2 U.S.C. 431(9)(B)) is amended—

(A) in clauses (viii) and (ix), by inserting ''national,'' after ''the payment by a''; and

(B) in clause (ix), by inserting ''general research activities,'' after ''the costs of''.

SEC. 123. CONTRIBUTIONS THROUGH INTERMEDIARIES AND CONDUITS.

Section 315(a)(8) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(8)) is amended to read as follows:

''(8) For purposes of this subsection—

''(A) Contributions made by a person, either directly or indirectly, to or on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate.

''(B) If a contribution is made by a person either directly or indirectly to or on behalf of a particular candidate through an intermediary or conduit, the intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

''(C) No conduit or intermediary shall deliver or arrange to have delivered contributions from more than 2 persons who are employees of the same employer or who are members of the same trade association, membership organization, or labor organization.

''(D) No person required to register with the Clerk of the House of Representatives or the Secretary of the Senate under section 308 of the Federal Regulation of Lobbying Act (2 U.S.C. 267), or an officer, employee or agent of such a person, may act as an intermediary or conduit with respect to a contribution to a candidate for Federal office.''.

SEC. 124. INDEPENDENT EXPENDITURES.

(a) ATTRIBUTION OF COMMUNICATIONS; REPORTS.—(1) Section 318 of FECA (2 U.S.C. 441d) is amended by adding at the end thereof the following new subsection:

''(c)(1) If any person makes an independent expenditure through a broadcast communication on any television or radio station, the broadcast communication shall include a statement—

''(A) in such television broadcast, that is clearly readable to the viewer and appears continuously during the entire length of such communication; or

''(B) in such radio broadcast, that is clearly audible to the viewer and is aired at the beginning and ending of such broadcast,

setting forth the name of such person and, in the case of a political committee, the name of any connected or affiliated organization.

''(2) If any person makes an independent expenditure through a newspaper, magazine, outdoor advertising facility, direct mailing, or other type of general public political advertising, the communication shall include, in addition to the other information required by this section—

''(A) the following sentence: 'The cost of presenting this communication is not subject to any campaign contribution limits.'; and

''(B) a statement setting forth the name of the person who paid for the communication and, in the case of a political committee, the name of any connected or affiliated organization, and the name of the president or treasurer of such organization.

''(3) Any person making an independent expenditure described in paragraph (1) or (2) shall furnish, by certified mail, return receipt requested, the following information, to each candidate and to the Commission, not later than the date and time of the first public transmission of the communication:

''(A) Effective notice that the person plans to make an independent expenditure for the purpose of financing a communication which expressly advocates the election or defeat of a clearly identified candidate.

''(B) An exact copy of the intended communication, or a complete description of the contents of the intended communication, including the entirety of any texts to be used in conjunction with such communication, and a complete description of any photographs, films, or any other visual devices to be used in conjunction with such communication.

''(C) All dates and times when such communication will be publicly transmitted.''.

(2) Section 318(a) of FECA (2 U.S.C. 441d(a)) is amended by striking ''Whenever'' and inserting ''Except as provided in subsection (c), whenever''.

(b) DEFINITION OF INDEPENDENT EXPENDITURE.—Paragraph (17) of section 301 of FECA (2 U.S.C. 431(17)) is amended—

(1) by striking ''(17) The term'' and inserting ''(17)(A) The term''; and

(2) by adding at the end thereof the following new subparagraph:

''(B) For the purpose of subparagraph (A), an expenditure shall be considered to be made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, authorized committee, or agent, if there is any arrangement, coordination, or direction by the candidate or the candidate's agent prior to the publication, distribution, display, or broadcast of a communication, and it shall be presumed to be so made when it is—

''(i) based on information about the candidate's plans, projects, or needs provided to the person making the expenditure by the candidate, or by the candidate's agents, with a view toward having an expenditure made; or

''(ii) made by or through any person who is, or has been—

''(I) authorized to raise or expend funds on behalf of the candidate or the candidate's authorized committees;

''(II) serving as an officer of the candidate's authorized committees; or

''(III) providing professional services to, or receiving any form of compensation or reimbursement from, the candidate, the candidate's committee, or agent.''.

(c) HEARINGS ON COMPLAINTS.—Section 309(a) of FECA (2 U.S.C. 437g(a)) is amended by adding at the end thereof the following new paragraph:

''(13) Within 3 days after the Commission receives a complaint filed pursuant to this section which alleges that an independent expenditure was made with the cooperation or consultation of a candidate, or an authorized committee or agent of such candidate, or was made in concert with or at the request or suggestion of an authorized committee or agent of such candidate, the Commission shall provide for a hearing to determine such matter.''.

(d) EXPEDITED JUDICIAL REVIEW.—Section 310 of the FECA (2 U.S.C. 437h) is amended by adding at the end thereof the following new sentence: ''It shall be the duty of the courts to advance on the docket and to expedite to the greatest possible extent the disposition of any matter relating to the making or alleged making of an independent expenditure.''.

TITLE II—INCREASE OF COMPETITION IN POLITICS

SEC. 201. SEED MONEY FOR CHALLENGERS.

Section 315 of FECA (2 U.S.C. 441a), as amended by section 111, is amended by adding at the end thereof the following new subsection:

''(j)(1) Notwithstanding subsection (a)(2), the congressional campaign committee or the senatorial campaign committee of a national political party, whichever is applicable, may make contributions to an eligible candidate (and the candidate's authorized committees) which in the aggregate do not exceed the lesser of—

''(A) $100,000; or

''(B) the aggregate qualified matching contributions received by such candidate and the candidate's authorized committees.

''(2) Any contribution under paragraph (1) shall not be treated as an expenditure for purposes of subsection (d)(3).

''(3) For purposes of this subsection, the term 'qualified matching contributions' means contributions made during the period of the election cycle preceding the primary election by an individual who, at the time such contributions are made, is a resident of the State in which the election with respect to which such contributions are made is to be held.

''(4) For purposes of this subsection, the term 'eligible candidate' means a candidate for Federal office (other than President or Vice President) who does not hold Federal office.''.

SEC. 202. USE OF CAMPAIGN FUNDS.

Section 313 of FECA (2 U.S.C. 439a) is amended by inserting ''(a)'' before ''Amounts'' and inserting at the end thereof the following new subsection:

''(b) Notwithstanding subsection (a), a holder of Federal office may not transfer any amounts received as contributions or other campaign funds to any account maintained for purposes of defraying ordinary and necessary expenses in connection with the duties of such Federal office.''.

SEC. 203. CANDIDATE EXPENDITURES FROM PERSONAL FUNDS.

(a) Section 315 of FECA (2 U.S.C. 441a), as amended by section 201, is amended by adding at the end thereof the following new subsection:

''(k)(1)(A) Not less than 15 days after a candidate qualifies for a primary election ballot under State law, the candidate shall file with the Commission, and each other candidate who has qualified for that ballot, a declaration stating whether the candidate intends to expend for the primary and general election an amount exceeding $250,000 from—

''(i) the candidate's personal funds;

''(ii) the funds of the candidate's immediate family; and

''(iii) personal loans incurred by the candidate and the candidate's immediate family in connection with the candidate's election campaign.

''(B) The declaration required by subparagraph (A) shall be in such form and contain such information as the Commission may require by regulation.

''(2) Notwithstanding subsection (a), if a candidate—

''(A) declares under paragraph (1) that the candidate intends to expend for the primary and general election funds described in such paragraph an amount exceeding $250,000;

''(B) expends such funds in the primary and general election an amount exceeding $250,000; or

''(C) fails to file the declaration required by paragraph (1),

the limitations on contributions under subsection (a), and the limitations on expenditures under subsection (d), shall be modified as provided under paragraph (3) with respect to other candidates for the same office who are not described in subparagraph (A), (B), or (C).

''(3) For purposes of paragraph (2)—

''(A) the limitation under subsection (a)(1)(A) shall be increased to $5,000; and

''(B) if a candidate described in paragraph (2)(B) expends more than $1,000,000 of funds described in paragraph (1) in the primary and general election—

''(i) the limitation under subsection (a)(1)(A) shall not apply;

''(ii) the limitation under subsection (a)(2) shall not apply to any political committee of a political party; and

''(iii) the limitation under subsection (d)(3) shall not apply.

The $5,000 amount under subparagraph (A) shall be adjusted each calendar year in the same manner as amounts are adjusted under subsection (a)(11)(B).

''(4) If—

''(A) the modifications under paragraph (3) apply for a convention or a primary election by reason of 1 or more candidates taking (or failing to take) any action described in subparagraph (A), (B), or (C) of paragraph (2); and

''(B) such candidates are not candidates in any subsequent election in the same election campaign, including the general election,

paragraph (3) shall cease to apply to the other candidates in such campaign.

''(5) A candidate who—

''(A) declares, pursuant to paragraph (1), that the candidate does not intend to expend funds described in paragraph (1) in excess of $250,000; and

''(B) subsequently changes such declaration or expends such funds in excess of that amount,

shall file an amended declaration with the Commission and notify all other candidates for the same office within 24 hours after changing such declaration or exceeding such limits, whichever first occurs, by sending a notice by certified mail, return receipt requested.

''(6) Contributions to a candidate or a candidate's authorized committees may be used to repay any expenditure or personal loan incurred in connection with the candidate's election to Federal office by a candidate or a member of the candidate's immediate family only to the extent that such repayment—

''(A) is limited to the amount of such expenditure or the principal amount of such loan (and no interest is paid); and

''(B) is not made from any such contributions received after the date of the general election to which such expenditure or loan relates.

''(7) For purposes of this subsection, the term 'immediate family' means—

''(A) a candidate's spouse;

''(B) any child, stepchild, parent, grandparent, brother, half-brother, sister, or half-sister of the candidate or the candidate's spouse; and

''(C) the spouse of a person described in subparagraph (B).

''(8) The Commission shall take such action as it deems necessary under the enforcement provisions of this Act to ensure compliance with this subsection.''.

SEC. 204. FRANKED COMMUNICATIONS.

(a) AMENDMENT OF TITLE 39, UNITED STATES CODE.—(1) Section 3210(a)(6)(A) of title 39, United States Code is amended—

(A) by striking clause (i) and inserting the following new clause:

''(i) if the mass mailing is mailed during the calendar year of any primary or general election (whether regular or runoff) in which the Member is a candidate for reelection; or''; and

(B) in clause (ii)(II), by striking ''fewer than 60 days immediately before the date'' and inserting ''during the year''.

(2) Section 3210(a)(6)(C) of title 39, United States Code, is amended by striking ''fewer than 60 days immediately before the date'' and inserting ''during the year''.

(3) Section 3210(a)(6) of title 39, United States Code, is amended—

(A) by redesignating subparagraphs (D), (E), and (F) as subparagraphs (E), (F), and (G), respectively; and

(B) by inserting after subparagraph (C) the following new subparagraph:

''(D)(i)(I) When a Member of the Senate disseminates information under the frank by a mass mailing, the Member shall register annually with the Secretary of the Senate such mass mailings. Such registration shall be made by filing with the Secretary of the Senate a copy of the matter mailed and providing, on a form supplied by the Secretary of the Senate, a description of the group or groups of persons to whom the mass mailing was mailed.

''(II) The Secretary of the Senate shall promptly make available for public inspection and copying a copy of the mail matter registered and a description of the group or groups of persons to whom the mass mailing was mailed.

''(ii)(I) When a Member of the House of Representatives disseminates information under the frank by a mass mailing, the Member shall register annually with the Clerk of the House of Representatives such mass mailings. Such registration shall be made by filing with the Clerk of the House of Representatives a copy of the matter mailed and providing, on a form supplied by the Clerk of the House of Representatives, a description of the group or groups of persons to whom the mass mailing was mailed.

''(II) The Clerk of the House of Representatives shall promptly make available for public inspection and copying a copy of the mail matter registered and a description of the group or groups of persons to whom the mass mailing was mailed.''.

(b) AMENDMENT OF STANDING RULES OF THE SENATE.—(1) Paragraph 1 of Rule XL of the Standing Rules of the Senate is amended by striking ''less than sixty days immediately before the date'' and inserting ''during the year''.

(2) This subsection is enacted—

(A) as an exercise of the rulemaking power of the Senate; and

(B) with full recognition of the constitutional right of the Senate to change the rules at any time, in the same manner and to the same extent as in the case of any other rule of the Senate.

SEC. 205. LIMITATIONS ON GERRYMANDERING.

(a) REAPPORTIONMENT OF REPRESENTATIVES.—Section 22 of the Act entitled ''An Act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress,'' approved June 18, 1929 (2 U.S.C. 2a), is amended—

(1) by striking subsection (c); and

(2) by adding at the end thereof the following new subsections:

''(c)(1) In each State entitled in the One Hundred Third Congress or in any subsequent Congress to more than one Representative under an apportionment made pursuant to the second paragraph of the Act entitled 'An Act for the relief of Doctor Ricardo Vallejo Samala and to provide for congressional redistricting', approved December 14, 1967 (2 U.S.C. 2c), as in effect prior to the date of enactment of this subsection, there shall be established in the manner provided by the law of the State a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only by eligible voters from districts so established, no district to elect more than 1 Representative.

''(2) Such districts shall be established in accordance with the provisions of this Act as soon as practicable after the decennial census date established in section 141(a) of title 13, United States Code, but in no case later than such time as is reasonably sufficient for their use in the elections for the One Hundred Third Congress and in each fifth Congress thereafter.

''(d)(1) The number of persons in congressional districts within each State shall be as nearly equal as is practicable, as determined under the then most recent decennial census.

''(2) The enumeration established according to the Federal decennial census pursuant to article I, section II, United States Constitution, shall be the sole basis of population for the establishment of congressional districts.

''(e) Congressional districts shall be comprised of contiguous territory, including adjoining insular territory.

''(f) Congressional districts shall not be established with the intent or effect of diluting the voting strength of any person, group of persons, or members of any political party.

''(g) Congressional districts shall be compact in form. In establishing such districts, nearby population shall not be bypassed in favor of more distant population.

''(h) Congressional district boundaries shall avoid the unnecessary division of counties or their equivalent in any State.

''(i) Congressional district boundaries shall be established in such a manner so as to minimize the division of cities, towns, villages, and other political subdivisions.

''(j)(1) It is the intent of the Congress that congressional districts established pursuant to this section be subject to reasonable public scrutiny and comment prior to their establishment.

''(2) At the same time that Federal decennial census tabulations data, reports, maps, or other material or information produced or obtained using Federal funds and associated with the congressional reapportionment and redistricting process are made available to any officer or public body in any State, those materials shall be made available by the State at the cost of duplication to any person from that State meeting the qualifications for voting in an election of a Member of the House of Representatives.

''(k) Nothing in this section shall be construed to supersede any provision of the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.).

''(l)(1) A State may establish by law criteria for implementing the standards set forth in this section.

''(2) Nothing in this section shall be construed as limiting the power of a State to strengthen or add to the standards set forth in this section, or to interpret those standards in a manner consistent with the law of the State, to the extent that any additional criteria or interpretations are not in conflict with this section.

''(m)(1) The district courts of the United States shall have exclusive jurisdiction to hear and determine any action to enforce subsections (c) through (l).

''(2) A person who meets a State's qualifications for voting in an election of a Member of the House of Representatives from the State may bring an action in the district court for the district in which the person resides to enforce subsections (c) through (l) with regard to the State in which the person resides.

''(3) Notwithstanding any other provision of this section, the district courts of the United States shall have authority to issue all judgments, orders, and decrees necessary to ensure that any criteria established by State law pursuant to this section are not in conflict with this section.

''(4) With the exception of actions brought for the relief described in paragraph (3), the district court for the purposes of this section shall be a three-judge district court pursuant to section 2284 of title 28, United States Code.

''(5) On motion of any party in accordance with section 1657 of title 28, United States Code, it shall be the duty of the district court to assign the case for briefing and hearing at the earliest practicable date, and to cause the case to be in every way expedited. The district court shall have authority to enter all judgments, orders and decrees necessary to bring a State into compliance with this Act.

''(6) An action to challenge the establishment of a congressional district in a State after a Federal decennial census may not be brought after the end of the 9-month period beginning on the date on which the last such district is so established.

''(7) For the purposes of this section, an order dismissing a complaint for failure to state a cause of action shall be appealable in accordance with section 1253 of title 28, United States Code.

''(8) If a district court fails to establish a briefing and hearing schedule that will permit resolution of the case prior to the next general election, any party may seek a writ of mandamus from the United States Court of Appeals for the circuit in which the district court sits. The court of appeals shall have jurisdiction over the motion for a writ of mandamus and shall establish an expedited briefing and hearing schedule for resolution of the motion. Such a motion shall not stay proceedings in the district court.

''(9) If a district court determines that the congressional districts established by a State's redistricting authority pursuant to this Act are not in compliance with this Act, the court shall remand the plan to the State's redistricting authority to establish new districts consistent with subsections (c) through (l). The district court shall retain jurisdiction over the case after remand.

''(10) If, after a remand under paragraph (9), the district court determines that the congressional districts established by a State's redistricting authority under the remand order are not consistent with subsections (c) through (l), the district court shall enter an order establishing districts that are consistent with subsections (c) through (l) for the next general congressional election.

''(11) If any question of State law arises in a case under this section that would require abstention, the district court shall not abstain. However, in any State permitting certification of such questions, the district court shall certify the question to the highest court of the State whose law is in question. Such certification shall not stay the proceedings in the district court or delay the court's determination of the question of State law.

''(12) With the exception of actions brought for the relief described in paragraph (3), an appeal from a decision of the district court under this section shall be taken in accordance with section 1253 of title 28, United States Code. An appeal under this paragraph shall be noticed in the district court and perfected by docketing in the Supreme Court within thirty days of the entry of judgment below. Appeals brought to the Supreme Court under this paragraph shall be heard as soon as practicable.

''(13) For purposes of this section, the term 'redistricting authority' means the officer or public body having initial responsibility for the congressional redistricting of a State.''.

(b) CONFORMING AMENDMENTS AND REPEALER.—(1) The first sentence of section 1657 of title 28, United States Code, is amended by striking ''chapter 153 or'' and inserting ''chapter 153, any action under subsection (m) through (l) of section 22 of the Act entitled 'An Act to provide for the fifteenth and subsequent censuses and to provide for apportionment of Representatives in Congress,' approved June 18, 1929 (2 U.S.C. 2a), or''.

(2) Section 141(c) of title 13, United States Code, is amended by adding at the end thereof the following: ''In circumstances in which this subsection requires that the Secretary provide criteria to, consult with, or report tabulations of population to (or if the Secretary for any reason provides material or information to) the public bodies having responsibility for the legislative apportionment or districting of a State, the Secretary shall provide, without cost, such criteria, consultations, tabulations, or other material or information simultaneously to the leadership of each political party represented on such public bodies. For purposes of this subsection, the term 'political party' means any political party whose candidates for Representatives to Congress received, as the candidates of such party, 5 percent or more of the total number of votes received statewide by all candidates for such office in any of the 5 most recent general congressional elections. Such materials may include those developed by the Census Bureau for redistricting purposes for the 1990 Census.''.

(3) The second paragraph of the Act entitled ''An Act for the relief of Doctor Ricardo Vallejo Samala and to provide for congressional redistricting'', approved December 14, 1967 (2 U.S.C. 2c), is repealed.

SEC. 206. ELECTION FRAUD, OTHER PUBLIC CORRUPTION, AND FRAUD IN INTERSTATE COMMERCE.

(a) ELECTION FRAUD AND OTHER PUBLIC CORRUPTION.—(1) Chapter 11 of title 18, United States Code, is amended by adding at the end thereof the following new section:

''§ 225. Public corruption

''(a) Whoever, in a circumstance described in subsection (d), deprives or defrauds, or endeavors to deprive or to defraud, by any scheme or artifice, the inhabitants of a State or political subdivision of a State of the honest services of an official or employee of such State, political subdivision, or Indian tribal government shall be fined under this title, or imprisoned for not more than 10 years, or both.

''(b) Whoever, in a circumstance described in subsection (d), deprives or defrauds, or endeavors to deprive or to defraud, by any scheme or artifice, the inhabitants of a State or political subdivision of a State of a fair and impartially conducted election process in any primary, runoff, special, or general election—

''(1) through the procurement, casting, or tabulation of ballots that are materially false, fictitious, or fraudulent or that are invalid, under the laws of the State in which the election is held;

''(2) through paying or offering to pay any person for voting;

''(3) through the procurement or submission of voter registrations that contain false material information, or omit material information; or

''(4) through the filing of any report required to be filed under State law regarding an election campaign that contains false material information or omits material information,

shall be fined under this title or imprisoned for not more than 10 years, or both.

''(c) Whoever, being a public official or an official or employee of a State, political subdivision of a State, or Indian tribal government, in a circumstance described in subsection (d), deprives or defrauds, or endeavors to deprive or to defraud, by any scheme or artifice, the inhabitants of a State or political subdivision of a State of the right to have the affairs of the State, political subdivision, or Indian tribal government conducted on the basis of complete, true, and accurate material information, shall be fined under this title or imprisoned for not more than 10 years, or both.

''(d) The circumstances referred to in subsections (a), (b), and (c) are that—

''(1) for the purpose of executing or concealing such scheme or artifice or attempting to do so, the person so doing—

''(A) places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing;

''(B) transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce any writings, signs, signals, pictures, or sounds;

''(C) transports or causes to be transported any person or thing, or induces any person to travel in or to be transported in, interstate or foreign commerce; or

''(D) uses or causes to use of any facility of interstate or foreign commerce;

''(2) the scheme or artifice affects or constitutes an attempt to affect in any manner or degree, or would if executed or concealed so affect, interstate or foreign commerce; or

''(3) as applied to an offense under subsection (b), an objective of the scheme or artifice is to secure the election of an official who, if elected, would have some authority over the administration of funds derived from an Act of Congress totaling $10,000 or more during the twelve-month period immediately preceding or following the election or date of the offense.

''(e) Whoever deprives or defrauds, or endeavors to deprive or to defraud, by any scheme or artifice, the inhabitants of the United States of the honest services of a public official or person who has been selected to be a public official shall be fined under this title or imprisoned for not more than 10 years, or both.

''(f) Whoever, being an official, public official, or person who has been selected to be a public official, directly or indirectly discharges, demotes, suspends, threatens, harasses, or in any manner discriminates against an employee or official of the United States or any State or political subdivision of a State, or endeavors to do so, in order to carry out or to conceal any scheme or artifice described in this section, shall be fined under this title or subject to imprisonment of up to 5 years or both.

''(g)(1) An employee or official of the United States or any State or political subdivision of such State who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against because of lawful acts done by the employee as a result of a violation of subsection (e) or because of actions by the employee or official on behalf of himself or others in furtherance of a prosecution under this section (including investigation for, initiation of, testimony for, or assistance in such a prosecution) may bring a civil action and shall be entitled to all relief necessary to make such employee or official whole. Such relief shall include reinstatement with the same seniority status that the employee or official would have had but for the discrimination, 3 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including reasonable litigation costs and reasonable attorney's fees.

''(2) An individual shall not be entitled to relief under paragraph (1) if the individual participated in the violation of this section with respect to which relief is sought.

''(3) A civil action brought under paragraph (1) shall be stayed by a court upon the certification of an attorney for the Government, stating that the action may adversely affect the interests of the Government in a current criminal investigation or proceeding. The attorney for the Government shall promptly notify the court when the stay may be lifted without such adverse effects.

''(h) For purposes of this section—

''(1) the term 'State' means a State of the United States, the District of Columbia, Puerto Rico, and any other commonwealth, territory, or possession of the United States;

''(2) the terms 'public official' and 'person who has been selected to be a public official' have the meaning set forth in section 201 and shall also include any person acting or pretending to act under color of official authority;

''(3) the term 'official' includes—

''(A) any person employed by, exercising any authority derived from, or holding any position in an Indian tribal government or the government of a State or any subdivision of the executive, legislative, judicial, or other branch of government thereof, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established and subject to control by a government or governments for the execution of a governmental or intergovernmental program;

''(B) any person acting or pretending to act under color of official authority; and

''(C) includes any person who has been nominated, appointed or selected to be an official or who has been officially informed that he or she will be so nominated, appointed or selected;

''(4) the term 'under color of official authority' includes any person who represents that the person controls, is an agent of, or otherwise acts on behalf of an official, public official, and person who has been selected to be a public official; and

''(5) the term 'uses any facility of interstate or foreign commerce' includes the intrastate use of any facility that may also be used in interstate or foreign commerce.''.

(2)(A) The table of sections for chapter 11 of title 18, United States Code, is amended by adding at the end thereof the following item:

''225. Public Corruption.''.

(B) Section 1961(1) of title 18, United States Code, is amended by inserting ''section 225 (relating to public corruption),'' after ''section 224 (relating to sports bribery),''.

(C) Section 2516(1)(c) of title 18, United States Code, is amended by inserting ''section 225 (relating to public corruption),'' after ''section 224 (bribery in sporting contests),''.

(b) FRAUD IN INTERSTATE COMMERCE.—(1) Section 1343 of title 18, United States Code, is amended—

(A) by striking ''transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds'' and inserting ''uses or causes to be used any facility of interstate or foreign commerce''; and

(B) by inserting ''or attempting to do so'' after ''for the purpose of executing such scheme or artifice''.

(2)(A) The heading of section 1343 of title 18, United States Code, is amended to read as follows:

''§ 1343. Fraud by use of facility of interstate commerce''.

(B) The chapter analysis for chapter 63 of title 18, United States Code, is amended by striking the analysis for section 1343 and inserting the following:

''1343. Fraud by use of facility of interstate commerce.''.

TITLE III—REDUCTION OF CAMPAIGN COSTS

SEC. 301. BROADCAST DISCOUNT.

(a) FINDINGS.—The Congress finds that—

(1) in the 45 days preceding a primary election, and in the 60 days preceding a general election, candidates for political office need to be able to buy, at the lowest unit charge, nonpreemptible advertising spots from broadcast stations and cable television stations to ensure that their messages reach the intended audience and that the voting public has an opportunity to make informed decisions;

(2) since the Communications Act of 1934 was amended in 1972 to guarantee the lowest unit charge for candidates during these important preelection periods, the method by which advertising spots are sold in the broadcast and cable industries has changed significantly;

(3) changes in the method for selling advertising spots have made the interpretation and enforcement of the lowest unit charge provision difficult and complex;

(4) clarification and simplification of the lowest unit charge provision in the Communications Act of 1934 is necessary to ensure compliance with the original intent of the provision; and

(5) in granting discounts and setting charges for advertising time, broadcasters and cable operators should treat candidates for political office at least as well as the most favored commercial advertisers.

(b) AMENDMENT OF COMMUNICATIONS ACT.—Section 315 of the Communications Act of 1934 (47 U.S.C. 315) is amended—

(1) in subsection (b)(1), by striking ''class and'';

(2) by redesignating subsections (c) and (d) as subsections (d) and (e), respectively; and

(3) by inserting immediately after subsection (b) the following new subsection:

''(c) A licensee shall not preempt the use, during any period specified in subsection (b)(1), of a broadcasting station by a legally qualified candidate for public office who has purchased such use pursuant to subsection (b)(1).''.

TITLE IV—MISCELLANEOUS PROVISIONS

Subtitle A—Federal Election Commission Enforcement Authority

SEC. 401. ELIMINATION OF REASON TO BELIEVE STANDARD.

Section 309(a)(2) of FECA (2 U.S.C. 437g(a)(2)) is amended—

(1) by inserting ''(A)'' after ''(2)''; and

(2) by striking the first sentence and inserting the following: ''Except as otherwise provided in subparagraph (B), if the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities determines, by an affirmative vote of 4 of its members, that an allegation of a violation or from pending violation of this Act or chapter 95 or 96 of the Internal Revenue Code of 1986 states a claim of violation that would be sufficient under the standard applicable to a motion under rule 12(b)(6) of the Federal Rules of Civil Procedure, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such vote shall occur within 90 days after receipt of such complaint.''.

SEC. 402. INJUNCTIVE AUTHORITY.

Section 309(a)(2) of FECA (2 U.S.C. 437g(a)(2)), as amended by section 401, is amended by adding at the end thereof the following new subparagraph:

''(B) The Commission may petition the appropriate court for an injunction if—

''(i) the Commission believes that there is a substantial likelihood that a violation of this Act or of chapter 95 or 96 of the Internal Revenue Code of 1986 is occurring or is about to occur;

''(ii) the failure to act expeditiously will result in irreparable harm to a party affected by the potential violation;

''(iii) such expeditious action will not cause undue harm or prejudice to the interests of others; and

''(iv) the public interest would be best served by the issuance of an injunction.''.

SEC. 403. TIME PERIODS.

Section 309(a)(4)(A) of FECA (2 U.S.C. 437g(a)(4)(A)) is amended—

(1) in clause (i) by—

(A) striking '', for a period of at least 30 days,''; and

(B) striking ''90 days'' and inserting ''60 days''; and

(2) in clause (ii) by striking ''at least'' and inserting ''no more than''.

SEC. 404. KNOWING VIOLATION PENALTIES.

Section 309(a)(5)(B) of FECA (2 U.S.C. 437g(a)(5)(B)) is amended by striking ''may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation'' and inserting ''shall require that the person involved in such conciliation agreement shall pay a civil penalty which is not less than the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, except that if the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1986 has been committed during the 15-day period immediately preceding any election, a conciliation agreement entered into by the Commission under paragraph (4)(A) shall require that the person involved in such conciliation agreement shall pay a civil penalty which is not less than the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation''.

SEC. 405. COURT RESOLVED VIOLATIONS AND PENALTIES.

Section 309(a)(6) of the Federal Election Campaign Act of 1971 (2 U.S.C. 437g(a)(6)) is amended—

(1) in subparagraph (A) by—

(A) striking ''Commission may'' and inserting ''Commission shall'';

(B) striking ''including'' and inserting ''which shall include''; and

(C) striking ''which does not exceed the greater of $5,000 or an amount equal to any'' and inserting ''which equals the greater of $10,000 or an amount equal to 200 percent of any''; and

(2) in subparagraph (B) by—

(A) striking ''court may'' and inserting ''court shall''; and

(B) striking '', including'' and inserting ''which shall include''; and

(C) striking ''which does not exceed the greater of $5,000 or an amount equal to any'' and inserting ''which equals the greater of $10,000 or an amount equal to 200 percent of any''.

SEC. 406. PRIVATE CIVIL ACTIONS.

Section 309(a)(6)(A) of FECA (2 U.S.C. 437g(a)(6)(A)), as amended by section 405, is amended—

(1) by inserting ''(i)'' after ''(6)(A)''; and

(2) by adding at the end thereof the following new clause:

''(ii) If, by a tie vote, the Commission does not vote to institute a civil action pursuant to clause (i), the candidate involved in such election, or an individual authorized to act on behalf of such candidate, may file an action for appropriate relief in the district court for the district in which the respondent is found, resides, or transacts business. If the court determines that a violation has occurred, the court shall impose the appropriate civil penalty. Any such award of a civil penalty made under this paragraph shall be made in favor of the United States. In addition to any such civil penalty, the court shall award to the prevailing party in any action under this paragraph, all attorneys' fees and actual costs reasonably incurred in the investigation and pursuit of any such action, including those attorneys' fees and costs reasonably incurred in bringing or defending the proceeding before the Commission.''.

SEC. 407. KNOWING VIOLATIONS RESOLVED IN COURT.

Section 309(a)(6)(C) of FECA (2 U.S.C. 437g(a)(6)(C)) is amended by striking ''may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation'' and inserting ''shall impose a civil penalty which is not less than the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation, except that if such violation was committed during the 15-day period immediately preceding the election, the court shall impose a civil penalty which is not less than the greater of $15,000 or an amount equal to 300 percent of any contribution or expenditure involved in such violation''.

SEC. 408. ACTION ON COMPLAINT BY COMMISSION.

Section 309(a)(8)(A) of FECA (2 U.S.C. 437g(a)(8)(A)) is amended—

(1) by striking ''act on'' and inserting ''reasonably pursue'';

(2) by striking ''120-day'' and inserting ''60-day''; and

(3) by striking ''United States District Court for the District of Columbia'' and inserting ''appropriate court''.

SEC. 409. VIOLATION OF CONFIDENTIALITY REQUIREMENT.

Section 309(a)(12)(B) of FECA (2 U.S.C. 437g(a)(12)(A)) is amended—

(1) by striking ''$2,000'' and inserting ''$5,000''; and

(2) by striking ''$5,000'' and inserting ''$10,000''.

SEC. 410. PENALTY IN ATTORNEY GENERAL ACTIONS.

Section 309(d)(1)(A) of FECA (2 U.S.C. 437g(d)(1)(A)) is amended by striking ''exceed'' and inserting ''be less than''.

SEC. 411. AMENDMENTS RELATING TO ENFORCEMENT AND JUDICIAL REVIEW.

(a) TIME LIMITATIONS FOR AND INDEX OF INVESTIGATIONS.—Section 309(a) of FECA (2 U.S.C. 437g(a)), as amended by section 124, is amended by adding at the end thereof the following new paragraphs:

''(14) The Commission shall establish time limitations for investigations under this subsection.

''(15) The Commission shall publish an index of all investigations under this section and shall update the index quarterly.''.

(b) PROCEDURE ON INITIAL DETERMINATION.—Section 309(a)(2) of FECA (2 U.S.C.

437g(a)(2)), as amended by section 402, is amended by adding at the end thereof the following: ''Before a vote based on information ascertained in the normal course of carrying out supervisory responsibilities, the person alleged to have committed the violation shall be notified of the allegation and shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the information. Prior to any determination, the Commission may request voluntary responses to questions from any person who may become the subject of an investigation. A determination under this paragraph shall be accompanied by a written statement of the reasons for the determination.''.

(c) PROCEDURE ON PROBABLE CAUSE DETERMINATION.—(1) Section 309(a)(3) of FECA (2 U.S.C. 437g(a)(3)) is amended by adding at the end thereof the following: ''The Commission shall make available to a respondent any documentary or other evidence relied on by the general counsel in making a recommendation under this subsection. Any brief or report by the general counsel that replies to the respondent's brief shall be provided to the respondent.''.

(2) Section 309(a)(4)(A) of FECA (2 U.S.C. 437g(a)(4)(A)) is amended by adding at the end thereof the following new clauses:

''(iii) A determination under clause (i) shall be made only after opportunity for a hearing upon request of the respondent and shall be accompanied by a statement of the reasons for the determination.

''(iv) The Commission shall not require that any conciliation agreement under this paragraph contain an admission by the respondent of a violation of this Act or any other law.''.

(d) ELIMINATION OF EN BANC HEARING REQUIREMENT.—Section 310 of FECA (2 U.S.C. 437h), as amended by section 124(d), is amended by striking '', which shall hear the matter sitting en banc''.

SEC. 412. TIGHTENING ENFORCEMENT.

(a) REPEAL OF PERIOD OF LIMITATION.—Section 406 of FECA (2 U.S.C. 455) is repealed.

(b) SUPPLYING OF INFORMATION TO THE ATTORNEY GENERAL.—Section 309(a)(12) of the Federal Election Campaign Act of 1971 (2 U.S.C. 437g(a)(12)(A)) is amended by adding at the end thereof the following new subparagraph:

''(C) Nothing in this section shall be deemed to prohibit or prevent the Commission from making information contained in compliance files available to the Attorney General, at the Attorney General's request, in connection with an investigation or trial.''.

Subtitle B—Other Provisions

SEC. 421. DISCLOSURE OF DEBT SETTLEMENT AND LOAN SECURITY AGREEMENTS.

Section 304(b) of FECA (2 U.S.C. 434(b)), as amended by section 112, is amended by striking ''and'' at the end of paragraph (8), by striking the period at the end of paragraph (9) and inserting a semicolon, and by adding at the end thereof the following new paragraphs:

''(10) for the reporting period, the terms of any settlement agreement entered into with respect to a loan or other debt, as evidenced by a copy of such agreement filed as part of the report; and

''(11) for the reporting period, the terms of any security or collateral agreement entered into with respect to a loan, as evidenced by a copy of such agreement filed as part of the report.''.

SEC. 422. CONTRIBUTIONS FOR DRAFT AND ENCOURAGEMENT PURPOSES WITH RESPECT TO ELECTIONS FOR FEDERAL OFFICE.

(a) DEFINITION.—Section 301(8)(A) of FECA (2 U.S.C. 431(8)(A)) is amended by striking ''or'' after the semicolon at the end of clause (i), by striking the period at the end of clause (ii) and inserting ''; and'', and by adding at the end thereof the following new clause:

''(iii) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of drafting a clearly identified individual as a candidate for Federal office or encouraging a clearly identified individual to become a candidate for Federal office.''.

(b) DRAFT AND ENCOURAGEMENT CONTRIBUTIONS TO BE TREATED AS CANDIDATE CONTRIBUTIONS.—Section 315(a) of FECA (2 U.S.C. 441a(a)), as amended by this Act, is amended by adding at the end thereof the following new paragraph:

''(12) For purposes of paragraph (1)(A) and paragraph (2)(A), any contribution described in section 301(8)(A)(iii) shall be treated, with respect to the individual involved, as a contribution to a candidate, whether or not the individual becomes a candidate.''.

SEC. 423. SEVERABILITY.

If any provision of this Act or any amendment made by this Act, or the application of any such provision to any person or circumstance is held invalid, the validity of any other such provision, and the application of such provision to other persons and circumstances shall not be affected thereby.

SEC. 424. EFFECTIVE DATE.

Except as otherwise provided in this Act, this Act and the amendments made by this Act shall become effective on November 10, 1992, and shall apply to all contributions and expenditures made after that date.

Mr. FEINGOLD. Senate bill 143 from the 102d Congress was offered by the Senator from Kentucky. It was not a group of people that had to sort of pull together to support the leader on this. Mr. MCCONNELL, the Senator from Kentucky, was the lead author, and then other Senators, distinguished Senators, agreed with him—Senator Dole, Senator Simpson, Senator Packwood, Senator COCHRAN, Senator DOMENICI, Senator MURKOWSKI, Senator ROTH, and Senator Hatfield; but the lead author of the bill was the Senator from Kentucky. And the bill banned soft money.

Mr. President, it specifically provides for the ban of soft money which the Senator from Kentucky has denounced as an unconstitutional part of the McCain-Feingold bill. So this notion that somehow the Senator from Kentucky was not supportive of this kind of concept, at least at that time, does not seem to withstand scrutiny.

Mr. President, I would also like at this time to spend a few moments talking a little bit about a very important item, and that is the proposal before us offered by the majority leader. That represents, to me, an attempt to put the onus of the entire campaign finance issue just on organized labor. That is the substantive impact of this proposal.

But I am afraid the proposal is, in the end, going to serve a larger purpose, if it prevails. The majority leader made it pretty clear that was his purpose. The purpose of the proposal, it seems to me, is to kill the McCain-Feingold bill. I know the majority leader has said that that is not the case. But I am not the only one who believes this is a poison pill. Just about everyone who has looked at this feels this is an attempt to kill this bill by insisting that Senate bill 9 be brought up at this time.

The Senator from Kentucky said that Senate bill 9 was a very important bill; that is why it was No. 9. I understand the rules around here. The leaders get to introduce about five bills each they consider to be a top priority. Senate bill 9 was one of those top priorities of the Republican leadership.

Why then, if it was such a top priority, did they wait almost until the end of this entire year, the end of this entire session, to bring it up? If it was so important, why wasn't it given the importance that it supposedly had? Others agree.

Mr. President, I ask unanimous consent that the editorial from the New York Times entitled ''The Swing Senators'' of October 5, 1997, be printed in the RECORD.

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

[From the New York Times, Oct. 5, 1997]

THE SWING SENATORS

It takes many routine votes to build and sustain a Senate career, but one memorable vote can destroy a reputation. For a handful of Republican senators who have championed campaign finance reform, that fatal vote could come on Tuesday if they kill the McCain-Feingold bill. It is hard to imagine how Olympia Snowe of Maine, James Jeffords of Vermont and John Chafee of Rhode Island can face their constituents if they bury the best chance in a generation to fashion a more rational system of financing Presidential and Congressional campaigns.

That is the simple, unforgiving logic of Tuesday's vote. Trent Lott, the majority leader, has scheduled a showdown on the McCain-Feingold bill, which would curb the unlimited donations to political parties that have been at the heart of the scandals this year. The bill would also restrict the ability of independent groups to raise money from rich individuals, corporations and labor unions to broadcast candidate attack ads masquerading as issue ads two months before an election. To kill the legislation, Mr. Lott has made the first order of business a vote on an amendment he knows Democrats do not support. It would limit the ability of labor unions to raise and spend money on elections. If the amendment is approved, the overall bill will die.

All 45 Democrats are prepared to vote against Mr. Lott's amendment, so just five Republicans are needed to defeat it. Senator John McCain of Arizona, a conservative who would otherwise support the Lott amendment, will vote against it because he knows it will strangle reform. Fred Thompson of Tennessee, Susan Collins of Maine and Arlen Specter of Pennsylvania, all supporters of McCain-Feingold, seem likely to join Mr. Cain.

Senator Snowe has sponsored campaign finance reform legislation in the past and Maine, her home state, last year overwhelmingly approved a referendum that established public financing of campaigns and limits on contributions and candidate expenditures. She would betray her own record and her state if she supported Mr. Lott's effort to torpedo the McCain-Feingold bill.

Since entering the Senate in 1989, Mr. Jeffords has been among the most articulate backers of campaign finance reform. In 1992, he voted to override a veto by President

Bush of legislation imposing spending and contribution limits. Senator Chafee has also consistently favored reform over the years.

Another swing vote this week ought to come from Alfonse D'Amato of New York. Mr. D'Amato is up for re-election next year and is counting on labor support. In the past he has opposed the kind of labor fund-raising curbs now pushed by Mr. Lott. He was even quoted recently as saying he favored a ban on unlimited donations to campaigns. Mr. D'Amato could enhance his standing among moderate Republicans and independents by rallying behind the McCain-Feingold bill.

If Mr. Lott prevails, supporters of campaign reform must not give up. Senator McCain has promised to attach his bill to every piece of legislation before the Senate in the coming weeks. That strategy worked last year for raising the minimum wage. After a year of scandal and abuse, there is no greater priority for Congress than removing the stain of corruption from American politics. The public's desire for reform demands nothing less. If Senators Snowe, Jeffords and Chafee would vote on principle rather than blindly following Mr. Lott, the Senate could approve reform this week.

Mr. FEINGOLD. Mr. President, that editorial identifies clearly the belief of most Americans that the purpose of this amendment is not necessarily to simply resolve this issue, although I am sure Members on the other side of the aisle, many of them, feel strongly about it, but it is to kill the McCain-Feingold bill.

Mr. President, I also ask unanimous consent that an editorial from the USA Today, dated October 6, 1997, entitled ''Squabble over union dues a pretext to stop reform'' be printed in the RECORD.

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

SQUABBLE OVER UNION DUES A PRETEXT TO STOP REFORM

Our View—As in the past, those in power are trying to kill campaign-finance reform without taking the rap.

For 20 years, Congress has mounted pieties about cleaning up the swamp of special-interest money in politics, while making quite sure nothing gets done about it.

Year after year, stalling, stalemate and deception have been weapons of choice for those who have mastered the system to get elected and have little interest in change. This week, masked in a contrived debate over union dues, it may happen again.

After finally agreeing to debate campaign-finance reform, Senate Majority Leader Trent Lott has made the first order of business his own amendment requiring that union members give written permission before their dues can be used for political purposes.

Sounds noble, but it's a phony. The campaign-reform bill already includes provisions effectively barring union treasuries from making political contributions.

It closes the so-called ''soft money'' loophole which has allowed massive, unregulated contributions to parties by both unions and business interests.

It brings ''independent expenditure'' and ''issue advocacy'' ads that target candidates under the same regulations as campaign contributions. That makes them a no-no for both unions and business.

Limited contributions from union political actual committees would remain legal, but PACs already must obtain sign-offs from contributors. Further, union members unhappy with the use of their dues already have a right to quit the union.

But the amendment is a useful vehicle for Lott and fellow Republicans to posture for the favor of employers whose contribution they seek—and to make retaliatory mischief for the unions, which spend $35 million attacking Republicans last year. And while they moan about it, the debate gives Democratic opponents a chance to preen as friends of the union leaders.

Unfortunately, the amendment also carries the risk of fracturing the fragile coalition pushing for much-needed change. Lott has as good as said that is its real purpose.

It's an old story. In 1990, the House and Senate actually passed somewhat similar campaign-reform bills, but the conferees appointed to iron out the differences never got around to meeting. In 1994, a slightly different scenario brought a similar result.

In 1988, a reform bill was killed by a filibuster. In 1992, a bill passed but was vetoed; the votes to override weren't there. Repeatedly, representatives and senators who want to get on record as reformers have been able to do so—but with little risk of change actually becoming law.

Now, despite a $260 million flood of unregulated campaign contributions in 1995-96, despite $3 million in illegal or questionable contributions, despite an unseemly money chase by the president and vice president that has prompted Justice Department and congressional investigations, reform is again at risk of being sidetracked.

Another modest effort to get at the mess of money in politics would be dead, with few fingerprints at the scene of the crime. Just stalemate and deception as usual.

Mr. FEINGOLD. The article, of course, lays out the arguments about the issue of union dues. In fact, as is the practice of USA Today, they give an opportunity to the majority leader to respond within the article. But the subheadline sort of says it all. ''As in the past, those in power are trying to kill campaign-finance reform without taking the rap.''

Mr. President, at this time I ask unanimous consent to have printed in the RECORD an article from the Washington Post by David S. Broder entitled ''Campaign Finance: A 'Poison Pill'* * *.''

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Washington Post, Oct. 5, 1997]

CAMPAIGN FINANCE: A ''POISON PILL''. . .

(By David S. Broder)

From Capitol Hill to California, conservatives claim to have found a new weapon for their arsenal—a device to disarm labor unions and put Democrats on the defensive. But it is a weapon that can produce a dangerous backlash.

The devicde is wonderfully simple: a legal requirement that workers give written permission before unions can use their dues for political purposes.

In Washington, Senate Majority Leader Trent Lott (R-Miss.) this week will try to attach such an amendment to the pending campaign finance reform bill. He calls its approval ''the price of admission'' to every other aspect of the debate Democrats call it a ''poison pill'' and say if it passes, they will filibuster to protect their union allies—which would allow Lott to blame them for sinking the overall reform package that he despises.

In California, where I was reporting last week, Republican Gov. Pete Wilson announced that he will lead an effort for a 1998 ballot initiative to enact a similar requirement. At the Republican state convention in Anaheim, Wilson, drew a standing ovation by declaring that ''union members shouldn't be forced to have their pockets picked for candidates or causes they don't support.''

This ''payroll protection'' drive, as proponents call it, is the handiwork of J. Patrick Rooney, an Indianapolis insurance tycoon who previously put millions into making medical savings accounts and school vouchers part of the national Republican agenda.

Rooney told me that, through the Evergreen Freedom Foundation in Seattle he is financing lawsuits by teachers against the Washington Education Association for allegedly violating a 1992 state initiative that is the model for the Lott and Wilson proposals.

The California initiative ''was going to stall out for lack of money,'' Rooney told me, ''so I got involved,'' and became chairman of a signature drive that seems likely to put the issue on next June's ballot. But that is not the end of it, Rooney said he and Grover Norquist, another conservative activist, have enlisted Wilson to take the proposal to next month's meeting of all Republican governors and urge them to do the same thing in their states. A parallel bill has attracted more than 160 co-sponsors in the House of Representatives.

Polls show the idea of letting union members control how their dues are spent is popular with voters. As a device for limiting labor's voice, it is devastatingly effective. ''It has had a dramatic, negative impact on us,'' by drying up funds and bringing on a lawsuit by the state attorney general, Trevor Neilsen, spokesman for the Washington teachers' union, told me. At the state employees' union, officials have reported that authorizations for payroll deductions for its political operations had been signed by only 82 of its 2,500 members.

In 1988, the Supreme Court ruled in *Teamsters* v. *Beck* that workers in a unionized company must be allowed the option of reclaiming the portion of their dues used for political purposes. But the *Beck* decision has not been enforced. Most employers are reluctant to risk union trouble by encouraging dissidents. In 1992, President Bush, responding to conservative pressure, issued an executive order requiring government contractors to inform employees of their *Beck* case rights. But President Clinton rescinded it on taking office, as a boon to unions and because, a White House official said, ''he thought it was one-sided.

Sens. John McCain and Russ Feingold, sponsors of the main Senate campaign finance bill, have included a codification of the *Beck* decision in their measure. But Lott and Wilson and Rooney would go much further by requiring written permission from workers each year for political use of their dues. Feingold and other opponents say that is unfair, noting that it would leave corporations free to continue making soft money political contributions without permission of stockholders who might hold opposing views. And the pending initiatives do not affect hundreds of other mass-membership organizations such as the National Rifle Association and the American Association of Retired Persons, which are also hip-deep in politics.

Whether this is a political masterstroke for Republicans remains to be seen. In 1958, conservatives promoted right-to-work initiatives, barring union shop contracts, in six states. They lost everywhere but in Kansas. In California and Ohio, the two biggest targets, labor's mobilization fueled Democratic victories that devastated the GOP.

California unions are threatening to retaliate against the Rooney-Wilson initiative by

placing on the ballot a measure that would ''sunset'' every existing corporate tax break not approved by two-thirds vote of the people and redistribute the estimated $8 billion to $12 billion a year of revenue in $1,000-a-person tax rebates.

Conservatives may learn that if you play with fire, you can be burned.

Mr. FEINGOLD. Mr. President, the Senator from Kentucky is fond of quoting Mr. Broder, a leading columnist and expert on these kinds of issues in the country. But he lays out pretty clearly the fact that this is not simply another piece of legislation that happens to come up as the first and potentially only amendment on the campaign finance reform bill. He clearly lays out some of the political and other considerations that are involved in bringing up such a poison pill.

Mr. President, I ask unanimous consent that an editorial dated October 1, 1997, from the New York Times entitled ''Trent Lott's Poison Pill,'' be printed in the RECORD.

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

TRENT LOTT'S POISON PILL

Trent Lott, as expected, has come up with a perverse stratagem to kill campaign finance reform this year. The Senate majority leader would add a provision to the McCain-Feingold bill requiring unions to get approval from workers before using their dues or fees for political purposes. The idea might deserve consideration another day, but Mr. Lott's purpose today is to scuttle the bill by making it unacceptable to Democrats.

After months of disclosures about excesses in both parties, all 45 Senate Democrats have joined 4 Republicans to support the McCain-Feingold legislation, which would prohibit unlimited donations to the parties by wealthy individuals, labor unions and corporations. These contributions were at the heart of the access-buying scandals of the Clinton campaign, and they figure in the influence of money from tobacco and other industries on Capitol Hill. Mr. Lott knows there are nearly enough senators to approve the bill, so he wants a poison pill to repel Democrats and shatter its bipartisan support.

Only one additional Republican would be needed to join other Republican backers of reform to block Mr. Lott's plan. But it will not be easy for Republicans to resist his seductive amendment. Even two reformers, Senators John McCain of Arizona and Susan Collins of Maine, support the principle behind the amendment, though they have said they oppose the amendment itself as a threat to reform at this crucial point. Many other Republicans would like to vote for something that would punish labor for its recent campaign spending, particularly the $35 million that paid for attack ads directed at Republican candidates in 30 Congressional races last year.

The McCain-Feingold bill would codify a nine-year-old ruling of the Supreme Court holding that non-union members who pay union dues or fees as a condition of employment are entitled to demand that the fees not be used for political purposes. If Republicans want to vote on a broader provision giving that right to all union members, they should accept the Democratic offer to consider it on another day without the threat of a filibuster. It would only be fair to consider a similar curb requiring corporations, which outspent unions nearly 9 to 1 on politics last year, to get approval from shareholders when making political expenditures.

If the four Republican supporters of McCain-Feingold stand firm, only one other Republican will be needed to defeat Mr. Lott's disingenuous amendment. Senator Alfonse D'Amato of New York, no particular champion of campaign reform in the past, is in for a tough re-election fight next year and has always had the backing of at least some labor unions. Senator Jim Jeffords of Vermont, a long-time champion of campaign reform should see the wisdom of standing up now. Senator Olympia Snowe of Maine, where campaign finance reform has been approved locally, can join with Senator Collins to save the reform legislation.

Other senators who have shown independence on this issue in the past, like John Chafee of Rhode Island, should also come to the rescue. Down the road, still more Republicans will be needed to save the bill, because it will take 60 votes to thwart a promised filibuster. For now, they should realize that if they let Mr. Lott kill the bill by subterfuge, their criticism of Democratic excesses will be mere opportunism and hollow rhetoric.

Mr. FEINGOLD. Mr. President, this again is another editorial indicating that people around this country know very well that what is going on here is not an opportunity to freely and fully debate and amend this bill but an attempt to narrow it down to one issue—and I am not saying it is not an important issue—but to narrow this whole issue down to one issue having to do with union dues, which could be easily resolved.

If everybody took a look at the McCain-Feingold provision, a provision that codified the Beck decision, a provision we placed in the bill after much negotiation, it says if you are a nonunion member and you do not want your dues to go to a political campaign, we can refund that. We codified what the Supreme Court said in that.

Our concern is that the majority leader's amendment goes well beyond that, knowing full well it would make it impossible for a real bipartisan bill to come out of this body.

Mr. President, if this were a proposal offered by a Democrat, and it had as its central premise the idea that the Federal Government should be regulating the internal functions of a voluntary organization, such as the Christian Coalition or the National Rifle Association, you can bet those on the other side would be beside themselves.

Mr. President, that is what a labor union is. In fact, if you read the Beck decision, as I did again today just to be sure, that whole decision is about the fact that the Taft-Hartley Act said they were not going to permit any more closed shops in America. So if you do not want to be a member of a union, you do not have to be but there would still be union shops. And that is because under that legislation, under that law, a union is a voluntary organization.

If members of a labor union do not approve of the collective bargaining activities or the political activities or any other activities of the union, they have the right to use the democratic process to change those activities. They can run for office within the union. They can build coalitions and seek leadership posts. And of course, Mr. President—and this is a point that has been glossed over far too often in debate—if the individual wants absolutely nothing to do with the union, he or she has the option of quitting or not joining the union in the first place.

Union membership is not mandatory. It is voluntary. But as the Democratic leader has pointed out, this provision, this amendment is not about reform. I am afraid it is a little more about the last election.

The sponsors of this proposal have come to the conclusion that all of the problems in our campaign system can be traced to the political activities of just labor unions. Who believes that? Clearly, labor unions are participants, but they are only one kind of participant and by no means the greatest participant when it comes to the kind of money that has been spent in recent elections.

The Senator from Arizona and I have come to a different conclusion. I know the Senator from Arizona believes passionately that the spending by organized labor has to be controlled with regard to elections, but he and I have come to the conclusion that to simply say that unions alone are the problem does not really measure the problem.

We have concluded we should craft a reform proposal that affects both parties—that affects both parties—in a fair and equal manner. We have concluded that corporate America is just as much to blame for our campaign system as labor unions or anyone else. That is the point here. There is plenty of blame to go around for everybody. Democrats are responsible, Republicans are responsible, corporations are responsible, labor unions are responsible, groups that are trying to divide us in this country are responsible. Everybody can and should accept part of the blame for this disastrous system.

What we are trying to do, what the Senator from Arizona and I are trying to do, is to get this nonsense to come to an end. Instead, we are being told by the supporters of the Lott amendment, apparently that when the Ford Motor Co. takes the money of its shareholders and makes a $500,000 soft money contribution to a political party, that is perfectly fine; but if the United Auto Workers makes a similar soft money contribution to a political party, that is not OK. That has to be what the authors of this amendment are suggesting because they are not suggesting that we treat them in the same way.

Of course, the other problem with the amendment is that it appears to be offered under the mistaken assumption that the underlying McCain-Feingold proposal would have no impact on labor unions. Mr. President, that is just false. The Senator from Arizona and I have worked hard to make sure that in a fair manner the activities of unions and other organizations that

seem to distort the political process are affected.

First of all, the bill bans all union and corporate soft money contributions to the parties. We ban it across the board. That includes all union soft money. But it also includes if it is done by the Ford Motor Co. In short, Mr. President, under McCain-Feingold it will be illegal—illegal—for a labor union to use the dues of its members or nonmembers—members or nonmembers—to make a soft money contribution to political parties.

So what is the problem if the dues can't be used for soft money, I say to my colleagues, whether union member or nonunion member? Where is the evil that we are not correcting?

Second, the McCain-Feingold bill provides that no organization, whether it is a labor union, a corporation or any other organization, can use unregulated soft money to fund those phony attack ads against candidates that are disguised as so-called issue ads. That is because of our concern that if we only ban soft money, all the money will flow into phony issue ads and you will end up with the same situation. That is a very significant restriction on the way in which unions participated in the last election, probably even more significant in terms of dollars than the soft money restrictions.

Again, it would be illegal, Mr. President, illegal under McCain-Feingold for a union to use the dues of its members or nonmembers, either one, to run those political ads attacking or supporting candidates that are not raised using hard money and properly disclosed during the 60-day period.

Mr. President, the third provision in this bill is one that is actually aimed only at labor unions. The other two really take care of the problem. The issue of phony issue ads and soft money are the big-ticket items with regard to union or corporate spending, but the third provision is aimed directly only at labor unions. Mr. President, it does exactly what the folks on the other side of the aisle have been calling for for years. It codifies the decision of the U.S. Supreme Court in the Beck decision.

This provision requires unions to notify nonunion members that those individuals are entitled to have their agency fees reduced by the amount the union spends on political activities. Mr. President, as you can see, the unions have every right to participate in our political system, and are taking a number of hits already under this bill. Our point is they should not be singled out as the only ones to be limited in this regard. Unfortunately, that is not enough for the sponsors of this proposal. I fear they want to cut unions out of our political process completely.

Some Senators have said they do not believe anyone in America should have to contribute involuntarily, Mr. President, to any political campaign. But what would happen if you applied that principle to corporations and other organizations, as well? Say I am living in Eau Claire, WI, and I own several shares of stock in AT&T. I assume that money I have invested in that corporation was being used to grow that company and improve its market share. That is what I would hope the company would do to protect my dollar, to do their fiduciary duty to their stockholders. Would I be surprised to learn my money is being used to finance a $500,000 soft money contribution to a national political party? Sure I would. Would I be informed of that contribution? Would AT&T have to get my permission before they use my money for that purpose under the Lott amendment? Absolutely not. Unions have to do it but AT&T doesn't have to do it. So much for fairness under this amendment.

Another telling indicator of the true purpose of this proposal, I am afraid, is the timing. If these union activities are such an affront to our democratic system, I want to repeat, why wasn't S. 9, a bill introduced on the first week of our Congress, brought to the floor before this point? The senior Senator from Oklahoma introduced this bill on this matter on the very first day of the session back in January. It was one of the highest priorities of the Republican leadership. Why hasn't it been marked up, even in committee? The answer is clear. It is serving a different function. Its function here is to fill up the tree, as we say, and prevent other amendments and perhaps to kill the bill. Mr. President, I am afraid this is not about the role of labor unions. It is too much about partisanship.

The majority leader stated a week ago Friday his intention was to create a situation where the Democrats would be forced to filibuster campaign finance reform. Those on the other side know that the passage of this amendment will trigger such opposition. I am disappointed that some have concluded that the purpose of this debate should be to see which party can get the other one to kill campaign finance reform. The Senator from Arizona and I have been working hard on ensuring that this proposal is fair to both parties. We have made compromises. We have attempted to craft a bill that would give both parties credit, together, for passing campaign finance reform.

Make no mistake, whether it was truly intended to do this or not, the proposal before the Senate today in the form of the Lott amendment would kill campaign finance reform. The vote on this proposal would be the vote to determine if we pass meaningful campaign finance reform this year or not. We know the vote will be close. We know it will come down to one or two Senators. So I hope, regardless of every Senator's personal feelings about how much we should do with regard to unions specifically, my colleagues will recognize this is not a vote about restricting labor unions but a vote to kill campaign finance reform.

I yield the floor.

The PRESIDING OFFICER. The Senator from Oregon is recognized.

Mr. SMITH of Oregon. Mr. President, I rise today in support of the Lott amendment and in opposition to the McCain-Feingold bill. It is not without some reservation that I take that position. I have the greatest esteem and respect for the Senator from Wisconsin and the Senator from Arizona. I know their motives in all of this are good and honorable.

I just happen to come from a State, however, where we enacted a bill not dissimilar—not identical, but not dissimilar—to the McCain-Feingold bill. My State legislative process went through an entire cycle with Byzantine kinds of rules applied before our State supreme court, a very liberal supreme court, threw it all out as unconstitutional, as violating the right of freedom of speech.

Now, Oregon is a State that is known for good clean government, good clean many things. We have in our State no allegations of corruption, or frankly they are very infrequent. We have voter turnout that often exceeds 80 percent. We have a very healthy democratic system in my State.

Notwithstanding that, in 1994 there was an initiative that came to our ballot, very similar to McCain-Feingold, that applied to State legislative and gubernatorial races. I will admit that it passed by a large margin. I said to myself, why would it pass by a big margin if we have a good thing going here, frankly, good government in our State? I think it is simply because people don't like to be inconvenienced by democracy sometimes, and I know how they feel. I don't like to see negative ads and I don't like to be imposed upon sometimes, but frankly, democracy sometimes is uncomfortable. It is sometimes messy.

On first blush it appeared to be a very good bill. However, when it came to its enactment, our secretary of state tried to explain it to all the legislative candidates. Everyone was wondering how you can run for public office. There were limits placed upon what a candidate could raise. There were limits placed upon what a citizen could contribute of $100. And the net effect of it all is that a State legislative office seeker could raise about $20,000 to $30,000, and that would buy maybe a couple cracks at communicating with his constituents.

The interest in the process didn't leave. It just simply vacated the open air of democracy and went back into the smoke-filled room. I am talking about organized labor and I am talking about big business. They, then, ran campaigns about candidates in the most slanderous and scurrilous of ways. For those campaigns, no one was accountable, no one was responsible. And in the end, I believe our democracy in the 98th cycle was dumbed down and disserved. Importantly, our

Supreme Court, as I mentioned, declared it all unconstitutional. They did so correctly.

Now, when I ran for the U.S. Senate I ran in a special election against my friend, now my colleague, my former competitor, RON WYDEN, a Member of this Chamber. He and I became the focus of the entire country in contesting for the seat formally held by Bob Packwood. Let me tell you what happened. Both of us were running hard-hitting campaigns. Then we became the victims, and I believe myself especially, by what I term ''drive-by shooting'' on our democratic process. I had, in the course of several weeks time, $1 million of the most scurrilous kinds of ads run against me and I hated what they said.

I remember my little boy sitting watching television when I happened to be there and seeing one of the ads that they ran, and he turned back to me with wide eyes and tears in his eyes and he said, ''That was a very bad ad, Dad,'' and it was.

You might think because of that I would want to shut down the ability of the unions to participate I don't want to do that, but I don't want to shut down the right of people like me and you to respond to these kinds of attacks. That is what these kinds of limits will do.

I truly believe that banning soft money is unconstitutional for many of the same reasons our State supreme court found it unconstitutional. I believe the U.S. Supreme Court would find such attempts here to be unconstitutional. Limit it—you may be able to do. But if you limit it, and I may even be able to vote for some form of limitation as we apply limits on contributions directly to candidates, perhaps there can be some constitutional limit on soft money. But if you do that, then there should be no more compulsory element left in this process.

Frankly, the huge loophole is this loophole provided by compulsory union dues. Unless the Lott amendment passes, I can't go any farther, because I saw what happened. It happened to me, and it happened to Republicans and Democrats alike in the State of Oregon. They had campaigns run about them and they were grossly unfair. I don't want to support campaign finance reform that will dumb down our democracy in that way. Indeed, I believe some of the best things that we could do are to require voluntarism in this process and then to put some reasonable spending limits or caps on soft money contributions and then to require candidates to disclose on a daily basis the source of their contributions 3 months out from a campaign so that the public knows if one candidate is getting too much from business or another candidate is getting too much from labor. Then they can decide whether that is significant to them when they cast their sacred vote.

In my view, the cure for bad democracy is not less of it but more of it and more open. I don't see that we provide for that in the McCain-Feingold bill. I see many things resulting, as they did in Oregon, which left my State in one election cycle, I believe, poorer for it.

So I plead with my colleague, vote for the Lott amendment, and then let's talk seriously about some things that we can do to make this whole process fair for both sides.

I yield the floor.

Mr. BRYAN. Mr. President, I rise today in strong support of the bipartisan campaign finance reform legislation offered by my colleagues, Senator FEINGOLD and Senator MCCAIN. I am pleased to join with all 44 of my Democratic colleagues, as well as Senators MCCAIN, THOMPSON, COLLINS, and SPECTER. I hope during the course of this debate others will join us in this first step in campaign finance reform that we so desperately need.

Campaign finance reform is an issue that deserves our full consideration and one that must be voted on this year, whatever time it takes. Mr. President, I would like to, at the outset, commend Senators FEINGOLD and MCCAIN for their thoughtful and careful bipartisan approach in crafting a piece of campaign finance reform that, although I believe it to be modest—more modest than I would have preferred—nevertheless marks a beginning.

The integrity of our political system is threatened by the tremendous amounts of money required to run for public office. The Members in this Chamber know it, political scholars know it, and the American people know it.

Mr. President, I first sought elective public office in 1968 as a candidate for my State legislature. Then and now, some money was required in order to put together a campaign, to prepare the necessary kinds of materials, and to make sure the constituents that one sought to persuade knew what your message was. Over the intervening years, I have had occasion to run for State elective office on four different occasions and have had an opportunity to run for the U.S. Senate twice now. There is no question, from any perspective, any point of view, that the amount of money that is involved today in the American political system far exceeds, by any measure, any growth that may be attributed to inflation or any other reasonable consequence, including the growth of the population in my own State and generally across the country.

There has been, during that intervening nearly 30 years since the time I have been involved in the elective political system, a marked decline in voter participation in this system. This is an alarming trend. It does not bode well for Democrats or Republicans or Independents, nor does it bode well for the future of democratic institutions.

Mr. President, I believe that there is an absolute correlation between declining voter interest and the ever larger sums of money being raised to fuel the money chase. Nearly $2.7 billion was spent on campaigns in the last election cycle. Every year the expense of campaigning climbs higher and higher, and the pressure to seek financial support for those who seek public office intensifies accordingly.

I know that some contend there is not enough money being spent in the American political system. I respectfully disagree with that opinion, and I believe that the great majority of the American public disagrees as well.

A full 92 percent of Americans believe that too much money is spent on campaigns. The Wall Street Journal poll of December of last year reflects that number. Indeed, money has become a dominant factor in American politics as to who runs and who wins. As a consequence, our political system is on a downward spiral that will continue to spin out of control unless we have the courage to take the steps necessary to stop it. There is a sense of irony, Mr. President, that the institution that benefits the most from the current system is the only one that can reform it. But we must put the interest of country ahead of our own political success and ahead of party interests.

The revised McCain-Feingold bill is, as I have said, a very modest proposal; nevertheless, it is a first step in reforming a campaign financing system that cries out for change. It just might begin to restore the people's trust in the ability of their elected officials to stop the hemorrhaging of the political system and to allow the healing process to begin. As I said, I would have preferred a more comprehensive approach, but that is not to be. However, this is an effort which may have a chance to attract more support and thus has a chance of becoming law. Senators FEINGOLD and MCCAIN have carefully reshaped their original bill as a compromise with the hope of attracting additional Republican votes, which will be needed for its passage.

First, the McCain-Feingold legislation bans the use of so-called soft money by the national political parties from corporations, labor unions, and wealthy individuals. State parties would be banned from spending soft money on activities related to Federal elections.

The creative expanded uses by both political parties of soft money has significantly increased the demand for campaign contributions. This past 1996 election year was the costliest ever in our Nation's history. Both parties raised overall $881 million for the election—a 73 percent increase over the amount of the preceding 4 years when the parties raised $508 million. In soft money alone, Democrat and Republican parties raised $263.5 million. That is nearly three times the amount that was raised in the preceding 4-year cycle. From 1988 to 1996, the amount of soft money raised by the parties has increased by nearly 600 percent.

What needs to be done? The American people have been asked what they

think needs to be done to reform the political process in this country. From the NBC/Wall Street Journal survey of June 1997 when that question was propounded, the American public is not confused. Perhaps some Members of Congress are confused, but the American public is not confused.

Reduce the amount that candidates can accept from political action committees, impose overall spending limits on campaigns, eliminate large contributions to political parties, and provide some financial incentives to candidates.

Sixty-two percent of the American people believe that is what ought to be done.

Among the other options that were discussed were:

Remove all limits on contributions so people can give as much money as they want, but require more timely disclosure of these donations.

Some of our colleagues believe that we ought to be spending more money in running for public office. The American public disagrees overwhelmingly. Only 18 percent favor the removal of limits on contributions.

Leave the current campaign financing system intact.

Only 14 percent favor that course of action.

Now, I understand that the debate and the argument is that campaign spending is a form of free speech and therefore cannot be regulated in any form. The American people, when asked that question, conclude that—18 percent of them—as a form of free speech, that cannot be regulated; and 74 percent believe campaign spending has nothing to do with free speech and that spending limits should be imposed. That data is also from the previously cited 1997 NBC News/Wall Street Journal survey.

Mr. President, I understand, having had occasion to practice law and having served as the attorney general of my State, that the constitutionality of an issue cannot be determined simply by a majority of public opinion at any one time. I certainly do not argue that to be the case because constitutional principles rise to a higher level than what a majority at any given point in time might favor. Nevertheless, during the course of debate on this and other legislation, critics of proposed legislation frequently invoke the contention that the legislation as drafted is unconstitutional. That debate has occurred in the context of this bill. The able and distinguished Senator from Kentucky has cited a number of constitutional scholars who weighed in in favor of the proposition that this legislation, in its attempt to limit soft money and other restrictions, is unconstitutional. On the other side of the constitutional divide, an equal body of distinguished scholars have weighed in on behalf of the proposition advocated by Senators FEINGOLD and MCCAIN and have asserted that these provisions are indeed constitutional.

My point in mentioning this is that we in this Chamber are not going to be able to decide that issue. We will not be able to resolve it. That is not our function. The function of the legislative branch of the two Houses of Congress is to enact legislation and, indeed, if the legislation that we have enacted is in any way constitutionally flawed, the courts—ultimately the Supreme Court of the United States—will make that decision, and the courts have done so when they believe that we have overstepped the constitutional limits in imposing restrictions on our campaign financing system.

Mr. President, we ought to allow the courts to make that determination and to move this legislation forward so that those who seek to challenge it have an opportunity to do so in the only meaningful forum in which this issue can be resolved on a constitutional basis, and that is in the judicial arena.

Mr. President, unless we have the good sense to change the rules of the game, candidates and their political parties will continue to pursue the money chase and the amount of money involved in future campaigns will continue to grow rapidly. I frequently tell the constituents in my own State that this fatally flawed campaign system that is involved has locked good people into a bad system in which, almost from the moment of our election, it is impressed upon us that the next campaign, if we choose to run for reelection, will be more costly than the previous one, and our focus almost immediately is upon how much money will I have to raise each week that I serve, each month that I serve, if I choose to seek reelection.

The amount of money has increased, as I have indicated, not just arithmetically based upon factors of inflation and the growth that is occurring in the populations of our respective States, but they have grown exponentially, and it might constitute the gravest threat to the integrity of the political system in America.

This bill proposed by Senators MCCAIN and FEINGOLD would do several things. In addition to the ban on soft money, the bill places a restriction on issue ads by independent special interests. If a Federal candidate's name is mentioned in any broadcast television or radio communication within 60 days of an election, for example, then this candidate-related expenditure will be subject to Federal election law and must be disclosed and financed with so-called hard dollars.

The Supreme Court has ruled that only communications that contain express advocacy of candidates are subject to Federal disclosure requirements and restrictions. This proposal would extend to include issue ads running 60 days prior to the election in which the individual candidate's name is mentioned in those ads.

Third, the legislation increases disclosure requirements and requires the Federal Election Commission to make campaign finance records available on the Internet within 24 hours of their filing. It requires political ads to carry a disclaimer identifying who is responsible for the content of the ad. Simply put, disclosure requirements would bring more accountability and responsibility to our political process.

Fourth, the bill prohibits political parties from making coordinated expenditures on behalf of Senate candidates who do not agree to limit their personal spending to $50,000 per election. This provision, in my opinion, will help to level the playing field between wealthy candidates and those candidates who do not have deep financial pockets.

Fifth, this bipartisan legislation prohibits anyone who is not a U.S. citizen from making financial contributions.

Finally, and what has become a central focus of this issue in recent days, McCain-Feingold requires that labor unions notify nonunion members that they are entitled to have their agency fees reduced by an amount equal to the portion of the fees used for political purposes if they file an objection to the use of those fees—a so called opt-out system in which the member can notify the union that he or she does not want any union dues used to finance any part of the political campaign contribution system. Fair enough, it seems.

The Supreme Court's 1988 Beck decision explicitly states that nonunion members in union shops may choose to pay reduced agency fees, and the McCain-Feingold bill simply codifies the Beck decision.

(Ms. COLLINS assumed the chair.)

Mr. BRYAN. Madam President, we hear that opponents of McCain-Feingold have argued for the need to codify the Beck decision. Senators FEINGOLD and MCCAIN have done just that by including a provision that expressly codifies the Supreme Court decision.

Now, however, there is an effort to seek a new amendment, a new provision. The pending amendment is clever. It indeed may rise to the level of being ingenious. But its sole purpose and function is to kill the cause of campaign finance reform. The majority leader himself was quoted in the Wall Street Journal in September this past month as saying:

I set it up [referring to the amendment] so they will be filibustering me.

This is a political tactic that is designed to thwart, to prevent campaign finance reform. It clearly indicates that this is not a serious debate about reforming our campaign laws.

Perhaps the Washington Post editorial of October 1, 1997, sets the record in the proper context. And I quote:

Senate Majority Leader Trent Lott, having magnanimously allowed campaign finance reform legislation to come to the floor, now proposes to kill it with an amendment affecting the use of labor union dues for political purposes.

I regret that the amendment in that form was offered. I hope that some

mechanism might be developed to permit us to pursue campaign finance reform and offer other amendments without this particular provision which has been variously characterized as a ''killer'' amendment or a ''poison pill'' amendment because I believe that its purpose is to effectively prevent campaign finance reform.

Mark Twain once observed that ''Everyone complains about the weather, but nobody does anything about it.'' The same could be said about the way we finance our campaigns for elective office.

If there ever was a time to reform our political system, the time is now. Neither political party has benefited in terms of public opinion from our present campaign finance system. Overwhelmingly, 92 percent of the American people believe that our system desperately needs reform and the time for us to do it is now. If we let this opportunity slip away, I fear that real campaign finance reform may not be enacted.

We need to ban soft money, and to stop the onslaught of negative ad attacks on political candidates.

We need to level the playing field, and give challengers who want to run for Congress and to prove that their ideas have merit and represent a broad base of public support the opportunity to do so.

Madam President, we need to restore public confidence in the American political system. And I believe that the McCain-Feingold revised measure represents our best hope for making these significant and needed changes prior to the next election.

I yield the floor.

Mr. HAGEL addressed the Chair.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. JOHNSON. Madam President, I am very pleased that the Senate has finally taken up the discussion of the McCain-Feingold campaign reform legislation.

I very much appreciate the efforts of Senator DASCHLE in pushing this process forward. His role in demonstrating that all 45 Senate Democrats support the revised version of McCain-Feingold I think was essential. And I hope that it becomes clear to all Americans that with the one additional Republican vote necessary that we will in fact achieve historic reform of the campaign funding system in our Nation.

But I also want to applaud Senators MCCAIN and FEINGOLD for what has been a tireless effort on their behalf in forging this bipartisan compromise legislation. We have seen many good bills fall by the wayside over the years. But this seems to be one of the best opportunities in recent years to actually achieve real reform.

That said, I have to express disappointment on my part that this legislation has been stripped down to a more modest level from its original version. In particular, I am disappointed that the system no longer creates a system of voluntary spending limits in the way that the original bill did. I believe that kind of limitation, that kind of restraint that will slow the nuclear arms race of campaign fundraising and spending in the long run, will in fact be essential.

Madam President, I have been a longtime supporter of campaign reform legislation. My experiences over these past 2 years have made it even more apparent to me that passage of this campaign finance reform legislation is absolutely critical to the health of our democracy.

There are those who would suggest that any restraint on spending of any kind is somehow a dumbing down of our democracy when in fact the reality is just the opposite. The quality of our democracy, the integrity of our democracy, is not a function of how much money we spend. It is a function of how well the debate is conducted.

There are those who have legitimate philosophical problems. There are those who simply see the status quo as being supportive of their own current election to the body, and to the House of Representatives. But I think that there are a great many of us here—and I believe a majority, if the opportunity were afforded to us to actually cast a vote on the merits of campaign finance reform—who would actually support this sweeping legislation.

I personally have just been through one of the longest and, frankly, one of the most expensive per voter Senate campaigns in the history of America. My opponent and I spent a total of $24 for every vote cast. And, if one were to include the money spent by the national party organizations and the various independent groups, total spending would rise to around $29 per vote. All of this money produced one of the longest political campaigns the Nation has ever seen. My opponent began running campaign commercials 17 months from the election, then 13 months before the election—an attack ad campaign, one that I had to respond to, although I was not yet even formally an announced candidate in the race.

That is the kind of campaign negative—vitriolic, long-winded, longstanding—that did nothing to improve the confidence of the American public in our political process, and did nothing to restore confidence that in fact the system reflects their values and their ideals and their values. It was simply a system awash in too much money.

Put in perspective, in South Dakota, our small State, with statewide television advertising relatively inexpensive, for a race like this, if one were run in a State like California at $29 per vote cast, the cost would be staggering. The equivalent cost in the State of California would be a $250 million Senate campaign.

Some argue that the money is good for democracy, that the voters will be more educated by this kind of enormous financial overkill.

Last week, the Washington Post quoted the House Speaker saying that ''If you have enough resources on both sides, you can actually communicate rationally.'' In his view, the more money spent by candidates the better.

But I can tell you with utmost certainty, given my own experience, that these arguments are utterly wrong. Voters in fact over recent years have been turned off by campaigns of this duration and of this negative quality because of unending commercials.

As I speak to South Dakotans in every corner of my State, there is a fervent wish that we could return to the days when campaigning began with great seriousness around Labor Day of the election year—not Labor Day of the year prior.

The appearance of this amount of money, the appearance of the raising of this amount of money, is one that gives rise to attitudes that the entire system is corrupt, the entire system is unresponsive, and the American public, that there is too much time spent raising the money.

Madam President, how long is it going to be that Members of this body and Members of the other body vacate their offices daily to go to their private campaign offices in the row houses and the streets off the Hill to make their fundraising phone calls, to do this ''dialing for dollars,'' as it is referred to around here, trying to raise the amount of money necessary to run one of these campaigns?

The typical U.S. Senate campaign, if it were raised in an equal level of energy throughout the 6-year term, would require the incumbent to raise $14,000 a week, every week, 52 weeks a year, for 6 years. Madam President, that is not the kind of money that can be raised casually. That is not the kind of money that can be raised with a barbecue in your backyard back home in South Dakota, or whatever State you are in. That is not the kind of money that can be raised in small increments. That requires a concerted, sophisticated, methodical effort. And it is corrupt and demeaning to the service in this body. And it is destroying the public's confidence in the quality of the deliberations that take place here, and in the kind of accountability that this body has.

As the amount of money rises, what we have seen last year in the last cycle becomes only more so in the future. The amount of money to raise to win a congressional seat has continued to rise astronomically. According to the Federal Election Commission, the typical candidate for an open seat in the House of Representatives raised nearly $600,000—close to double what was required only 4 years ago. The growth in so-called soft money has been even more explosive. Data from the 1996 elections show that the amount of soft money that was raised and spent was more than three times what was spent in 1992, and 11 times more than was spent in 1980.

It should be so fundamentally absolutely clear that something is wrong—

something is terribly wrong with our system of financing elections in this country.

Campaigns have become in many ways little more than a campaign finance arms race. And the American public has understandably become disenchanted with politics in large part because of this process.

There are people who suggested that all we need to do is to ban soft money raised by the political parties. Again, a mistake. Banning soft money without addressing the expanding role of independent groups and political campaigns would not go far enough, and it could create a whole new set of problems. We need to redefine the term ''soft money'' to include all forms of campaign spending that is presently unregulated.

During the 1996 election cycle when we experienced a flurry of campaign activity by independent organizations and congressional races, independent expenditures accounted for $19 million of spending—most of it targeted to key congressional races.

An even more pressing problem is the new phenomenon of issue advocacy advertisements. Last year's Supreme Court decision in the Colorado case opened the floodgates for this kind kind of activity.

According to a study by the Annenberg Center at the University of Pennsylvania, one-third of all campaign advertising totaling $150 million came from these so-called issue ads. Just as influential as other ads, they are political ads. They are not subject to the same fundraising regulations as in reporting requirements. Nobody knows where the money comes from. They are utterly unregulated.

The Annenberg study indicated that issue ads were the most virulently negative ads on the air. Overall, 81 percent of these ads were attack ads.

We have also seen the last expansion in the political activity by tax-exempt organizations—organizations, in effect, using taxpayer dollars to further a very political agenda on the left and on the right. And 30 tax-exempt groups are not supposed to be engaged in partisan political activity. But the reality has become very apparent to everyone who has even had a casual following of what has transpired over these last 2 years. In particular, banning soft money to political parties without addressing the growing problem of third-party groups would merely cause more money to flow into these unregulated groups.

One of my fears is, while we may limit spending that flows formally through the campaign structures of the respective candidates and their parties, that the money then as water flowing downhill washes increasingly into even more unregulated and less accountable mechanisms for running the campaigns, and the candidates will find themselves increasingly irrelevant to their own political campaigns, the political themes. And the political attacks and responses will be orchestrated and designed and organized by these so-called tax-exempt groups—groups that are, in fact, using taxpayer dollars in effect to run their partisan independent issue advocacy kinds of campaigns.

That does a disservice to the political dialog in our Nation. That does a disservice to any hope that we have that political candidates will be accountable to the public for the positions they take. The American public deserves better than that, and that is why we need campaign finance reform and that is why we need a broadened sense of soft money regulation.

It is not clear whether there are going to be any amendments allowed in the course of this debate. It is certainly my hope there will be. That is the nature of debate in this body. It is what we have done for 200 years on issues of great public significance. And yet we find a parliamentary procedure being used that may, unfortunately, stop amendments, stop debate and cause this whole exercise to come tumbling down.

But if we have an opportunity for a full, meaningful debate, involving amendments, if we are allowed to offer amendments, I have two I want to pursue. One is an amendment that would deal with the problem of candidates spending their campaign funds for personal use. This is something I think has become out of hand, as reimbursement payments to elected officials are not itemized and there are literally thousand-dollar reimbursements coming back to candidates for their personal use.

I think we need to clean this up. I think we need to take another step in the right direction to make the American public think that in fact this system is responsive to them, that campaign money is not some additional source of slush fund, not some additional source of personal financial wealth that is available to candidates.

A recent study by the Gannett News Service last year showed that many candidates have reimbursed themselves thousands upon thousands of dollars from their campaign funds with virtually no explanation of where the money has gone, what it has been used to purchase. I believe the same itemization requirements ought to be applied to candidates as are applied to other areas.

Second, I believe another matter in cleaning the system up and restoring a greater sense of integrity to the system is campaigns ought to pay the fair market value for use of private aircraft such as the corporate jets that transport Members from one corner of this continent to the other. Currently, candidates simply reimbursing the equivalent of first-class airfare, when in fact the cost of this transportation is often in the tens of thousands of dollars, and again going unrecorded, results in less accountability than I believe we should have.

We have had a historic first session of the 105th Congress as we come down now to this final month in the sense I think we have dealt responsibly with the Federal budget, the Federal budget deficit, with the design of some tax relief, in placing I think a greater emphasis on education, preserving a commitment to the environment, doing I think some positive things. But this Congress cannot be deemed a success and history will treat this Congress poorly, in my view, if we miss this opportunity now to enact meaningful, significant campaign finance reform, reform that is supported by the nonpartisan reform organizations around the Nation, one that is not designed to tilt the playing field to one political party or the other because, frankly, in past years that has happened from time to time. We need to get away from that and, in fact, to pursue this kind of significant reform that has bipartisan support, that is supported on a very broad basis by the American public and to quit making excuses to the American public about why it could not get done, no more excuses about why the money will continue to mount, no more excuses why there will not be any greater accountability than in the past, about where the money is raised and how it is spent, no more excuses about why these campaigns are taking now years and years rather than months and months to transpire, no more excuses about where the money came from and who, in fact, has their interests best being considered by our legislative bodies in Washington.

We have that opportunity now. We cannot allow this to escape from us. We have, today and tomorrow, an opportunity to cast a historic vote to get past some of the parliamentary abuses that are attempted to be used here, the poison pill parliamentary efforts, to get past that and to allow each one of us in this body to go home at the end of this session of the 105th Congress and to look our constituents in the eye and say, I voted for or I voted against campaign finance reform on the merits, up or down. Let us be permitted to cast that vote with the full breadth of debate. While I am worried that that may not in fact transpire today or tomorrow, during the remainder of this 105th Congress we have this great opportunity and it is certainly my hope we will not allow it to slip.

I yield the floor.

Mr. HAGEL addressed the Chair.

The PRESIDING OFFICER. The Senator from Nebraska is recognized.

Mr. HAGEL. I thank the Chair.

Madam President, much of the debate this past week about campaign finance reform has missed an important dynamic of the political process. The integrity of any process depends on the integrity of the individual. We recapture the trust and confidence of the American people not by passing more laws, more regulation and more Government but by taking responsibility for our own actions and the conduct for our own campaigns—personal responsibility. Will more Government control, more regulation, more law really

change our behavior and our conduct? Will more Government control make us more honest and fill us with newfound integrity? I do not think so.

Systems are corrupt because of the people. Systems are not corrupt because of the system. When we lower our expectation and we lower our standards, as we have in American politics, we lower our self-worth. We lower the system. And when we do not expect much, we do not get much. When we do not expect much from our candidates and our politicians, we will not get much. It all becomes self-fulfilling.

Now, why do we blame the system and excuse the violators? Where is the outrage over those who subvert the system and deliberately break the rules and the laws already in place? Where is the outrage over individuals who break the law and refuse to take responsibility for their own actions? Where are the voices demanding personal responsibility and personal accountability? Where are those voices? Those voices are now talking about the system.

We glide over the alleged wrongdoing of individuals, saying, well, it doesn't count, it doesn't matter—like it is beyond our control. We say that it is the system; that is the problem. The system is flawed, not the individual but the system. We say that money is evil, money is the terrible evil in our system. We excuse the alleged wrongdoing and corruption by blaming the so-called vagaries of the campaign finance system and the laws.

We dance on the pinhead of technicalities. What is allowed? What is not allowed? What is the correct shading of the law? Did the person really break the law? How must we change the rules and regulations so that this never happens again? All we need is more Government. Everybody knows that. If we have more rules, more regulation, more enforcement, more Government, then people will abide by the law.

Something is greatly amiss when we are debating the technicalities of right and wrong. There are no technicalities between right and wrong. Right is right. Wrong is wrong. There are no shades of right or degrees of wrong. The difference between right and wrong is not subject to a controlling legal authority. It is a matter of honesty. It is a matter of simply just doing the right thing. Is that difficult to grasp? Is that so difficult to this body to grasp?

We are here today debating whether or not to pass new laws based on the fact that some people broke the law, or at least allegedly broke the law. Those are laws that we already have. Those are regulations and rules on the books now. It is very clear. We already have laws prohibiting foreign contributions. We already have laws prohibiting the solicitation of campaign funds in a Government building. We already have laws that very clearly spell out the difference between so-called hard money and soft money.

I ask my colleagues one question: How will changing the rules and the laws and the regulations change behavior of those already inclined to break them? It will not. No number of new laws and new regulations will change the basic integrity of the candidate. The integrity of the system depends on the integrity of the candidate. Each candidate must take personal responsibility for his or her own actions in the conduct of their campaigns. We need to focus on individual violations of current law. We need to focus on individual conduct and behavior, individual responsibility and accountability. If each of us in public office conducted our campaigns, every aspect of our campaigns in a manner that our constituents will be proud of, not necessarily always agreeing with our positions but be proud of how we conduct ourselves and our campaigns, then we would not be engaged in this campaign finance reform debate.

People get involved and participate in a democracy because they believe in things. The idea that more people will participate in our political process if we pass more laws and regulations completely discounts the nature of free people. Politics is about people. Politics is not about Government. Politics is not about rules and regulations. Politics is about people. Politics is about people who believe in things. We will not restore the trust and confidence of the American people in elected officials and the political system by placing further restrictions, by placing further restrictions on the rights of Americans to participate in the political process.

A former Governor of Deleware and former Member of Congress, Pete DuPont, made a very compelling argument in last week's Wall Street Journal when he wrote that limits in campaigns are akin to price controls in the economy. And he said, ''All of these ideas are bad economics, bad politics and, as 40 centuries have proved, very bad public policy.''

The best way to correct the system is not to replace an old bad set of rules with a new bad set of rules. That is not reform. That is rearranging the restrictions. Too many people here in Washington confuse the two. The best thing to do would be to provide the American people complete and immediate disclosure of all contributions—complete and immediate disclosure of every dollar in the system. Hard money, soft money, independent expenditures, every single dollar that goes into the system must be disclosed immediately.

The press already does a good job of telling the people who is giving money to whom, when the media knows, that is. I have every confidence that if we had full disclosure of every dollar, the press would inform the people as to who is giving and receiving these contributions. They will tell the people who is spending the money for or against candidates. They will let the people know where candidates are getting their campaign contributions. Let the press do the job and report all of these contributions.

I trust the people. I trust the people of this country to be able to sort it out. If they have the information, if the people of this country have the information, they will make an informed decision. They will determine what is acceptable to them, not because some bureaucrat or Washington regulator tells them what is right or wrong but the people sort it out. Just give the people the information.

As Governor DuPont wrote, ''A well-informed electorate will safeguard American campaigns far better than any appointed group of the best and brightest Washington regulators.''

Another change we might look at is to again make political contributions tax deductible. We used to do that. We allow people to deduct contributions to charities. We allow union members to deduct their union dues, but if people want to participate in American democracy by giving money, it is not tax deductible. Is not our system of self-government just as important as a charity or a union?

How will we restore the trust and confidence of the American people in their elected officials? By electing good people to office, by holding those who serve in public office accountable for their actions, and holding them to the highest standards. I consider serving in public office to be an honor and privilege. I know every one of my colleagues feels the same. This is not a right. This is not a right, to be in this body, to hold public office. It is not mine to hold onto by whatever means I can, no matter how questionable those means. It is a privilege bestowed on me by the people of my State. It is a privilege they also have the right to revoke. The people need to be our partners in the political process. We can create all the laws we want, but only the people—not the laws, not the regulators, not the regulations, not the system—but only the people can hold elected officials accountable for their actions. Only the people can, through their votes, determine when someone no longer deserves their trust and confidence.

I believe that for far too long we have been creating a society less dependent on the voluntary rule of honesty and good behavior of the citizen than on the impressive mandates of Government. Government does not mold human behavior. Behavior comes from within. I cannot support any proposal that seeks to limit the ability of the people and institutions to express themselves and takes the power to shape our public policy debate away from the people and gives it to the Government. I cannot support such legislation. That is what McCain-Feingold would do, in the name of reform.

What are we really reforming, the right of people to participate in the political process? In a free democracy, taking away people's rights is not reform. In *Buckley* v. *Valeo* the Supreme Court ruled the debate about campaign finances is about the fundamental role of the people in our democratic society. The Court wrote:

In the free society ordained by our Constitution, it is not government but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.

Madam President, the system has not failed us. Campaign dollars are not the problem. They may be the excuse—the system, dollars, may be the excuse for some. But our problems are with ourselves. What outrages the American people is the conduct of some politicians—and my good friend, Senator MCCAIN, talked about this earlier this afternoon when he referenced in the poll the ''lying windbags,'' the lying windbags that many people think of as politicians, and I know that is true. But what really outrages the American people is the conduct of some politicians and their supporters who have corrupted the system by violating the integrity of the process for their own end.

Our political leaders have, as one of their most sacred responsibilities, the responsibility to set the moral tone in America and give moral leadership. I do not mean religious leadership. I do not mean religious leadership. I mean moral leadership. Moral leadership goes well beyond the rule of law and regulation. Were the great leaders of our Nation great because of laws and regulations dictating their actions and behavior? No. Our great leaders were great because they had a moral compass and they shared that moral compass with our people and our Nation. And they relied upon that moral compass for governance. America deserves leaders who lead through the force of character and integrity, not through the force of regulation and law. Before we reform the campaign finance system, we should first look at how we might reform ourselves. We might look at how we might reform ourselves.

Madam President, I would like to end my speech this afternoon with a quote from Thomas Jefferson, our third President, one of our Nation's strongest defenders of the rights of the American people. Thomas Jefferson said, many, many years ago:

I know of no safe depository of the ultimate powers of society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is surely not to take it from them, but to inform their discretion by education.

Madam President, I yield the floor.

The PRESIDING OFFICER. The Senator from Missouri is recognized.

Mr. ASHCROFT. Madam President, as I mentioned when I was last on the floor, the campaign finance reform bill we are debating will not produce meaningful political reform. The McCain-Feingold proposal will not lead to reform because it leaves the single greatest obstacle to competitive elections untouched. In fact, it will strengthen the single greatest obstacle to competitive elections. That obstacle is the advantage of incumbency, which is now and always has been the single greatest perk in politics. An incumbent has access to the podium, access to the news media, and the ability to create name identification. Any time you limit political spending, any time you limit what the competitor can generate in terms of information, you strengthen the incumbent.

I submit that Hershey doesn't need to advertise that it sells chocolate, but a new competitor does. And those who inhabit public office are well-known for the fact that they inhabit it. But new individuals need to have the ability to create that same awareness in the mind of the public.

Campaign finance legislation that restricts core political speech strengthens incumbents by limiting the ability of challengers to increase their own name recognition and to highlight the incumbents' voting record on issues of concern to the voters.

So, if you say you cannot spend much money against an incumbent, and your supporters can't talk about his or her voting record, then you can't match the incumbent's advantages of being on C-SPAN in the Senate Chamber, of moving through the news industry with press releases. If Senators want true political reform, the answer is to limit terms, not to limit speech. Let's limit politicians, not the citizens. We should be talking about limiting the tenure of people in public office, not the first amendment rights of the citizens of this country.

To this end, this afternoon, I have filed an amendment to the pending campaign finance reform legislation that would authorize States to impose term limits on their Senators and Representatives. However, my amendment will not come up for debate or a vote if cloture is invoked on the McCain-Feingold bill. Accordingly, a vote for cloture on McCain-Feingold is a vote against term limits.

Let me just review for a second why term limits would provide the true reform. Incumbency is the real problem in our system. It is the single greatest perk. Committee assignments and the ability to control committees relates to incumbency, and committee assignments translate into big bucks. The value of incumbency is as strong or stronger, now that we have had modest reforms over the last several years, than it was before. As a matter of fact, when campaigning was wide open 100 years ago the value of incumbency wasn't anything like what it is now.

Madam President, 94 percent of all Members who seek reelection get reelected, and an individual challenging them, if limited in what he or she can spend, is at a disadvantage. Madam President, 94 percent is 19 out of 20. That means that the only true elections are for open seats.

Term limits are a tried and tested kind of reform: Forty one Governors, 20 State legislatures and the U.S. President have term limits. It is time that the Congress be term limited as well.

Term limits mean no more politics as usual. As a matter of fact, studies done by research institutes indicate that we would have had the balanced budget amendment to the Constitution long ago if we had term limits, which would have brought new individuals to Washington who voted the way people do in their first two terms in office instead of voting the way they do after they have spent term after term after term here and begin to endorse the bureaucracy and to sanction it and to support it. I believe we should not limit the amount that citizens can spend on politics. We should limit the amount of time politicians can spend in Washington.

I will ask that individuals vote against cloture on the McCain-Feingold bill so we would have an opportunity to vote on term limits. A vote for cloture on McCain-Feingold will be a vote against term limits. A vote against cloture will at least provide us with the opportunity to bring forward amendments. Those amendments, including my term limits amendment, hold the promise of giving us a real opportunity to amend and to otherwise change the election procedures for the benefit of the people.

The people deserve honest elections. They first deserve enforcement. So much of what is being talked about these days is the violation of laws in existence. We don't need to proliferate the laws in order to enforce them. But we do need to give opportunity to individuals who are not a part of the system now. That cannot be done by limiting what they can spend to get known or limiting what their supporters can spend to expose the record of those who are in office. But it can be given to them if we decide America has enough talent to allow it to circulate individuals through the Senate and the House, and by term limits, to say that no individual should be a lifetime occupant here, that we should give individuals an opportunity to seek election and that is the kind of campaign reform which will really benefit America.

I yield the floor.

Mr. BINGAMAN addressed the Chair.

The PRESIDING OFFICER. The Senator from New Mexico is recognized.

Mr. BINGAMAN. Madam President, is there any limitation on speaking at this point? What is the parliamentary situation?

The PRESIDING OFFICER. There is none.

Mr. BINGAMAN. Madam President, let me speak for a few minutes, then, on campaign finance reform. I would like to step back from the details of the debate. There has been some debate about limiting spending: Should we limit spending or not, should we ban soft money or not, should we regulate phony issue advocacy ads or not, should we provide more power to the Federal Election Commission or not—those are the kinds of questions we debate here. But I believe this entire discussion about campaign finance reform

is about one central question and that is what should determine the outcome of our Federal elections? Should we allow money to determine the outcome of our Federal elections? Or should we allow, or try to get to a situation, where a complete and a balanced discussion of the differences between the candidates determines the outcome of the election? Should we allow money or helpful information to change the minds of voters? And should we allow money or robust debate to determine who wins the race?

This fundamental issue, which I think is at the center of campaign finance reform, has been obscured because opponents of campaign finance reform have been hiding behind what I believe are mistaken Supreme Court opinions that have tried to equate money and speech. They argue that money is speech, and, therefore, to limit money is to limit speech. They say that money is robust debate. They say money is helpful information for voters. And they even say that money is or constitutes a complete and a balanced discussion about the differences between candidates.

In my view this argument is blatantly wrong. To any reasoned observer of our Federal campaigns, the argument obviously is without merit. Ask any challenger to an incumbent Senator if the millions of dollars that an incumbent is able to raise and spend in the race has meant more robust debate, more helpful information for the voters, more complete and valuable discussions about the difference between the candidate and the challenger?

The challenger will laugh out loud at the question.

My colleague said, to limit spending in campaigns is to assist incumbents because you have a lot of challengers out there who would like to be able to spend more than incumbents to challenge them and to get their message out and they are not able to do so. Madam President, that may be true for a very few rich individuals who have very substantial private wealth that they can put into races. But for an average candidate for public office in this country, your ability to raise large sums of money and compete in the media and buy the air time is directly dependent upon your incumbency. Accordingly, a challenger is at a very substantial disadvantage unless we somehow restrict or control the amount of money coming into this process.

Ask any voter who has been deluged with negative TV ads, funded by swelling campaign war chests, whether those TV ads have produced a more robust debate and provided more helpful information to the voters, or a more complete and balanced discussion of the differences between the candidates? They would think that you were crazy to suggest that those 30-second negative TV spots in fact improve their ability to make a reasoned judgment.

No, the vast increases in money spent in political campaigns have not produced more robust debate, they have not produced more helpful information for voters, or more complete and balanced discussions about the differences between candidates. This increased amount of money has meant the very opposite. In fact, voters will tell you not only that money does not equal speech, but that excessive campaign money does equal the erosion and the undermining of our political system.

To them, money means bad government. To them, money is not speech; money is the corruption of the system. The American people are very specific in their beliefs about this, Madam President. Voters surveyed recently by the Princeton Survey Associates tell us exactly what the public thinks:

55 percent of the public think that campaign money gives one group more influence by keeping other groups from having their say in policy outcomes;

50 percent think that campaign money gets some people appointed to government office who would not otherwise be considered;

48 percent think that campaign money keeps important legislation from being passed in the Senate and in the House of Representatives;

45 percent think that campaign money leads elected officials to support policies that even those elected officials don't think are best for the country;

41 percent think that campaign money even leads elected officials to vote against the interests of the constituents who sent them to Washington;

63 percent of the public think that campaign money leads elected officials to spend too much time fundraising;

And, finally, 52 percent think that money, and not speech, determines the outcome of elections under our current system.

Madam President, it is hard to argue with the public's view on these various points. I submit that the arguments by opponents of campaign finance reform, that money is speech, should not and fortunately does not pass the laugh test with the American people.

The people are right, that we desperately need to reform the campaign system. In fact, they are right that we need to do a full U-turn from where we are today. We need to reduce the amount of money raised and spent in campaigns. We need to increase the amount of robust debate, providing really helpful information to voters. We need to increase the amount of complete and balanced discussions about the differences between candidates so the public has good information.

Even the modified McCain-Feingold campaign reform bill is a big step in the right direction. It does at least two very important things. First, it will reduce the amount of big unregulated donations from corporations and unions and wealthy individuals in our campaigns, and that is good. We need to reduce that. And second, it will regulate the huge amounts of money spent by so-called independent special interest groups on advertising that they disguise as issue ads but are, in fact, designed to advocate the defeat of a particular camp.

The original McCain-Feingold bill did much more. There were more affirmative proposals to actually encourage more robust debate, more helpful information for the voters, more complete and balanced discussions of the differences between the candidates, but the bill had to be scaled back to reduce the objections of some of the opponents of campaign finance reform. This modified version of the bill that we now have before us does not complete the U-turn that we ought to be making, but it is turning the car in the right direction.

Madam President, I stand ready to support the modified version of McCain-Feingold. I hope we will have an opportunity at some point in the near future, and hopefully this week, to have an up-or-down vote on the bill. Perhaps at some point we can get past these parliamentary maneuvers of killer amendments, of filling out the amendment tree, second-degree amendments to block an up-or-down vote. Perhaps at some point in the near future the opponents of campaign finance reform will listen to the people and conclude that money is not speech, that money, in fact, is undermining the political system that we were sent here to help ensure the functioning of.

I hope we will move expeditiously this week to pass campaign finance reform. Our constituents desire it, and we should do it.

Madam President, I yield the floor.

Mr. MCCONNELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Kentucky is recognized.

Mr. MCCONNELL. Madam President, there has been a development today that has a direct bearing on this debate that I thought would be of interest to our colleagues and particularly the occupant of the chair.

The Supreme Court today denied cert and, therefore, refused to overturn a first circuit decision, in effect confirming a district court decision, specifically ruling unconstitutional, once again, most of the issue advocacy language in the McCain-Feingold bill which we have before us. The similarities are noteworthy. Two of the three categories of restrictions on issue advocacy in McCain-Feingold read as follows. As we all know, the courts have been very clear for 21 years that you are free to go out and express your views about any of us as often as you want to, in any way that you want to, as long as you don't say certain things like ''vote for'' or ''vote against.'' That does not fall within the jurisdiction of the Federal Election Commission. That group does not have to answer to a Federal agency in order to criticize us. The Federal Election Commission, as

we all know, doesn't like that. So they have issued regulations seeking to change by regulation previous Court decisions on what is or what is not issue advocacy.

In those regulations, which are remarkably similar to two of the three sections in McCain-Feingold dealing with issue advocacy, the similarities are noteworthy.

In the McCain-Feingold bill, the following words are used, and the words mean this in the bill, as I understand it, that if any of these things happen, the group would fall under the Federal Election Commission and be subject to their jurisdiction. In addition to the bright line test that the Supreme Court has already laid down, the bill would seek to add to that the following:

. . . or a campaign slogan or words that in context can have no reasonable meaning other than to advocate the election or defeat of one or more clearly identified candidates.

Madam President, that is part of the language in the underlying bill.

Other language in the underlying bill remarkably similar to the FEC regulations struck down by the Supreme Court today read as follows:

. . . expressing unmistakable and unambiguous support for, or in opposition to, one or more clearly identified candidates when taken as a whole and with limited reference to external events, such as proximity to an election.

What the underlying bill is seeking to do is to outline a series of circumstances under which a group would fall within the jurisdiction of the Federal Election Commission. Currently, they are outside of that jurisdiction unless they say ''vote for'' or ''vote against,'' tests which the Supreme Court laid down 21 years ago and has never changed.

That was the language from McCain-Feingold. Let me now read the language out of the FEC regulations which were struck down by the Supreme Court today:

. . . more communications of campaign slogans or individual words which in context can have no other reasonable meaning than to urge the election or defeat of a candidate.

Further language from the proposed FEC regulations which were struck down by the Supreme Court:

. . . when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more candidates.

Further from the FEC regulations struck down by the Supreme Court today:

The electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning.

Madam President, there is a remarkable similarity between the language struck down by the Supreme Court today and the language of two of three of the sections in the McCain-Feingold bill which seek to redefine by statute what happens in an issue advocacy campaign. This is an important new development.

We have had a lot of discussion on the floor of the Senate over the last week and a half about what is and isn't constitutional. It has been suggested that there are 126 constitutional scholars out there who are certifying, in effect, that these new restrictions on issue advocacy are, in fact, constitutional. That has been asserted by some of our colleagues, even though there have been a whole line of Supreme Court decisions before the one today reiterating that they crafted this the way they did on purpose; it was not an accident. The Supreme Court wanted to have the widest latitude possible for organizations to criticize us, and there is no indication that they intended that criticism to necessarily be evaded just because it was in proximity to an election.

There is no language on the 60-day test, which is the third provision of the McCain-Feingold bill. Frankly, that is sort of a new item. The FEC has not yet tried that. But if you look at that language and look at the fact that the Court has confirmed time and time and time again that it meant what it said it did with regard to issue advocacy, I don't think it is much of a stretch to predict that, if the Court is going to strike down language almost the same as two of the three sections in McCain-Feingold seeking to make it difficult for groups to criticize us, they would be very likely to strike down the third, which makes it impossible effectively for them to criticize us without becoming a federally registered committee in the last 60 days of an election.

As I said—I see my colleague from Washington on his feet—we can discuss as long as we want to what is and isn't constitutional. The final word on that is the U.S. Supreme Court, and they just spoke again today on the very subject that we have been discussing on the floor of the Senate in the last week and a half. I think it is a very important additional indication that the Court, in spite of all the prodding of the Federal Election Commission to set up a new standard for issue advocacy, the Court has absolutely no intention of changing its mind. It has been absolutely, unequivocally consistent for 21 years as to what you would have to put in an advertisement to be brought within the Federal Election Campaign Act and thereby covered by the FEC.

Here is what the Court said back in Buckley—and it has had many opportunities to revisit that, it hasn't changed its mind over the years, didn't change its mind again today—this is what the Court said. For a communication by a group to fall within the Federal Election Campaign Act, you would have to have express words of advocacy of election or defeat, such as ''vote for,'' ''elect,'' ''support,'' ''cast your ballot for,'' ''Smith for Congress,'' ''vote against,'' ''defeat'' or ''reject.''

They have had 21 years to revisit that standard, 21 years to decide the Federal Election Commission knew better than the courts about how to craft this language, 21 years to change its mind, new judges coming onto the bench and old judges leaving, and the Court has never changed its mind, up to and including today when it refused to grant certiorari on a lower court decision, in effect upholding the same language that has been on the books since 1976.

So, Mr. President, I think this is an important addition to the debate. I hope that Senators will note that the Supreme Court is not of a mind to change its opinion on issue advocacy versus express advocacy, one of the important issues that we have been debating here in the context of the proposed McCain-Feingold bill.

I yield the floor.

Mr. GORTON addressed the Chair.

The PRESIDING OFFICER (Mr. ROBERTS). The Senator from Washington is recognized.

Mr. BUMPERS. Will the Senator yield for a parliamentary inquiry?

Mr. GORTON. He would.

Mr. BUMPERS. Mr. President, is there any order of sequence on the speaking?

The PRESIDING OFFICER. There is not.

Mr. BUMPERS. I thank the Chair.

Mr. GORTON. Mr. President, in 1974, impelled by certain individuals and groups who felt that too much money was being spent on political campaigns and on political speech, the Congress of the United States passed a law limiting the amount of money that a candidate for Federal office could receive from any individual source, and limiting the amount of money that a candidate for a Federal office could spend advocating his or her election to that office.

The Supreme Court of the United States upheld the half of that statute that limited the amount of money that a candidate could seek from any given individual or organization or group; but about the proposition that a candidate could be limited in the amount of money that he or she could spend on a campaign, the Supreme Court of the United States made this statement—and I quote

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech. Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.

And the Supreme Court of the United States found invalid, as a violation of the fundamental first amendment right of free expression, any such limitation.

The same mindset that gave us those laws and that has forced those individuals or groups who feel vitally interested in the election or defeat of a candidate to spend money in other ways, often through the political parties that sponsor those candidates, now has brought this McCain-Feingold bill to the floor of the U.S. Senate.

Finding it ineffective simply to limit the amount of money that candidates can collect from a given individual, the bill now seeks to limit severely the amount of money that political parties can collect with which to express their message to the American people. The fact that this flies in the face of most thoughtful academics observing the political scene in the United States who call for greater party responsibility and a greater role for political parties to play in order to create a greater degree of responsibility and responsiveness in carrying out the will of the people as expressed in elections, the McCain-Feingold bill seeks to tie the hands of parties and to render them largely ineffective.

The sponsors of the bill do recognize, however, that there are other methods of communicating political ideas. While they did not attempt to limit the right of other individuals or organizations in communicating their ideas directly, and in some cases not at all, they do attempt, as the Senator from Kentucky has just pointed out, to take a form of communication called issue advocacy—that is to say, making your views known to the people of the United States with respect to issues that come before the Congress of the United States—and force it into a category which they define as express advocacy, essentially whenever the name of a candidate or a Government officeholder is used, and once again provide limitations on the amount of money that can be collected for the expression of that form of advocacy.

As the Senator from Kentucky has so clearly pointed out, not only is that portion of the McCain-Feingold bill unconstitutional on the basis of a long line of Supreme Court decisions, its unconstitutionality was reaffirmed this morning, this very morning by the refusal of the Supreme Court even to listen to a challenge to a first circuit decision on exactly that subject.

So what we have in McCain-Feingold is, in addition to the limitation on the amount of money that can be spent or contributed to individual candidates, an additional limitation on the amount that can be contributed to political parties, but no limitation at all on the amount of money that can be spent independently of those political parties by the widest range of groups and individuals in the United States who have a vital interest in the actions of this Congress unless those groups make a mistake which is absolutely unnecessary to make and use one of a handful of magic words.

Finally, of course, McCain-Feingold does not attempt in any respect whatsoever to limit the commentary, either in news columns or on editorial pages, on the part of the newspapers in the United States or similar commentary on radio and television stations. It isn't long, however, since exactly such a set of potential restrictions were proposed.

With a degree of intellectual honesty, absent from this debate, in February and March of this year many of those who are here today promoting the McCain-Feingold bill recognized that the goals they sought were blatantly violative of the first amendment to the Constitution of the United States and proposed to amend the first amendment.

At this point, Mr. President, I think it not at all inappropriate once again to read into the RECORD what those Senators—I think some 30-plus of them altogether in the final vote—proposed to do to the first amendment to the Constitution of the United States. They proposed to say:

> Congress shall have power to set reasonable limits on the amount of contributions that may be accepted by, and the amount of expenditures that may be made by, in support of, or in opposition to, a candidate for nomination for election to, or for election to, Federal office.

It seems clear to me, Mr. President, that that constitutional amendment, were it placed in the Constitution of the United States, would have permitted Congress to state that the New York Times, or a newspaper in a city of 50,000 people in a city in Kentucky, could have its commentary on election campaigns limited in the same way that the present law limits contributions to candidates today.

Now, Mr. President, I think a newspaper—I will take one of my own—say the Tri City Herald in central Washington, with a circulation of some 40,000 newspapers a day, if it writes an editorial in favor of my candidacy, which I am pleased to say that it has, and distributes 40,000 copies of that newspaper, it has exceeded that $1,000 campaign contribution limit if the cost of writing and printing and distributing that newspaper exceeded 2.5 cents a copy.

Lord knows by how much the New York Times would exceed that contribution by making any kind of commentary on behalf of or in opposition to a candidate for political office. Lord knows how much more such a commentary on network television news could be considered to be worth.

Yet, Mr. President, at least the proponents of that constitutional amendment were being intellectually honest and at least they were being consistent, or would have been consistent had they been willing to say they wanted to limit the way newspapers and radio stations and television stations could comment on politics, because, obviously, if every other form of communication is going to be limited, how in the world can we justify letting those few people in the United States with enough money to own the newspapers or having the good fortune to be on their editorial boards and, for that matter, to write news stories about politics not be limited? Of course they should.

But, Mr. President, the first amendment was written not when we had television or radio stations, but when we had thousands of newspapers in the United States of America, most of them speaking much more sharply about candidates and issues than do newspapers today. And the men who wrote the first amendment to the Constitution of the United States knew that every one of those newspaper publishers had a greater first amendment right by the definition used by the promoters of McCain-Feingold than did the average citizen who did not own or write for a newspaper. But they consider that right of mass communication about political ideas to be a fundamental liberty of the people of the United States. Now we have opponents of this bill who say it is not only not a fundamental liberty of the United States; it is such a great evil that we need effectively to muzzle them.

Hark back to the Supreme Court in which the Supreme Court says virtually every means of communicating ideas in today's mass society require the expenditure of money. We have proponents who say we should not allow the expenditure of money in amounts that are sufficient to communicate those ideas.

Having limited the amount of money candidates can get, they now wish to limit the amount of money political parties can get. It is clear they wish to limit the amount of money that these independent groups can get, but in the absence of their constitutional amendment, they can't do that.

Now, last year, Mr. President, I asked this question: Were the expenditures of candidates or of political parties or of third party interest groups the least responsible? The answer, obviously, is the latter. A candidate whose name must go on all political communications can be immediately called to account for falsehood and, in fact, can readily be called to account even for what is considered to be an unfair characterization of his or her own candidacy or an unfair criticism of an opponent. Expenditures by political parties don't carry that same degree of responsibility. The occupant of the chair at the present time is not really responsible for the communications of the Kansas State Republican Party, nor am I in my political party in my State. We will catch a certain degree of criticism for what our parties do, but we at least have plausible deniability. But now having forced even the parties

out of the field of effective communication, we leave all political communication to the newspapers and the television stations and those organizations, whether they are of the left or the right or of a narrow special interest, almost wholly to the field of unregulated communication for which neither beneficiaries have any responsibility nor the victims any effective way of responding.

The Senator from Oregon, during the course of this debate, has pointed out the impact of a law very much like the one that we are discussing here on politics in Oregon. There the limitations on contributions for candidates were even tighter. The point that he made of what happens in the real world was the candidates can't raise very much money, the political parties are fairly weak, so campaigning became more negative than it had ever been before—not only more negative because of the use of the undocumented constitutional rights of these outside groups to criticize, but from the fact that almost all of their communication was critical and negative in nature, and the limitations on the candidates made it effectively impossible for them to answer.

My own State, Mr. President, is going through pretty much the same experience. The more the limitations on the candidates, the greater the expenditure of money independently in so-called issue advocacy will be, and the more negative political communication will be, as it was in the classic example of the tens of millions of dollars spent by the labor unions in 1995 and in 1996.

Now, Mr. President, one other point, and I will have to admit, along with everyone else who has spoken today, almost everything that has been said today has been with respect to the revised McCain-Feingold bill. The issue before the Senate, however, is the Lott-Nickles amendment. The same analysis does not attain to the Lott-Nickles amendment because it simply says that labor unions and labor union-type organizations, while they remain entirely unlimited in the way in which they can spend their money, and with respect to issue advocacy, can only be involved in politics by the use of money to the extent that there are members who have paid dues into those unions who allow their money to be spent in such a fashion.

It is curious in the mind of this Senator that such an obviously just policy—not allowing my money, your money or anyone else's money to be used to communicate ideas with which you or I or that third party disagrees, a proposition that is clearly constitutional—should be considered to be a poison pill or the death knell for campaign reform. What could be more fundamental, Mr. President, than the idea that the individual whose money is being spent in connection with the communication of political ideas should have some control over how that money is spent?

Now, Mr. President, I am in a position to tell you how that works in practice because another element of one of the latest of the campaign reforms in the State of Washington was to make just such a provision. When that provision became law, 80 percent or more of the members of the Washington Education Association, the teacher's union, refused to allow their money to be used in politics at all. I have just heard, though I can't be entirely certain of this statistic with respect to other labor unions, the percentage of members who are willing to permit their money to be used is in single digits. Presumably, the members of those organizations prefer their money to be used for the primary function of a union with collective bargaining rights and not even on politics with which they agree, much less politics with which they disagree.

That, Mr. President, is the reason the opposition to this amendment is so fierce. That is the reason we are told most of the proponents of McCain-Feingold will filibuster this very bill if it is included. It is just because the opposition on the part of members of these organizations to spending their money in the way in which it has been spent over the last several years is so deep, so broad, and so fierce.

But in this case, I want to state once again, Mr. President, we are not talking about a matter over which there could be any serious constitutional challenge at all. We are simply talking about whether or not it is good policy. We are talking about something that would meet the goals of McCain-Feingold to the extent that their goals are to limit the amount of money being spent on political speech. It would certainly limit it in connection with the last campaign.

Now, I am not convinced of the case that we are spending too much money on political speech. I believe the wide diffusion of political ideas was exactly what the first Congress of the United States had in mind when it passed the first amendment. However, if you are going to limit political speech, you ought to do so fairly and across the board. To do so fairly and across the board, you must gut the first amendment to the United States, you must change the Constitution, and you must say we are going to have Government—Members of this body and the appointed Federal Election Commission—decide what speech in the political context is legitimate and what speech is not, and the definition of that challenge is its own death knell because, defined in that fashion, there aren't 5 percent of the American people who would agree.

We have before the Senate, Mr. President, a flawed bill with a flawed and unconstitutional goal, together with the breathtaking statement that should we make the fundamental requirement that a man or woman's money not be spent on politics with which he or she disagrees, that we are killing this flawed proposal.

Well, I don't think the bill becomes any more constitutional by the adoption of the Lott-Nickles amendment. I don't believe the obvious constitutional flaws reiterated once again today by the Supreme Court of the United States are improved by it. Abstract fairness probably is. But a bill that says that there is something wrong with the communication of ideas—the last Democratic speaker criticized the way in which campaigns were conducted, apparently feeling that maybe we ought to have a governmental entity that says what an individual says in a political campaign is fair or unfair. We have created the greatest and strongest democracy in history and the greatest debate over political ideas with the first amendment as it is. I, for one, believe we ought to leave it alone.

Mr. McCONNELL. Will the Senator yield?

Mr. GORTON. I am happy to yield to the Senator.

Mr. McCONNELL. As the Senator from Washington pointed out, today's huge news that the Supreme Court has struck down essentially most of the issue advocacy language in the McCain-Feingold bill, maybe we shouldn't waste our time talking about this. But if you look at the original bill, it was designed to shut down campaigns, shut down parties, and shut down issue advocacy, and the Senator from Washington pointed out the only entity exempt from this would have been the press which enjoys a specific exemption under the Federal Election Campaign Act.

In fact, I have it here for our viewers if they want to look, section 431(9)(B), subsection 1:

> Any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

In other words, a blanket exemption for the press that no one else would enjoy.

I say to my colleague from Washington, just to ask a question, Westinghouse owns CBS, Disney owns ABC, and GE owns NBC. Now, these big corporate giants in America will, through the ownership of these television broadcast networks, enjoy a total exemption from all the restrictions that would be placed on the political speech of everybody else. This is not an unrealistic hypothetical. We just saw Ted Turner, who used to control CNN, declare on Friday he would not sell ads to a certain group because he did not like what they were saying.

So I ask my friend from Washington if he could speculate with me for a moment the mischief that might be created by the ownership of the only exempt avenue to engage in free and unfettered political expression without the heavy hands of the Federal Government, what kind of mischief he might imagine could happen in our country?

Mr. GORTON. It would certainly increase the price of television stations and television networks. It would be a bonanza to those corporate owners, as any other corporation that had a political agenda would find the only way it could effectively communicate its ideas would be through the ownership of a television network or a major metropolitan newspaper and the like.

But the point made by the Senator from Kentucky is a most interesting one. Westinghouse and Disney and GE don't need to give soft money to parties, do they? They don't need to come up with their political ideas indirectly. They have the ability to communicate them directly, without control, without limitation as to amount, to the people of the United States. So the Senator from Kentucky has made my own point better than I did myself. If you are going to limit political speech effectively, you are going to have to limit everyone's political speech. And the fewer the exemptions from those limitations, the more valuable those unlimited mouthpieces are because they cannot effectively be countered, except by someone else with the exemption.

I want to repeat one more time that I believe the constitutional amendment that was seriously debated, but defeated, on the floor of this Senate in March would have permitted limitations on what those television networks could have done, what the New York Times and every newspaper in the United States could have done. And it is the very fact that that constitutional amendment would have allowed such limitations that is the reason it should not have gotten one-third of the votes of the Members of this body. It should not have gotten any at all.

Once, however, you determine that we should continue the more than 200 years of unrestricted freedom on the part of the mass media, it becomes increasingly difficult to justify the proposition that we should limit the ability to communicate of everyone else.

As the Supreme Court decided more than 20 years ago, the ability to use money and to use, in turn, the mass media is at the very heart of the first amendment rights. The Senator from Nebraska, who was here before, it seemed to me, had the appropriate answer to this question. Political contributions should be freely given, not coerced. They should be immediately publicized and made available. Those who violate those laws of disclosure ought to be appropriately punished. None of these elements is a part of the law today, and that is where reform ought to start.

Mr. ALLARD addressed the Chair.

The PRESIDING OFFICER. The Senator from Colorado is recognized.

Mr. ALLARD. Mr. President, today, I want to take a few minutes and let my views be known concerning campaign finance reform. First, I want to commend my colleagues from Arizona and Wisconsin. It is not easy to introduce legislation that you know will be adamantly opposed from the outset. I recognize this and I want to congratulate them. Second, I want to commend the Senator from Kentucky, who on more than one occasion has stood on this floor and took an unpopular stand against popular legislation for all the right reasons.

Mr. President, I have always been a strong advocate of congressional reform, even to the point of introducing legislation that has upset many of my colleagues. I have always believed that congressional reform should make Congress more like the people we represent not above them. That is why I have long been a supporter of term limits, which I believe would be one of the best campaign finance reform measures we could ever enact.

Campaign finance reform should give every American the opportunity to participate, as fully or as little as they want. This country's principles are based on freedom. People should have the ability to choose whether they want to participate in the system. We cannot and should not coerce or force citizens participation in this process. Nor should we stifle citizens participation in the electoral process. I do not believe that this quick fix of McCain-Feingold passes either one of these tests.

First, I do not believe this legislation protects the working men and women in this country. Our electoral system is a voluntary activity. The U.S. Congress should never force participation in a voluntary activity, whether through individual activity or through financial contributions. This is why I believe the Lott amendment is so important for any campaign finance reform legislation. I would never do anything to stop outside groups from participating in the system, I just ask that all activity be voluntary. I would never force anyone to support me by either their vote or through a contribution if they disagreed with my views and I believe this should apply across the board to any group involved in our political system.

I have heard complaints that the Lott amendment would weaken the union's power and hurt the union membership. If the political positions of the union bosses are supported like they believe they are by the membership, then there should be no problem whatsoever for the unions to stay strong. But, if the unions' Washington office takes positions that are contrary to its membership, then maybe they need to rethink their ways.

Also, a provision that is forgotten by many who oppose the Lott amendment is that it also applies to corporations and national banks. The amendment makes it unlawful for any corporation or national bank to collect from or assess its stockholders any dues, initiation fee, or other payment as a condition of employment if such dues, fee or payment will be used for political activity in which the national bank or corporation is engaged. Likewise, a labor organization cannot collect or assess its members or nonmembers any dues, initiation fee, or other payment if any part of such dues, fee, or payments will be used for political activities.

I think this amendment is very clear, no matter where you work, you should not have to choose between putting food on the table for your family or participating in an election or supporting an election. Let's make it very clear, the people who do not support this amendment believe that working men and women, union or not, should have to choose between working or supporting issues and elections with which they disagree.

I have also heard that being a union member is voluntary and one of the most democratic institutions since employees must vote to start a union, elect its leaders and if they do not like the direction the union is taking then they can work to change it or as a last resort, quit the union. If you do not like the direction of the union, you must quit your job as a last resort. I do not think any union member should have to make that choice—a job or a political contribution. This same provision applies to corporations and national banks. No employee should have to choose between keeping their job or participating financially to causes or elections they disagree with.

Some want to apply this amendment to groups such as the NRA or the Sierra Club or other issue groups. The difference between these groups and the employment condition in the Lott amendment is that joining these groups is completely voluntary and is not tied to a job. If a member of one of these issue groups wants to quit their respective group, then they just stop paying the dues and rip up the card. There is no employment backlash that causes that person to lose their job.

Thomas Jefferson summed it up best when he said, ''To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.''

Second, in our quest of campaign finance reform, American citizens should not have to lose their voice. The first amendment is very clear in its wording, ''Congress shall make no law * * * abridging the freedom of speech or the press * * *.'' While campaign finance reform efforts are based on the best of intentions, whether by legislation or just simple suggestions, most of the time they will affect individuals' first-amendment rights.

The Supreme Court has been very clear where it stands on the first amendment and campaign finance laws. Since the post-Watergate changes to the Federal Election Campaign Act of 1971, 24 congressional actions have been declared unconstitutional, with 9 rejections based on the first amendment. Out of those nine, four dealt directly with campaign finance reform laws. In each case, the Supreme Court

has ruled that political spending equals political speech. This Senate attempted to change this through a constitutional amendment limiting the amount one can spend in a campaign, which only tells me that this fact is undeniably recognized by this body.

In the now famous, or infamous to some, Buckley versus Valeo case, the Court states that:

The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.

This simply states that the Government may not ration or regulate political speech of a citizen through spending limits or limit its quantity any more than it can tell the local newspaper how many papers it can print, what it can print, or when it can print.

Also, the court states that '' * * * the mere growth in the cost of Federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending * * * .'' This goes for not just the candidate but also outside groups who want to participate in the process.

That brings me to a specific provision in the legislation before us. I have yet to hear what makes 60 days such a magic number. How can an outside issue group's ad carry a valid message 61 days before an election but if run the next day, it would lose all validity and become illegal. This just makes little sense. When I ran for this seat in the Senate, I was blasted from all angles by many different groups, but that's fine. It made my life and campaign a little more difficult, but it let me explain why I voted the way I did. These groups brought all the issues into play and no candidate can hide their record from the public.

However, no matter how I have to defend my record against these ads, I will never attempt to legislatively silence their voice. To do so would place myself over the rest of America. I cannot support the idea that my viewpoint is so much more important, that no one outside of the candidate can speak less than 60 days before the election. I cannot and will not quiet the electorate.

I did forget one exception during the 60-day blackout, the media. This 60-day blackout only strengthens the media and whatever they say, cannot be challenged, except by the candidate. Today, newspaper endorsements are held off until the end of the campaign to maximize their effect, but this 60-day blackout period will let the endorsement go without criticism from outside groups. And I question whether once a candidate gets an endorsement, if their campaign will be covered with the same amount of scrutiny as the other candidate, for again, any rebuttal to their coverage can only come from the candidates opponent.

I believe this provision places too much power in the hands of a few. I have the utmost respect for the media and the professionals who work for in the field, but too much of one gets too powerful for all.

Also, I believe this 60 day blackout will be used to remove Congress from the close scrutiny of the public. Let me explain. I am afraid that Congress will hold off some of the more controversial issues until the last 60 days before an election in order to escape the scrutiny of these outside groups. This regulation is nothing more than politicians wanting to quiet citizens from bringing up issues that politicians want to ignore.

Another problem arises regarding soft money. The definition of soft money is campaign money raised outside the regulatory structure for Federal elections—or non-Federal money. These funds are raised and spent by political parties outside of the Federal fundraising limitations to benefit the party's State and local elections efforts. While soft money is not federally regulated, it is regulated by the 50 States. Current law already bans the use of soft money in Federal elections. Basically, a complete ban on the ability of the parties to raise and spend any soft money would federalize all elections because any money given to the national parties in support of state and local candidates would fall under the stricture of Federal laws.

The Buckley case clearly states that ''[S]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.'' The ACLU says that ''the purpose of this profound distinction is to keep campaign finance regulations from overwhelming all political and public speech. And it is this distinction which defenders of the constitutionality of a ban on soft money continue to disregard.''

The Court has permitted the unrestricted use of soft money by political parties and nonparty organizations in the Buckley decision and has enhanced and given it legitimacy in its subsequent decisions, including a decision involving the Republican Party from my own State of Colorado in 1996.

Let me also make a point about money being the determining factor in elections. In my Senate race, I was outspent by almost $750,000—a quarter of $1 million. You don't have to have the most money to win, you just have to have the right message and I will not legislatively try and stop someone from speaking their message during a campaign, not even my opponent's.

Many believe that now is the right time to pass a restrictive campaign finance measure with all the scandal surrounding the last Presidential campaign and that we should take a chance on the Supreme Court to rule it constitutional. The problem with this logic is that since 1976, the Supreme Court has referred to the Buckley decision over 100 times in setting limits on the Government's authority to regulate political speech. I just cannot see this Supreme Court overturning a ruling that has become the landmark decision and reference point for all campaign finance decisions.

In the end, our campaign finance system needs to be fixed, but any reform must not run counter to the first amendment. The first amendment ensures that even if we don't like what someone says, they have the right to say it. While many believe that the amount of money being spent in campaigns is objectionable, the Court has clearly stated that campaign spending is equal to speech and no matter how objectionable, it is protected under the first amendment.

I will have to say that the McCain-Feingold bill has gotten organized efforts behind it, like this ad run in the Denver Post on Thursday, October 2, by the group Campaign for America. However I would like to point out a few things.

I find some great irony in this ad. First, if McCain-Feingold passes and this ad was to be aired on TV or radio, it may just be illegal, especially if it is within the 60-day blackout period before an election. If an incumbent believes this ad to be an attempt to influence an election, they can challenge it, thus stifling debate. The very message they wish to send could be stopped by the legislation they support. That is the point I would like to make.

They want to stop big money and big guys with their big bucks from buying the system, which I want to do also by the way. Well, this group is backed by the some of the richest people in America. Actually, two of the men are on the Forbes 400 list. Plus, many of them have given hundreds of thousands of dollars to each party. It seems to me that this group is a bunch of rich guys using their big bucks to buy legislation. And, despite my request, I have yet to receive a full disclosure from this group on how much is spent, who gives and how much. All I know is who sits on their board of directors.

But in all honesty, I cannot in good conscience stop them from exercising their first amendment rights. I want any campaign finance reform legislation to encourage this—not stop it.

This is why I introduced my own bill, the Campaign Finance Integrity Act. My bill does not restrict one from exercising their political speech rights, but asks for complete and honest disclosure for all campaign spending. While this statement is not one of endorsement concerning my legislation, but in a review of the McCain-Feingold bill, the ACLU says, ''Disclosure, rather than limitation, of large soft money contributions to political parties, is the more appropriate and less restrictive alternative.'' My bill does just

that. As a matter of fact, I believe my bill has the strongest open disclosure requirements of any bill introduced.

My bill also will require candidates to raise at least 50 percent of their contributions from individuals in the State or District in which they are running;

Equalize contributions from individuals and political action committees [PAC's] by raising the individual limit from $1,000 to $2,500 and reducing the PAC limit from $5,000 to $2,500;

Index individual and PAC contribution limits for inflation;

Reduce the influence of a candidate's personal wealth by allowing political party committees to match dollar for dollar the personal contribution of a candidate above $5,000, by using only hard money;

Require organization, groups, and political party committees to disclose within 24 hours the amount and type of independent expenditures over $1,000 in support of or in opposition to a candidate.

Incorporate the Lott amendment, along with the requirement of an annual full disclosure of those activities to members and shareholders;

Prohibit depositing of an individual contribution by a campaign unless the individual's profession and employer are reported;

Encourage the Federal Election Commission to allow filing of reports by computers and other emerging technologies and to make that information accessible to the public on the Internet less than 24 hours of receipt;

Completely ban the use of taxpayer financed mass mailings; and

Lastly, will create a tax deduction for political contributions up to $100 for individuals and $200 for a joint return to encourage small donations.

One of the best way to reduce special interest money is to reduce the size and scope of Federal Government and I am not alone believing this. A recent survey by Rasmussen Research shows that 62 percent of Americans think that reducing Government spending would reduce corruption in Government. The same survey showed that 44 percent think that cutting Government spending would do more to reduce corruption than campaign finance reform, while 42 percent think campaign finance reform would reduce corruption more than cutting Government spending. I have said many times, if the Government rids itself of special interest funding and corporate welfare, then there would be little influence left for these large donors.

That is why I am fighting corporate welfare, especially thee Overseas Private Investment Corp. Some may not see OPIC in the same light, but any benefit for corporations will just keep them coming back for more. Another way to achieve campaign finance is too eliminate the Department of Commerce, where a majority of the corporate welfare programs are funded. Also, by scrapping the existing Tax Code with its many tax breaks in favor of a flatter and simpler system would clean up our campaigns greatly. Big Government solutions will not stop big business and big labor money. To break special interest money, we must break the so-called iron triangle of big business, big labor, and big Government.

I must say that by objecting to the Washington media is very difficult for any politician, but turning your back on the first amendment is more difficult for me. I want campaign finance reform and I have shown in my legislation how I would like to do it, but I will not do so at the expense of the first amendment. Not even at the expense of those people's speech who will disagree with me on this issue. The first amendment is the reason we can disagree.

Let me end with this. While big money has been made the villain, I believe it is not the money but the people. Bad people will do bad things if given the chance. I believe that the tighter we made it, the more people will try to find loopholes resulting in more scandals. We need to enforce the laws on the books first before we add more Government regulation is not always the answer. To me it sounds like those who are under investigation and are calling for more Government regulation of campaigns are saying, ''Stop me before it sin again.'' Well let's first uphold the law and then we can better fix it. And when we do, let's not do so at the expense of those who legally want to exercise their first amendment rights. Don't let the bad shut out the good participants in our system.

I yield the floor.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. MCCONNELL. Mr. President, very briefly, I thank the distinguished Senator from Colorado for an outstanding contribution to this debate. I listened carefully to his entire speech. I thought it was truly outstanding. I just wanted to commend him for that and thank him for his contribution to this important debate.

Mr. ALLARD. I thank the Senator.

Mr. BUMPERS addressed the Chair.

The PRESIDING OFFICER (Mr. ALLARD). The Senator from Arkansas is recognized.

Mr. BUMPERS. Mr. President, let me say, first of all, that the distinguished Senator from Maine, Senator COLLINS, has been waiting for a long time. I am most reluctant to take her spot. But I understand she has to leave. So rather than waste the time, and with her indulgence, I hope she will forgive me, I will go ahead and proceed with my statement.

First of all, Mr. President, I would like for every Member of Congress to ask himself or herself this very simple question: How much longer do you think our democracy can survive if we continue under the present system of financing our campaigns?

The first question ought to be: Can we continue to pass laws and elect people based on how much money they have and expect a participatory democracy to survive?

Question No. 2: Can this democracy survive under the present system of financing campaigns if we adopt McCain-Feingold?

With the utmost respect for two dear friends in the Senate, Senator FEINGOLD and Senator MCCAIN, I would have to say that this bill will help our democracy last a little longer than it would if we do nothing.

We call ourselves a participatory democracy. And yet, most people have long since quit participating.

So another question that every Member of the Senate ought to ask before they vote on this bill is: Why do only 50 percent of the people in our country bother to vote?

The next question they ought to ask is: Why do only about 4 percent of the people in the country contribute to candidates and parties?

We can contribute 3 bucks to the Presidential Election Fund by checking a box on our tax return, without any cost to ourselves, yet the percentage of people who check that box is down now to about 13 percent of the people who file tax returns. Thirteen percent will say, ''Yes. I want $3 of my taxes to go to the Presidential campaigns.'' I think there are an awful lot of people in this country that think they are paying that $3 out of their own pocket. They don't pay the $3. All they do is say I would like for $3 of my existing tax liability to go to the Presidential campaign. That system has attracted much higher percentages than in the past. But it has been declining.

So, ask yourself. Why do only 50 percent of the people vote?

Why do only 4 percent of the people contribute?

Why is the number of people checking the box on their Federal tax return continuing to go down?

The answer to that is very simple. They don't think they count. They say to themselves: ''Why should I contribute? Yes. I could give 25 bucks. I could give 50 bucks.'' But when you see $100,000 contributions in soft money, and you see the $2,000 contributions to candidates, really $4,000 if the contributor's spouse also contributes, who will believe that his $15 or $20 is going to make a difference? And they are showing in big numbers they don't believe they count by staying home on election day. And they see legislation passed continually where they know money was the determining factor.

I can remember when I was a young attorney just out of law school practicing law in my little hometown. A man came into my office one day. He said, ''I want you to give me $250 for a Member of Congress.'' And I said, ''He's not even up for reelection this year. Why would I give him $250?'' He said, ''Well, they have a lot of expenses,'' and so on. And I said, ''Well, I'm not going to give

you $250,'' the primary reason being I don't have $250. The second reason is $250 is two monthly house payments. And the third reason is I don't even like the guy; he doesn't represent my views. And fourth, I thought, if I were going to give $250, why would I give it to you? Why wouldn't I give it to the candidate so he would at least know I had given him $250 and I would also like for him to know that that is a big, big amount of money for a struggling young lawyer in a little town in Arkansas.

Mr. DOMENICI. Will the Senator yield for a question?

Mr. BUMPERS. No, I won't yield, Senator. I have been waiting all afternoon to speak.

When I ran for Governor the first time, I found asking for money the most difficult thing I had ever done. I could not believe that I had to go around pleading with people to give me a few dollars. Nobody wanted to give me any money anyway because I had 1 percent name recognition when I started running. Some guy gave me a $100 one day, and he said, ''I bet the horses all my life, but I have never bet on such a long shot as yours.'' But he gave me $100 anyway.

I asked Tom Eagleton, the fine Senator from Missouri, when he announced he was going to leave the Senate, ''TOM, why are you leaving?'' He gave me three reasons. First of all, he said, ''I'm tired of laughing at things that ain't funny.'' The second was, ''I'm tired of answering hate mail.'' And third, ''I'm tired of going around with my tin cup out''—three very compelling, perfectly legitimate reasons for wanting to leave the Senate.

As good as McCain-Feingold is, it does not remove the problem Senators face of voting on issues in which an awful lot of people who have given them money have a dynamite interest. My son, who lives in Little Rock, and his wife had twins about a year ago, and they had a woman who came to stay with them when the twins were born. They are very fortunate they can afford that. A lot of people have twins and they can't afford to have that kind of help. Be that as it may, she has been a very intelligent woman. I visit with her when I go over to see the twins. Last week she said, ''You know, DALE, I don't know much about what's going on up there, but it seems to me like you all spend all your time investigating each other.'' I said, ''That's right, Nancy.''

That is all we are ever going to do as long as we finance campaigns the way we do now. Every time you vote on an issue, Senators, you are vulnerable to accusations if it benefits anybody who ever helped you. When you take money from somebody and you vote on an issue, you better hope two things: That the issue turns out well, and that the guy who gave you money does not turn out to be a crook because if he does, the press comes running to you: How much money did he give you or why did he give you money? Was there any quid pro quo?

I am reluctant to mention this, but I am going to tell you the truth. I never did like the Keating case. A colleague whom I consider to be one of the most honest men I have ever known spent $600,000 of his own personal money defending himself because he was said to have helped somebody who gave him money in a campaign. I can promise you he would never have taken it in a thousand years if he thought it had the least taint to it. And if Keating's S&L had made it, you would never have heard about the Keating case. There would have been no case. But because he was giving money to a lot of people and his S&L went under, and he turned out to be a crook, then we had this big dog and pony show in the Senate that lasted a year or more.

You know, I have been a friend of the President's for now 26 years. And as well as I knew the President, as close a friend as we have been through the years, I never heard of Whitewater until he became President, never knew there was such a place, never knew there was such a corporation. And if Bill Clinton hadn't had the temerity to come to Washington as the President of the United States, you would never have heard of Whitewater. It is all how things turn out.

But to reemphasize the point I started to make, that is, colleagues, when you take a contribution from anybody, even if your own intentions are pure, you better hope that money is coming from an honorable person. You better hope it is coming from somebody who isn't out defrauding people. And you better be careful how you vote on issues that can help a contributor if they turn sour or turn out to be a crook. It doesn't matter if you cast that vote on the merits. And as long as we have this system of financing campaigns you can lie awake at night worrying about it because it is a real threat. Where a quid pro quo can be inferred, it will be. That is the perception that will remain until we change the campaign finance law.

We have reached the point, Mr. President, where every single Member is constantly just one step away from disaster. And guilt or innocence has little to do with the outcome. One woman told me the other day that she had been interviewed and appeared before grand juries in one of these many investigations and was going to have to deed her house—I promise you she is totally innocent of anything—going to deed her house to her lawyer because it is the only asset she has that will come close to covering her legal bills.

Well, we have reached the point in this country where simple negligence, bad judgment, just plain policy differences are becoming criminal offenses. How many independent counsels do we have running loose in this town? And how many more will we have? I can answer that partially. As long as we finance campaigns the way we do now, there are going to be independent counsels galore in this city. When you increase funding, spending on congressional elections in 1976 from $99 million to, in 1996, almost $800 million, you have to ask, where is this going to end? That is an 800 percent increase in 20 years, with no letup in sight.

Look at the $450 million or almost $500 million in soft money for both parties during the last election cycle. It will be more this year, they are already ahead of the 1995–1996 cycle. Who gives that money? It is not little struggling lawyers as I was 40 years ago in a little town in Arkansas. It is not average folks with five and ten and fifty dollar contributions.

I will tell you when it is going to end, Mr. President. It is going to end when the American people rise up in righteous indignation and come to the realization that the system is rotten, come to the realization that they do not count. It will end when enough people in Congress get tired of every contribution that goes sour being microscopically addressed by the press and wondering about when you are going to be on one of the news magazines the next episode.

There is no perfect solution to this. I happen to come down on the side of public financing. I have a bill. I wanted to introduce my bill as an amendment. Senator KERRY and Senator WELLSTONE have a bill. We discussed whether to try to offer our bills as amendments to this bill. We concluded that would probably be counterproductive, would not get many votes, probably would not get a single Republican vote, maybe 25 or 30 Democrat votes. Yet 66 percent of the people, according to a Gallup poll in October of last year, 66 percent of the people in this country said they favor public financing of our campaigns.

I heard the distinguished Senator from Colorado say a moment ago that he won even though he was outspent. I was too in my first race. I ran against a Rockefeller. I guess you would call that stupidity. But in any event, I won, and when I ran for the Senate against an incumbent, I was badly outspent. But I tell you, those are rare exceptions. I applaud anybody who spends less money than his opponent and manages to win because 90 percent of the candidates in this country who spend the most money end up winning. Pretty heavy odds. According to statistics to this date, if you have the money, you have a 9-to-1 chance of winning.

In the 1995–96 election cycle, 400 corporations, labor unions, and individuals contributed $100,000 or more in soft money; 400 of them gave over $100,000. Were they after good government? Is that what they wanted? I don't mean to demean anybody, because I have a lot of friends who have been faithful to me for 26 years in the contribution area. I can truthfully say I am most grateful to all of them. But when I first started running for Governor in my State, there were no campaign laws and I was absolutely aghast

at the amount of cash money, greenbacks, that was floating around in campaigns. One man handed me fifty $100 bills. I knew he had a deep and abiding interest in certain things that were bound to come up when I was elected, if I was elected. So I handed him his fifty $100 bills back.

Do you know something? He doesn't like me to this day. You can't give people money back and make them like it, can you, Senator?

My campaign finance director came up and said, ''How are we going to run this race? You are giving more money back than we are taking in.'' I have given a lot of money back. All I am saying is, when you think about how much money $100,000 is, and when you think about who gave it, you have to believe that they wanted something more than good government.

In 1996—listen to this—in the U.S. Senate, Senate incumbents had a 2 to 1 spending advantage over challengers. You hear people say public financing of campaigns is welfare for the politicians. Do you know what I say to chamber of commerce and Rotary Club members, all conservative businessmen who do not much like this idea of public financing? I remind them, you have been investing in the stock market for several years now and you have been doing well. But I can tell you, if you really want to make some money, if you really want a return on your investment, you opt for public financing. That will give you the biggest return of any investment you ever made in your life, because we won't be spending a lot of money on unworthy projects that contributors supported. It will be a great investment because it will yield a cleaner government and the people will believe it is a cleaner government.

The average successful Senate race today costs $4 million. That is average. Some races have cost as much as $28 million. Where will we be 20 years from now if the costs of Senate races continue to go up another 800 percent? You can't count that high. You can't get computers to count that high at the rate we are going.

One of the problems that I have with the McCain-Feingold bill, and I am a cosponsor and ardent supporter and I certainly intend to vote for it, but I will tell you one of my fears is, while it will help preserve our democracy for a little longer and it will take some of the problems out of the way we finance campaigns today, nothing will cure the problem like public financing.

But the point I want to make, what I worry about is, if we pass McCain-Feingold, there will be a lot of hoopla about it, because I have never known people as tenacious and determined and as hard-working as Senator FEINGOLD and Senator MCCAIN have been on this issue. They have my deep and abiding admiration for their tenacity and their determination to try to do something about what is wrong with the system. But if it passes, we will go home and we will pat ourselves on the back and give ourselves the ''good government'' award, as Senator HOLLINGS is always saying, and the American people will be thinking the system has been fixed. A lot of it will have been fixed, but problems will remain and I fear that they will make the people even more cynical.

The issue advocacy ads that are really ads for a candidate—they drive me crazy. This bill would help to bring them under control, require disclosure of the sources of money used to produce them. They are really campaign spending.

I can tell you, I have voted for one constitutional amendment since I have been in the Senate. I voted for ERA soon after I arrived in the Senate.

Since that time, I have voted about 32 times against every constitutional amendment. Either earlier this year or last year, I voted against Senator HOLLINGS' amendment to the Constitution which would have allowed the Congress to set campaign spending limits. I am going to vote for it. I want to announce now publicly, the next time Senator HOLLINGS brings that amendment up, I intend to support it. Despite my deep reservations about amending our Constitution, I will do almost anything to change the way we finance campaigns in this country, because I am absolutely convinced that this system is totally destructive to our democracy. I yield the floor, Mr. President.

Ms. COLLINS addressed the Chair.

The PRESIDING OFFICER. The Senator from Maine.

Ms. COLLINS. Mr. President, I rise to announce my intention to join my colleague from Arizona, Senator MCCAIN, and vote for his motion to table the amendment offered by the distinguished majority leader to the McCain-Feingold campaign reform legislation.

This has not been an easy decision for me. I strongly support the underlying objective, if not the precise language of Senator LOTT's amendment. The principle that America's working men and women should not be required to contribute their hard-earned money to advance the campaign of candidates they do not support is a compelling one. The strong opposition of big labor to this reasonable proposal demonstrates their fear that many of the rank and file union members would not agree to the use of their dues for political purposes.

But in the final analysis, my decision on this matter must be determined by considerations other than the merits of Senator LOTT's amendment. The plain truth is that its adoption will kill campaign finance reform. That is not simply my judgment; it is the judgment of Senator MCCAIN and Senator FEINGOLD who have devoted so much time and energy to further the cause of reform.

When I ran for the U.S. Senate, I made a clear and unambiguous promise to the people of Maine. I promised that I would fight for campaign finance reform. The people of my State responded by entrusting me to represent them in this body, and whatever other loyalties that I might have, I owe my ultimate allegiance to them. I kept that promise when I cosponsored the McCain-Feingold bill, and I am keeping it now by pledging to vote against what I have concluded is, in fact, a killer amendment.

I do, however, want to say a few words to my Democratic colleagues. At the end of the day, we will not have campaign finance reform without sacrifices and courage on both sides of the aisle. If Senator LOTT's amendment is not defeated, the spotlight will shift to the Democrats. So far, they have had the easy road, able to proclaim their passion for reform, knowing that it faces an uphill battle and confident that they can blame the Republicans if it does not pass.

But if their response to the Lott amendment is simply to filibuster and not to offer a reasonable compromise on the union dues issue, an already skeptical public will reach the inevitable conclusion that Democrats are not serious about reforming the system. A number of Democrats have urged me to put principle over party, and to them I say, ''Your turn may come.''

Mr. President, a fair campaign finance system is essential to a healthy democracy. While not perfect, the McCain-Feingold bill would give us a fair system. Given the commitment of the people of Maine to fair play, I am confident that my position on this issue not only is right as a matter of principle, but also reflects the values of my home State.

I want to also take this opportunity to commend Senator MCCAIN and Senator FEINGOLD for their unceasing efforts in this very important fight.

Thank you, Mr. President. I yield the floor.

Mr. FEINGOLD addressed the Chair.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, let me take this opportunity to say what a Senator of courage the Senator from Maine is. This is a very difficult issue. The Senator from Maine, of course, is a loyal Republican, but for her to come out here and have the courage to stand up and join with us to say that this amendment would kill our bill is extremely important.

I have heard her admonition as well that this must continue to be bipartisan. But the fact that she would come out here at this key moment and say that she will stand with a bipartisan effort, as she has done in the past, is not a minor matter. It is the same thing the Senator from Maine did a few months ago when everyone kept saying, ''You don't have any cosponsors; you only have two Republican cosponsors.'' It was the Senator from Maine who actually had some ideas that were better than our ideas, and we added them to the bill and improved it.

Let me add both my personal and professional gratitude for the commitment of the Senator from Maine to reform. We in Wisconsin like to think that we are the greatest reform State, but Maine sure gives us a challenge.

Ms. COLLINS. Will the Senator yield?

Mr. FEINGOLD. I yield for a question.

Ms. COLLINS. I thank the Senator for his kind comments.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SHELBY. Mr. President, I rise today to add my voice to the very important discussion that the Senate is having regarding campaign finance reform, and I commend the Senator from Kentucky, Senator MCCONNELL, for not only his leadership but for his tenacity in defending what he believes and so many of us believe is an assault on the first-amendment rights of all Americans.

I also thank Senator LOTT, our leader, for his leadership in scheduling this debate, and I commend my colleagues who thus far have added insight and value to our discussion.

Mr. President, if we are to have campaign finance reform, I believe we must achieve those changes necessary to ensure public trust in our institutions and our Government officials. Serious reform must take into consideration the significant number of Americans who are compelled to make mandatory political contributions at their workplace as a condition of employment. No citizen should be required to make involuntary contributions to any candidate, party, or political interest group. No corporation, no labor union, and no business entity should have the power to twist the arms of their employees or members. These practices are wrong and un-American, and I believe they must be ended as part of our overall effort to reform the financing of Federal elections.

Serious reform must also contain provisions that increase the frequency and specificity of mandated contribution disclosure. I support measures which bring about greater transparency, those that allow the American people to know the where, the when, how much, and from whom of campaign contributions.

The last election cycle was filled with numerous activities that violated existing campaign laws. As we proceed through this debate, we should be mindful of the fact that these new reforms do nothing to reach those past violations. We must ensure that illegal foreign contributions are kept from election campaigns, and I believe that we must ensure disclosure violations are uncovered and are punished. Thus, perhaps the most important so-called change we can now achieve is to ensure that the existing laws are routinely and are properly enforced.

However, in our zeal for change, we should not compromise the rights and freedoms of the same people we claim to protect. We must pay close attention, I believe, to the numerous Supreme Court decisions which clearly set forth that the regulation of many campaign-related activities directly implicates first-amendment rights.

In 1974, the Supreme Court reviewed the Federal Election Campaign Act in the case of Buckley and struck down the statutory restrictions on campaign expenditures. In its holding, the Court concluded that political discourse ''is at the core of our electoral process and of the first amendment freedoms.''

While the Court did allow a minimal level of restriction that we know about—caps on the direct contributions to candidates—and only for the purpose of preventing corruption or the appearance of corruption, it granted the full protection, Mr. President, of the first amendment to anyone spending money to communicate an idea, a belief, or a call to action.

In no uncertain terms, the Buckley decision makes clear that the first amendment forbids the Federal Government from restricting political speech and expression rights by way of campaign expenditure limits.

Mr. President, the Buckley decision does not stand in isolation. For the past 20 years, the Supreme Court of the United States has returned to this decision and consistently and unequivocally reaffirmed its soundness. The Court's subsequent decisions clearly demonstrate this, such as in FEC versus National Conservative Political Action Committee. The Court, tracking the Buckley decision, struck down restrictions on funds spent in support of publicly financed Presidential candidates in furtherance of their election. The Court held that such expenditures fell squarely, Mr. President, within the protections of the first amendment rights.

Also, in the FEC versus Massachusetts Citizens for Life, the Court ruled that the voter guide published by an incorporated entity was entitled, Mr. President, to first amendment protections and invalidated an enforcement action the FEC brought against this organization.

More recently, Mr. President, in Colorado Republican Federal Campaign Committee versus FEC, the Court again, following Buckley, held that first amendment protection covers someone communicating an idea, a belief, or a call to action. The Court found that political party expenditures made in support of party ideals and even party candidates were protected under the first amendment of the Constitution of the United States so long as the expenditures were not made, as we say, in coordination with candidates.

Mr. President, the Supreme Court rulings provide us two guideposts in our endeavor to reform campaign finance. We have the constitutionally proscribed power and thus the responsibility to prevent corruption and/or the appearance of corruption in Federal elections, but we can ''make no law * * * [that] abridges the freedom of speech * * *,'' quoting the Constitution.

Therefore, I believe that it is essential that any reform initiatives we pass do not further encroach on the basic rights protected under the first amendment. It is not the proper role of Government, I believe, to restrict the ability of the American people to participate in election campaigns. It would be absurd, I think, to allow the Government to control the manner in which Americans communicate. If reform crosses these lines, I think it commands too high a price, it goes too far.

Mr. President, in light of the Supreme Court holdings, I do not understand and cannot support the present legislative efforts that directly impinge on first amendment rights. I particularly object to the so-called reform in Senators MCCAIN and FEINGOLD's bill which restricts independent parties from communicating ''for the purpose of influencing a Federal election,'' regardless of whether the communication is expressed advocacy.

Just think about it. Time and again, in case after case, the Supreme Court of the United States has held that Congress can only legislate to restrict campaign-related activities where those activities comprise the express advocacy of a particular candidate. The Court even specified in a footnote in the Buckley case what it meant by express advocacy—communications such as ''vote for,'' ''elect,'' ''defeat'' and ''reject.'' So when Congress places restrictions on communications that do not fall within this tightly drawn class, it violates, according to the Court, the first amendment.

Mr. President, as we have consistently heard on the floor during this debate, the first amendment is not a loophole. It is beyond our constitutional authority to restrict the ability of independent groups to communicate their political views where they do not engage in express advocacy.

Mr. President, I am also greatly troubled, as are others, by a provision in Senators MCCAIN and FEINGOLD's bill which prohibits independent communications that merely mention the name of a candidate within 60 days of a Federal election. Not only does such a restriction strike at the heart of first amendment protections, it all but guarantees a free ride to the incumbent involved in the election.

Just think about it, Mr. President. If there is no commentary regarding a candidate's performance in office at the time when the electorate is most tuned into the campaign, no sitting Member would ever lose. Incumbents would be able to capitalize on the inherent advantages of being in office, while challengers would be forced to rely solely on their own and probably much less resources.

This provision is incumbent reelection insurance, not campaign finance

reform. Make no mistake about it. The electorate must be able to hear all the views about candidates in a timely manner. And candidates must be able to stomach the full range of opinions regarding their candidacy.

Mr. President, we must clean up the system but without compromising fundamental first amendment rights. I believe this task is difficult but not impossible. Without infringing upon any American's rights, we can ensure that the American people control the direction of their contributions, have an understanding of who gave what to whom, and are confident that our elections are free of foreign influence, which is so important.

Mr. President, the Senate, I believe, should work to enact these measures into law and not infringe on our first amendment rights.

I yield the floor.

Mr. LEVIN addressed the Chair.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. DOMENICI. I say to the Senator, I wonder if I might take 3 minutes as in morning business. I can go into morning business and do this, and then we can come back to this.

Mr. LEVIN. I ask unanimous consent that I be allowed to yield to Senator DOMENICI for up to 5 minutes and then have my rights to the floor restored.

The PRESIDING OFFICER. Is there objection? Hearing no objection, without objection, it is so ordered.

The Senator from New Mexico is recognized.

Mr. DOMENICI. I thank the Senator very, very much. I will be perhaps even briefer than that.

PROVIDING TECHNICAL ASSISTANCE TO AID IN THE RESTORATION OF THE BASILICA OF ST. FRANCIS OF ASSISI

Mr. DOMENICI. Mr. President, on September 24 and 25, Umbria, Italy, that community, was hit by twin earthquakes. Extensive damage was inflicted upon the towns and villages across the region. Eleven people lost their lives and thousands of homes and buildings have been damaged.

The Basilica of St. Francis of Assisi was one of the buildings that was severely damaged. It isn't just a church or a great center of pilgrimage, or an artistic archive and yet it is all of those things.

It is one of those special places that you visit one day, but long to return to for a lifetime if you are fortunate enough to get to Italy and to set about to see some very, very historic buildings with culture and with religion that just wreaks from the walls.

That is why I was profoundly saddened to learn that the basilica was severely damaged by the earthquakes of September 24 and September 25, and again last week.

It seems so ironic that the basilica, built in honor of the patron Saint of Italy who cherished the natural world, was ravaged by an act of nature.

The basilica is one of the finest examples of Italian Gothic architecture, a building of ''unparalleled importance in the evolution of Italian art.'' It has been written, by those more knowledgeable about art and architecture than I am and will ever be, that ''a harmonious relationship exists between the architecture and its fresco decoration.'' ''The strong and simple forms are repeated throughout the building both to unify and to articulate the space with so powerful an effect that the architectural members are echoed in the painted framework to the frescos.''

The basilica is a living museum providing a home for the art of several great masters of the 13th and 14th centuries. These art treasures depict scenes from the Old and New Testaments.

The famous fresco artist, Cimabue, began his work in the basilica, believe it or not, in 1277. Cimabue's frescos include scenes from the life of the Virgin, popes, angels, and saints, as well as scenes of the Apocalypse and the Crucifixion.

Cimabue's pupil, Giotto, painted 28 famous, and beautiful frescos based on St. Bonaventure's version of St. Francis' life, and major accomplishments. These famous Giotto frescos painted on the sidewalls of the basilica were cracked by the earthquake but are miraculously somewhat in tact. These frescos are world treasurers. So that my colleagues understand, let me make this comparison. Giotto was to the basilica what Brumidi was to our own beautiful Capitol.

Mobilization of Italian artists and restorers has been swift. In addition, the National Museum in London and the Louvre have offered experts to help with the restoration.

The sense-of-the-Senate resolution calls upon the Smithsonian, the National Gallery of Art, and any of the other premier art museums in the United States that have the pertinent expertise to provide technical assistance to aid in the restoration of the Basilica of St. Francis of Assisi and the works of art that have been damaged in the earthquake.

I want to indicate to the Senate I will send to the desk to be considered in wrapup a resolution—just by the Senate; we are not going to try to go to the House—just a sense-of-the-Senate resolution that states the facts regarding this disaster, and merely says that the Smithsonian Institution, the National Gallery of Art and any of the other premier art museums of the United States having pertinent expertise in restoration should provide technical assistance to aid in the restoration of the Basilica of St. Francis of Assisi and the works of art that have been damaged in the earthquake. That is essentially what it is.

BIPARTISAN CAMPAIGN REFORM ACT OF 1997

The Senate continued with consideration of the bill.

Mr. LEVIN. Mr. President, I am a cosponsor and strong supporter of the McCain-Feingold bill, and I want to explain this afternoon in some detail why I support a key section in the bill that is the subject of much debate. It is section 201, the provision that is intended to stop what we call issue ad abuse. By issue ad abuse I mean the mislabeling of candidate ads as issue ads in order to evade contribution limits and the disclosure requirements that now exist in Federal campaign law.

I want to emphasize this point because it has been overlooked, it seems to me, by so many of us during this debate. Current law restricts contributions and the Buckley case has upheld that restriction as being consistent with the first amendment. Section 201 is not only constitutional within Buckley but it is also critically important to campaign finance reform. I want to spend some time explaining why.

Now, Buckley—which I think has been cited by just about everybody who has spoken in this debate—is the touchstone for drafting constitutionally permissible Federal campaign finance laws. So I want to start with Buckley. In Buckley, the Supreme Court upheld a strict set of limits on campaign contributions to Federal candidates, despite impassioned argument, including by the ACLU, that such limits impermissibly restricted first amendment rights of free speech and free association.

This is what the Court said in Buckley, and I will be quoting at some length because it is critical in understanding the permissible limits of campaign finance law and limits:

> It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation. Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure political quid pro quo's from current and potential office holders, the integrity of our system of representative democracy is undermined. . . .
>
> Of almost equal concern is the danger of actual quid pro quo arrangements and the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. . . .

And the Court went on:

> Congress could legitimately conclude that the avoidance of the appearance of improper influence ''is also critical. . . if confidence in the system of representative government is not to be eroded to a disastrous extent.'' . . .