Political Campaign Expenditure Limitations and the Unconstitutional Condition Doctrine

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Introduction

The Supreme Court has said that government "may not deny a benefit to a person on a basis that infringes . . . constitutionally protected interests—especially, . . . freedom of speech."[1] The Court has pointed out that to hold otherwise "would allow the government to 'produce a result which [it] could not command directly.' "[2] In numerous cases the Court has invalidated statutes that required an individual to choose between obtaining a government benefit and freely exercising constitutional rights.[3] In these cases the Court has used several different methods of analysis: some restrictions have been invalidated because they imposed indirect burdens on constitutional rights;[4] other conditions have been viewed as violations of the Due Process Clause[5] or the Equal Protection Clause.[6] Such cases have been described by

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1. Perry v. Sindermann, 408 U.S. 593, 597 (1972).

2. *Id.* (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

3. *See* Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Sherbert v. Verner, 374 U.S. 398, 404-05 (1963).

4. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972) (state college professor could not be denied renewal of employment because he exercised right to speak); Sherbert v. Verner, 374 U.S. 398 (1963) (disqualification of claim for unemployment benefits solely because of a claimant's refusal to accept unemployment on Saturday, as contrary to clamaint's religious beliefs, violated Free Exercise Clause).

5. *See, e.g.*, Speiser v. Randall, 357 U.S. 513 (1958) (property tax exemption cannot be conditioned on loyalty oath); *cf.* North Carolina v. Pearce, 395 U.S. 711 (1969) (criminal defendant who attacks prior conviction on appeal cannot be given longer sentence on reconviction).

6. *See, e.g.*, Memorial Hosp. v. Maricopa Co., 415 U.S. 250 (1974) (non-emergency hospitalization or medical care at a county's expense cannot be conditioned on foregoing the right to travel); Shapiro v. Thompson, 394 U.S. 618 (1949) (welfare benefits cannot be conditioned on foregoing the right to travel).

commentators,[7] and occasionally by the Court itself,[8] as involving "unconstitutional conditions." The Burger Court has interpreted these decisions narrowly in some recent cases involving statutes that place conditions on government benefits;[9] because of this trend commentators have asserted that the exercise of constitutional rights is in serious jeopardy.[10]

In early 1980, the Court affirmed per curiam a decision of a three-judge district court upholding the constitutionality of the federal statute which conditions the eligibility of presidential candidates for federal subsidies upon certification that they "will not incur expenses in excess of the aggregate to which the candidate is entitled from the Fund,"[11] and that no private contributions will be used, except to the extent necessary to make up any deficiency in the Fund."[12] In *Republican Na-*

7. *See* Rubin, *The Resurrection of the Right-Privilege Distinction: A Critical Look at* Maher v. Roe *and* Bordenkircher v. Hayes, 7 HASTINGS CONST. L.Q. 165 (1979) [hereinafter cited as Rubin]. *See also* Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Oppenheim, *Unconstitutional Conditions and State Powers*, 26 MICH. L. REV. 176 (1927); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977); Van Alstyne, *The Demise of the Right Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

8. *See* Branti v. Finkel, 445 U.S. 507, 514 (1980) (basing continuation of employment of a public defender on party affiliation is an unconstitutional condition); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 225-27 (1977) (requiring a public employee to pay the equivalent of union fees to maintain public employment is not an unconstitutional condition, but such fees cannot be used for political purposes to which the non-union employee objects). North Carolina v. Pearce, 395 U.S. 711, 724 (1969) (imposition of more severe sentence after reversal of a prisoner's original conviction is an unconstitutional condition on the right to a jury trial). *See also* Harris v. McRae, 448 U.S. 295, 334-37 (1979) (Brennan, J., dissenting); California v. La Rue, 409 U.S. 109, 123 (1972) (Marshall, J., dissenting); Wyman v. James, 400 U.S. 309, 326 (1971) (Douglas, J., dissenting).

9. *See* Harris v. McRae, 448 U.S. 297 (1980); Bordenkircher v. Hayes, 434 U.S. 357 (1978); Maher v. Roe, 432 U.S. 464 (1977). For a discussion of these cases see *infra* text accompanying notes 73 to 113. *See also* Regan v. Taxation With Representation of Wash., 103 S. Ct. 1997 (1983) (denying tax deductions for contributions made to non-profit organizations engaged in substantial lobbying is constitutional).

The Court has granted certiorari in a case challenging the constitutionality of a federal statute which prohibits editorializing by non-commercial educational broadcasting stations accepting funds from the Corporation for Public Broadcasting. League of Women Voters of Cal. v. FCC, 547 F. Supp. 379 (C.D. Cal. 1982), *cert. granted*, 52 U.S.L.W. 3344 (U.S. Nov. 1, 1983) (No. 83-651). The district court found the statute violative of the First Amendment. The Court's disposition of the case will be important in determining the future course of the unconstitutional condition doctrine in the Burger Court.

10. *See, e.g.*, Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113 (1980); Rubin, *supra* note 7.

11. 26 U.S.C. § 9003(b)(1) (1983).

12. *Id.* at § 9003(b)(2).

tional Committee v. Federal Election Commission (RNC),[13] the constitutionality of the statute was challenged on several grounds.[14] One of the allegations was that the restrictions placed unconstitutional conditions upon the exercise of a candidate's constitutional right to expend unlimited sums in his or her campaign.[15] The fact that the Supreme Court did not write an opinion in *RNC* has further confused the status of the unconstitutional condition doctrine.

This Article will summarize the Court's approach to unconstitutional conditions, past and present, and will attempt to determine whether *RNC* is indicative of a further erosion of protection under the doctrine or whether it is consistent with a more protective approach. The Court's decision in *RNC* is significant because of what it might signal with respect to the doctrine of unconstitutional conditions generally, and because it may exemplify the vigor with which the Court will scrutinize other statutes imposing restrictions upon fundraising and expenditures in political campaigns. Although the Court has purported

13. 487 F. Supp. 280 (S.D.N.Y.), *aff'd*, 445 U.S. 955 (1980).

14. Plaintiffs asserted that the restrictions have the effect of decreasing "grassroots" political activity. As the court acknowledged, "[P]rivate individuals are unable to make expenditures coordinated with the campaign organizations, such as renting vans to distribute literature, paying the cost of photocopying and distributing campaign materials received from the candidate's organization." 487 F. Supp. at 286. For a more detailed discussion of the effects on grassroots activity see Ifskin, *The Demise of Grassroots Political Activity Under the Presidential Election Campaign Fund Act*, N.Y. REVIEW OF LAW & SOCIAL CHANGE COLLOQUIUM, ELECTION LAW IN THE EIGHTIES, 93-97 (1980-81). This problem has been somewhat reduced by the 1979 amendments, which permit local party organizations to raise and spend unlimited sums for some volunteer activities. *See* Ifskin, *supra*, at 96. Further measures to loosen the restrictions as applied to local volunteer activity may be needed to solve this problem.

Plaintiffs asserted that the limitations discriminate in favor of incumbents and against challengers. "Incumbents can, with less [sic] campaign expenditures and through exercise of their official powers and use of public facilities, command more national attention than can challengers . . . ." 487 F. Supp. at 287. Plaintiffs also alleged that the expenditure limitation discriminated "against candidates not politically allied with a substantial number of labor organizations" because the Act allows "unions to raise and spend unlimited amounts of money on 'a variety of partisan political activities.' " *Id.* at 288-89. The district court responded to these allegations by asserting that the same inequities would exist under private funding, and that the law should not "be required to remedy pre-existing inequities between candidates." *Id.* at 287, 289. The court commented that "[a]bsent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." *Id.* at 287 (quoting Buckley v. Valeo, 424 U.S. 1, 31 (1976)). The court also concluded that "[t]he claim of discrimination in favor of candidates having labor union support [was] based on speculation rather than facts." 487 F. Supp. at 289.

15. This constitutional right was recognized in Buckley v. Valeo, 424 U.S. 1, 58-59 (1976).

to apply strict scrutiny[16] to limitations upon contributions and expenditures on the theory that they involve First Amendment expression rather than "speech plus,"[17] the actual analyses and results in cases involving campaign finance restrictions are not always consistent with that approach.[18] Thus, *RNC* may have more to say about the Court's approach to campaign finance regulation in general, than it does about the question of the Court's approach to what constitutes an unconstitutional condition.

With respect to the specific question of whether overall campaign expenditure ceilings constitute an unconstitutional condition upon the granting of subsidies to federal candidates, presumably the Supreme Court's summary affirmance has settled the matter.[19] However, this question is undecided on the state level because state courts have interpreted their state constitutions to prohibit as unconstitutional conditions restrictions outside the campaign finance area which probably would be upheld by the Supreme Court in a challenge based on the federal Constitution.[20] State financing schemes similar to the federal statute have been enacted in several states and are being considered in others.[21] These statutes will be subject to the challenge that they vio-

16. Strict scrutiny review is usually described as limiting governmental actions to those necessary to further a compelling government interest. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S., 765, 786 (1978).

17. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 16-17 (1976).

18. *See infra* text accompanying notes 22 to 51. *See also* Nicholson; *The Constitutionality of Contribution Limitations in Ballot Measure Elections*, 9 ECOL. L.Q. 683, 689-700 (1981), (hereinafter cited as Nicholson, 9 ECOL. L.Q.); Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Elelction Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323, 346-372, [hereinafter cited as Nicholson, 1977 WIS. L. REV.].

19. Although a summary affirmance is an adjudication on the merits and therefore has a stare decisis effect on state and lower federal courts, the Supreme Court feels less compulsion to follow precedent based on summary affirmance than when dealing with precedent supported by a written opinion. *See* C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 4014, at 631 (1977). In Edelman v. Jordan, 415 U.S. 651 (1974), the Court held that awarding retroactive benefits in a class action against an Illinois welfare agency violated the Eleventh Amendment. The Court had previously granted, without discussion, retroactive benefits in Shapiro v. Thompson, 394 U.S. 618 (1969), and had summarily affirmed three district court cases granting such awards even though the litigants had argued that the Eleventh Amendment precluded such benefits. In *Edelman* the Court commented that "Shapiro v. Thompson and these three summary affirmances obviously are of precedential value. . . . Equally obviously, they are not of the same precedential value as would be an opinion of this Court treating the question on the merits. . . . Since we deal with a constitutional question, we are less constrained by the principle of stare decisis than we are in other areas of the law." 415 U.S. at 671.

20. *See infra* text accompanying notes 178-203.

21. Six states, Hawaii, Maryland, Michigan, Minnesota, New Jersey and Wisconsin, impose limits on spending by political candidates who accept public financing. HAWAII REV. STAT. § 11-223 (Supp. 1982); MD. ANN. CODE art. 33 § 31-3 (Supp. 1982); MICH. COMP.

late state constitutions. This Article will discuss the analytical and practical strengths and weaknesses of various theories which state courts may rely upon to uphold state campaign subsidies coupled with expenditure limitations.

I. Campaign Finance Regulation in the Supreme Court

The Court's approach to constitutional challenges to attempts to regulate political funding have not resulted in a model of judicial clarity. The 1974 amendments to the Federal Election Campaign Act (FECA), for the first time presented a comprehensive, effective, and enforceable regulatory scheme.[22] In 1975, the Court reviewed these amendments in *Buckley v. Valeo*,[23] the seminal case on the constitutionality of campaign finance regulations. The lengthy per curiam opinion touched on numerous aspects of the statute. Contribution limits were upheld on the theory that they prevented the appearance and reality of undue influence and corruption of elected officials.[24] Limitations upon independent expenditures on behalf of candidates were invalidated because the Court viewed the burden on First Amendment interests to be greater than that imposed by contribution limitations and because the restrictions were insufficiently related to the legitimate government interest in preventing corruption.[25] The Court invalidated limitations upon the use of a candidate's personal wealth, applying near absolutist First Amendment reasoning.[26] The majority rejected the argument that overall campaign expenditure limitations were necessary to assure compliance with the contribution limits, and it found no other interest sufficient to justify such limitations.[27] The Court viewed the overall campaign expenditure ceiling as "designed primarily to [reduce] the allegedly skyrocketing costs of political cam-

LAWS ANN. § 169.267 (West Supp. 1982); MINN. STAT. ANN. § 10A.32 (West Supp. 1983); N.J. STAT. ANN. § 19.44A-7 (West Supp. 1982); WIS. STAT. ANN. § 11.31 (West Supp. 1982). N.C. Gen. Stat. § 163.278.31 (1982). The California Senate and Assembly have passed bills which would publicly fund legislative campaigns and impose a campaign expenditure limitation. Cal. S.B. 87, as amended, 1983-84 Sess.; Cal. A.B. 12, as amended, 1983-84 Sess. The bills have been submitted to a conference committee. A similar bill was recently passed by both houses of the Illinois legislature, but was vetoed by the Governor. Ill. S. 938, 83rd Gen. Assembly, 1983 Sess.

22. For the specific reforms enacted by the 1974 Amendments to the FECA see Nicholson, 1977 WIS. L. REV., *supra* note 18, at 323-24 nn. 3-6.

23. 424 U.S. 1 (1976).

24. *Id.* at 26-29.

25. *Id.* at 39-48, 50-51.

26. *Id.* at 54. *See infra* note 31.

27. 424 U.S. at 55-58. *See infra* text accompanying notes 33-34.

paigns."[28] Acknowledging that costs had risen significantly, the Court nevertheless asserted that "the First Amendment denies government the power to determine that spending is wasteful, excessive or unwise."[29] In dictum, however, the Court stated that overall campaign expenditure restrictions would be constitutional if applicable only to candidates receiving public subsidies.[30] The Court did not discuss the issue addressed in this Article: whether such limitations should be viewed as unconstitutional conditions.

Defendants in *Buckley* had rationalized all of the restrictions as a means of equalizing the political influence of non-affluent voters and candidates. The Court considered this rationale when reviewing limitations upon a candidate's using his or her personal wealth[31] and the limitations upon independent expenditures,[32] and rejected it as inconsistent with the First Amendment. The Court found it unnecessary to consider the equalization rationale in order to uphold contribution limits because it found preventing the appearance and reality of corruption and undue influence to be sufficient justification.[33] In dealing with limitations upon overall campaign expenditures, the majority was somewhat less dogmatic, but it nevertheless refused to accept the equalization rationale. The Court commented that:

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28. 424 U.S. at 57.

29. *Id.* The Court also said that "[i]n 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." *Id.*

30. *Id.* at 57 n.65. *See infra* text accompanying notes 130-32.

31. The Court stated that "the First Amendment simply cannot tolerate [this] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." 424 U.S. at 54. The Court also noted that the limitations might fail to promote equality because the candidate's opponent might raise more funds. *Id.* It concluded that "it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *Id.* at 52-53.

32. The Court declared that "[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . . The Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 48-49 (citations omitted).

33. "Appellees argue that . . . the limits serve to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections. . . . 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." *Id.* at 25-26.

> Given the limitations on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate.[34]

It is difficult to determine the standard of review employed by the Court to evaluate the various restrictions in *Buckley*. Although the per curiam opinion relied upon cases in which strict scrutiny was explicitly applied,[35] it was less than explicit in describing the standard it was actually employing.[36] The decision in *Buckley* may be viewed as a case in which the strictest First Amendment review was applied to all of the limitations. The fact that contribution limitations were upheld may simply mean that those restrictions alone were found to be necessary to further a compelling government interest. The Court's initial rejection of the argument that a lesser standard of review than strict scrutiny should apply because the limitations applied to "speech plus" rather than "pure speech,"[37] supports this view. On the other hand, the Court seemed to scrutinize some of the limitations more closely than others, giving credence to the interpretation that the level of scrutiny was subject to a sliding scale, depending upon the Court's view of the burden

34. *Id.* at 56. The Court also observed that instead of equalizing the potential of candidates to influence voters, the limitation might handicap candidates without name identification or other exposure before the start of the campaign. *Id.* at 56-57 (footnotes omitted).

Professor Daniel Lowenstein has posited two standards of fairness—those of equality and intensity. The standard of equality is satisfied "when both sides have a roughly equal opportunity to present their arguments to the voters." Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 U.C.L.A. L. REV., 505, 515 (1982). The intensity standard is satisfied when "the ability of either side to present its arguments more or less reflects the number of people who actively support that side and the strength of their feelings." *Id.*

By upholding the constitutionality of contribution limitations and invalidating overall expenditure limitations, the Court in *Buckley* implicitly approved the intensity standard of fairness and rejected the equalization standard. By invalidating limitations upon independent expenditures, however, the Court rejected the intensity standard. Large independent expenditures may simply reflect the availability of funds to a particular person or group rather than the intensity of their support.

35. 424 U.S. at 25 (citing NAACP v. Button, 371 U.S. 415 (1963); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958)).

36. In dealing with the contribution limitations, for example, the Court stated, "[w]e find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling." 424 U.S. at 29.

37. *Id.* at 16-17.

upon First Amendment interests.[38] For the purposes of this Article, it must be noted that the limitations upon overall campaign expenditures seemed to fall somewhere in the middle. Unlike its treatment of independent expenditures and the use of a candidate's personal wealth, the Court did not greatly stress the seriousness of the burden, and did not speak in absolutist terms.[39] Rather, the primary emphasis was upon the inadequacy of the proffered rationales.[40]

Subsequent cases dealing with campaign finance regulations have contributed little to a clear understanding of the Court's methodology. In *First National Bank v. Bellotti*,[41] the Court seemed to apply strict scrutiny review to invalidate a ban on corporate expenditures in ballot measure elections.[42] In *California Medical Association v. FEC*

38. The Court was much more deferential to Congress in dealing with campaign contribution limits and the subsidy provisions than it was in dealing with limitations on the use of personal wealth, independent expenditures, and overall campaign expenditure limits. *See* Nicholson, 9 ECOL. L.Q., *supra* note 18, at 689-92.

39. The Court stated that the "$1,000 ceiling on spending relative to a clearly identified candidate . . . would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication." 424 U.S. at 19-20 (footnotes omitted). See *supra* notes 31-32 for examples of absolutist language used by the Court in discussing limitations on independent expenditures and the use of personal wealth. Compare these statements to the language used by the Court in considering the overall expenditure limitations. *See supra* note 34 and accompanying text. The Court did observe that all expenditure limitations "impose direct and substantial restraints on the quantity of political speech. 424 U.S. at 39. Nevertheless, the limitation upon independent expenditures was said to be the "most drastic." *Id.* at 39. The Court described the burden created by overall expenditure limitations in the following terms: "Although the Act's limitations on expenditures by campaign organizations and political parties provide substantially greater room for discussion and debate [than independent expenditure limitations] they would have required restrictions in the scope of a number of past congressional and Presidential campaigns and would operate to constrain campaigning by candidates who raise sums in excess of the spending ceiling." *Id.* at 20.

40. See *supra* note 34 and accompanying text for a discussion of the Court's rejection of the proffered rationales.

41. 435 U.S. 765 (1978).

42. The Court stated that "the State may prevail only upon a showing of a subordinating interest which is compelling." *Id.* at 786. It further explained that "the state must employ means "closely drawn to avoid unnecessary abridgement. *Id.* The Court rejected the equalization rationale. *Id.* at 790-92. It found insufficient evidence to support a finding that corporations were dominating the electoral process and thus causing voter estrangement. *Id.* at 789-90. Although the majority expressed doubt that there was a sufficient governmental interest in protecting dissenting shareholders, *id.* at 794 n.34, it assumed "*arguendo*, that [such] protection [was] a 'compelling' interest." *Id.* at 795. However, the Court found "no substantially relevant correlation between the governmental interest asserted and the State's effort to prohibit [corporations] from speaking"; as a result, the statute was found to be both overbroad and underinclusive. *Id.* (quoting Shelton v. Tucker, 364 U.S. 479, 485 (1980)). It should be noted that the reference to a "substantially relevant correlation" resembles the language of middle tier analysis used in gender-based discrimination cases. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 204 (1976); Reed v. Reed, 404 U.S. 71, 75 (1971).

(CMA),[43] a plurality of the Court apparently rejected strict scrutiny review in upholding limitations upon contributions made to multi-candidate political committees.[44] The Court's consistency in striking down independent expenditure limitations and upholding contribution limitations was shattered in 1981 when the Court, in an eight to one decision, invalidated a statute limiting contributions in ballot measure elections. Ignoring *CMA*, the majority appeared to apply strict scrutiny review to the limitations at issue in *Citizens Against Rent Control (CARC) v. Berkeley*.[45] *CMA* was, however, relied on the following year in *Federal Election Commission v. National Right to Work Committee (NRWC)*,[46] a unanimous opinion written by Justice Rehnquist upholding that portion of the Federal Corrupt Practices Act which greatly restricts the freedom of corporations without shareholders or members to

43. 453 U.S. 182 (1981) (plurality opinion).

44. "Because we conclude that the challenged limitation does not restrict the ability of individuals to engage in protected political advocacy, Congress was not required to select the least restrictive means of protecting the integrity of its legislative scheme." *Id.* at 199 n.20. *See* Nicholson, 9 ECOL. L.Q., *supra* note 18, at 698. In his concurring opinion, Justice Blackmun invoked the standard of strict scrutiny. 453 U.S. at 201.

45. 454 U.S. 290 (1981). *See generally* Nicholson, 9 ECOL. L.Q., *supra* note 18.

The summary affirmance by an equally divided Court in Common Cause v. Schmitt, 455 U.S. 129 (1982), was somewhat surprising. The case involved the constitutionality of limitations upon independent expenditures made by political action committees in support of presidential candidates accepting public subsidies. A three judge district court unanimously found the restrictions unconstitutional. 512 F. Supp. 489 (D.D.C. 1980). Eight Justices agreed in *Buckley* that limitations upon independent expenditures by individuals were unconstitutional, yet four Justices voted to uphold the committee restrictions in *Schmitt*. The Federal Election Commission (FEC) has taken the position that the Supreme Court's decision has no precedential effect and has attempted to continue to enforce the restrictions. The Commission recently relitigated the issue and lost in Democratic Party v. NCPAC, 578 F. Supp. 797 (E.D. Pa. 1983). The Supreme Court has noted probable jurisdiction, 52 U.S.L.W. 3756 (U.S. Apr. 17, 1984) (83-1122), but denied without comment petitioner's request for expedited review which would have enabled the Court to resolve the issue prior to the 1984 general election. *See Court Plans No Early Ruling on PAC Limits*, N.Y. Times, May 1, 1984, at A27, col. 3.

In *Schmitt*, the plaintiff had argued that there is a greater danger of corruption when political committees make independent expenditures than when the expenditures are made by individuals. Committees are usually able to amass larger sums than individuals, and, because they are spent by professional managers, they are of greater aid to the campaigns. It was asserted that the managers of these huge aggregations of money, rather than the contributors, are the beneficiaries of undue influence. Brief for Appellants, at 27, 28, 37, *Schmitt*, 512 F. Supp. at 489. The district court ignored this argument; instead, the court adopted the position taken by the Court in *Buckley* that independent expenditures provide little assistance and therefore are unlikely to result in undue influence. 512 F. Supp. at 495. The district court stressed the burden on freedom of association, declaring that contributors to political committees, unlike contributors to candidates, share a "community of political interest" and "express themselves through the political committees." *Id.* at 497. A similar argument was accepted by the Supreme Court in *CARC*, 454 U.S. at 294-300 (1981).

46. 459 U.S. 197 (1982).

solicit for contributions to their political action committees (PACs).[47] The language in *NRWC* was startlingly different in approach and tone from *Bellotti*. Indeed, the Court in *NRWC* seemed to apply very little scrutiny to the limitations.[48] Furthermore, the opinion made numerous unnecessarily sweeping statements regarding the power of Congress to restrict participation by corporations and unions in political fundraising.[49] In a number of earlier cases, the Supreme Court had strained to avoid deciding whether the restrictions on union and corporate political fundraising and expenditures were constitutional.[50] Now the Court seems to be signaling that such restrictions are constitutional and that,

47. 2 U.S.C. § 441b(b)(4) (1982).

48. The Court stated that "This careful legislative adjustment of the federal electoral laws, in a cautious advance, 'step by step' . . . to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference . . . ." 459 U.S. at 209 (citations omitted). The Court distinguished *Bellotti* on the basis that it involved restrictions on ballot measure elections and therefore did not involve preventing corruption of public officials. Since the statute authorizes corporations to solicit contributions to their PACs only from "stockholders and their families and [their] executive or administrative personnel and their families," 2 U.S.C. § 441b(b)(4)(A) (1982), and, in the case of membership corporations, allows solicitation from members, 2 U.S.C. § 441b(b)(4)(c) (1982), corporations with neither members nor shareholders would be extremely restricted in their ability to raise funds for PACs and would be nearly barred from making political contributions. Presumably, such PACs' only real sources of funds would be administrative or executive personnel. The Court did not explain why such a restriction was necessary to prevent corruption. It also did not address the question whether less restrictive means were available.

49. *See supra* note 48. The Court also stated that "[T]he statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation. . . . While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation." 459 U.S. at 209-10. It should be noted that Justice Rehnquist, who wrote the opinion in *NRWC*, had dissented in *Bellotti*, arguing in part that because of the corporate nature of the entities the states had extensive power to regulate their political activities. 435 U.S. at 822-27. Indeed, his language in *Bellotti* is strikingly similar to his opinion in *NRWC*. In *Bellotti*, Justice Rehnquist asserted that "the Congress of the United States and the legislatures of 30 other States of this Republic have considered the matter, and have concluded that restrictions upon the political activity of business corporations are both politically desirable and constitutionally permissible. The judgments of such a broad consensus of governmental bodies over a period of many decades is entitled to considerable deference from the Court." 435 U.S. at 823 (Rehnquist, J., dissenting). Compare this statement with the language of the majority opinion in *NRWC* reproduced *supra* note 48.

50. *See* Pipefitters Local 562 v. United States, 407 U.S. 385 (1972) (statute does not prohibit expenditures from separate, segregated account funded by voluntary contributions); United States v. CIO, 335 U.S. 1061 (1948) (statute does not prevent internal union communications). In United States v. UAW, 352 U.S. 567 (1957), the Court reversed a judgment that had dismissed an indictment against the union under the predecessor statute of the Federal Election Campaign Act (FECA) of 1971. In that case, the Court refused to "anticipate (the) constitutional questions," stating: "[O]nly an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative process especially demanded

so long as the stated aim is preventing corruption, Congress will have a free hand to even further restrict such entities.[51]

As the next section will elucidate, the Court does not apply the unconstitutional condition doctrine in every instance in which a person is required to forego the exercise of a constitutional right in order to obtain a government benefit. It has refused to apply the doctrine to rights that it describes as merely "qualified."[52] Although there are no clear guidelines as to which rights should be viewed as qualified, common sense suggests that the Court's view as to the importance of the right and the degree of burden are factors. As the foregoing discussion illustrates, the Court's perception of the significance of restrictions on campaign financing emerges as muddled, at best. Its wavering and inexplicit analyses in the campaign finance cases provide little guidance. Further confusion exists because the specific restriction on which this Article focuses—limitations upon overall campaign expenditures—

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for constitutional decision . . . . [B]y remanding the case for trial it may well be that the Court will not be called upon to pass on the questions now raised." *Id.* at 591-92.

51. This view is reinforced by the Court's recent denial of certiorari in a case upholding the constitutionality of bans on direct contributions and expenditures in federal elections by commercial corporations. Athens Lumber Co. v. FEC, 52 U.S.L.W. 3686 (U.S. Mar. 19, 1984). The appellate court had determined that the question was settled by *NRWC.* 718 F.2d 363 (11th Cir., 1983) (en banc) (per curiam).

The Court could have decided NRWC on narrower grounds. Indeed, the Court of Appeals had construed the definition of "member" in the statute broadly so that the committee's solicitation of persons who were not considered members of a corporation under state corporations statutes, but who had evidenced support for the committee through responses to mailings, could be solicited for contributions to the corporate political action committee. 459 U.S. at 202-03. The Supreme Court commented that the Circuit Court's "construction was reached at least in part because of concern for the constitutional implications of any narrower construction." *Id.* at 201. The Supreme Court seemed to be unwilling to cast doubt on the constitutionality of a broad construction of the statute by invoking a narrowing construction. This approach is very different from that of earlier decisions of the Supreme Court dealing with restrictions on corporate and union political fundraising. *See supra* note 50.

The Court in *NRWC* also might have avoided the sweeping pronouncements regarding the power of Congress to regulate the political activities of corporations by asserting that the burden on the Committee was small in as much as it simply could have used the form of a membership corporation under state law, and thus would have been entitled to solicit contributions from its members. The Committee argued in its brief before the Supreme Court, however, that it was "incorporated under Virginia law . . . (which) . . . required . . . an annual meeting of all members, a prohibitively expensive requirement." Brief for Respondents at 25 n.12. *NRWC,* 459 U.S. at 197. The Committee stated further that such a meeting would serve "no purpose in the context of a corporation organized not for profit or other business purposes, but for promotion of a political philosophy." *Id.*

52. *See infra* text accompanying notes 70-76. A recent case also suggests that the Court will not apply the doctrine when the government refuses to subsidize the exercise of some First Amendment activity so long as the refusal is not based on point of view. *Regan,* 103 S. Ct. at 202-03. *See supra* note 9.

were dealt with in *Buckley* as neither the most heinous, nor the most insignificant of the various restrictions.

The only pattern that emerges from the campaign finance cases is that after *Buckley* the Court has not invalidated a statute which was rationalized as preventing the corruption of public officials.[53] *RNC* is consistent with that pattern. The summary affirmance in *RNC* seemingly means that the Court either viewed the unconstitutional condition analysis as inapplicable, or that the restrictions would survive the stringent review required by the unconstitutional condition doctrine. It should be recalled that despite *RNC*, state courts could determine that similar restrictions do violate state constitutions. Had the Court chosen to write an opinion, it might have provided some guidance as to the appropriate means of dealing with this issue. Furthermore, a choice by the Court between the two alternatives to affirmance might have shed light on two murky areas of constitutional law. A written opinion could have given some hint as to the approach the Court will take in future cases dealing with other campaign restrictions. It also might have clarified the Court's current approach to the application of the unconstitutional condition doctrine generally. As will be seen in the next section, such a clarification is needed.

II. The Unconstitutional Condition: Supreme Court Doctrine

A. The "Right-Privilege" Distinction

In 1892, Justice Holmes propounded an analysis which came to be known as the "right-privilege" distinction.[54] In *McAuliffe v. Mayor of New Bedford*,[55] a former policeman contended that the city could not fire him for engaging in political activities. Justice Holmes disagreed, commenting that "[T]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[56] Thus, the essence of the doctrine was that if one has received a "privilege" from the government that could be withheld absolutely, then that grant could also be withheld conditionally; the fact that the condition standing alone would violate one's constitutional rights was considered insignificant.[57]

53. In *Buckley*, however, the Court rejected the argument that individual expenditure limitations and overall campaign expenditure limitations could be justified as a means of preventing corruption. *See supra* notes 25-27 and accompanying text.

54. *See* Rubin, *supra* note 7, at 168-71; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439-64 (1968).

55. 155 Mass. 216, 29 N.E. 517 (1892).

56. *Id.* at 220, 29 N.E. at 517.

57. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 509-10 (1978).

Perhaps the clearest articulation of the right-privilege distinction by the Supreme Court occurred in *Adler v. Board of Education*.[58] In *Adler*, the Court upheld a statute that made membership in the Communist Party a prima facie basis for dismissing a teacher. The Court stated that:

> It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. . . . It is equally clear that they have no right to work for the State . . . on their own terms. . . . If they do not choose to work on [terms set down by the state] they are at liberty to retain their beliefs and associations and go elsewhere.[59]

B. Abandonment of the "Right-Privilege" Distinction

Shortly after *Adler*, the "right-privilege" distinction began to disintegrate. In *Weiman v. Updegraff*,[60] decided the same year as *Adler*, the Court invalidated a loyalty oath requirement for state employees. A series of Warren Court decisions completed the process of disintegration. In *Sherbert v. Verner*,[61] the Supreme Court found that a Seventh Day Adventist's unemployment benefits were unconstitutionally denied because receipt of those benefits was conditioned upon her availability for Saturday work. The Court explicitly rejected the "right-privilege" distinction: "[I]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[62] The Court stated that "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionaly [sic] invalid even though the burden may be characterized as being only indirect."[63] Finally, in *Keyishian v. Board of Regents*,[64] the Court effectively overruled *Adler* by holding that membership in the Communist Party alone could not constitutionally bar one from the privilege of teaching.[65]

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58. 342 U.S. 485 (1952).
59. *Id.* at 492 (citations omitted).
60. 344 U.S. 183 (1952).
61. 374 U.S. 398 (1963).
62. *Id.* at 404.
63. *Id.*
64. 385 U.S. 589 (1967).
65. Prior to *Keyishian*, the Court had held that membership in the Communist Party could not constitutionally be prohibited unless the member also had a specific intent to facilitate an unlawful end. Noto v. United States, 367 U.S. 290, 298-99 (1961); Scales v. United States, 367 U.S. 203, 228-29 (1961).

Richard Rubin has explained that "the key to the Court's shift from decisions like . . . *Adler* to those such as *Sherbert* . . . [was the] equation of an indirect burden . . . in the

When analyzing conditions placed upon the exercise of constitutional rights, the Warren Court first determined whether there was an actual impingement on a constitutional right.[66] If the law either discouraged[67] or placed a detriment[68] upon the exercise of a right, an impingement was found. The Court then applied strict scrutiny review which required that the restrictions be necessary to a compelling government interest.[69]

C. Unconstitutional Conditions in the Burger Court

Although the Burger Court has applied the unconstitutional condition doctrine in much the same way as the Warren Court in dealing with some First Amendment questions,[70] it has refused to apply the doctrine in the context of abortion funding[71] and plea bargaining.[72] In these important cases, the Court has qualified the doctrine in ways that could result in a less stringent approach to future unconstitutional condition cases. Discussion in this Article will focus upon the abortion funding cases because, as in *RNC*, they involve the failure to fund the exercise of a constitutional right. In *Maher v. Roe*,[73] the Supreme Court upheld a state welfare regulation that denied Medicaid funding for abortions not necessary to the mother's physical and psychological well-being. The Court did not approach the issue in *Maher* by apply-

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form of a . . . condition, with a direct sanction placed upon the exercise of a constitutional right." Rubin, *supra* note 7, at 172. Rubin also has pointed out that the "indirect violation of right" doctrine has been applied primarily in speech and religion cases. *Id.* In United States v. Jackson, 390 U.S. 570 (1968), however, the Court struck down a provision of the Federal Kidnapping Act that had the effect of exposing only those defendants who chose a jury trial to the possibility of capital punishment.

66. Rubin, *supra* note 7, at 173.

67. *Id.* (citing Keyishian v. Board of Regents, 385 U.S. at 604, 609; United States v. Jackson, 390 U.S. at 581-83; Sherbert v. Verner, 374 U.S. at 404-05).

68. Rubin, *supra* note 7, at 173 (citing *Keyishian*, 385 U.S. at 607; *Jackson*, 390 U.S. at 581-83; *Sherbert*, 374 U.S. at 406).

69. Rubin, *supra* note 7, at 174 (citing *Keyishian*, 385 U.S. at 608-10; *Jackson*, 390 U.S. at 582; *Sherbert*, 374 U.S. at 406). Rubin points out that in some cases the Court did not explicitly apply the compelling state interest test, although such a test probably would have been satisfied. Rubin, *supra* note 7, at 174 n.57. *See, e.g.*, United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (restrictions on political activities of federal employees upheld).

70. *See, e.g.*, Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976) (conditioning continuation of government employment on political affiliation violates First Amendment rights of employees). *But see* Snepp v. United States, 444 U.S. 507 (1980) (upholding a contractual requirement that former CIA employees submit any manuscript about CIA activities for prepublication review).

71. Harris v. McRae, 448 U.S. 297 (1979); Maher v. Roe, 432 U.S. 464 (1977).

72. Bordenkircher v. Hays, 434 U.S. 357 (1978).

73. 432 U.S. 464 (1977).

ing the analysis developed in earlier unconstitutional condition cases.[74] Instead, the majority decided that the constitutional right to an abortion, which the Court recognized in *Roe v. Wade*,[75] is "not . . . an unqualified 'constitutional right' . . . . Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."[76]

The Court distinguished *Shapiro v. Thompson*[77] and *Memorial Hospital v. Maricopa County*[78] as involving penalties on the exercise of the constitutional right to travel.[79] According to the Court, those cases "recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict judicial scrutiny."[80] Rejecting the notion that the state "penalizes" the woman's decision to have an abortion by refusing to pay for it, the Court asserted that the analogy to *Shapiro* and *Maricopa* would be more appropriate if the state had denied general welfare benefits to all women who had obtained abortions.[81] Thus, denial of funding that enables a person to exercise a constitutional right is not a penalty, but denial of other benefits because he or she chooses to exercise such a right would be considered a penalty.[82] The emphasis is not upon the effect of the burden created by the condition, but upon its form. Unlike the approach of the Warren Court, under this analysis, neither deterence nor hardship are important in determining whether an unconstitutional condition exists.[83] This position was made even clearer in *Harris v. McRae*, when the Court upheld a federal statute denying funding for medically necessary abortions.[84] The Court in *Harris* stated that "[a]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not

74. The Court approached the issue as an equal protection question. *Id.* at 469-80. Finding no suspect class or fundamental right, the Court applied a mere rational basis test. *Id.*

75. 410 U.S. 113 (1973).

76. 432 U.S. at 473-74.

77. 394 U.S. 618 (1969).

78. 415 U.S. 250 (1974).

79. 432 U.S. at 474-75 n.8.

80. *Id.* at 475 n.8.

81. *Id.* at 474-75 n.8.

82. The Court asserted that "a substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible [woman] simply because [she] had exercised her constitutionally protected freedom to terminate her pregnancy by abortion." *Harris*, 448 U.S. at 317 n.19.

83. *See* Rubin, *supra* note 7, at 72-73. *See supra* text accompanying notes 66-68.

84. 448 U.S. 297 (1980).

remove those not of its own creation."[85]

The most startling aspect of the *Maher-Harris* analysis is that it accepts deterring the exercise of a constitutional right as a legitimate government interest.[86] The Court saw "a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[87] Thus, the state was free "to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."[88]

Of particular interest for purposes of this Article is the fact that the Court in *Maher* cited *Buckley v. Valeo* to support the distinction between interference with the exercise of a constitutional right and state encouragement of an alternative activity.[89] According to the Court, this distinction was the basis of its rejection in *Buckley* of a constitutional challenge to the subsidy provisions that deny funding to candidates of parties which cannot demonstrate certain thresholds of numerical support in past elections.[90] In rejecting the analogy to the ballot access cases in which strict scrutiny was said to have been ap-

85. *Id.* at 316. In *Harris*, the Court further asserted that "regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id.*

86. See *infra* text accompanying notes 223-41 for a discussion of the role of intent in unconstitutional condition analysis.

87. *Maher*, 432 U.S. at 475 (footnote omitted).

88. *Id.* at 474.

89. *Id.* at 475 n.9.

90. *Id.* The amendments to the Revenue Act of 1972 provided for funding in the general election for presidential candidates of parties defined as "major" or "minor." I.R.C. § 9003 (amended 1976). A major party is one whose candidate received 25% or more of the popular vote in the preceding presidential election. I.R.C. § 9002(b). A "minor" party is one whose candidate received 5% or more but less than 25% of the vote. I.R.C. § 9002(7). Minor parties receive a portion of the major party entitlement that is equal to the ratio of the votes received by the minor party's candidate in the preceding election to the average of the votes obtained by the candidates of the major parties in that election. I.R.C. § 9004(a)(2)(A). New parties obtain no pre-election funding, but may obtain reimbursement for outstanding debts after the election, based upon the actual vote of the new party in the election in question in relation to the average number of votes garnered by the major parties. I.R.C. § 9004(2)(B). Denial of pre-election funding to candidates of small parties could be viewed as an unconstitutional condition in that they would have to give up their right to run as third party candidates, and instead run as major party candidates in order to receive government funds. However, a candidate cannot simply decide to run as a major party candidate. Thus, denial of funding does not involve two clearly alternative actions in the same way as choosing abortion or childbirth, or agreeing or refusing to agree to an expenditure limitation. The Court did not address an unconstitutional condition issue in *Buckley*.

plied,[91] the *Maher* Court pointed out that the opinion in *Buckley* distinguished *"direct burdens"* imposed by such restrictions from the denial of public financing.[92] The latter was viewed as "not restrictive of voters' rights and less restrictive of candidates."[93] Quoting from *Buckley*, the Court in *Maher* explained,

> *[t]he inability, if any, of minority party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions*. Any disadvantage suffered by operation of the eligibility formulae . . . is thus limited to the claimed denial of the enhancement of opportunity to communicate with the electorate that the formulae afforded eligible candidates.[94]

However, it is not clear whether the Court in *Buckley* meant that the "denial of the enhancement of the opportunity to communicate" would never require strict scrutiny review. Indeed, the Court was somewhat ambiguous with respect to the standard of review applied to the denial of subsidies.[95] Furthermore, in *Buckley*, the Court stressed that candidates receiving subsidies have a "countervailing denial" due to overall campaign expenditure limitations.[96] It was in part due to this factor that the Court in *Buckley* considered the burden on ineligible candidates to be less significant than the burden on those denied ballot access.[97]

It would be inappropriate to conclude that the reference in *Buckley* to expenditure limitations as a countervailing denial settled the

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91. 424 U.S. at 93-95. There is some question whether strict scrutiny was actually applied in all of the ballot access cases. *See* Nicholson, 1977 WIS. L. REV., *supra* note 18, at 355-56.

92. 432 U.S. at 475-76 n.9 (citing *Buckley*, 424 U.S. at 94-95 (emphasis added by the *Maher* Court)).

93. *Id.*

94. *Id.* (citing *Buckley*, 424 U.S. at 94-95) (emphasis added by the *Maher* Court).

95. After concluding that "public financing is generally less restrictive of access to the electoral process than . . . ballot-access regulations," the Court stated, "[i]n any event, Congress enacted Subtitle H in furtherance of sufficiently important governmental interests and has not unfairly or unnecessarily burdened the political opportunity of any party or candidate." 424 U.S. at 95-96. "Sufficiently important" could be another way to describe "compelling." The language, however, is similar to that of intermediate scrutiny used in gender discrimination cases. *See e.g.* Craig v. Boren, 429 U.S. 190, 204 (1974) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"). However, the reference to necessity is more common in strict scrutiny review. *See supra* note 16.

96. 424 U.S. at 95.

97. It should be noted that this factor weakens *Buckley* as support for the Court's holdings in the abortion funding cases because those choosing childbirth over abortion suffer no "countervailing denial."

question of the constitutionality of those limitations.[98] The challenge in *Buckley* was based upon the argument that the ineligible candidates were disadvantaged vis a vis those who were eligible. The expenditure limits applicable to candidates receiving subsidies were not challenged in *Buckley*; the Court merely recognized that these limits equalize, at least to some extent,[99] the burdens allocated by the statute upon candidates eligible for subsidies and those ineligible for funding. Presumably, if such limitations were later challenged and found to be unconstitutional, the Court could reconsider the challenge of ineligible party candidates rejected in *Buckley*.

The Burger Court's approach to alleged unconstitutional conditions apparently has qualified that of the Warren Court. It has articulated a standard that would not require the application of strict scrutiny analysis when a burden upon a constitutional right is "indirect," unless the burden can be viewed as a penalty.[100] Although the Court's conception of what constitutes a penalty is not clear,[101] it appears that the Burger Court does not view the failure to pay for the exercise of constitutional rights as a penalty.[102] This may have been the basis of the Court's summary affirmance in *RNC*.[103] However, because state courts need not make the same distinction in interpreting their constitutions, it is important to determine whether the distinction is a convincing one.

In *Maher*, the Court pointed to earlier cases that seemingly had accepted the proposition that it is not necessary to apply strict scrutiny when government refuses to fund the exercise of a constitutional right. For example, in *Pierce v. Society of Sisters*,[104] the Court invalidated a

98. The district court in *RNC* apparently concluded that the Court's reference in *Buckley* to the expenditure limitations as a "countervailing denial" somehow made the Court's comments regarding the constitutionality of the unchallenged expenditure limitation conditions a holding rather than mere dicta. *See* 487 F. Supp. at 284 n.6. *See also infra* notes 130-33 and accompanying text.

99. The Court did observe, however, that the limitations may fail to equalize because they would "handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." 424 U.S. at 57.

100. *See supra* text accompanying notes 70-85.

101. *See* Rubin, *supra* note 7, at 212-14.

102. The Court made its position clear in *Maher*: "[T]he claim here is that the State 'penalizes' the woman's decision to have an abortion by refusing to pay for it. *Shapiro* and *Maricopa* did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers." 432 U.S. at 474-75 n.8. This view is reinforced by the recent case in which the Court upheld the denial of tax deductions for contributions made to non-profit organizations engaged in substantial lobbying. Regan v. Taxation With Representation of Wash., 103 S. Ct. 1997 (1983).

103. The district court in *RNC* purported to apply strict scrutiny to the challenged restrictions. *See infra* text accompanying notes 128-77.

104. 268 U.S. 510 (1925).

statute that made it a crime to send a child to a private school; nevertheless, in *Norwood v. Harrison*,[105] nearly fifty years later, the Court rejected the argument that private schools must receive state aid.[106] In addition, the Court in *Maher* quoted dicta from *Meyer v. Nebraska* for the proposition that, although it cannot be made a crime to teach children in elementary school a foreign language, "the power of the State 'to prescribe a curriculum' that included English and excluded German in its free public schools 'is not questioned.' "[107]

Despite these cases, other situations involving a failure by the government to provide funding might be analyzed differently by the Court. For instance, a statute might grant subsidies only to elementary private schools that did not teach foreign languages, or only to schools that teach the negative aspects of abortion. Such statutes probably would be seen by the Court as analogous to the statutes in *Pierce* and *Meyer* and would be invalidated because they impinge on teachers' rights of expression and parents' right to choose the appropriate education for their children.[108] It is unlikely that the Court would apply a rational basis test in such cases on the ground that the fact patterns involve mere failures to fund the exercise of constitutional rights, rather than penalties.

The public forum cases also offer analogies. Should the Court apply strict scrutiny to a statute that authorizes the use of a public auditorium to those who wish to speak in favor of child birth and against abortion, but prohibits advocates of the opposing point of view from using the auditorium? It is clear that strict scrutiny review would be appropriate,[109] despite the Court's finding in *Maher* that encouraging normal childbirth is a legitimate state interest.[110] The Court probably

105. 413 U.S. 455 (1973).

106. 432 U.S. at 477. The Court in *Norwood* stated that "[i]t is one thing to say that a state may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection receive state aid." 413 U.S. at 462 *quoted in Maher*, 432 U.S. at 477.

107. 432 U.S. at 477 (citing Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).

108. In *Meyer v. Nebraska*, the Court described plaintiff's right to teach and the parents' right to "engage him so to instruct their children" as within the guarantee of liberty secured by the Fourteenth Amendment. 262 U.S. at 400.

109. *See infra* note 189. In *Harris*, Justice Brennan stated in dissent that "surely the Government could not provide free transportation to the polling booths only for those citizens who vote for Democratic candidates." 448 U.S. at 336 n.6.

110. Another method of encouraging normal childbirth would be to pay the expenses of candidates who speak in favor of encouraging normal childbirth and against abortion. Professors Laurence Tribe and Jesse Choper have discussed the hypothetical situaton of subsidies given only to one political party. J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS (1981). Tribe's position was that strict

would distinguish such cases from *Maher* on the basis that First Amendment rights, unlike the right to an abortion, are unqualified.[111] The state cannot constitutionally make judgments that favor the exercise of certain First Amendment rights over others.[112] In *Maher*, the Court distinguished *Sherbert v. Verner*,[113] partly because "that case was decided in the significantly different context of a constitutionally imposed 'governmental obligation of neutrality' originating in the Establishment and Freedom of Religion Clauses of the First Amendment."[114]

It is not clear whether the Court views the rights implicated in limiting total campaign expenditures as being qualified or unqualified. The Court in *Buckley* purported to equate money with speech; the right to freedom of speech should be as unqualified as the right to the free exercise of religion. Likewise, the same "governmental obligation of neutrality"[115] is involved when dealing with either First Amendment right. Certainly there is a "governmental obligation of neutrality" if regulation of the content of speech is at issue.[116] Probably everyone would agree that government could not condition subsidies on a candidate's promise not to discuss certain issues.[117] However, because the

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scrutiny should not be applied to situations in which the government merely fails to provide funds. However, he would invalidate the hypothetical statute because it advances "only the wholly illegitimate interest of . . . encouraging one political party to win at the expense of the other." *Id.* at 256. He considers "no Political Establishment" as implicit in the Constitution and "no less axiomatic than the right to vote, which is also not mentioned in the Constitution." *Id.* at 256-57.

Professor Choper responded that such a statute would be unconstitutional because of the legislative intent to favor "one person's exercise of his constitutional rights . . . as opposed to another's." *Id.* at 281-82. Choper would apply strict scrutiny review whenever an intent to burden a constitutional right is established. For a discussion of the significance of purpose to unconstitutional condition analysis, see *infra* text accompanying notes 223-41.

111. *See supra* text accompanying notes 74-76.

112. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1971) (statute cannot prohibit all but peaceful labor picketing near school). *But cf. Regan, supra* note 9.

113. 374 U.S. 398 (1963). *See supra* text accompanying notes 61-63.

114. 432 U.S. at 474-75, n.8 (quoting *Sherbert*, 374 U.S. at 409).

115. *Id.*

116. The Supreme Court has repeatedly stated that content discrimination is unconstitutional. *See, e.g.*, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536-37 (1980); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972). Nevertheless, the Court has upheld numerous restrictions upon content. *See Consolidated Edison*, 447 U.S. at 545 n.2. (Stevens, J., concurring) (citing cases where subject matter was a permissible consideration in the state's restriction on speech forms).

117. Although Professors Laurence Tribe and Jesse Choper disagree about the correctness of *Harris* and *Maher*, both agree, although for different reasons, that it would be unconstitutional to fund only those people who work for one political party. J. CHOPER, Y. KAMISAR, & L. TRIBE, *supra* note 110, at 256, 281. In *Regan, see supra* note 9, the statute was upheld in part because it was " 'not aimed at the suppression of dangerous ideas.' " 103

expenditure limitations restrict the quantity rather than the content of expression, arguably the analogy to *Sherbert* is inappropriate.[118]

Apparently, the government's obligation of neutrality in dealing with free exercise issues required the application of strict scrutiny in *Sherbert* even though the burden on religious exercise took the indirect form of a condition to receive government largesse.[119] Does the governmental obligation of neutrality in dealing with burdens on the quantity of campaign speech require that strict scrutiny apply to conditions which limit the quantity of campaign expression in the pursuit of a legitimate state objective? Presumably the government's duty should prevent it from mandating expenditure limits on the ground that the quantity of campaign speech is excessive. In *Buckley*, the Court stressed that government has no business deciding how much speech is too much.[120] But in *Sherbert* the Court went further. The restriction in that case seemed to involve no element of intentional action to disadvantage a particular religion, yet strict scrutiny was applied.[121] Likewise, in *RNC* the statute has legitimate government purposes,[122] and limiting the quantity of speech because the government thinks there is too much, was not asserted as a rationale.

How does one decide when the obligation of neutrality arises? Prior to the abortion funding cases, it could have been argued that the degree of burden on the individual is decisive determinative.[123] Now it appears that the Court will simply pick and choose among the various constitutional rights, and will require neutrality based upon the indi-

S. Ct. at 2002-03 (quoting Cammarano v. United States, 358 U.S. 462, 513 (1959). *See also* discussion of *League of Women Voters*, *supra* note 9.

118. The Court in *Regan* asserted that the fact that the organization "did not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like" did not render the statute unconstitutional. 103 S. Ct. at 2003. The expenditure restrictions could be viewed as involving subject matter discrimination in that they restrict speech advocating the election of some candidates. In *Consolidated Edison*, the Court rejected the argument that subject matter restrictions, as opposed to point of view constraints, do not require strict scrutiny. Nevertheless, prior to *Consolidated Edison*, the Court had been more protective of point of view than of subject matter restraint. *See* Justice Stevens' concurring opinion in *Consolidated Edison*, 447 U.S. at 542 n.2. It is likely that the Court will continue this unarticulated dual level of protection. *See generally* Stone, *Restrictions on Speech Because of Its Content*, 46 U. CHI. L. REV. 81 (1978). The ambiguous state of the unconstitutional condition doctrine makes this an area in which the Court might choose to make such a distinction. Indeed, the Court in *Regan* ignored *Consolidated Edison*, did not apply strict scrutiny and did not describe lobbying as involving subject matter discrimination.

119. *See supra* text accompanying notes 61-63.

120. *See supra* note 29 and accompanying text.

121. *See infra* text accompanying note 234.

122. *See infra* text accompanying notes 141-77.

123. *See supra* text accompanying notes 66-69, 80-83.

vidual policy choice of five or more Justices.[124] Predictions are even more problematic because the confusion in the campaign finance regulation cases[125] makes it difficult to determine the Court's policy preferences in this area.

One can only guess whether the Supreme Court's summary affirmance in *RNC* was based upon strict scrutiny or a lesser standard of review such as the approach used in *Maher*.[126] As will be shown in the next section, however, the district court in *RNC* did purport to apply strict scrutiny to the restrictions.[127] Since state courts may follow that approach, it is important to consider whether the court in *RNC* properly applied that standard.

III. The *RNC* District Court Opinion

The district court in *RNC* framed the issue as whether Congress could "condition a presidential candidate's eligibility for public federal campaign funds upon the candidate's voluntary acceptance of limitations on campaign expenditures and private contributions."[128] The court concluded that "as long as the candidate remains free to engage in unlimited private funding and spending instead of limited public funding," the statute did not violate First Amendment rights.[129] Quoting from a footnote to the Supreme Court opinion in *Buckley*, the district court explained that:

> "Congress may engage in public financing of election campaigns and *may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations.* Just as a candidate may voluntarily limit the size of the contributions he

124. *See infra* text accompanying note 243.

125. *See supra* text accompanying notes 22-53.

126. One might attempt to distinguish *RNC* from *Maher* and *Harris* on the ground that in those cases the government had decided not to fund a particular medical procedure. In the campaign subsidy situation, however, the government had decided to fund campaigns generally and discriminate against those who choose to exercise their right to expend unlimited sums. Such an approach involves little more than semantics. If the government benefit in the abortion cases is described broadly as funding for the resolution of pregnancy, the government's choice to fund one means of resolution and not another discriminates against those who choose to exercise their right to abortion. Although it is true that a better analogy to the abortion cases would involve subsidies for only certain kinds of campaigning, the crucial similarity between *RNC* and the abortion funding cases is that there are two clear alternatives, both of which are protected by the Constitution. The choice of one results in funding, the choice of the other does not.

127. The district court in *RNC* did not even cite to *Maher* or *Harris*.

128. 487 F. Supp. 280, 284 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980).

129. *Id.* at 284.

> chooses to accept, he may decide to forgo [sic] private fundraising . . . ."[130]

The district court disagreed with the plaintiff's assertion that this passage was mere dictum; the court pointed out that in *Buckley* the subsidy allocation provisions were challenged by ineligible candidates. The Supreme Court upheld the statute, noting that those who receive public subsidies suffer a "countervailing denial" because they must abide by expenditure limitations.[131] Apparently the lower court concluded that by relying upon the effect of such limitations as one reason for finding the subsidy allocation formula constitutional, the Court implied that the limitations were also constitutional. This interpretation, however, is certainly not a necessary one.[132] In any event, because the expenditure limitations imposed on candidates receiving public subsidies were not challenged in *Buckley*, the quoted language should have been considered no more than strong dicta. Of course, after the summary affirmance by the Supreme Court in *RNC*, the issue is academic: such limitations are valid under the federal Constitution.[133] The remaining uncertainties concern the Court's reasoning in *RNC* and whether the state courts will find such limitations valid under their state constitutions.

In *RNC*, the district court began its analysis of the allegation that the limitations impose an unconstitutional condition by making the following assertion:

> [t]he fact that a statute requires an individual to choose between two methods of exercising the same constitutional right does not render the law invalid, provided the statute does not diminish a protected right or, where there is such a diminution the burden is justified by a compelling state interest.[134]

The court concluded that there was no "diminution" caused by the expenditure limitations, and even if there was, "the burden attributable to the limits imposed by the legislation [was] fully justified by the compel-

130. *Id.* (quoting 424 U.S. at 57 n.65) (emphasis added by the *RNC* court).

131. 487 F. Supp. at 284 n.6 (construing *Buckley*, 424 U.S. at 95).

132. *See supra* text accompanying notes 97-98. In California Medical Ass'n v. FEC, 453 U.S. 182 (1981), the Court rejected an equal protection challenge to a contribution limitation that had the effect of restricting the funds an unincorporated association could use to administer its political action committees. The Court stated that the fact that corporations and labor unions were not subject to the limitation was irrelevant because other restrictions applicable to those groups resulted in "far *fewer* restrictions on . . . unincorporated associations." *Id.* at 200 (emphasis in original). The Court commented that appellants had not challenged the limitations upon corporate and union activity. *Id.* at 201. Such a challenge would not be foreclosed by *CMA* any more than a challenge to the expenditure limits imposed on candidates accepting subsidies should have been foreclosed by *Buckley*.

133. See *supra* note 19 regarding the legal effect of a summary affirmance.

134. 487 F. Supp. at 284-85 (citing *Sherbert*, 374 U.S. at 403).

ling state interests."[135]

The district court's initial conclusion that there was no First Amendment burden was apparently based upon its characterization of the statute as "merely [providing] a presidential candidate with an *additional* funding alternative which he or she would not otherwise have."[136] The court reasoned that "[s]ince the candidate remains free to choose between funding alternatives, he or she will opt for public funding only if it will *enhance* the candidate's powers of communication and association."[137] However, some candidates may choose public funding for reasons other than enhancing their ability to communicate.[138] Indeed, as the district court acknowledged in *RNC*, both candidates in the 1972 presidential election raised and spent more than the presidential candidates received in subsidies in 1976 or 1980.[139]

In *Buckley*, the Court equated the quantity of money spent with the quantity of expression. If one assumes that the limitations diminish the quantity of speech, then based on the Court's opinion in *Buckley*, the issue must be analyzed as involving a burden upon First Amendment interests.[140] The district court in *RNC* might have determined, relying on *Maher* and *Harris*, that even if there were a burden on expression, strict scrutiny analysis was not necessary. Instead, that court purported to apply strict scrutiny, asserting that even if there was some burden on the First Amendment rights of candidates, the statutory scheme was supported by compelling state interests.[141]

IV. The Compelling Interests

The interests described by the district court in *RNC* included preventing the

> "great drain on [candidates'] time and energies" required by fundraising "at the expense of providing competitive debate of the

135. 487 F. Supp. at 285.

136. *Id.*

137. *Id.*

138. Some candidates may seek to avoid what they consider to be the degrading task of raising private funds. The late Senator Hubert Humphrey once stated that "the most demeaning, disgusting, depressing and disenchanting part of politics is related to campaign financing." 119 CONG. REC. 14985 (daily ed. July 28, 1973), *quoted in* Biden, *Public Financing of Elections: Legislative Proposals and Constitutional Questions*, 69 NW. L. REV. 1, 9 (1974). Others may want to avoid the appearance of undue influence that may result from private funding.

139. 487 F. Supp. at 283-89. It is possible, although unlikely, that the candidates in 1976 and 1980 would have been unable to raise more than the subsidies.

140. *See supra* text accompanying notes 35-40.

141. 487 F. Supp. at 285.

> issues for the electorate" and "[elimination of] reliance on large private contributions" and on the implicit obligations to private contributors that may arise from such reliance without decreasing the ability of the candidates to get their message to the people.[142]

The court observed that without overall campaign expenditure limits, these goals could not be achieved.[143]

A. Preventing Undue Influence

In *Buckley* the Court accepted the argument that the interest in preventing the reality and appearance of corruption justified contribution limits.[144] It is unclear whether the Court applied strict scrutiny or a lesser standard of review to the contribution limitations.[145] It is also unclear whether the Court invalidated the overall campaign expenditure limitations using strict scrutiny or a lesser standard of review.[146] There is little doubt, however, that the Court would consider the prevention of undue officeholder obligation to contributors to be a compelling government interest.[147] Whether overall expenditure limitations are necessary to accomplish the acknowledged compelling state interest is a more difficult question. Arguably, low contribution limits would be a less burdensome alternative for two reasons.[148] First,

142. *Id.* at 284 (quoting S. REP. NO. 689, 93d Cong., 2d Sess. 5-6, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5587, 5591-92).

143. 487 F. Supp. at 285-86.

144. 424 U.S. at 26-28.

145. *See supra* text accompanying notes 35-38.

146. *See supra* text accompanying notes 37-40.

147. In *Buckley*, the Court referred to the "basic governmental interest in safeguarding the integrity of the electoral process." 424 U.S. at 58. In *Bellotti* the Court asserted that the "importance of the governmental interest in preventing [corruption] has never been doubted." 435 U.S. at 788 n.26.

148. Although low contribution limits might be a less burdensome alternative in the presidential general election, they may not be a feasible alternative in the presidential primary election. Very low contribution limits, not accompanied by generous public subsidies, will make it very difficult for some candidates to adequately fund their campaigns. Presidential primary campaigns are funded on the basis of matching grants for up to the first $250 of a contribution. I.R.C. § 9034(b)(4). Unlike the general election in which subsidies are large enough to fund the entire campaign, the level of subsidy in the primary election is uncertain and may account for a small percentage of funds available to the candidate. Matching is used in presidential primary elections because of the difficulty of devising other fair and efficient methods for allocating primary subsidy funds. *See* D. ADAMANY & G. AGREE, POLITICAL MONEY: A STRATEGY FOR CAMPAIGN FINANCING IN AMERICA 202-03 (1975).

Expenditure limitations may be viewed as a desirable alternative to very low contribution limits because expenditure restrictions take away the incentive for collecting numerous large contributions; as a result, the opportunities for undue influence would be reduced and candidates could raise sufficient funds to mount a serious campaign. *See* Lowenstein, *supra* note 34, at 598 n.347; Note, *Campaign Contributions and Federal Bribery Law*, 92 HARV. L.

the Court has stressed that contribution limits, unlike expenditure limitations, involve only "marginal" burdens on First Amendment interests.[149] Second, it is unlikely that a small contribution would engender any serious sense of obligation in an officeholder toward a contributor. For example, even a $1,000 contribution made to a presidential candidate arguably would represent such a small proportion of total campaign funds that it would have no serious influence on the elected candidate.[150]

Like the expenditure limitations attached to public subsidies in *RNC*, the overall expenditure limitations invalidated in *Buckley* were rationalized as a means of preventing undue influence. In *Buckley*, however, the Court rejected this rationale and concluded that this interest would be "served" by the FECA's contribution limitations and disclosure provisions.[151] The Court felt that any danger that the contribution limitations would be circumvented was sufficiently dealt with by the criminal penalties of the Act and by the possibility of political repercussions.[152] The question that the Court did not explicitly address in *Buckley* is whether contribution limitations and disclosure requirements are sufficient to solve this problem. The clear implication from *Buckley* is that the Court thought they were.[153] But if the Court's conclusion is correct, then how can the same limitations attached to subsidy provisions be necessary to prevent undue influence? Of course, the district court did articulate another governmental interest, and perhaps that interest was the basis for the Court's summary affirmance in *RNC*.[154]

There are at least three arguments that would have permitted the Court in *RNC* to rely on the undue influence rationale despite its rejection in *Buckley* as a basis to uphold expenditure limitations. First, the Court might not have applied the same level of scrutiny to the limitation because it was an "indirect burden" in the form of a condition on

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REV. 451, 461 n.52 (1978). The Court in *Buckley* did not deal with this argument when it invalidated limitations on campaign expenditures for candidates not accepting public subsidies. Of course, the contribution limitations considered in *Buckley* may have been high enough to assure adequate funding.

149. 424 U.S. at 20.

150. The Court in *Buckley* refused to consider whether the thresholds set by Congress for contribution limitations were unnecessarily low. *Id.* at 30. *See* Nicholson, 1977 WIS. L. REV., *supra* note 18, at 347 n.105.

151. 424 U.S. at 55.

152. *Id.* at 56.

153. *Id.* at 55.

154. *See infra* text accompanying notes 171-77.

receiving the subsidy, rather than a direct burden on expression.[155] Thus, the Court may have applied the analysis used to uphold the denial of abortion funding in *Maher* and *Harris*.[156] Arguably, an interest insufficient for strict scrutiny review would suffice for the level of scrutiny applied in those cases. A second possibility is that political events in the seven years since *Buckley* caused the Court to conclude that contribution limitations and disclosure do not sufficiently curb undue influence.[157]

It is inappropriate to view the problem of undue influence in the context of an isolated campaign contribution. A number of $1,000, $500, or even $100 contributions known to come from persons of like concerns could create undue influence upon an officeholder. Even very small contributions solicited from numerous persons with known policy preferences could cause an officeholder to consider the views of those contributors over the views of non-contributors in some matters, particularly in areas that attract little public attention. Thus, no matter how low the contribution limit, it might not prevent contributors from unduly influencing some officeholders. If candidates are aware of the policy interests of contributors, only a complete ban upon contributions can totally eliminate the problem of officials feeling obligated to their financial backers. Those statutes that limit campaign expenditures to the amount of the public subsidy, such as the federal statute applicable to the presidential general election at issue in *RNC*,[158] are in effect bans on contributions.

One might question whether the burden on the First Amendment expression of contributors that results from the total ban is too high a price to pay for the alleviation of the undue influence which may arise when numerous small and moderate contributions are given by like-minded persons.[159] In part, the answer depends on how commonplace this scenario has become. With the emergence of many one-issue polit-

155. *See supra* text accompanying notes 71-107.

156. *Id.*

157. *See generally* E. DREW, POLITICS AND MONEY (1983). This conclusion could result in a reversal of the Court's holding in *Buckley* that campaign expenditure limitations, applying to candidates not accepting public subsidies, are unconstitutional. 424 U.S. at 54-57.

158. In presidential primary elections, candidates are permitted to accept private contributions because subsidies are allocated on the basis of matching grants. The need to totally eliminate the undue influence of private contributions was presumably weighed by Congress against the extreme difficulty of devising a fair and efficient formula for allocation in the primary other than matching. *See supra* note 148. Even though private contributions are permitted in the primary, the expenditure limitation reduces the incentive for raising numerous private contributions, thus reducing the opportunities for undue influence.

159. In *Buckley*, the Court viewed the expression involved in a contribution as the communication by the contributor to the candidate of his or her support. 424 U.S. at 21. Pre-

ical groups, which are regularly solicited by candidates for small or moderate contributions, the incidence of officeholders feeling such influence may be substantial.[160]

If a majority of the Court were to accept the argument that small to moderately sized contributions must be eliminated in order to prevent corruption, they would be taking a position that may be inconsistent with *Buckley*. In *Buckley*, the Court indicated that the $5,000 and $1,000 contribution limitations were sufficient to prevent corruption.[161] Likewise, those same limitations arguably would be enough to prevent corruption of candidates accepting public subsidies. However, the Court did not focus on the undue influence that can flow from small and moderately sized contributions. In *Buckley*, the Court stated that "(t)he major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions."[162] If the Court could be convinced that moderate and small contributions also pose a danger of undue influence and corruption, arguably not only would they uphold expenditure limitations, but they also might conclude that expenditure limitations not attached to public subsidies are constitutional. This reversal of *Buckley* could be grounded upon recent empirical evidence that the contribution limitations have not in fact been sufficient to prevent corruption.[163]

The Court's summary affirmance in *RNC* might have been based on reluctance to rationalize its decision upon a theory that could result in reversal of one of its holdings in *Buckley*. Indeed, state courts considering public subsidies tied to expenditure limitations might share that reluctance. It is possible, however, to base a rationale for affirmance on the need to prevent undue influence from small and moderate contributions without concluding that expenditure limitation, not attached to public subsidies are constitutional.

With or without public subsidies, an expenditure limitation places the same burden on campaign expression. If no more than thirty mil-

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sumably this message could be communicated without a contribution; hence, the burden on First Amendment interests is small. *See infra* note 164.

160. Some may contend that candidates do not seek financial assistance from such groups unless they already share their policy concerns so that most contributions from those sources actually produce no undue influence. Even so, the extent to which such organizations should be permitted to influence elections by virtue of their financial resources remains an issue. If these assumptions are correct, the goal served by contribution restrictions would be preventing undue influence on voters, another way of expressing the equalization rationale that the Court rejected in *Buckley*. *See supra* text accompanying notes 31-34.

161. 424 U.S. at 55.

162. *Id.*

163. *See generally* E. DREW, *supra* note 157.

lion dollars can be spent on a campaign, the maximum amount of campaign expression will be the same whether it comes from public, private or both sources.[164] What does change, however, is the effectiveness of the limitation in serving the goal of preventing undue influence. An expenditure limitation not accompanied by public subsidies only reduces the opportunity for corruption by the amount that could have been raised over the limit. For instance, if forty million dollars could have been raised and the limitation is thirty million dollars, the opportunity for corruption has been reduced by twenty-five per cent; if, however, ten million dollars comes from public subsidies and twenty million dollars from private contributions,[165] undue influence has been reduced by half,[166] with no further reduction in campaign expression.[167] If the thirty million dollars comes entirely from public subsidies, as is the case in the presidential general election, the opportunity for undue influence is reduced to zero,[168] again with no further reduction in campaign expression.

Expenditure limitations without public subsidies reduce undue influence only slightly, and impose the same burden on campaign expression as limits accompanied by substantial subsidies. It is the combination of limitations and subsidies that substantially reduces the opportunity for corruption. The higher the subsidy, the greater the reduction in undue influence. Without expenditure limitations, subsidies would have no effect on undue influence because contributions from persons seeking such influence presumably would be used to augment

164. The only additional burden on expression that occurs when public funding substitutes for private funding is upon the expression of those who are foreclosed from contributing. In *Buckley*, however, the Court described the expression of contributors as merely informing the candidate of their support, and pointed out that there are other ways of expressing that support. 424 U.S. at 21-22. Would-be contributors are free "to become a member of any political association and to assist personally in the association's efforts on behalf of candidates." *Id.* They can also make independent expenditures expressing their support.

165. Subsidies in the federal primary and in some state general elections are based on matching moderately sized private contributions. Larger contributions are also permitted up to the contribution limit. Therefore, it might occur that the ratio of private to public funding would be approximately two to one. The maximum amount of any contribution that can be matched under federal law is $250. I.R.C. § 9033(b)(4) (1984). The contribution ceiling, however, is $1,000 for individuals. 18 U.S.C. § 608(b)(1) (Supp. IV 1974), as amended by 2 U.S.C. § 441a(a)(1)(A) (1976). For a discussion of state funding schemes see H. ALEXANDER, FINANCING POLITICS, 136-43 (2d ed. 1980).

166. Of course such a reduction will not take place to the extent that ways are found to circumvent the restrictions. *See generally*, E. DREW, *supra* note 157.

167. *See supra* note 164.

168. *See supra* note 166.

public subsidies.[169] Perhaps the Court in *Buckley* balanced the burden upon expression caused by expenditure limitations against the need to reduce undue influence caused by contributions below the statutory limits, and found the benefit inadequate given the burden on expression. In a case involving subsidies, the greater benefit might cause the balance to be struck differently. Although such an approach was not articulated in *Buckley*,[170] it also was not rejected. This analysis could be persuasive to state courts considering conditional subsidy legislation under state constitutions.

B. Saving Time and Energy for Political Expression Other than Fund-Raising

The district court in *RNC* pointed out that the legislative history of the FECA indicated that an interest other than preventing corruption supports the campaign expenditure restriction: "[t]o lessen the 'great drain on [the candidate's] time and energies required by fund raising' at the expense of providing competitive debate of the issues for the electorate."[171] There are two aspects of this interest: the candidate is personally benefitted by the removal of a burden and the electorate is benefitted from increased communication.

Certainly, many candidates dislike the grueling and demeaning task of raising money for their campaigns.[172] It is not at all clear, however, that removing this burden should alone be considered a compelling government interest. Indeed, it is a burden that some candidates would prefer to retain, otherwise the Republican National Committee would not have challenged the constitutionality of the statutory restrictions on expenditures.

The second aspect of this interest is more compelling: by freeing candidates from fundraising, more of their time will instead be spent

169. It is possible that private funding would not be so crucial to the campaign, and therefore would not influence officeholders greatly. This seems unlikely, however, because candidates probably judge their need for funding on what their opposition is spending; without expenditure limitations that figure is frequently very high. *See* E. DREW, *supra* note 157.

170. In dealing with expenditure limitations as a means of preventing corruption, the Court stressed the burden on expression and the fact that such limitations were not needed due to the effect of other provisions. 424 U.S. at 55-58. However, it did not address the question of undue influence flowing from moderate and small contributions because it viewed "the major evil associated with rapidly increasing campaign expenditures [as] candidate dependence on large contributions." *Id.* at 55.

The Court in *Buckley* did seem to balance the burden against the benefit in dealing with contribution limitations, which were found to be constitutional. *Id.* at 58.

171. 487 F. Supp. at 284.

172. *See supra* note 138.

communicating with the electorate, thereby increasing, rather than decreasing, overall communication. Presumably, candidates who are totally or largely publicly funded will spend their time communicating with undecided voters, rather than trying to convince those who already have decided to vote for them to contribute. Furthermore, fundraising traditionally has been accomplished by the candidate communicating with small groups of "fat cats."[173] With expenditure limitations, political communication should be improved because more voters will hear the message, and those who need the information most will be more likely to receive it.

To some extent, however, the notion that the expenditure restrictions actually enhance communication is flawed. The form of campaign communication that reaches the greatest number of persons is that which uses the media. It takes money to use media, and it is the total amount of money used in the campaign that was limited by the challenged restrictions in *RNC*.

Perhaps the expenditure limitations were actually based upon the congressional judgment that expensive media advertising is a less beneficial form of political expression than other less expensive means. The slick prime time spot advertisement is probably the most expensive, yet least informative, means of political communication. The district court referred to freeing the candidates' time and energies for "competitive debate of the issues for the electorate."[174] Presumably the reference was not only to formal debates between the candidates,[175] but more generally to discussion of the issues by the candidates. Candidates who cannot afford expensive media advertisements and who do not spend their time and energy fundraising, may spend more time meeting with groups of voters and using less expensive but more informative media devices.[176] The expenditure limitations thus may be seen as an attempt to improve the quality of political expression at the expense of the

173. The $1,000 contribution limit probably makes it impractical for candidates for federal office to spend much time meeting with small groups of wealthy persons. These candidates, however, now probably spend their time meeting with those who control political action committees (PACs). PACs can contribute up to $5,000 each, 18 U.S.C. §608(b)(2) (Supp. IV 1974), as amended by 2 U.S.C. § 44 1(a)(1)(C) (1976), and may influence members to make individual contributions or work for candidates.

174. S. REP. No. 93-689, 93d Cong., 2d Sess. 5-6, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5587, 5591-92, *quoted in* RNC v. FEC, 487 F. Supp. at 284.

175. Decisions to debate opponents are usually made for reasons of strategy, and would seem to have little to do with time or energy.

176. Nonprime-time television and radio, purchased in blocks of time longer than spot advertisements, are less expensive per unit of time and are long enough to allow discussion of issues rather than mere recitation of slogans. Newspaper advertisements are less expensive than broadcast media and provide opportunity for issue discussion. Debates, press con-

quantity of expression.[177]

V. Unconstitutional Condition Analysis in the California Supreme Court

A number of states have adopted or are considering legislation that would provide subsidies to state candidates conditioned upon campaign expenditure limitations.[178] After *RNC* such statutes should pose no problems under the federal Constitution; nevertheless, they may violate state constitutions. For example, such legislation is pending before the California legislature.[179] Furthermore, the California Supreme Court has adopted an approach to unconstitutional conditions which is more sensitive to the protection of constitutional rights than that of the United States Supreme Court. Although the precise formulation of the rule is not entirely clear,[180] the California Supreme Court has specifically rejected the restrictive interpretation of the unconstitutional condition doctrine applied by the Supreme Court in *Maher* and *Harris*. In *Committee to Defend Reproductive Rights v. Myers*,[181] a case involving substantially the same issue as *Maher*, the California court repudiated the U.S. Supreme Court's "distinction between a measure which denies other governmental benefits to women who choose to have an abortion and one which simply denies funding for the abortion itself."[182] The California Attorney General had argued that based upon *Harris* "(t)he former measure . . . imposes an unconstitutional penalty; the latter merely withholds funding for actions which the state does not want to subsidize."[183] The California court responded that such a principle was inconsistent with California precedent.[184]

Before *Myers*, however, no California case had invalidated the simple failure to fund the exercise of a constitutional right using uncon-

ferences, and speeches, which may be reported in news programs and sometimes are broadcast live also permit more in depth discussion than spot advertisements.

177. This could be viewed as an attempt to alter the content of political expression. Content discrimination is considered the most serious burden on the First Amendment. In addition, the Court has held that subject matter restrictions are to be treated with the same strict scrutiny review as point of view restrictions. *See Consolidated Edison*, 447 U.S. 530, 537 (1980).

178. *See supra* note 21.

179. *Id.*

180. *See infra* text accompanying notes 197-204.

181. 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981).

182. *Id.* at 268, 625 P.2d at 788, 172 Cal. Rptr. at 875.

183. *Id.*

184. *Id.*

stitutional condition analysis.[185] The court in *Myers* relied upon *Wirta v. Alameda-Contra Costa Transit District*,[186] which had invalidated a public transit policy of making advertising space available for commercial messages, but not for political expression. This case could be viewed as a failure to subsidize the exercise of a constitutional right; perhaps it could also be an unconstitutional condition because a person could advertise only on the condition that no political topics would be addressed.[187] The court in *Wirta*, however, considered the issue as a denial of access to a public forum;[188] there was no reference to the unconstitutional condition doctrine.[189]

The California Supreme Court has been much more likely to find a public forum than has the United States Supreme Court. In *Lehman v. City of Shaker Heights*,[190] a case nearly identical to *Wirta*, the Supreme Court found no public forum, and thus no First Amendment violation. Furthermore, as the California Supreme Court pointed out in *Myers*, the California courts have found unconstitutional conditions in fact situations nearly identical to other cases in which the Supreme Court has found no constitutional violations.[191] For instance, in *Parrish*

185. *See* Comment, Committee to Defend Reproductive Rights v. Myers: *Abortion Funding as an Unconstitutional Condition*, 70 CALIF. L. REV. 978, 993 (1982).

186. 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).

187. The choice here is not so clear an alternative as the decision to have an abortion or to agree to an expenditure limitation.

188. 68 Cal. 2d at 55, 434 P.2d at 985, 64 Cal. Rptr. at 433.

189. Even the United States Supreme Court would find a First Amendment violation where there has been discrimination on the basis of political ideas in the allocation of access to a public forum. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (city officials' refusal to allow the production of the musical "Hair" in a municipal theater because the officials thought it obscene was a prior restraint forbidden by the First Amendment). *See generally* Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123 (1974); Karst, *Public Enterprise and the Public Forum: A Comment on* Southeastern Promotions, Ltd. v. Conrad, 37 OHIO ST. L.J. 247, 248, 255 (1976).

There is precedent, however, that predates the Court's abandonment of the right-privilege distinction which would support the constitutionality of discrimination on the basis of point of view in allocating the benefits of a public forum: in Davis v. Massachusetts, 167 U.S. 43 (1897), the Court upheld discrimination against an unpopular preacher in allocating the use of the forum of a public park. *But see* Niemotko v. Maryland, 340 U.S. 268 (1950) (denying Jehovah's Witnesses' right to use a public park while allowing use by other religious groups violates Equal Protection Clause); *cf.* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1971) (statute prohibiting all picketing near a school other than peaceful labor picketing violates equal protection.); Carey v. Brown, 447 U.S. 455 (1980) (prohibition on picketing in residential areas with exception for some peaceful labor picketing violates Equal Protection Clause).

190. 418 U.S. 298 (1974) (plurality opinion).

191. 29 Cal. 3d at 266-67, 625 P.2d at 787, 172 Cal. Rptr. at 873-74.

v. Civil Service Commission,[192] the California Supreme Court invalidated the practice of requiring welfare recipients to agree to home visits by social workers as a condition of receiving benefits. A similar requirement was upheld by the United States Supreme Court in *Wyman v. James*.[193] Furthermore, in *Bagley v. Washington Township Hospital District*,[194] the California court invalidated restrictions upon the political activities of civil service employees; the U.S. Supreme Court has upheld similar restrictions.[195] The California Supreme Court in *Myers* observed that "these cases indicate, for at least the past decade the federal decisions in this area have not been a reliable barometer of the governing California principles."[196]

After *Myers*, it seems unlikely that a California court would accept the Supreme Court's distinction between a penalty and a mere failure to fund. If the California Supreme Court considered expenditure limitations to burden expression, the court would probably apply some form of elevated scrutiny to an expenditure limitation conditioned on the receipt of public subsidies.[197] The precise formulation of such a standard of review is not clear. The plurality opinion in *Myers* purported to apply a three part test used in *Bagley v. Washington Township Hospital District*.[198]

> [First, the state] must establish that the conditions relate to the purpose of the legislation which confers the benefit . . . . Second ". . . the conditions [must] reasonably tend to further the purpose sought by conferment of that benefit, [and] the utility of imposing the condition must manifestly outweigh any resulting impairment of constitutional rights. . . ." Third . . . the state must establish the unavailability of less offensive alternatives and

192. 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

193. 400 U.S. 309 (1971). The alleged unconstitutional condition, which was asserted in Justice Douglas's dissent, *id.* at 326, was ignored by the majority.

194. 65 Cal. 2d 449, 421 P.2d 409, 55 Cal. Rptr. 401 (1966); *see also* Fort v. Civil Serv. Comm'n, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964).

195. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973). It is unclear what standard of review was applied by the Court. *See* Rubin *supra*, note 7, at 174 n.57.

196. 29 Cal. 3d at 267, 625 P.2d at 787, 172 Cal. Rptr. at 879-83.

197. Arguably *Myers* could be distinguished from a campaign subsidy case. In *Myers*, the court stressed the special significance of the right of privacy, which is explicitly recognized in the California constitution, as well as the severe burden on the right to privacy caused by the failure to fund. *Id.* at 274-80, 625 P.2d at 792-96, 172 Cal. Rptr. at 887-92; *see also id.* at 288-95, 625 P.2d at 800-05, 172 Cal. Rptr. at 887-91 (Bird, C.J., concurring). It seems unlikely, however, that the California Supreme Court would view freedom of expression as less deserving of protection than the right to privacy, unless the court were to distinguish between restrictions based on content and quantity. *See supra* notes 116-20 and accompanying text.

198. 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966).

> demonstrate that the conditions are drawn with narrow specificity, restricting the exercise of constitutional rights only to the extent necessary to maintain the integrity of the program which confers the benefits.[199]

Chief Justice Bird, in a concurring opinion in *Myers*, rejected the *Bagley* test; instead, she evaluated the "restrictions under the strict judicial scrutiny test used to assess *any* government action which burdens the exercise of a fundamental right."[200] The second *Bagley* criteria—whether the utility of the condition outweighs any impairment of constitutional rights—appears to introduce a balancing test into the analysis.[201] Thus, the *Bagley* test could be easier to meet than the compelling government interest test. Chief Justice Bird was concerned that the *Bagley* criteria might lead a court to try to balance "degrees of burden and degrees of fundamentalness."[202] For instance, a strong government interest in preventing corruption could outweigh a weak, but nevertheless fundamental interest in unlimited expenditures.[203]

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199. *Myers*, 29 Cal. 3d at 265-66, 625 P.2d at 786-87, 172 Cal. Rptr. at 873 (quoting *Bagley*, 65 Cal. 2d at 505-07, 421 P.2d at 409, 55 Cal. Rptr. at 401.

200. 29 Cal. 3d at 289, 625 P.2d at 801, 172 Cal. Rptr. at 873-74 (emphasis in original). The Chief Justice concluded that the *Bagley* test is simply "an early attempt by the court to formulate a standard for this close scrutiny. Its precise formulation of the standard to be used has been superseded by later developments." *Id.* at 289 n.2, 625 P.2d at 801 n.2, 172 Cal. Rptr. 888 n.2. Chief Justice Bird also pointed out that the California Supreme Court has previously "cited *Bagley* as authority for the proposition that the state could not impair the exercise of a fundamental right without demonstrating a compelling interest." *Id.* (citation omitted). Chief Justice Bird's interpretation is supported by the actual opinion in *Bagley*; the court, quoting from an earlier case, stated that "only 'compelling' public interests can justify a governmental entity in demanding a waiver of constitutional rights as a condition of public employment." 65 Cal. 2d at 507, 421 P.2d at 409, 55 Cal. Rptr. at 401 (quoting Fort v. Civil Service Comm'n, 61 Cal. 2d at 337, 392 P.2d at 388, 38 Cal. Rptr. at 628.

201. Although the *Bagley* test does not explicitly require a finding of a compelling government interest, it seems unlikely that a court would allow an interest which is not truly significant to outweigh the impairment of a constitutional right. Indeed, in determining whether the asserted state interest is compelling, courts probably consider whether on balance the interest outweighs the burden imposed upon constitutional rights by the challenged state action. In Moe v. Secretary of Admin., 382 Mass. 629, 417 N.E. 2d 387 (1981), the Massachusetts Supreme Judicial Court invalidated a state ban that resulted in withholding funding for medically necessary abortions for indigent women. The court rejected the Supreme Court's analysis in *Harris* in favor of an approach similar to that of the California Supreme Court. The Massachusetts court purported to apply the strict scrutiny test; however, the court explicitly stated that a balancing of interests is preferable to such a "rigid formulation," and proceeded to invalidate the restriction on that basis. *Id.* at 417 N.E.2d at 403-04. It is unclear whether the Massachusetts court was rejecting the compelling state interest formulation or whether it was using a balancing approach in applying that test. *Id.* at 417 N.E.2d at 403.

202. *Myers*, 29 Cal. 3d at 289-90 n.2, 625 P.2d at 801 n.2, 172 Cal. Rptr. at 888 n.2 (Bird, C.J., concurring).

203. Although the Supreme Court invalidated overall campaign expenditure limitations not conditioned on receipt of public subsidies, the Court did not view these limitations as the

Also, the two dissenting justices in *Myers* apparently accepted the view of the United States Supreme Court in *Maher* that the mere failure to fund the exercise of a right does not require the application of strict scrutiny.[204] Thus, several members of the California Supreme Court might apply less than strict scrutiny review to candidate subsidy provisions.

Even if the California court felt compelled by precedent to articulate strict scrutiny as the appropriate standard of review in a case challenging conditional subsidy legislation, this would not present an insurmountable obstacle to affirmance. In *Citizens Against Rent Control v. City of Berkeley (CARC)*,[205] four California Supreme Court justices purported to apply strict scrutiny to an ordinance limiting contributions in ballot measure elections; nevertheless the court upheld the restrictions as necessary to prevent corruption of the political system.[206] Ballot measures ordinarily do not involve the corruption of officeholders; therefore, the concept of corruption the court acknowledged as a compelling state interest was the need to prevent disaffection from the democratic process by voters who perceive that elections can be bought through large contributions.[207] Very little evidence of a link between large contributions and voter disaffection was presented before the California Supreme Court in *CARC*.[208] As a consequence, there is some question whether the California court's articulation of a strict standard of review actually described their methodology.[209] The case does

most burdensome of the challenged restrictions in *Buckley*. *See supra* notes 27-30 & 34 and accompanying text.

204. 29 Cal. 3d at 297-306, 625 P.2d at 806-12, 172 Cal. Rptr. at 893-99. Justice Clark, who joined Justice Richardson's dissenting opinion, has left the court. Justices Kaus and Broussard have joined the Court since the *Myers* opinion.

205. 27 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980), *rev'd*, 454 U.S. 290 (1981).

206. 27 Cal. 3d at 832, 614 P.2d at 749, 167 Cal. Rptr. at 91.

207. *Id.* at 826, 614 P.2d at 746, 167 Cal. Rptr. at 88. Political scientists have referred to this as "systemic corruption" as opposed to the narrow concept of corruption of public officials.

208. *See* Amicus Curiae Brief of the City of San Francisco at 27, *CARC*, 27 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980). *See also* Nicholson, 9 ECOL. L.Q., *supra* note 18, at 706-11.

209. *See* discussion in D. Lowenstein, Campaign Spending and Ballot Propositions n.572 (1981) (paper delivered at annual meeting of American Political Science Ass'n, Sept. 2-6, 1981, New York City). This ambiguity in the standard of review is not unique to the California Court. *See, e.g.*, Storer v. Brown 415 U.S. 724 (1974) and American Party of Texas v. White, 415 U.S. 767 (1974) (in which the Court purported to apply strict scrutiny without determining whether the restrictions were necessary). *See supra* text accompanying notes 23-40 for a discussion of the United States Supreme Court's approach to some of the limitations in *Buckley*. *See also* Nicholson, 1977 WIS. L. REV., *supra* note 18, at 354-355.

The California Supreme Court's decision in *CARC* was overruled by the United States Supreme Court because the Court did not find the rationale of preventing corruption of the

demonstrate sensitivity to the policy concerns behind campaign finance regulation, and a willingness to defer to the expertise of legislative bodies in this area—an approach frequently not shared by the United States Supreme Court, which overturned the California court's decision in *CARC*. It seems unlikely that the California court would invalidate a campaign finance restriction that has been upheld by the United States Supreme Court, regardless of the standard of review articulated.[210]

This view is reinforced by the fact that the California court has been much more sensitive to the issue of wealth discrimination than has the United States Supreme Court. Indeed, the California court, in contrast to the United States Supreme Court's interpretation of the United States Constitution,[211] has found distinctions based on economic class to be suspect for the purposes of review under the California Constitution's equal protection clause.[212] In *Myers*, the court commented in its opinion invalidating the failure to fund abortions for indigent women that "[i]n the past, this Court has been particularly critical of statutory mechanisms that restrict constitutional rights of the poor more severely than those of the rest of society."[213] This concern is also evident in the area of political rights. The California court invalidated a statute that required candidates for water district elections to be

political system to be sufficient to sustain the restrictions. It is not clear whether the majority rejected the rationale entirely or merely determined that there was insufficient evidence to establish that the limitation was necessary to further that interest. *See* Nicholson, 9 ECOL. L.Q., *supra* note 18, at 738-39. Because the Supreme Court in *RNC* upheld expenditure limitations conditioned on public subsidies, the fact that the Supreme Court might not agree with the California court's application of strict scrutiny would be purely academic. In fact, the appellate court opinion in *RNC* resembled the California Supreme Court's analysis in *CARC* in that neither opinion was specific about the need for the restrictions in question, although each court purported to apply strict scrutiny. *See supra* text accompanying notes 143-77.

210. Applying strict scrutiny review, the California Supreme Court has invalidated overall campaign expenditure limitations in ballot measure elections. Citizens for Jobs and Energy v. Fair Political Practices Comm'n, 16 Cal. 3d 671, 547 P.2d 386, 129 Cal. Rptr. 106 (1976). The result in *Citizens for Jobs and Energy*, however, was clearly required by the Supreme Court's holding in *Buckley* that overall campaign expenditure ceilings in candidate elections were unconstitutional. *See supra* note 31. Therefore, *Citizens for Jobs and Energy* should not be considered to represent the view that campaign expenditure limitations are particularly burdensome under the California Constitution. Ballot measure elections involve no realistic connection to preventing corruption of public officials; expenditure limitations in candidate elections arguably do prevent undue influence of officeholders.

211. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (wealth not a suspect classification).

212. Serrano v. Priest, 5 Cal. 3d 584, 597, 487 P.2d 1241, 1250, 96 Cal. Rptr. 601, 610 (1971).

213. 29 Cal. 3d at 281, 625 P.2d at 796, 172 Cal. Rptr. at 883.

property owners;[214] the United States Supreme Court, however, has upheld statutes requiring voters in such elections to own property.[215]

Based on these precedents, the California court could take the position that the California equal protection clause reflects a stronger commitment to political equality than does the federal constitution.[216] Campaign subsidies without expenditure limitations allow candidates with ties to wealthy interests to greatly outspend those whose supporters have more modest means. Also, despite the United States Supreme Court's rejection of equalization as a rationale for restrictions,[217] the California court could assert that the rationale is consistent with and even enhances the goals of the California Constitution's freedom of expression provisions. Indeed the court of appeals in *Buckley* had viewed the goal of equalizing access to and impact upon the political process as a countervailing First Amendment interest to be weighed against the argument that limitations burden the First Amendment rights of the wealthy.[218] Thus, arguably, there would exist strong public policy interests to offset any burden upon expression created by expenditure

214. Choudhry v. Iree, 17 Cal. 3d 660, 552 P.2d 438, 131 Cal. Rptr. 654 (1976) (invalidating requirement that candidates for the board of directors of a water irrigation district be landowners).

215. *E.g.* Ball v. James, 451 U.S. 355 (1981) (rejecting a federal equal protection challenge to a statute limiting the right to vote in a water district election to landowners). The California Supreme Court in *Choudhry* applied strict scrutiny analysis, whereas the Supreme Court in *Ball* applied a rational basis test. The functions of the water districts were virtually identical. The dissent in *Ball* agreed with the California Supreme Court's position in *Choudry*. 451 U.S. at 385-86 n.9.

216. The appellate court in *Buckley* noted numerous Supreme Court cases invalidating burdens upon the right to vote imposed on the basis of wealth, and asserted that "[o]urs is a nation that respects the drive of private profit and the pursuit of gain, but does not exalt wealth thereby achieved to undue preference in fundamental rights. . . .

It would be strange indeed if, by extrapolation outward from the basic rights of individuals, the wealthy few could claim a constitutional guarantee to a stronger political voice than the unwealthy many because they are able to give and spend more money, and because the amounts they give and spend cannot be limited." 519 F.2d 817, 841 (D.C. Cir. 1975) (*overruled* 424 U.S. 1).

217. *See supra* notes 31-34 and accompanying text.

218. The court asserted that "[t]here is a positive offset to plaintiffs' invocation of the First Amendment in the presentation by intervening defendants that the statute taken as a whole affirmatively enhances First Amendment values. By reducing in good measure disparity due to wealth, the Act tends to equalize both the relative ability of all voters to affect electoral outcomes, and the opportunity of all interested citizens to become candidates for elective federal office. This broadens the choice of candidates and the opportunity to hear a variety of views." 519 F.2d 817, 841 (D.C. Cir. 1975). Judge Skelly Wright, who was among the majority in the per curiam appellate court opinion in *Buckley*, has asserted his conviction that "the 1974 legislation [chose] to move closer to the kind of community process that lies at the heart of the First Amendment conception—a process wherein ideas and candidates prevail because of their inherent worth, not because prestigious or wealthy people line up in favor, and not because one side puts on the more elaborate show of support." Wright, *Poli-*

limitations.[219]

Even though the California courts would be free to interpret their constitution differently than the federal constitution, so long as federal rights were not infringed,[220] it must be acknowledged that this approach would put a state court in a rather unusual position. It would

tics and the Constitution: Is Money Speech?, 85 YALE L.J. 1001, 1005 (1976). *See generally*, Karst, *Equality as a Central Principle of the First Amendment*, 436 U. CHI. L. REV. 20 (1976).

219. It should be emphasized that this is a public policy argument and not an argument that the California Constitution requires expenditure limitations. The California Supreme Court has interpreted the California equivalent of the Equal Protection Clause not "to apply broadly to all purely private conduct." Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (citing Kuger v. Wells Fargo Bank, 11 Cal. 3d 352, 366-67, 521 P.2d 441, 449-50, 113 Cal. Rptr. 449, 457-58 (1974)). The actions of a candidate in spending huge sums on an election would not be considered state action, particularly given the Burger Court's restrictive interpretation of that doctrine in recent years. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). For support of the view that private funding would constitute state action, see Nicholson, *Campaign Funding and Equal Protection*, 26 STAN. L. REV. 815, 830-36 (1974). Of course, California courts are free to interpret their state action doctrine more broadly than that doctrine is applied in federal courts. *See infra* note 220. Indeed, the California Supreme Court has implicitly done so in Pruneyard Shopping Center v. Robins, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854, *aff'd* 447 U.S. 74 (1979). In *Gay Law Students Ass'n* the California Supreme Court interpreted the California equivalent of the federal Equal Protection Clause as applicable to employment discrimination even though the Supreme Court in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), had rejected the argument that the actions of a regulated utility should be considered the equivalent of governmental action for purposes of the Due Process Clause. Although the California Supreme Court distinguished *Jackson*, arguing in part that "courts have applied a different standard of state action in cases presenting procedural due process questions than has been traditionally applied in cases involving discrimination under the equal protection clause," 24 Cal. 3d at 474 n.9, 595 P.2d at 601 n.9, 156 Cal. Rptr. at 24 n.9 (citations omitted), the court also made it clear that it was free to adopt a different interpretation of the state action doctrine. *Id.* at 496, 595 P.2d at 598, 156 Cal. Rptr. at 20. Nevertheless, it seems unlikely that the California Supreme Court would go so far as to endow the expenditure of privately donated campaign funds with the attributes of governmental action for purposes of equal protection. This would be an extension of the state action doctrine that goes even further than previous California cases. Such an approach would require the Court to either choose an appropriate remedy itself, or require the legislature to do so. As the volume of literature and litigation on campaign finance legislation suggests, effective remedies are complex and expensive. The California court would probably prefer to avoid such a quagmire.

220. In Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) the Supreme Court upheld a California Supreme Court decision interpreting the freedom of expression provision in the California Constitution to require private owners of shopping centers to allow access to persons seeking a "forum for political expression"; in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) the Court had interpreted the federal Constitution as not requiring such access. The court in *Pruneyard* explained that the state may "adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." 447 U.S. at 81 (citations omitted). Justice Brennan has suggested that state courts should utilize their power to expand individual rights to counteract the Burger Court's restrictive approach to such rights. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

be accepting as a sufficient state interest a rationale that has been rejected as insufficient to justify limitations on campaign expenditures under the federal Constitution. Although the United States Supreme Court would agree with the California court's result, its agreement would be based upon different reasoning—possibly upon an approach to unconstitutional conditions that affords less protection than that given under state constitutions.[221] State supreme court justices might find it awkward to write an opinion expressing such views. Thus they might prefer another approach to affirmance that would require less inconsistency with the Supreme Court's approach in *Buckley*. Therefore, the argument made in the last section, that expenditure limitations combined with subsidies are much more effective in preventing undue influence than such limitations without subsidies, and impose no additional burden on expression, would probably be accepted more readily.[222]

VI. The Significance of Intent in the Unconstitutional Condition Doctrine

The question of the role of intent in constitutional law doctrine is confused at best. A finding of intent is necessary to a determination of unconstitutionality in dealing with some issues,[223] and irrelevant when dealing with others.[224] Furthermore, there is uncertainty regarding what is meant by intent.[225] The significance of intent in unconstitutional condition doctrine is no less confused than in other areas of con-

221. *See supra* text accompanying notes 70-94.

222. *See supra* text accompanying notes 164-70.

223. Intent is a necessary element for a successful challenge of government discrimination on the basis of race, Washington v. Davis, 426 U.S. 229 (1976), and gender, Personnel Admin. of Massachusetts v. Feeney, 442 U.S. 256 (1979).

224. Intent is apparently not necessary to a successful equal protection challenge alleging discrimination on the basis of a fundamental right. For example, the apportionment cases have not required a finding of intentional malapportionment. *See, e.g.*, Avery v. Midland County, 390 U.S. 474 (1968); Reynolds v. Sims, 377 U.S. 533 (1964).

Intent does not seem to be an element in cases finding infringement of First Amendment rights. Nevertheless, Professor Geoffrey Stone has concluded that the Court's special disfavor of content discrimination is rooted, in part, in the perception that content discrimination usually reflects an intent to prefer one point of view over another. Stone, *supra* note 118, at 103.

225. Some Justices seem to require a finding of ill will rather than merely an intent to do an act. For instance, in United Jewish Organizations v. Carey, 430 U.S. 144, 179-80 (1976), Justices Stewart and Powell concurred in the judgment that an apportionment plan which had carved out districts with the purpose of permitting black voters to elect a representative of their own race was constitutional. They stressed that the legislature acted not from a purpose to disadvantage white voters, but because the Justice Department had asserted that the Voting Rights Act required the creation of such districts.

stitutional law. Although the Court seldom discusses the point, intent to deter the exercise of a constitutional right probably existed in most of the cases invalidating such conditions.[226] In several cases, the Warren Court held that a finding of such an intent required that the governmental action be invalidated.[227] The Burger Court has, however, in *Maher* and *Harris*[228] and in *Bordenkircher v. Hayes*,[229] rejected that approach. This aspect of these cases has engendered much criticism from legal scholars.[230]

226. The abortion funding cases are probably the clearest examples. *See* Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977). However, other cases probably also involved such an intent. For instance, in Elrod v. Burns, 427 U.S. 347 (1976), requiring political support for party machine candidates by government workers probably was motivated by the desire to induce them to forgo their right to support other candidates. In Shapiro v. Thompson, 394 U.S. 618 (1969), the residency requirement for welfare recipients was probably aimed at inducing indigents to forgo their right to move to Florida. Unlike the abortion cases, however, it seems likely that in these cases the attempt to induce others to alter their conduct was motivated by practical, rather than moralistic concerns. In *Sherbert v. Verner*, however, it seems unlikely that an intent to induce individuals to forego constitutional rights was involved. *See infra* text accompanying notes 233-41.

227. Shapiro v. Thompson, 394 U.S. 618, 631 (1969) (invalidating residency restrictions on receipt of welfare benefits); United States v. Jackson, 390 U.S. 570, 581 (1968) (invalidating provision of the Federal Kidnapping Act that resulted in the possibility of a death penalty only in jury trials); North Carolina v. Pearce, 395 U.S. 711, 723-24 (1968) (heavier sentence cannot be imposed as punishment for defendant who succeeded in having his original conviction set aside).

228. *See supra* discussion of the abortion funding cases, at text accompanying notes 71-107.

229. In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the Supreme Court upheld the action of a district attorney who reindicted a criminal defendant on a more severe charge because he refused to plead guilty and forgo his right to a jury trial. The Court stated, "It follows that by tolerating and encouraging the negotiations of pleas, this court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." *Id.* at 364.

230. *See, e.g.*, Professor Jesse Choper's discussion in TRENDS, *supra* note 110, at 280-83, 287-88; Rubin, *supra* note 7 at 212. Professor Laurence Tribe criticized the statute upheld in *Maher* as "only an attempt to achieve with carrots what government is forbidden to achieve with sticks." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 933 n.77 (1978). Professor Tribe has changed his position and now supports the Court's approach in *Maher* and *Harris*. He has asserted that "neutrality may be required with respect to religion and perhaps even with respect to partisan politics, but not with respect to anything else." TRENDS, *supra* note 110, at 290. Professor Gale Kamisar, apparently agrees with Professor Tribe's most recent position. *Id.* at 282. Professor Choper, however, would apply strict scrutiny whenever government purposely attempts to induce persons to forego the exercise of constitutional rights. *Id.* at 277-88. He apparently would not limit the inquiry to purpose, however, and would also invalidate statutes on the basis of impact in some situations. *Id.*

There are problems in applying either the Choper or the Tribe analysis. Tribe's approach leads to the conclusion that governments can discriminate in granting public subsidies on the basis of their approval or disapproval of the views to be expressed as long as neither partisan politics nor religion are the subject matter. Nevertheless, Tribe is correct in

One should not necessarily assume that intent to deter the exercise of a constitutional right will never again emerge as an important factor. The Burger Court is adept at discarding its own doctrine when convenience requires,[231] and the abortion funding and plea bargaining cases may turn out to be aberrations that are explainable on political, rather than doctrinal grounds.[232] In any event, state courts need not follow the Court's approach in *Maher*, *Harris* and *Bordenkircher*, and may view intent as an important factor when applying unconstitutional condition doctrine under state constitutions.

In some fact situations it is easy to determine whether or not the legislative body had an intent to deter the exercise of a constitutional right. There was no serious doubt, for instance, that the failure to fund abortions for indigent women was aimed at discouraging them from having abortions.[233] On the other hand, in *Sherbert v. Verner*,[234] it is extremely unlikely that the requirement that unemployment compensation recipients be available for Saturday work was an attempt to deter the free exercise of some religions. The expenditure limitation attached to public subsidies to candidates is not so easily categorized. If the persons who promulgated the Saturday work requirement in *Sherbert* thought about it at all, they were probably neutral with respect to whether the regulation interfered with religious observance. In the case of an expenditure limitation attached to candidate subsidies, proponents have asserted that in order to serve the purposes of the subsidy,

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asserting that "(p)urpose is a treacherous inquiry because it can be so easily manipulated." TRENDS, *supra* note 110, at 286. While discussing *Maher*, Tribe noted that an inquiry into intent involves "the problem of mirror images. [I]s . . . the [legislative] purpose to discourage and wash its hands of abortion—or to encourage and support healthy childbirth?" *Id.*

The issue of intent is further complicated by the fact that there are some forms of purposeful discrimination which few would consider illegitimate. Tribe points out that even though one may have a right to divorce, few would object if the government, in order to discourage divorce, funded marriage counseling. *Id.* at 387. Nor would many doubt the constitutionality of a statute that seeks to discourage abortions by funding the costs of childbearing for mothers who put their children up for adoption. Professor Choper would simply apply strict scrutiny to such statutes and uphold them if they are necessary to further a compelling government interest. *Id.* at 295-96. Tribe, however, fears that such an approach would weaken strict scrutiny analysis. *Id.* at 296.

231. Compare the language in First National Bank v. Bellotti, 435 U.S. 765 (1978) to FEC v. NRWC, 459 U.S. 197 (1982) *supra* notes 41-42, 46-51 and accompanying text. *See* V. BLASI, ROOTLESS ACTIVISM, THE BURGER COURT 198-217 (1983).

232. *See infra* text accompanying note 244.

233. Indeed, the Court acknowledged that this was the purpose of the legislation. *Maher*, 432 U.S. at 473-75. *See supra* text accompanying notes 86-88. *But see* the mirror image problem discussed *supra* note 230.

234. 374 U.S. 398 (1963).

interference with the right to spend unlimited sums is necessary.[235] The fact that it was contemplated that a burden on the exercise of a constitutional right will be necessary should not, however, be enough to find an intent to deter the exercise of that right. The Court has said that legislators cannot do indirectly that which they are forbidden to do directly;[236] in the cases in which there seemed to be a clear intent to deter the exercise of a constitutional right, this is precisely what the legislatures were attempting to do. They could not ban abortion, so they refused to fund it;[237] they could not pass a law requiring support of certain candidates, so they made such support a condition of government employment;[238] they could not prohibit jury trials, so they required abandonment of that right in order to obtain other favorable treatment;[239] they could not require loyalty oaths, so they made them a condition of tax exemption.[240]

The expenditure condition attached to candidate subsidies is dissimilar to most cases in which an unconstitutional condition has been found in that the statute is not merely a purposeful attempt to do indirectly that which cannot constitutionally be done directly. There is much more involved than a mere attempt to induce candidates to abide by expenditure limitations. The intent is to create a public funding system that will either greatly reduce or eliminate entirely reliance on private funds.[241] That goal can be accomplished only if subsidies are combined with expenditure limitations.

Conclusion

In *Maher* and *Harris*, the Supreme Court ignored the serious burden faced by indigent women seeking elective or medically necessary abortions.[242] Rather than focusing on the practical effect of the burden, the Court applied a highly formalistic approach. The majority considered the mere failure to fund the exercise of a constitutional right not to be a penalty, and therefore not subject to strict scrutiny analysis.[243] One commentator has observed that "[t]he term 'penalty' thus seems . . . to have evolved into a form of smoke screen behind which the

235. RNC v. FEC, 487 F. Supp. at 285-86.
236. Perry v. Sinderman, 408 U.S. 593, 597 (1971).
237. Maher v. Roe, 432 U.S. 464 (1977).
238. Elrod v. Burns, 427 U.S. 437 (1976).
239. Bordenkircher v. Hayes, 434 U.S. 357 (1978).
240. Speiser v. Randall, 357 U.S. 513 (1959).
241. *See supra* text accompanying notes 162-69.
242. *See supra* text accompanying notes 70-88.
243. *Id.*

Court may make a nonstandardized decision as to whether it wishes to find infringement. In actuality, the members of the Court seem to be responding to unarticulated political or social concerns . . . .[244] *Maher* and *Harris* are consistent with the Burger Court's opposition to elevating the disadvantages of poverty to constitutional dimensions and aversion to placing judicially created affirmative obligations upon government.[245]

It is unclear whether the Court's summary affirmance in *RNC* was based upon the *Maher-Harris* analysis. Arguably, the Court would have found that approach inappropriate because First Amendment interests were at stake, rather than the "qualified" right to an abortion.[246] This conclusion would, however, merely illustrate the emptiness of the Court's formalistic approach to the unconstitutional condition problem. If the degree of burden were the determining factor, then a decision not to fund a medically necessary abortion should be subjected to stricter scrutiny than a decision not to subsidize candidates who will not accept expenditure limitations. The Court might also have avoided strict scrutiny review in *RNC* on the grounds that the statute restricted the quantity of speech rather than the content of the expression.[247] Language in *Buckley* to the effect that restrictions on the quantity of speech require strict scrutiny review[248] might have been distinguished as applying only to direct restrictions, and not indirect burdens in the form of conditions.[249]

The district court in *RNC* did not apply the *Maher-Harris* analysis. Instead, the court concluded that the restriction would not result in a diminution in the quantity of speech.[250] Alternatively, it asserted that even if there were such a diminution, the restrictions were necessary to further compelling government interests. The Court has yet to address the rationale proffered in *RNC* of saving candidates' time and energy for political expression other than fundraising as a rationale for restrictions.[251] Although preventing undue influence was also asserted as a

244. Rubin, *supra* note 7 at 212. *See also* V. BLASI, *supra* note 231.

245. *See* L. TRIBE, *supra* note 230, at 1118-36. Professor Tribe noted "[t]he Burger Court's enormous reluctance to tell the states how to spend their scarce resources, and its willingness to tolerate—indeed occasionally its own adoption of—pejorative generalizations about the poor." *Id.* at 1129-30.

246. *See supra* text accompanying notes 109-14.

247. *See supra* notes 115-18 and accompanying text.

248. *See supra* text accompanying notes 35-40.

249. *See supra* text accompanying notes 116-24.

250. *See supra* text accompanying note 135.

251. The Court in *Buckley* did refer to this rationale as one of the bases for the congressional decision to publicly fund candidates. 424 U.S. at 91, 96.

rationale in *RNC* and probably is a compelling government interest,[252] in *Buckley* the Court rejected the argument that the expenditure limitations are a necessary concomitant to contribution limitations to prevent corruption. It is difficult to see how such limitations could be necessary to prevent corruption when attached to public subsidies, but not when standing alone.[253] Of course, the summary affirmance in *RNC* may have been based on evidence since *Buckley* showing that contribution limitations and disclosure are not enough to substantially reduce the problem of undue influence on public officials.[254] Furthermore, the Court could have reasoned that expenditure limitations coupled with subsidies restrict campaign expression no more than expenditure limitations alone and are much more effective in preventing undue influence. Thus, using a balancing approach, the Court might have upheld the statute in *RNC* without overruling *Buckley*. This approach would have involved an analysis different from, but not necessarily inconsistent with, that used in *Buckley* to deal with expenditure limitations.[255]

Two other rationales applicable to the expenditure limitation condition on subsidies were explicitly rejected by the Court in *Buckley*. Such expenditure limitations could be an effective method of equalizing the resources available to opposing candidates for political expression, and of reducing the costs of political campaigns.[256] If these were the articulated interests, however, the limitations might be considered invalid as purposeful attempts to induce candidates to forego their constitutional rights to spend unlimited funds in their campaigns and to outspend their political opponents.[257] Thus, the legislation upheld in *RNC* might have been viewed as an attempt to do indirectly that which, after *Buckley*, Congress could not do directly. If the *Maher-Harris* analysis were applied, however, such a purpose probably would not even result in strict scrutiny review.[258]

In light of the theoretical difficulties inherent in the various analyses that could have been used to validate the restrictions in *RNC*, it is

252. *See supra* text accompanying notes 144-70.

253. *See supra* text accompanying notes 151-53.

254. Such an approach would seemingly make it possible for the Court to uphold expenditure limitations not attached to subsidies if Congress or state legislatures were to enact them. *See supra* text accompanying notes 157-63.

255. *See supra* text accompanying notes 164-70.

256. The Court in *Buckley* pointed out, however, that expenditure limitations are an imperfect method of equalizing because candidates with name identification will have an advantage over others. *See supra* note 99. Also, costs might continue to rise, because such limitations would not affect independent expenditures.

257. *See supra* text accompanying notes 27-29 & 34.

258. *See supra* text accompanying notes 223-40.

not surprising that the Court preferred a summary affirmance to a fully reasoned opinion. Lurking behind the summary affirmance in *RNC* may have been second thoughts about some of the Court's more dogmatic pronouncements in *Buckley*. Could the spectre of a candidate substantially outspending the opposition by accepting thirty million dollars of public funds and raising another eighty million dollars have caused the Court to reconsider whether it is always inconsistent with the First Amendment for government to attempt to limit the overall costs of campaigns[259] or to restrict the voices of some in order to enhance the voices of others?[260] More basically, does the Court still fully believe that giving and spending money in a political campaign is the equivalent of speech?[261]

State courts, like the United States Supreme Court, have several different avenues for validating expenditure limitations as conditions for receiving public subsidies by candidates. Those state courts which reject the *Maher-Harris* analysis that a "mere" failure to fund cannot be an unconstitutional condition may feel constrained to apply strict scrutiny to such limitations.[262] In addition to the persuasive argument that such limitations are necessary to prevent undue influence, state courts could validate the restrictions using rationales not available to the United States Supreme Court. Those courts may interpret their state constitutions in a different manner than the Supreme Court has interpreted comparable federal constitutional provisions. Because conditional expenditure limitations were upheld under the federal Constitution in *RNC*, such state court interpretations would not infringe upon federally protected rights.[263] A state court could conclude that, despite the Supreme Court's rejection of the equalization rationale, that rationale is consistent with and even enhances the goals of the freedom of expression provisions in that court's state constitution.[264] Alternatively, state courts could determine that their state equivalent of the Equal Protection Clause mandates a stronger commitment to political equal-

259. Buckley v. Valeo, 424 U.S. at 57.

260. *Id.* at 48-49. In 1972 the last presidential general election in which the candidates were not publicly funded, President Nixon spent over sixty million dollars, more than double the amount spent by Senator McGovern. *See* H. ALEXANDER, FINANCING POLITICS 5 (2d ed. 1980). In 1980, the Presidential candidates in the general election received $29,440,000 each in federal subsidies. 1980 Federal Election Comm'n Annual Rep. 16.

261. *Id.* at 16-17. For an in depth critique on the Court's conclusion that in the context of political campaigns, money is speech, see Wright, *supra* note 218.

262. *See supra* text accompanying notes 180-210.

263. *See supra* note 220.

264. *See supra* note 218 and accompanying text.

ity than does the federal Constitution.[265] Even though expenditure limitations should not properly be thought of as constitutionally compelled,[266] state equal protection provisions may be considered as reflecting a strong state interest in equality that would be sufficiently compelling to offset the burdens upon expression.[267] In states such as California where, unlike the United States Supreme Court,[268] the high court has held that wealth is a suspect classification for purposes of the state equal protection clause,[269] such an interpretation would be particularly appropriate.[270] Given the various theories available to state courts desiring to uphold such restrictions, it should not be necessary to use the analysis of *Maher* and *Harris* in which the United States Supreme Court established precedent for a serious erosion of protection under the federal unconstitutional condition doctrine.

265. *See supra* notes 214-16 and accompanying text.
266. *See supra* note 219.
267. *See supra* notes 216-19 and accompanying text.
268. *See supra* note 211.
269. *See supra* note 212.
270. *But see supra* text accompanying notes 220-22.