

# NOTES

## Reexamining Compelling Interests and Radical State Campaign Finance Reforms: So Goes the Nation?

*By* MOLLY PETERSON\*

Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. . . .

Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.<sup>1</sup>

### I. Introduction

Recently, North Carolina businessman James A. Cartrette wrote to his elected official, Democratic governor Jim Hunt, to express his grievance—like most other constituents. His complaint, however, distinguishes his correspondence from the sort that representatives usually get. Angry that the \$24,450 that he had given to Hunt's reelection campaign and the state Democratic party had not bought the political appointments he believed he was promised, Cartrette wrote and asked for his money back:

When I read . . . that [someone else] had been appointed . . . I lost all confidence in the system. We gave money and would

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\* J.D. Candidate, University of California, Hastings College of the Law, 1998; B.S., Georgetown University, School of Foreign Service, 1994. The author would like to thank Sheila, Katie and Mike Peterson for their kitchen conversations, and especially the lawyers whose integrity has been her example—Ronald C. Peterson and Raymond L. Sullivan. This note is dedicated to Winifred Carreras Sullivan.

1. THE FEDERALIST No. 57, at 390 (James Madison) (Edward Gaylord Bourne ed., 1961).

have given more if you had asked. We . . . have supported you all through your career. You misrepresented the truth to us. We are very disappointed and feel that our money should be returned.<sup>2</sup>

Founding father James Madison's concern with protecting the integrity of the system of government he propounded compelled him to note that "[t]here are two methods of curing the mischiefs of [a] faction: the one, by removing its causes; the other, by controlling its effects."<sup>3</sup> Removing the causes of factions would require eradicating the differences among us all—a practical impossibility. Madison believed that republican government would only lend stability to the system, not impregnability.<sup>4</sup> Factious disruptions contrary to the establishment of a well-functioning democratic republic would inevitably break out from time to time.<sup>5</sup> Perhaps Mr. Cartrette's letter is just one of those outbreaks of factious behavior; perhaps we are not as far afield from the Madisonian vision as it would seem.

Campaign finance laws, intended to control the disproportionate and perceived disproportionate effects of factions, are a pragmatic response to the need, recognized by Madison, to protect the quality and integrity of our representation and reduce "instability, injustice, and confusion."<sup>6</sup> Practical choices, however, are not always the foremost choices. Often, practical choices are the "best choices," but under the circumstances, or considering the political reality, or during a given Presidential term. Their functionality limits their effectiveness.

At the 1984 Democratic National Convention, a potential contributor was told not to worry about contribution-limiting laws; all he had to do, the party hack told him, was "decide how much he wanted to give and someone would instruct him on how to make out the checks."<sup>7</sup> Little has changed in the last three election cycles, a fact often credited to public apathy.<sup>8</sup> In a *New York Times* poll conducted

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2. *The Campaign-Finance Refund?*, HARPER'S MAGAZINE, Mar. 1998, at 18 (excerpting letter from James A. Cartrette to Jim Hunt).

3. THE FEDERALIST No. 10, at 63 (James Madison) (Edward Gaylord Bourne ed., 1961).

4. *See id.* "A pure democracy . . . can admit of no cure for the mischiefs of faction." *Id.* at 67.

5. *See id.*; *see also* JACK RAKOVE, ORIGINAL MEANINGS 190 (1996) ("Madison went no further than to imply that outbreaks of factious behavior would be safely quarantined within the boundaries of individual states.")

6. *Id.*

7. PHILIP M. STERN, THE BEST CONGRESS MONEY CAN BUY 165 (1988).

8. *See* John S. Shockley & David A. Schultz, *The Political Philosophy of Campaign Finance Reform as Articulated in the Dissents in Austin v. Michigan Chamber of Commerce*, 24 ST. MARY'S L.J. 165, 179-81 (1992). Characterizing the citizenry as apathetic could be an understatement in two ways. *Washington Post* columnist E.J. Dionne would characterize the American public's attitude toward politics and campaigns even more negatively:

last year, 75% of adults contacted said that “many public officials make or change policy decisions as a result of money they receive from major contributors.”<sup>9</sup> Thirty-nine percent of those polled said “the system needs to be completely rebuilt;” an additional 50% said that “fundamental changes” were necessary to fix the system.<sup>10</sup> Only 8% wanted “minor changes.”<sup>11</sup> “Money talks,” said one respondent. “The special-interest groups spend millions to get their point across, and people like me aren’t heard at all.”<sup>12</sup>

No wonder the American public is skeptical of reform; everything it hears from critics and sees in politicians’ behavior insists that the wrong cannot be cured by legislative action.<sup>13</sup> The coincidence of the 1996 election cycle, bringing long-standing questions about the influential ability of political action committees back to the forefront, and the investigation into contributions funneled through Asia may, however, finally bring an end to complaints about abuses of the system and mark the beginning of actual improvement. President Clinton, Vice President Gore, and several members of the House and Senate are now under investigation for allegedly accepting illicit campaign contributions funneled through Asia.<sup>14</sup> The Lincoln bedroom, among other parts of the White House, likely was used for fundraising sleepovers.<sup>15</sup> When even cynical donors like Mr. Cartrette have lost faith, we can ignore the “factious behavior” no longer.

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Campaigns have become negative in large part because of a sharp decline in popular faith in government. To appeal to an increasingly alienated electorate, candidates and their political consultants have adopted a cynical stance which, they believe with good reason, plays into popular cynicism about politics and thus wins them votes. But cynical campaigns do not resolve issues. . . . Therefore, problems get worse . . . .

E.J. DIONNE, JR., *WHY AMERICANS HATE POLITICS* 17 (1991).

Second, some argue that historically, a system in which money buys access is the norm. Tracing the history of American campaign financing, Bradley Smith concludes that the problem of money as influence thus identified has always been present. “When reformers suggest that money is ‘distorting’ our election process, it is not clear to what norm they refer.” Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 *YALE L.J.* 1049, 1056 (1996) (footnotes omitted).

9. Francis X. Clines, *Most Doubt a Resolve to Change Campaign Financing, Poll Finds*, *N.Y. TIMES*, Apr. 8, 1997, at A1.

10. *Id.*

11. *Id.*

12. *Id.*

13. See *Cycles of Campaign Reform*, *N.Y. TIMES*, Nov. 10, 1997, at A22; but see Linda Greenhouse, *Ethics in Government: The Price of Good Intentions*, *N.Y. TIMES*, Feb. 1, 1998, § 4, at 1 (explaining that campaign finance reform based on “stunningly naive” premise “lies in ruins”).

14. See Clines, *supra* note 9, at A1.

15. See *id.* See also *Talking Reform to Death*, *ST. LOUIS POST-DISPATCH*, Mar. 2, 1998, at B6.

As the legislative tool in the battle for the integrity of the system, campaign finance laws have been de-clawed insofar as they implicate political speech protected by the First Amendment.<sup>16</sup> Indeed, such political expression lies at the core of the values embodied in the First Amendment<sup>17</sup> and limitations on expressions of support for candidates or issues are not to be taken lightly.<sup>18</sup> As Madison argued convincingly long ago, however, our democratic process depends on our representatives being chosen based on quality rather than finances.<sup>19</sup> To the present moment, on a state and federal level, we struggle with a way to meet these seemingly incompatible demands.<sup>20</sup>

Several states have incorporated public financing into their reform packages;<sup>21</sup> however, partial public financing and reform schemes born in compromise have met with mixed success in state courts when challenged for constitutionality.<sup>22</sup> Public financing for federal and state legislative races is only one of many reforms proposed. Electronic filing with full disclosure, lowered contribution limits, campaign time limits, total voluntary spending limits, candidate loan limits, PAC contribution bans, banning bundled contributions or out of state contributions, restricting soft money, reduced-rate television time, contribution tax credits or deductions, and vouchers are other reforms undertaken or suggested.<sup>23</sup> Others propose even more

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16. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

17. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

18. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), *rehearing denied*, 393 U.S. 900 (1968).

19. See THE FEDERALIST No. 10, 67-78 (James Madison) (Edward Gaylord Bourne ed., 1961).

20. See, e.g., Greg Lucas, *Judge Blocks Campaign Finance Law: Limits in Prop. 208 Ruled Unconstitutional*, S.F. CHRON., Jan. 7, 1998, at A1 (discussing invalidation of California's Proposition 208 contribution limits by a federal district court).

21. The idea of publicly financed elections is obviously not new; several states have experimented with tax credits and deductions tied to contribution limits and \$1 check-off provisions, whereby taxpayers can add a dollar to their tax liability and allocate it to the party of their choice or to the general fund. See HERBERT E. ALEXANDER & MIKE EBERTS, PUBLIC FINANCING OF STATE ELECTIONS: A DATA BOOK ON TAX ASSISTED FUNDING OF POLITICAL PARTIES AND CANDIDATES IN TWENTY STATES 5-13 (Citizens Research Foundation, 1986). Public financing's latest iteration is much more aggressive, tying allocation of funds to candidate acceptance of contribution and campaign expenditure limits (and sometimes opponents' spending behavior). This analysis of public financing contained herein concerns this most recent round of partial public financing, especially insofar as it provides insight into the fate of a fully publicly funded system like that of Maine.

22. See discussion *infra* section III.

23. See CENTER FOR RESPONSIVE POLITICS, MONEY IN POLITICS REFORM: PRINCIPLES, PROBLEMS, AND PROPOSALS, 1, 11-17 (1996) [hereinafter MONEY IN POLITICS REFORM].

radical solutions than “radical” reforms: former Senator Bill Bradley, for one, has expressed approval of a constitutional amendment overturning *Buckley v. Valeo*,<sup>24</sup> a course of action that would be as problematic as it would be arduous.<sup>25</sup>

Until 1996, the only full public financing system at both the federal and state levels was implemented for the presidential general election.<sup>26</sup> Maine’s referendum-enacted public financing law is the most ambitious of the reforms so enacted by states. Until the Maine Clean Election Act, full public funding of presidential general elections was the only such system on the federal or state level.<sup>27</sup> And still, presidential public financing is the only working model: with first disbursement in Maine scheduled for the 2000 campaigns, opposition groups are already mounting challenges to the Act on numerous grounds.<sup>28</sup>

During the 1996 primary election season, all candidates together spent \$237.2 million.<sup>29</sup> By comparison, in 1976, just after the enactment of the Federal Election and Campaign Act, as amended in 1974<sup>30</sup> (hereinafter, F.E.C.A.) and the *Buckley* decision, spending in the presidential primary season amounted to less than a third of that.<sup>31</sup> The role of money has grown dramatically. Concurrently, political actors’ ability to circumvent the campaign spending limits has

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24. 424 U.S. 1 (1976) (upholding limits on campaign contributions and striking individual expenditure limits).

25. See, e.g., Ellen S. Miller, *Clean Elections, How To*, in *THE AMERICAN PROSPECT*, Jan./Feb. 1997, at 56, 59.

26. *MONEY IN POLITICS REFORM*, *supra* note 23, at 17.

27. See *id.*; see also Fred W. Lindecke, *Maine Law May Set the Standard for Election Financing*, *ST. LOUIS POST-DISPATCH*, Jan. 20, 1997, at B5.

28. The Maine Civil Liberties Union (M.C.L.U.), for example, has claimed that the program is “coercive” and speech-chilling, and that the requirement for seed money to qualify for public financing harms low-income voters by forcing the public to underwrite campaigns. See John C. Bonifaz, *Whose Speech is Protected?*, *N.Y. TIMES*, July 31, 1997, at A23. Nathaniel Rosenblatt, a member of the M.C.L.U. board of directors, seems to argue that more government involvement in the regulation of political speech is less viable constitutionally; he says that the changes “require a level of government involvement in political speech that violates the First Amendment.” *Id.*

29. Federal Election Commission, *Financing the 1996 Presidential Campaign* (visited Apr. 1, 1998) <<http://www.fec.gov/pres96/presgen1.html>>. Receipts during this period were \$243.9 million, including \$42.4 million for the Clinton campaign, \$44.6 million for Dole, and a paltry \$8.2 million for Perot. Federal Election Commission, *Financing the 1996 Presidential Campaign: Presidential Candidate Summary Report* (visited Apr. 1, 1998) <<http://www.fec.gov/pres96/presmstr.html>>.

30. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

31. Federal Election Commission, *Financing the 1996 Presidential Campaign*, *supra* note 29, at *id.*

increased steadily since *Buckley* gutted the F.E.C.A.<sup>32</sup> Consequently, serious doubts about the efficacy of the F.E.C.A. and similarly-written campaign finance laws linger. Apparently also recognizing that the causes of factionalism are here to stay, Congress has instead debated and addressed bills aimed at limiting the effects of disproportionate access and representation, with varying results.<sup>33</sup>

Early post-*Buckley* reforms were rudimentary, either limiting contributions or limiting spending.<sup>34</sup> But money trickled through the various loopholes created by court decisions, mostly profiting party committees, PACs and other associations. The idea that all expenditure limits are legal and all contribution limits are illegal<sup>35</sup> has been undermined by trickle of money. The dichotomy relied upon by the Court in *Buckley* ceased to be the decision-making “touchstone” it once was.<sup>36</sup>

Twenty-four years after the F.E.C.A. was last amended, the latest round of legislative action shows the most promise yet. In the first session of the 105th Congress, at least one hundred pending House and Senate bills proposed changes to existing federal campaign finance laws, largely codified in the F.E.C.A.<sup>37</sup> In the absence of definitive federal action, however, several states have implemented innovative legislation, inspired by dictum in *Buckley* approving public

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32. “Campaign finance reform lies in ruins, with money pouring into campaigns as never before.” Greenhouse, *supra* note 13, § 4, at 1.

33. See, e.g., Miller, *supra* note 25, at 56, 58 (dismissing low individual contribution limits and the McCain-Feingold campaign reform initiative as flawed alternatives). “[T]here is no viable alternative that would bring down the cost of campaigns, free candidates and elected officials from the incessant ‘money chase,’ and, most importantly, end their dependency on special-interest contributors.” *Id.*

34. See Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 *CAP. U. L. REV.* 381, 381-82 (1992) [hereinafter *A Patternless Mosaic*].

35. See, e.g., *Cycles of Campaign Reform*, N.Y. TIMES, Nov. 10, 1997, at A22.

36. See Lowenstein, *A Patternless Mosaic*, *supra* note 34, at 381-82.

37. See, e.g., unenacted Senate and House bills, all from the 105th Cong., 1st Sess. (1997): H.R. 506 (would establish public funding for federal House of Representative races, limiting individual contributions to \$100 and allowing no more than 20% out of state contributions); S. 179 (would loosen reporting requirements and place restrictions on PACs), H.R. 462 (would prohibit House of Representative candidates from accepting PAC money or contributions from outside district), H.R. 243 (would limit expenditures and create a public financing structure in House elections), H.R. 767 (would limit PAC contributions and require 65% of contributions from individuals within the district or state), S. 57 (proposed by perennial campaign finance reform champion Wisconsin Sen. Feingold, and would provide a voluntary spending limit and partial public funding system), H.R. 493 (would limit large individual contributions as well as PAC contributions), H.R. 3485 (would modify limits on contributions when candidate spends “excessively” on his own behalf), and H.R. 419 (would create a temporary commission to study reform).

funding approaches.<sup>38</sup> These state governments finance political campaigns in a manner similar to the federal government financing of Presidential campaigns.<sup>39</sup>

Such “footnote 65” approaches are being challenged in federal and state courts for the same reasons and the same legal principles, the *Buckley* appellants used to challenge the F.E.C.A. in the early 1970s—i.e., contribution and spending limits violate the First Amendment. The First Amendment guarantees freedom of speech no more strongly anywhere than in the political realm.<sup>40</sup> Laws impacting political speech are subject to strict scrutiny, where the government’s interests must be compelling and the law must be narrowly tailored to effectuate that interest.<sup>41</sup>

Anti-reformers now challenging state campaign finance laws and First Amendment absolutists are correct that the First Amendment requires the strictest scrutiny for, and the least burden imposed on, political speech, including the giving of money for campaign spending. But when confronted with other constitutional or otherwise fundamental interests, the greater structural integrity of the Constitution will win out and strict scrutiny will be overcome.<sup>42</sup> Fundamental principles of American political theory may support a compelling government interest in making the process by which our representation is chosen as equitable as possible. If so, narrowly tailored public financing programs can survive. This Note establishes that compelling government interests, including but not limited to preventing corruption and the appearance thereof, support certain types of campaign finance regulation, including public financing.

Section II characterizes recognized government interests throughout the checkered history of campaign finance reform in the wake of *Buckley*. Section III outlines lessons learned from innovative state campaign finance reform efforts and the subsequent legal challenges launched against them. Section IV presents compelling interests against the backdrop of the newly implemented reforms. Section V examines Maine’s recently-enacted Clean Election Act to determine how well a full public-financing effort is tailored to the interests

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38. 424 U.S. at 57 n.65. (“Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations.”)

39. See, e.g., Lindecke, *supra* note 27, at B5; Miller, *supra* note 25, at 57. See also *infra*, discussion at section III.

40. “[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

41. *Buckley*, 424 U.S. at 16-17, 24-25.

42. See generally *Adarand v. Peña*, 515 U.S. 200 (1995) (holding federal affirmative action programs to strict scrutiny but noting that strict scrutiny is not absolute).

reformers are trying to protect. Finally, Section VI concludes by discussing full public financing in the context of the compelling government interests that could be used to justify the initiative against the impending court challenge.

## II. *Buckley* and Its Successors: Characterizations of Compelling Government Interests

The modern era of campaign finance laws began in 1974 with the enactment of the 1971 Federal Election Campaign Act (hereinafter, F.E.C.A.),<sup>43</sup> as amended in the wake of President Nixon's Watergate scandal.<sup>44</sup> In 1974 the F.E.C.A. was the first modern and most ambitious congressional attempt to regulate campaign finance.<sup>45</sup> Congress, aware that when enacted the law would raise serious First Amendment issues,<sup>46</sup> included an expedited consideration provision<sup>47</sup> which enabled the consolidated and wide-ranging challenge to take place "almost before the ink of [the F.E.C.A.] had dried."<sup>48</sup> The Court's response, *Buckley v. Valeo*,<sup>49</sup> a per-curiam decision spanning 144 pages, was as wide-ranging as the law it interpreted.<sup>50</sup> With minor changes, the F.E.C.A. that emerged from that decision still haunts Presidential and Congressional campaigns.

The *Buckley* Court began by observing that the F.E.C.A.'s spending limits, disclosure requirements, and public financing of presidential elections "operate in an area of the most fundamental First Amendment activities."<sup>51</sup> The Court cited several significant First

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43. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1971), as amended by Federal Campaign Act amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

44. The Act was initially passed in 1971, but was amended in 1974 before many of the original provisions even went into effect. See Pub. L. No. 93-443, 88 Stat. 1263. Nahra argues that the financing abuses revealed by the Watergate scandal demonstrated the (perceived) need for further regulation. See Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 *FORDHAM L. REV.* 53, 65 (1987); see also FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE MYTHS AND REALITIES* 7 (1992); Daniel M. Gillen, *Buckley v. Valeo: Federal Election Campaign Reform at the Expense of First Amendment Rights*, 4 *OHIO N.U. L. REV.* 77, 77-78 (1977).

45. See Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 *CAL. L. REV.* 1045, 1053 (1985).

46. See DANIEL HAYS LOWENSTEIN, *ELECTION LAW* 507 (1995).

47. See 2 U.S.C. § 437(h) (1974).

48. LOWENSTEIN, *supra* note 46, at 507.

49. 424 U.S. 1 (1976).

50. See generally 424 U.S. at 1-144. In addition to the per curiam decision, five of the eight justices who considered the case (Justice Stevens did not participate in the decision) added their own separate opinions totaling 59 additional pages in the reports. See *Buckley*, 424 U.S. at 235-294.

51. *Id.* at 14.

Amendment cases<sup>52</sup> to support its conclusion that the dissemination of information about and the access to candidates are crucial for the simple reason that “the identities of those who are elected will inevitably shape the course that we follow as a nation.”<sup>53</sup>

In writing that past decisions bound it to a “rigorous standard of review,”<sup>54</sup> the Court left no doubt that “critical scrutiny”<sup>55</sup> would be applied to every provision. In fact, the language with which the *Buckley* Court struck down independent spending limits<sup>56</sup> and mandatory campaign spending ceilings bordered on establishing an absolute sanctity of the First Amendment.<sup>57</sup>

Throughout *Buckley* the Court re-emphasized the skepticism with which it regarded the Act’s provisions in light of the First Amendment. Language in a footnote, however, tempered the otherwise critical tenor of the decision: “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 specific expenditure limitations.”<sup>58</sup> While footnote 65 approves the possibility of public financing outright, the constitutional question of the practicalities of public financing nevertheless remains: it lies in what conditions are narrowly tailored enough to meet compelling government interests.

The Supreme Court has consistently held that laws limiting political speech in the campaign and election context are subject to a very

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52. See, e.g., *Roth v. United States*, 354 U.S. 476, 484 (1957) (explaining broad protection is implicated by the First Amendment “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (noting a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (indicating the fullest application of the First Amendment was to conducting campaigns for public office). The Court also cited *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), the freedom of association case, for the principle that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” *Buckley*, 424 U.S. at 15.

53. *Buckley*, 424 U.S. at 15.

54. *Id.* at 29.

55. *Id.* at 11.

56. Independent spending limits are limits on how an individual can spend her own money on behalf of a candidate. See, e.g., *CENTER FOR RESPONSIVE POLITICS, COMING TO TERMS: A MONEY-IN-POLITICS GLOSSARY* 1, 9 (1995) (defining independent expenditure as spending money not in conjunction or coordination with a candidate or her committee in order to expressly advocate election or defeat of a candidate). Originally, the F.E.C.A., as enacted in 1970, limited independent expenditures to \$1000 “relative to a clearly identified candidate.” *Buckley*, 424 U.S. at 1. The independent spending limitations were invalidated because the Court said they “represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.” *Id.* at 19.

57. See Harold Leventhal, *Courts and Political Thickets*, 77 *COLUM. L. REV.* 345, 358, 373 (1977).

58. *Buckley*, 424 U.S. at 57 n.65.

critical analysis.<sup>59</sup> As mentioned *supra*, since *Buckley* the Court has held repeatedly that in cases implicating protected speech in the political realm, any government regulation burdening free speech must be shown to be narrowly tailored to achieve compelling state interests.<sup>60</sup> Laws subject to this level of scrutiny include regulation of expenditure limits on individuals, PACs, corporations and political parties, contribution limits on those organizations, and public funding and associated inducement mechanisms.<sup>61</sup>

For example, in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*,<sup>62</sup> the Federal Election Commission (hereinafter F.E.C.) brought a suit against a Massachusetts right-to-life organization for publishing a pamphlet urging pro-life votes in the state primary election, in violation of a prohibition against corporate direct expenditure in elections.<sup>63</sup> The Court held first that the F.E.C.A. provision prohibiting expenditures out of the corporate treasury fund by Massachusetts Citizens For Life (hereinafter, M.C.F.L.) “in connection with any election” clearly prohibited the special flyer distributed by the organization.<sup>64</sup> In the second part of the holding, however, the Court found that the provision clearly violated the First Amendment.<sup>65</sup>

There was no question to Justice Brennan that the regulation burdened speech; “the avenue it leaves open is more burdensome than the one it forecloses.”<sup>66</sup> The Court engaged in a “close examination” of the justifications is perceived for the regulation and the way the regulation was applied to M.C.F.L.<sup>67</sup>

While acknowledging the “historical role of contributions in the corruption of the electoral process,” the Court pointed out that the existence of other means “more narrowly tailored and less burdensome” to achieve the same ends made the Act’s provision unconstitutional.<sup>68</sup> The government “must curtail spending only to the degree necessary to meet the particular problem at hand, and must avoid in-

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59. See, e.g., *Roth v. U.S.*, 354 U.S. at 484; *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

60. See, e.g., *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783-84 (1978), *reh’g denied*, 438 U.S. 907 (1978) (striking limitations placed on corporate spending to express positions on ballot initiatives).

61. Disclosure requirements, a system by which election authorities publicize which donors have given what money to which candidate, were upheld unconditionally by the *Buckley* Court. *Buckley*, 424 U.S. at 60-83. I will leave those aside for clarity’s sake. For the Court’s holding regarding disclosure requirements, see *id.*

62. 479 U.S. 238 (1986).

63. *Id.* at 244-45.

64. *Id.* at 245-48.

65. See *id.* at 255-63.

66. *Id.* at 255.

67. *Id.* at 257.

68. *Id.* at 260-61.

fringing on speech that does not pose the danger that has prompted regulation.”<sup>69</sup> A desire for a bright-line rule may be admirable; however, it is not compelling enough to restrict speech.<sup>70</sup>

On behalf of the majority, Justice Brennan wrote that “[d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace.”<sup>71</sup> Brennan noted that even if the idea of “political free trade” suggested that not everyone had to have an equal share of the resources, corporations’ resources only represent investors’ economic interests, not their political voice.<sup>72</sup> “The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.”<sup>73</sup> With those words, Justice Brennan recognized the unease Americans already shared about money’s ability to augment political speech. However, he stopped well short of explicitly rendering that unease into a compelling interest.

Next, in *Federal Election Commission v. National Conservative Political Action Committee* (hereinafter *N.C.P.A.C.*),<sup>74</sup> the Court struck down regulations limiting contributions by associations on the grounds that independent expenditures are “at the core of the First Amendment.”<sup>75</sup> The Court analogized the freedom to use money to the ability to amplify one’s speech: “allowing the presentation of views while forbidding the expenditure of more than \$1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system.”<sup>76</sup> In allowing independent expenditures, the Court did recognize the “substantial” amount of money spent on communicating ideas through “sophisticated” advertising campaigns.<sup>77</sup> The Court then did more than follow in the footsteps of the *Buckley* Court’s analysis. It overstated *Buckley*’s holding, “reaffirming” that preventing corruption and the appearance of corruption are the “only” legitimate and acceptable government interests.<sup>78</sup> By the mid-eighties, the sands had shifted.

A case arising from the 1976 Michigan Campaign Finance Act<sup>79</sup>

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69. *Id.*

70. *Id.* (stating that we “must be as vigilant against the modest diminution of speech as we are against its sweeping restriction”).

71. *Id.* at 257.

72. *See id.* at 257-58.

73. *Id.* at 258.

74. 470 U.S. 480 (1985).

75. *Id.* at 493.

76. *Id.*

77. *Id.*

78. *Id.* at 496-97.

79. MICH. COMP. LAWS ANN. § 169.255 (West 1989).

provided another opportunity for the Supreme Court to address the issue of group expenditures. In *Austin v. Michigan State Chamber of Commerce*,<sup>80</sup> Justice Thurgood Marshall reasoned that the members of the Michigan Chamber of Commerce were more like shareholders of a corporation than were the members of the M.C.F.L.<sup>81</sup> Chamber members paid dues, possessed diverse interests and purposes that were not necessarily political, and were essentially a conglomeration of business interests whose penchant for direct corporate spending was the exact evil at which the statute was aimed.<sup>82</sup> Because the goal of the statute was to prevent corporate campaign spending that would violate the political expression rights of minority shareholders, the similarity in makeup of the Chamber of Commerce to a corporation meant that the law was narrowly tailored to the problem.<sup>83</sup> Marshall further distinguished the Michigan Chamber of Commerce from unions, which are unincorporated, and media corporations, which play the watchdog role of the press and therefore are worthy of being exempted from an otherwise blanket rule.<sup>84</sup>

Justice Scalia's dissenting opinion called the majority "Orwellian,"<sup>85</sup> and said it was guided by the principle that "too much speech is an evil that the democratic majority can proscribe."<sup>86</sup> The majority contended that while speech was burdened, it was not snuffed completely; corporations could still expressively act by setting up separate funds through which to give.<sup>87</sup> In fact, Justice Marshall asserted that this channeling of speech is the ideal, because it ensures that "the speech generated accurately reflects contributors' support for the corporation's political views."<sup>88</sup>

The compelling government interest identified by the Court in *Austin* is the prevention of corruption of the political system through the regulation of corporate expressive activity.<sup>89</sup> Justice Marshall found the regulatory provision "precisely" tailored to the end of eliminating corruption.<sup>90</sup>

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80. 494 U.S. 652 (1990).

81. *Id.* at 662-65.

82. *See id.*

83. *See id.*

84. *See id.* at 665-68.

85. *Id.* at 678-79 (Scalia, J., dissenting).

86. *Id.* Justice Scalia's opinion began: "Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate: \_\_\_\_\_." *Id.*

87. *See id.* at 660.

88. *Id.* at 660-61.

89. *Id.*

90. *Id.* at 661.

However, the corruption identified in *Austin* seems to differ from the *Buckley* Court's more simple construction. Informed by the mal-apportionment of expressive activity power favoring corporations over individuals, Justice Marshall's corruption also incorporated elements of the need to put a brake on spiraling costs and the equalizing rationale expressing a desire to level the playing field—both recognized by the *Buckley* Court as “ancillary”<sup>91</sup> interests. By 1990, when *Austin* was decided, the sands had shifted once more.

Based on Supreme Court precedent, strict scrutiny applies to campaign finance reform proposals; consequently, determining which compelling government interests can support such proposals necessarily precedes determination of the proposals' legality. *Buckley's* discussion of these interests centered on corruption.<sup>92</sup> The *Austin* Court picked up on that language and restated it incorrectly asserting that corruption is the only concern,<sup>93</sup> as did the court in *NCPAC*.<sup>94</sup> In the *M.C.F.L.* case, the Court relied on a similar kind of corruption as a sole government interest, but did not characterize it as exclusive.<sup>95</sup>

Finally, the Court's most recent campaign finance decision in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*<sup>96</sup> indicates a continuation of broad protection for political speech under the First Amendment, especially in the electoral context. The Court struck down limitations on independent expenditures by political parties, despite an F.E.C. policy allowing the limits based on the presumption that parties are incapable of spending money independently,<sup>97</sup> because the Court held that a governmental presumption of a characteristic does not render that characteristic present, especially concerning such a basic right as the right to free speech.<sup>98</sup> “We are not aware of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction,”<sup>99</sup> Justice Breyer wrote. Falling back on legislative history to reemphasize the importance of parties, the Court dis-

91. 424 U.S. at 25.

92. 424 U.S. at 25-26 (finding it “unnecessary” to look beyond primary purpose of the F.E.C.A. for justification).

93. 494 U.S. at 660-61.

94. 470 U.S. at 496-97.

95. 479 U.S. at 256-58.

96. 518 U.S. 604 (1996). A Republican party fund-raiser, describing how to circumvent the law to make the most of party-financed advertising: “So we have a little dance where we dance around the law in a way that never breaks the letter but breaks the spirit of the law, but we don't agree with the law anyway.” STERN, *supra* note 7, at 165.

97. *See id.* at 619-22.

98. *See id.*

99. *Id.* at 616. Later, Breyer noted that no record evidence nor legislative materials suggesting corruption related to independent party expenditures was presented by the F.E.C. *Id.* at 2316.

missed the “constitutionally insufficient” desire to reduce wasteful spending as not compelling enough.<sup>100</sup>

Making corruption the only justifiable interest could be the equivalent of establishing a standard “strict in theory, fatal in fact” similar to the one Justice Marshall characterized in *Fullilove v. Klutznick*<sup>101</sup> in the equal protection context—depending on how broadly or narrowly corruption is characterized. If other state interests do exist, however, or if corruption is painted more broadly, that danger—that no campaign finance reform could ever exist—is decreased significantly.

In looking for a compelling government interest, the *Buckley* Court found it unnecessary to go beyond the primary justification cited by the parties, namely the “prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions.”<sup>102</sup> “Ancillary” interests also touched on in *Buckley*, like the equalization of citizens’ access to the political process and the limitation of the “skyrocketing” cost of campaigning, were largely ignored, both by the *Buckley* Court and the subsequent courts in their characterizations of compelling interest.<sup>103</sup> However, these until-now overlooked interests are subject to resurrection. In addition, the preservation of representatives’ time for the job of representing rather than soliciting campaign funds, has also been argued recently.<sup>104</sup> This interest, not yet directly addressed by the Supreme Court, has been implicated in at least one recent state court decision.<sup>105</sup>

Justice Louis D. Brandeis once called the states “laboratories of reform.”<sup>106</sup> State government responses to public funding mechanisms illustrate well the ever-changing relationship between the regulation of campaign funding and the justifications for those laws. The laws and court rulings of these laboratory states represent cutting edge First Amendment political speech jurisprudence. These values have been implicated to varying degrees in several recent state court decisions in Missouri, Minnesota, Wisconsin, and Kentucky.<sup>107</sup> Through the state court interpretations of legislative reform efforts,

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100. *Id.* at 618.

101. 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

102. 424 U.S. 1, 25.

103. *See id.* at 25-26.

104. *See, e.g.,* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1282 (1994).

105. *See* *Rosensteil v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996).

106. Herbert E. Alexander, *Introduction*, in *CAMPAIGN MONEY: REFORM AND REALITY IN THE STATES* 1, 13 (Herbert E. Alexander ed., 1976).

107. *See infra* Part III.

the interests that are compelling and the type of programs tailored to those interests that are supportable under the First Amendment can be discerned.

### III. Lessons Derived from "Radical" State Reforms

If there were once lingering questions about the practicality and efficacy of "footnote 65" financing on any level, the several states that have enacted partial public financing and similar reforms for state representative positions have put such doubts to rest. Congress has often begun talking seriously about reforms, but has not completed any since the post-*Buckley* amendments.<sup>108</sup> While Congress may have missed a golden opportunity by failing to provide for federal representatives' public funding,<sup>109</sup> these states have picked up the fallen standard by employing variable contribution limits,<sup>110</sup> partial public financing,<sup>111</sup> and cap gaps.<sup>112</sup>

All of these reforms similarly grant benefits to candidates who voluntarily limit amounts of campaign contributions.<sup>113</sup> The way the federal and state courts examine the nexus between the compelling interest and the reform measure tailored to serve that interest indicates the viability and elasticity of the interests themselves. In the wake of Maine's newly-enacted full public financing scheme, these state laws which formerly represented the outer limits of reform can serve as a starting point for the future. Thus, while *Buckley* provided the basic framework, campaign finance laws in Missouri, Minnesota, Wisconsin, and Kentucky now demonstrate that the *Buckley*-born bright lines of campaign finance have blurred because of the changing landscape of campaign finance.

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108. See Dane Strother, *Campaign Finance 'Reforms' Don't Work*, N.Y. TIMES, Feb. 1, 1997, at A19.

109. See J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, in *LAW AND LIBERALISM IN THE 1980s* 1, 2 (Vincent Blasi ed., 1991).

110. Variable contribution limits "allow[ ] candidates who comply with voluntary campaign spending limits to accept contributions in larger amounts than non-complying candidates are allowed to accept." *COMING TO TERMS: A MONEY-IN-POLITICS GLOSSARY*, *supra* note 56, at 36.

111. Partial public financing occurs when part of a candidate's funding comes from the government, usually through matching funds to the private funds raised. See *id.* at 34.

112. "Cap gaps" describe the difference in limits on either total campaign spending or expenditures when a public financing system is in place. Those who comply with requirements are given higher limits on dollar amounts. See *Vote Choice v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993); see also generally *Wilkinson v. Jones*, 876 F.Supp. 916 (W.D. Ky. 1995); *Rosensteil v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996).

113. See *MONEY IN POLITICS REFORM*, *supra* note 23, at 11-17.

### A. Missouri's 'Voluntary' Spending Limits: Separating the Carrots From the Sticks

Like many state-born reforms, Missouri's legislation originated in a popular initiative. After the state assembly passed a different contribution limits bill, voters ratified Proposition A, shrinking individual and group contributions to \$100 per election cycle per candidate in small districts, \$200 per cycle per candidate in larger districts, and \$300 for state races.<sup>114</sup>

In *Carver v. Nixon*,<sup>115</sup> the Eighth Circuit overturned a district court ruling that these individual campaign contribution limits were constitutional.<sup>116</sup> While obviously recognizing *Buckley*'s preeminence and the premium it placed on political speech, the *Carver* district court relied heavily on *Buckley*, which it characterized as saying that "even a significant interference with protected rights of political association may be sustained so long as the state demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment" of constitutional expressive rights.<sup>117</sup> The district court, with little elaboration, found that Missouri "clearly" had an interest in contribution limits. The appellate court held that the limits were not narrowly tailored to effectuate the interest of the state in preventing corruption or the appearance of corruption.<sup>118</sup> While quoting the same passage from *Buckley* concerning the possibility of supporting a significant interference with expressive rights, the Eighth Circuit commented that just postulating the existence of a compelling interest does not render it a reality<sup>119</sup>—leaving open the possibility that such interests do, in fact, exist.

Then, in a closely related case, *Shrink Missouri Government PAC v. Maupin*,<sup>120</sup> the court scrutinized the remainder of the ballot initiative provisions and state senate laws unchallenged by *Carver* for impermissible restrictions of political speech.<sup>121</sup> Under the statute, a Missouri state-office candidate could file an affidavit of willingness to comply with spending limits.<sup>122</sup> Compliance would entitle the candidate to accept contributions from PACs, parties, unions, corporations

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114. MO. ANN. STAT. § 130.100, repealed by L. 1997, S.B. No. 16 § A. According to the interpretation of the state attorney general at the time, the more restrictive provision controlled—in this case, the ballot initiative.

115. 72 F.3d 633 (8th Cir. 1995).

116. *Id.* at 645.

117. 882 F.Supp. 901, 904 (W.D. Mo. 1995).

118. *See id.*

119. 72 F.3d 633, 638. This language perhaps foreshadowed the *Colorado Republicans* opinion the next year.

120. 71 F.3d 1422 (8th Cir. 1995).

121. *Id.* at 1424.

122. MO. REV. STAT. §§ 130.052.1, 130.052.3, repealed by L. 1997, S.B. No. 16 § A.

and other candidate's committees, while non-compliant candidates could only accept contributions from individuals.<sup>123</sup>

The same panel, having held in *Carver* that spending limitations and prohibition of carryovers from one campaign to another violated the First Amendment,<sup>124</sup> upheld the district court's conclusion that total-campaign spending limits, limits on how much a candidate could give to his own campaign, and carryover provisions were not narrowly tailored to serve the compelling state interests cited.<sup>125</sup> The appellate court further held that the state of Missouri could not characterize as an incentive what had been a preexisting entitlement.<sup>126</sup>

The *Maupin* district court had relied heavily on *Buckley* as controlling authority.<sup>127</sup> It found candidate self-contribution limits<sup>128</sup> clearly unconstitutional under *Buckley*.<sup>129</sup> It noted that *Buckley* upheld voluntary spending limits "only where the reward for adhering to the limits was the receipt of public campaign financing."<sup>130</sup> And it stated that where spending limits stop acting as inducements (or carrots) and serve instead as threats (sticks), even public financing-connected limits cannot be legal.<sup>131</sup>

The district court in *Maupin* applied the First Amendment barrier more absolutely<sup>132</sup> than the district court had in *Carver* just two months earlier.<sup>133</sup> While the *Maupin* district court recognized that "negative campaigning does not benefit the public discourse" and that "expenditures of unlimited amounts of money . . . is not a sensible use of society's resources,"<sup>134</sup> the laws in question were not sufficiently

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123. *See id.*

124. *Carver*, 72 F.3d at 645; *see Maupin*, 71 F.3d at 1428-29.

125. *See Shrink Missouri Gov't PAC v. Maupin*, 892 F. Supp. 1246, 1250 (E.D. Mo. 1995).

126. *See Maupin*, 71 F.3d at 1425. "The limits are not voluntary because they provide only penalties for noncompliance rather than an incentive for voluntary compliance." *Id.*

127. *Maupin*, 892 F. Supp. at 1250-52. The appellate court noted that the district court's opinion was "well-reasoned." 71 F.3d at 1423.

128. MO. ANN. STAT. § 130.011(12)(a) defines self-contribution to include "[a] candidate's own money or property used in support of his candidacy other than expense of his food, lodging, travel, and payment of any fee necessary to the filing for public office." MO. ANN. STAT. § 130.011(12)(a) (West Supp. 1998).

129. *See Maupin*, 892 F. Supp. at 1251.

130. *Id.* at 1252.

131. *See id.*; *see also* *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993); *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994).

132. *Maupin*, 892 F. Supp. at 1256.

133. The district court decided *Carver*, 882 F. Supp. 901 (1995), on April 18 and *Maupin* on July 7. *See* 892 F. Supp. at 1246. *Carver* was appealed, and the Eighth Circuit opinion was decided on December 19, 1995. *See Carver v. Nixon*, 72 F.3d 633 (1995).

134. *Maupin*, 892 F. Supp. at 1256.

narrowly tailored to withstand political speech scrutiny.<sup>135</sup> In both cases, however, the Eighth Circuit's affirmation of the district court's holding cemented a nearly insurmountable First Amendment barrier. Oddly, the *Maupin* district court listed all four of the compelling interests cited by the plaintiffs—preserving election integrity, preventing corruption, preventing false statements, and promoting individual participation in the election process—and commented that “[a]s political or policy goals these statements cannot be seriously argued with.”<sup>136</sup>

What has happened in Missouri provides positive indicia for implementation of future reforms elsewhere. First, the courts acknowledged compelling interests beyond simple corruption; this could signal a move away from strict formalism and an acknowledgment of the problems plaguing the system since *Buckley*. Second, and on a more cautionary note, the distinction drawn between a permissible inducement encouraging participation, an unjust punishment for noncompliance, and a protected mode of communication in running for office is a close one, and should be viewed with trepidation. It is not yet clear at which point voluntarily accepted spending limits turn into an unfairly induced requirement; however, it is apparent that falling into the latter category renders reforms ready for attack.

## B. Minnesota's Partial Public Financing: Attacking the PACs

Minnesota's campaign finance reform history is longer than that of most states. Public financing has been in place there since 1976 and was amended most recently in 1996.<sup>137</sup> The overwhelming majority of candidates signed on to Minnesota's plan from the very beginning.<sup>138</sup> By 1992, 97% of state legislative candidates filing for office agreed to the public financing scheme in place since the 1988 elections,<sup>139</sup> the stated goal of which was to “enhanc[e] the public's confidence in the political process by ensuring the viability of the legislature's statutory scheme.”<sup>140</sup> PACs and party associations, not surprisingly, bore the

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135. *Id.* at 1251 (striking limits on candidates' own funds); *id.* at 1253 (striking spending limits); *id.* at 1254 (striking provision limiting carryover of funds from one campaign to next); *id.* at 1256 (striking provision that would add “approved and authorized by” to political advertisements).

136. *Id.* This is strange considering the narrowness with which it applied language from *Buckley* regarding compelling government interests.

137. *Rosensteil v. Rodriguez*, 101 F.3d 1544, 1547 (8th Cir. 1996); *Day*, 34 F.3d at 1358.

138. *See Rosensteil*, 101 F.3d at 1564. The candidate participation rate “bottomed out” at 66% in 1980. *Id.*

139. *See Day*, 34 F.3d at 1361 (citing MINN. ETHICAL PRACTICES BOARD, ETHICAL PRACTICES BOARD ISSUES SUMMARY OF 1992 CAMPAIGN FIN. REP. FOR STATE CANDIDATES, POL. COMMITTEES, AND POL. FUNDS 2 (July 2, 1993)).

140. *Id.* at 1361 (citing appellee's brief).

brunt of the regulatory action as the main targets.<sup>141</sup>

After Minnesota's 1992 reforms, several different associations challenged the public funding provisions limiting independent expenditures for campaigns that remained privately financed.<sup>142</sup> In particular, one regulation applied when an independent association communicated beyond its dues-paying membership with non-member voters. The regulation would increase a publicly-funded candidate's expenditure limit in an amount equal to the independent expenditure supporting the candidate or slinging mud at the candidate's opponent.<sup>143</sup> Further, the candidate who had complied with the voluntary public spending provisions would receive up to half the independent association's expenditure amount in the form of public financing.<sup>144</sup> The Eighth Circuit, in *Day v. Holahan*, permanently enjoined these provisions from ever taking place, finding that the contribution limit of \$100 was so low that it infringed on protected political speech and associational rights under the First Amendment.<sup>145</sup>

Again faced with a First Amendment political speech challenge, the Eighth Circuit panel that found Minnesota's reforms constitutional in *Rosensteil v. Rodriguez* did so even while the state legislature was amending the 1992 reforms.<sup>146</sup> Advocating the state financing limits, chair of the state Ethical Practices Board Carolyn Rodriguez argued that the cap gaps were "provided to encourage maximum candidate participation in [the state's] public financing of political campaigns" and were strictly voluntary.<sup>147</sup> The court found such interests compelling and likely to be achieved through the regulations.<sup>148</sup>

Statutory provisions controlling speech and targeting the factions themselves rather than the candidates can thus survive. Further, benefits conferred on campaigns accepting limitations and public financing simply aimed at leveling the playing field fall squarely within the category of permissible inducements. Only time will tell whether the reforms as enacted cure the mischief of Minnesota's factions.

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141. See, e.g., MINN. STAT. § 10A.27.1 (1993), MINN. STAT. ANN. § 10A.27.1 (West 1996) (providing voluntary limit on candidate receipt of PAC contributions); see also *Day*, 34 F.3d at 1365-66 (invalidating Minnesota's \$100 limit on contributions from individuals and PACs).

142. See *Day*, 34 F.3d at 1358-59.

143. See MINN. STAT. § 10A.25 subd. 13 (1993).

144. See *id.*

145. *Day*, 34 F.3d at 1361.

146. *Rosensteil*, 101 F.3d at 1548.

147. *Id.* at 1550.

148. See *id.* at 1552-53. Since candidates can choose funding which, in their opinion, "is most advantageous to their candidacy," the Eighth Circuit held that "the State's scheme promotes, rather than detracts from, cherished First Amendment values." *Id.* at 1552.

### C. Wisconsin's Aggregated Committee Limits: "Not a Dichotomy, But a Spectrum"

Because Wisconsin's campaign finance reform approach does not fit easily into the expenditure/contribution dichotomy, it highlights some of the shortcomings of post-*Buckley* First Amendment jurisprudence associated with campaign finance reform. Wisconsin Statutes section 11.26(9)(a) lumps together money received from all "committees"—including PACs, parties, and campaign committees—into one aggregate, cappable total that, if violated, allows opposition candidates to receive more public money than they would otherwise be eligible to receive.<sup>149</sup> State legislative candidate John Gard, his campaign committee, and other Wisconsin state legislators and their campaign committees, together challenged the constitutionality of the campaign finance laws after the state election enforcement agency sought damages for violations of the spending cap.<sup>150</sup>

The Wisconsin Supreme Court upheld the constitutionality of the PAC-to-candidate contribution limits by finding the law narrowly tailored to the compelling government interest in preventing undue and corrupt influence by committees.<sup>151</sup> The court distinguished the limitations on money in section 11.26(9)(a) from an absolute limitation on speech, since the limitations in question were directed at committees' giving to the candidate, and did not constitute an absolute cap on the amount of money the candidate could spend.<sup>152</sup> Characterizing the statute's effects as "marginal," the Wisconsin court pointed out that according to the *Buckley* interpretation, "even a 'significant interference' with constitutionally-protected rights could be sustained under the right circumstances."<sup>153</sup> As a mitigating factor, candidates could still receive endless funding from "other individuals, from their own sources, and from individuals through other sources such as conduits."<sup>154</sup> The court used legislative history to find that the evil the law was written to attack was committee access to legislators; "narrow

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149. WIS. STAT. § 11.26 provides in pertinent part:

No individual who is a candidate for state or local office may receive and accept more than 65% of the value of the total disbursement level determined under §11.31 for the office for which he or she is a candidate during any primary and election campaign combined from all committees subject to a filing requirement, including political party and legislative campaign committees.

WIS. STAT. § 11.26(9)(a)(1986). Section 11.31 creates limits for candidates who accept public financing; the percentage taken in § 11.26(9)(a) above is taken from the amount, different for every office, in this section. WIS. STAT. §§ 11.26(9)(a), 11.31.

150. See *Gard v. Wisconsin State Elections Bd.*, 456 N.W.2d 809 (Wis. 1990), cert. denied 498 U.S. 982 (1990).

151. See *id.* at 813.

152. See *id.* at 816, 819.

153. *Id.* at 817.

154. *Id.* at 819.

interest groups have a corrupting influence on individual candidates."<sup>155</sup>

The statutes primarily targeted PACs, with the current regulations intended to close those loopholes.<sup>156</sup> For example, other sections near section 11.26(9)(a) further restricted PACs. They limited the percentage PAC contributions could make up of the candidate's total financing<sup>157</sup> and the amount of money a party-related committee could receive from PACs;<sup>158</sup> they also prohibited designation of contributions to state parties by PACs for specific campaigns or candidates.<sup>159</sup> The court pointed out that "there would be a potential for undue domination of a candidate's campaign by narrow interest PAC contributions if party-related committees were not restricted in their ability to contribute to an individual candidate."<sup>160</sup> The court found that the other anti-PAC measures were not enough; "effective and comprehensive contribution limits [were] required."<sup>161</sup>

Citing *M.C.F.L.*, the *Gard* court also stated that the aggregate-committee-spending cap was a limit on contributions and not expenditures.<sup>162</sup> Whether or not an aggregate spending limit is a contribution cap, rather than a limit on expenditures, however, is far from clear.<sup>163</sup>

As a result, the *Gard* decision suggests a strong argument for moving away from the First Amendment jurisprudence established in *Buckley*. The contribution/expenditure dichotomy, established by the F.E.C.A., approved by *Buckley*, and continued in subsequent cases, becomes a blurry and therefore unwieldy distinction when the aggregate limit includes both expenditures and contributions.

Lowenstein argues that "the contribution limit/expenditure limit contrast is not a dichotomy after all, but a spectrum."<sup>164</sup> Indeed, pragmatic concerns increasingly require that the distinction between expenditures and contributions, artificial from the start, be de-

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155. *Id.* at 822.

156. *See id.*

157. *See* WIS. STAT. § 11.26(9)(b).

158. *See id.* §§ 11.26(8)(a), 11.265(2). A party-related committee is described in the opinion as a "legislative campaign committee." 456 N.W.2d at 812; *see also id.* §§ 11.01(4), 11.05 (setting out definitions).

159. *See id.* §§ 11.16(4) (prohibiting "earmarking"), 11.30(1) (prohibiting "laundering") (1984).

160. *Gard*, 456 N.W.2d at 824.

161. *Id.* at 823-24.

162. *Id.* at 817-18.

163. There is a wide range of scholarly opinion on this topic. For an opinion that aggregate limits are expenditure limits, see Lawton Chiles, *PACs: Congress on the Auction Block*, 11 J. OF LEGIS. 193, 213 (1984). Others have asserted, like the Wisconsin Supreme Court, that aggregate limits are contribution limits since they affect even the smallest contributions. *See* Fred Wertheimer, *The PAC Phenomenon in American Politics*, 22 ARIZ. L. REV. 603, 625 (1980).

164. Lowenstein, *supra* note 34, at 417 (citation omitted).

emphasized. To see aggregate limits in absolute terms, as either a contribution or expenditure cap, is a mistake; the implemented effects of either one can range from overwhelmingly good and effective to arbitrary and deleterious.<sup>165</sup> Forcing aggregate limits to fit into the *Buckley* categories is thus inconsistent with the rationale of *Buckley* requiring precision in analyzing and implementing limits, because such limits possess elements of both expenditures and contributions, without actually being entirely either one. Focusing on money's status as either a contribution or as an expenditure is disingenuous, and should be relegated to a secondary indicator at best; the primary focus should be the relationship between the means and the end.

Paced by Senator Russ Feingold's nearly futile efforts to enact federal reforms as well as the state efforts litigated in *Gard*, Wisconsin remains on the cutting edge of reforming campaigns. It is not alone—since *Gard* validated the aggregate limit, at least five other states have implemented a similar measure.<sup>166</sup> What makes these reforms successful as pragmatic responses is their drafters' unwillingness to pigeonhole reforms in an artificial category. Wisconsin's reform, while creative, is classical in its narrow nexus between the interest acknowledged and the right affected. As shown in Wisconsin, distancing statutory language from *Buckley*'s binary structure is one way to escape the complex ramifications of *Buckley*'s muddled opinion.

#### D. Kentucky: The Failure of Excessively Large Gaps Between Candidate's Caps

In *Wilkinson v. Jones*,<sup>167</sup> a federal district court confronted Kentucky campaign finance provisions implemented after, and similar to, those in Wisconsin. The provisions, aimed at encouraging public financing of Kentucky state-office campaigns, triggered higher expenditure limits for publicly-funded campaigns whose opponents did not accept the voluntary spending limits<sup>168</sup> and set higher individual con-

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165. See *id.* at 424. Lowenstein further argues that no clean way to separate the good limits from the bad exists. *Id.*

166. See, e.g., ARIZ. REV. STAT. ANN. § 16-905 (West 1989); CAL. GOV'T CODE § 85305 (1990); HAW. REV. STAT. § 11-205 (West 1985); LA. REV. STAT. ANN. § 18-1505.2 H(7) (West 1990); MONT. CODE ANN. § 13-37-218 (1989).

167. 876 F. Supp. 916 (E.D. Ky. 1995).

168. Publicly-funded campaigns agreed to limit private contributions in each of the primary cycle and the actual campaign cycle to \$600,000, with 2-to-1 matching grants of \$1.2 million, for a total spending limit of \$1.8 million. See KY. REV. STAT. §§ 121A.030(1), 121A.060(2) (Michie 1996). This limit would then be rendered moot if the qualifying candidate's opponent spent more than \$1.8 million, and the publicly-funded candidate could continue to raise and match funds. See *id.* §§ 121A.030(5)(a), 121A.060(2)(c), 121A.080(4), 121A.080(5).

tribution limits for those publicly-funded campaigns.<sup>169</sup>

“The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech.”<sup>170</sup> The *Wilkinson* district court distinguished the Minnesota trigger provision, because Kentucky’s provision applied only when the candidate made an affirmative decision to expand the campaign budget beyond \$1.8 million.<sup>171</sup> Further, the Kentucky public funds were only available to the candidate when additional private contributions are made.<sup>172</sup> However, the court went on to find that the trigger provision would accomplish the compelling governmental interests of promoting *New York Times v. Sullivan*-style speech, not inhibiting it.<sup>173</sup>

It nevertheless found the “cap gap” not narrowly tailored to the interests at hand.<sup>174</sup> That provision lowered the contribution limit to \$100 for privately-funded candidates, as compared with \$500 for candidates volunteering to participate in the public-funding system.<sup>175</sup> According to the *Wilkinson* court, the low \$100 limit constituted a penalty, its differential ratio too high at five to one.<sup>176</sup> Although the court invalidated the law, it did accept that, at least in theory, a cap gap could pass constitutional muster.<sup>177</sup>

#### IV. Pushing the Limits: Reassessing “Ancillary” Compelling Government Interests

Understanding American government’s objective and applying it in a modern context is crucial to tailoring reform programs that pass constitutional muster. James Madison explained:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public

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169. See KY. REV. STAT. § 121.050 (Michie 1996). The *Wilkinson* court lays out the statutory scheme in full at the beginning of its opinion. 876 F. Supp. at 920-21. See also generally KY. REV. STAT. ANN. § 121, 121A (Michie 1996).

170. *Day*, 34 F.2d at 1360.

171. See *Wilkinson*, 876 F. Supp. at 928-29.

172. See *id.*

173. See *id.* at 928 (“It occurs to this court that the trigger provision promotes more speech, not less”).

174. *Id.*

175. See KY. REV. STAT. ANN. § 121A.050 (Michie 1996).

176. 876 F. Supp. at 929-30.

177. See *id.* at 929.

trust.<sup>178</sup>

Reformers who would implement campaign finance laws in the face of First Amendment strict scrutiny review have been forced to search for alternate justifications amounting to compelling state interests. Increasingly, preventing corruption and the appearance thereof has become a wobbly foundation on which to rest campaign finance reform.<sup>179</sup> In the absence of the striking down of *Buckley* or a large-scale overhaul of the F.E.C.A., the success of future legislative efforts both at the federal and state levels will depend on legislators' ability to articulate and incorporate alternate justifications that have not yet been rejected. Equality and representative time management concerns are two of many such interests that have not yet been fully explored.

### A. Equal Access to the Political Process

Arguably, political dialogue requires ensuring that "everyone gets an equal allocation of time and a fair chance to express his point of view."<sup>180</sup> However, application of this principle to campaign finance laws is tricky. Members of the Court who acknowledge the power of money to influence the political process have been reluctant to limit the money because of the blurred distinction between access to speech and the speech itself,<sup>181</sup> and this reluctance has undermined momentum for leveling the playing field.

In *Buckley*, the Court commented that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."<sup>182</sup> Although the *Buckley* Court thus came very close to equating money with speech, scholars and various subsequent courts have retreated from that formulation in recent years. Justice J. Skelly Wright, for example, has

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178. THE FEDERALIST No. 57 (James Madison) (Edward Gaylord Bourne ed., 1961).

179. See *supra* discussion at Section III.

180. ELIZABETH DREW, MONEY AND POLITICS 149 (1983).

181. See, e.g., *Buckley*, 424 U.S. at 19 n.18. "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* However, later in the per curiam opinion, the Court noted that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Id.* at 21. But Chief Justice Burger noted in his concurring opinion that limiting contributions would have the same practical effect as limiting expenditures if in fact the limitations on money equaled the limitations on speech. See *id.* at 241 (Burger, J., concurring). Justice White specially noted in his concurrence that "money is not always equivalent to or used for speech, even in the context of political campaigns." *Id.* at 263 (White, J., concurring).

182. *Buckley*, 424 U.S. at 19.

long been skeptical of the Court's decision in *Buckley*,<sup>183</sup> particularly of its money-speech equation.<sup>184</sup> Still, to the extent that campaign finance regulation equalizes that which the state should not manipulate, *Buckley* renders such regulation unconstitutional.<sup>185</sup>

Equality of opportunity to influence the political process, sometimes characterized as "leveling," should be recognized as a constitutionally compelling governmental interest.<sup>186</sup> The leveling rationale can be further subdivided into "straight leveling" and "proportional leveling." Proportional leveling "permits government to require that expenditures from a political fund be in proportion to the views of those who contribute to the fund"<sup>187</sup> but is nonetheless subject to derision for its "slippery slope" tendencies. Straight leveling "has the beauty of egalitarian purity;"<sup>188</sup> but, taken to its extreme, would necessitate overruling *Buckley* and allowing all limits, even on individuals' independent expenditures—the type of spending most clearly protected by the *Buckley* Court's analysis. Considering the political impracticality of either type of leveling and the certain unconstitutionality of the straight leveling rationale, the lack of a palatable alternative could suggest that proponents of campaign finance reform would be better off staying away from these types of rationales altogether.<sup>189</sup>

Modern political philosopher John Rawls' balancing of the principles driving First Amendment jurisprudence and the principles driving our fundamental notions of public representation is pragmatic; as Rawls puts it, "[t]he First Amendment no more enjoins a system of representation according to influence effectively exerted in free political rivalry between unequals than the Fourteenth Amendment en-

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183. Wright has noted wryly that his skepticism is partially attributable to the fact that the Court overrules his District Court's opinion in its per curiam decision in *Buckley*. See Wright, *supra* note 109, at 94 (quoting Wright's circuit court opinion in *Buckley*, 519 F.2d 821, 897 (D.C. Cir. 1975), *rev'd in part*, 424 U.S. 1 (1976)).

184. See J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976). Members of the court frequently have written to agree. See, e.g., 424 U.S. at 244 (Burger, J., concurring in part and dissenting in part); *id.* at 261 (White, J., concurring); *id.* at 290 (Blackmun, J.); see also *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 519 (1985) (Marshall, J., dissenting).

185. The *Buckley* Court found parts of the F.E.C.A. invalid: "Although the Act does not focus on the ideas expressed by persons or groups subject to its regulations, it is aimed in part at the equalizing of the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups." 424 U.S. at 17.

186. See Daniel Hays Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory, and the First Amendment*, 29 U.C.L.A. L. REV. 505 (1982); Marlene Arnold Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815 (1974).

187. RODNEY SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 237 (1992).

188. *Id.* at 238.

189. See *id.* at 239.

joins a system of liberty of contract and free competition between unequals in the economy.”<sup>190</sup> Rather than requiring free debate between equals, Rawls demands a minimum condition of “background justice” as a prerequisite for the competition in both the electoral ring and the economic market.<sup>191</sup>

Rawls’ objection to the status quo is more nuanced than corruption; he notes that the role of money in the political system at present is such that it is “inconsistent with both the philosophical meaning and the practical exercise of political equality.”<sup>192</sup> Rawls has also argued that “valid claims of equal citizens are held within certain standard limits by the notion of a fair and equal access to the political process as a public facility.”<sup>193</sup> In a constitutional democracy where all adults have the right to engage in political affairs, Rawls’ principle of participation not only requires equal access but also engenders the type of “fair rivalry” for elected office reformers desire.<sup>194</sup>

The Court has agreed, to an extent. In *Reynolds v. Sims*,<sup>195</sup> a voting-rights case, the Court found that “[f]ull and effective participation by all citizens in state government requires . . . that each citizen has an equally effective voice in the election of members of his state legislature.”<sup>196</sup> What the Court was upholding in *Reynolds* was not just the right to vote, but the right of access to the whole process. Without that access, other basic rights may not be sufficiently protected.<sup>197</sup> Further, taken to the logical extreme, such disenfranchisement of non-contributing voters at the hands of contributing individuals, associations, and corporations creates a general voter demeanor of apathetic cynicism,<sup>198</sup> since the public recognizes that a basic justice is missing from the political system.<sup>199</sup>

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190. John Rawls, *The Basic Liberties and Their Priority*, 3 THE TANNER LECTURES ON HUMAN VALUES 78 (Sterling M. McMurrin ed., 1982). Rawls seems to think *Buckley* will be outmoded much in the same way *Lochner* has been. See *id.*

191. See *id.* “Background justice” was first defined by Rawls in his *A Theory of Justice*. JOHN RAWLS, A THEORY OF JUSTICE 83-89 (1971). Briefly, it refers to the establishment of underlying or preceeding conditions the existence of which guarantees a fair procedure and, in conjunction with other related guarantees, justice. *Id.*

192. Wright, *supra* note 184, at 13.

193. Rawls, *supra* note 190, at 43.

194. RAWLS, *supra* note 191, at 227.

195. 377 U.S. 533 (1964) (using the 14th Amendment to find a fundamental right to vote).

196. *Id.* at 565.

197. Rawls, *supra* note 190, at 78; see also RAWLS, *supra* note 191, at 221-34.

198. See *id.*

199. See *id.*; see also Clines, *supra* note 9, and accompanying text.

## B. Preserving Representative Government

Another compelling government interest to be reinvestigated holds that the time required to solicit donations at a pace consistent with that of the rest of the political market detracts from the quality of the representation we receive from the representatives themselves.<sup>200</sup> Further, in order to protect our right to representation we must protect the time representatives have to engage in our representation.

Critics of the role of money in politics have noted the advent of what has been called the "war chest mentality"<sup>201</sup> gripping politicians, causing them to amass more and more money for the next battle.<sup>202</sup> Former Arizona Senator Barry Goldwater said of the spiraling costs of campaign funding: "Unlimited campaign spending . . . causes the elected officials to devote more time to raising money than to their public duties."<sup>203</sup> This mentality causes representatives at all levels to be concerned with the fundraising, not the day to day business of legislating: responding to constituents, gathering information about issues, debating and analyzing policy, and writing and speaking on pieces of legislation.<sup>204</sup>

While this justification was not argued by the parties in *Buckley*, it was discussed in committee when the F.E.C.A. was being developed.<sup>205</sup> One of the government interests justified by the public funding provisions for congressional races was in fact the diversion of candidate's efforts to non-representative duties.<sup>206</sup> This Senate report is cited in *Buckley*, when the Court speaks vaguely to a need to "free candidates from the rigors of fundraising."<sup>207</sup>

*Reynolds* adds a modicum of support to the representative time management argument as well.<sup>208</sup> In *Reynolds*, Chief Justice Warren held that "representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies."<sup>209</sup>

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200. See Blasi, *supra* note 104, at 1284-85.

201. *Id.*

202. Herbert Alexander reported in 1992 that a senator had to raise \$13,000 a week for all six years of his term to reach the amount spent in one campaign. HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 78-81 (1992).

203. STERN, *supra* note 7, at 3.

204. See Blasi, *supra* note 104, at 1282-83.

205. See *Buckley*, 424 U.S. at 1.

206. See S. REP. No. 93-689, at 5 (1974).

207. *Buckley*, 424 U.S. at 91.

208. *Reynolds*, 377 U.S. at 565.

209. *Id.*

While a more extreme argument, the idea that elected politicians who spend too much time raising funds for the next campaign are not really representatives at all has basis in several of the fundamental documents of the Nation.<sup>210</sup> First, the requirements of representation are implicated in the Constitution. In Article I, section 2, the legislative powers granted to Congress in section 1 are “apportioned among the Several States.”<sup>211</sup> The Guarantee Clause that serves as a supplementary source of federal power also guarantees the representative structure delineated in Article I.<sup>212</sup>

When representative-candidates spend as much time campaigning as they do representing their constituency, a failure of representation and a crisis of republicanism results.<sup>213</sup> If we accept that politicians are nervous about their political fortunes, the only way to prevent them from being further “enslaved by their constant obsession with fundraising” is to assure them of a minimum amount of disinterested funding.<sup>214</sup> Hence, the birth of public financing, partial or whole, tax-based or not.

A Jeffersonian concept of representation, focusing on the virtue of the electors who have risen through the meritocracy, would imagine campaigning as a corruptive influence.<sup>215</sup> At the very least, a more benign Madisonian view of representation giving more leeway to the elected officials would see the current system of campaign finance as a negative distraction.<sup>216</sup>

Republican notions of representation were earlier implicated by the Court’s decision in *Colorado Republican*.<sup>217</sup> But the concept of representation upheld in that ruling was much more rooted in the party system.<sup>218</sup> While parties serve a valuable purpose to the democratic republic,<sup>219</sup> a better understanding of representation transcends the party system.

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210. Blasi, *supra* note 104, at 1283.

211. U.S. CONST. art. I, § 2.

212. U.S. CONST. art. IV, § 4.

213. See Blasi, *supra* note 104, at 1283.

214. STERN, *supra* note 7, at 181.

215. See, e.g., GARRET W. SHELDON, *THE POLITICAL PHILOSOPHY OF THOMAS JEFFERSON* 78-82 (1991).

216. See GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 184-88 (1981).

217. *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604, 116 S.Ct. at 2309.

218. Note, *Leading Cases*, 110 HARV. L. REV. 135, 241 (1996).

219. Nahra, *supra* note 44, at 57; see also *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U.S. 480, 498 (1984).

## V. Narrowly Tailored Full Public Funding: Maine's Clean Election Act

Maine's Clean Election Act<sup>220</sup> is still too young to be exhaustively measured for success; however, its ambition is impressive. The Act creates a general pool of money from which candidates will draw. The pool is funded by a base of tax revenues augmented by funds from the checkoff program, the "seed money" initially collected by candidates during the qualifying period, voluntary independent donations to the fund itself, and fines collected for noncompliance.<sup>221</sup> Its stated purpose is to finance gubernatorial, state senatorial and state representative campaigns.<sup>222</sup>

To qualify for public funding, a would-be candidate must officially declare her intent to participate,<sup>223</sup> at which point she can only accept two categories of money: "seed money" contributions in varying amounts, depending on the race,<sup>224</sup> and qualifying contributions.<sup>225</sup> Since the purpose of seed money is to enable would-be candidates to qualify for public funding, it can only be accepted before and during the qualifying period. For most candidates, this period extends from the beginning of November in the year preceding the election and ends on March 16 of the election year, before the party primary.<sup>226</sup> "Unenrolled" independents can qualify until June.<sup>227</sup> Most importantly, seed money must be spent during the qualifying period.<sup>228</sup>

Qualifying contributions must be in the amount of no more than \$5 in the form of a check or money order.<sup>229</sup> Since their function is to demonstrate support within the community for the candidate, the quantity required is pegged to the relative size of the constituency

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220. ME. REV. STAT. ANN. tit. 21-A, § 1121 *et seq.* (West 1997). The ballot initiative, I.B.5, was passed by the voters of the state of Maine on November 5, 1996, with 56% approval, at which point the statute was added to the Maine Code. *Nation Turns to Maine's Campaign Reform Plan; But Challenges to the State's Clean Elections Initiative May Suggest It's Still a Work in Progress*, PORTLAND PRESS HERALD, Mar. 17, 1997, at B1.

221. See title 21-A, §§ 1124(2)(A)-(D), (G), (H).

222. See title 21-A, §§ 1124(2)(A)-(D), (G), (H). The Act also provide that if a candidate drops out of a race or has unspent funds at the end of the campaign cycle, the funds revert to the general fund. *Id.* § 1124(2)(E), (F). The pool is administered by a commissioner. See *id.* §§ 1124(2)(E), (F).

223. See *id.* § 1125(1).

224. See *id.* § 1125(2).

225. See *id.* §§ 1125(3)(A)-(C).

226. See *id.* § 1125(8).

227. *Id.*

228. *Id.*

229. See *id.* § 1122(7)(A).

represented.<sup>230</sup>

Pending approval by the state election commission of the qualifying contributions as submitted, disbursement of public funds is immediate. The amount given to each candidate in a contested general election race must equal the average of what each candidate spent in similarly contested campaigns over the past two years.<sup>231</sup> Candidates in uncontested general elections do not qualify for funding, and candidates in uncontested primaries only qualify for an amount equal to the past average.<sup>232</sup>

After disbursement, candidates' behavior is regulated and monitored through reporting requirements.<sup>233</sup> Significantly, the Act provides for matching funds to be given to the opponent or opponents of a candidate who spends more than the distribution amount, in "an additional amount equivalent to the reported excess," up to twice what was originally disbursed.<sup>234</sup>

The Act is not structured to address on its face the status of non-participant candidates.<sup>235</sup> Instead, it is presented as an "alternate" option; technically, it is an alternative to Maine's extant campaign laws, also amended by the November 1996 referendum. Currently, contribution limits in Maine are capped at \$1000 for individuals<sup>236</sup> and \$5000 for committees, corporations and associations.<sup>237</sup> When full public financing begins in 1999, contributions both from individuals and these groups will be limited to \$500 for the gubernatorial race and \$250 for other races.<sup>238</sup> The voluntary expenditure limits already in place remain.<sup>239</sup>

"[I]n some circumstances, what seems to be government regulation of speech actually might promote free speech, and should not be treated as an abridgment at all . . . . [Moreover,] what seems to be free speech in markets might, in some selected circumstances, amount

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230. *See id.* § 1125(3). Thus, gubernatorial candidates need contributions from at a minimum 2500 people, state senate candidates need support from at least 150 constituents, and state representative candidates must receive money from 50 residents. *Id.*

231. *See id.* § 1125(8)(C).

232. *See id.* §§ 1125(8)(B), (D).

233. *Id.* § 1125(12).

234. *See id.* § 1125(9).

235. In related reporting requirement provisions, however, candidates who are not registered as receiving money from the Clean Election Fund are subject to accelerated reporting requirements and expedited deadlines for disclosing campaign spending totals. *See id.* §§ 1017 (3-A(A), (F)).

236. *Id.* § 1015(1).

237. *Id.* § 1015(2).

238. *Id.* §§ 1015(1), (2).

239. Candidates who voluntarily limit their expenditures will now be placed on a published compliance list. *Id.* § 1015(7), (9).

to an abridgment of free speech.”<sup>240</sup> Public funding has been called the “ultimate in disinterested money” in a democracy since the funds come from the people through the government and is not identifiable with special interest groups or wealthy individuals.<sup>241</sup>

From its ill-timed arrival in the midst of gigantic deficit problems to more recent disillusionment with any and all politicians, public funding has not enjoyed widespread popularity even where it has been implemented fully.<sup>242</sup> At best, public reaction has been mixed. Responding to the same poll in which 9 out of 10 people said they wanted major changes to campaign finance reform, only half of those polled said that public financing would reduce the effects of special interests; 43% said that it would not.<sup>243</sup> Congressional public funding to support the presidential public funding scheme was considered within the original F.E.C.A. framework; the idea was rejected in 1971 and again in 1977.<sup>244</sup> However, “what was sauce for the presidential goose was not, it turned out, sauce for the congressional gander.”<sup>245</sup>

Prodded by its constituents, Congress has been slow to act once it has dipped its toe into the proverbial waters of campaign finance reform,<sup>246</sup> and the American public certainly has not demanded serious Congressional consideration of public financing.<sup>247</sup> A 1990 survey indicates that American public opinion on public financing is at the very least ambivalent and very clearly shallow, fluctuating with different considerations.<sup>248</sup> While a “plurality, perhaps even a majority”<sup>249</sup> of Americans support such programs, two recessions and opposition to “radical” change have kept public financing on shaky ground.<sup>250</sup>

Generally, the implementation of public funding would require a careful balance between two competing manifestations of democratic interest. On the one hand, the minimum, or “floor,” should be high

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240. Cass R. Sunstein, *Free Speech Now*, in *THE BILL OF RIGHTS IN THE MODERN STATE* 255, 267 (1986).

241. Stern, *supra* note 7, at 180.

242. The Maine referendum passed with a bare 56% of the vote, with no organized opposition prior to November 1996. *Civil Liberties Group Challenges Campaign Law; Other Groups and Individuals Join a Lawsuit Alleging Maine's Election Finance Initiative is Unconstitutional*, PORTLAND PRESS HERALD, Apr. 1, 1997, at B3.

243. See Clines, *supra* note 9, at A1.

244. See GARY C. JACOBSEN, *MONEY IN CONGRESSIONAL ELECTIONS* 207 (1980). The idea was also considered in 1977, but despite widely-professed support, it never got out of committee or filibuster in either house. See *id.*

245. *Id.* at 204.

246. “It’s sorta like the term-limits issue,” Rep. Christopher Shays said. “Nobody wants to do anything that might hurt their job security.” David Hess, *Mixed Emotions Grip Congress as Campaign Reform Advances*, SAN DIEGO UNION-TRIB., Feb. 3, 1996, at A24.

247. See Clines, *supra* note 9 and accompanying text.

248. See FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE* 146 (1992) (citation omitted).

249. *Id.* at 146.

250. Alexander, *supra* note 106 at 8.

enough to make spending private funds over and above that amount of little consequence.<sup>251</sup> At the same time, numerous “undemocratic” consequences could result from too high of a bar.<sup>252</sup> “The line between an indictment whose acceptance is truly voluntary and one that begins to verge on the coercive is a wavering one.”<sup>253</sup>

Only now has this need to balance public financing’s effects become a relevant constitutional inquiry. Maine’s law avoids the pitfalls that have hobbled other states’ regulations: on a practical level, it presents the public financing scheme as a primarily voluntary option, albeit a “sweetened” one, and it directs the harshest consequences and reforms at groups and associations. Structurally, it recognizes that campaign finance implicates a First Amendment right of speech by requiring candidates to seek qualifying contributions as well as support within each district. The provision of matching funds to publicly-funded candidates whose opponents fail to play by the rules merely brings the public-funding candidate to the level of her opponent and does not punish the opponent outright. In short, Maine has learned her lessons from less radical reforms (and the court decisions eliminating them) in states such as Kentucky, Minnesota, Missouri and Wisconsin.

“As Maine goes, so goes the nation.” In the nineteenth century, prior to the establishment of a nationalized federal election day in November, Maine voted in September, before the rest of the country.<sup>254</sup> Similarly, the public funding provisions of the Clean Election Act bring Maine to the vanguard of electoral politics once again.

## VI. Conclusion

The Court’s jurisprudential trend concerning First Amendment-protected political speech is toward maintaining a nearly-impregnable level of scrutiny. This level of protection is inconsistent with public demand for change, and is not necessary to sustain constitutional integrity or even strict scrutiny. First, a balance between two strong constitutional interests is perhaps the best way to protect the interests’ existence at all.<sup>255</sup> And second, this vision is near-myopic in its failure to take into account that which earlier Courts articulated in *Buckley* and *Austin*.

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251. See Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1086 (1996).

252. See *id.* Smith lists three consequences: removal of legislative monitoring (because there would be no incentives), a rise in the frequency of outright corruption, and the shifting of power from one group of elites to another. *Id.* at 1086.

253. Frederick Schauer, Statement Regarding the Constitutionality of S. 1219 (May 8, 1996) (transcript available on LEXIS, Legis Library, CNGTST file)

254. *Salmagundi*, BALTIMORE EVENING SUN, Oct. 20, 1992, at A16.

255. Sunstein, *supra* note 240, at 268.

Congress' inability to act on what is now a near-universal plea to fix a faulty system is also inconsistent with demand for reform.<sup>256</sup> For decades, campaign finance reform has remained on the back burner, often for congressionally self-interested purposes. Consequently, the resulting failures since the *Buckley* Court "gutted" the F.E.C.A. have been almost entirely masked.<sup>257</sup> It has been argued that Congress has "created a false appearance of regulation."<sup>258</sup> Recent activity in the 105th Congress illustrates this well: of all the bills proposed recently, not one has been passed. Complaints about inaction now are being volleyed from all sides.

*Buckley's* poorly worded per curiam decision constrains any radical movement in this area of law.<sup>259</sup> Still, giving up entirely on the *Buckley* framework may not be necessary. The *Buckley* Court relied solely on corruption to justify the F.E.C.A., but it recognized the possibility of "ancillary" interests. Without overturning *Buckley* altogether,<sup>260</sup> new justifications and public financing are the best option for reform.

Shifting to more solid ground in the realm of justifications can take two forms. First, the Court could recognize, on the strength of *Buckley* alone, the existence of non-corruption interests like equality of access and the less radical preservation of representative government. Equality of access is unlikely to succeed as a justification more for political than constitutional reasons. Preservation of the integrity of representative government by protecting legislators' time to legislate has the strongest constitutional and pragmatic bases of the government interests proposed to supplement corruption. Properly

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256. The 104th Congress came closer to reform in 1996 than at any other time in recent memory with S.1219, the McCain-Feingold bill. A bipartisan proposal, McCain-Feingold offered inducements to candidates to accept limits on spending in the form of reduced ad rates and postage. But S.1219 was filibustered to death on June 10, 1996, when an attempt to close debate failed by 6 votes. Democrats voted 46-1 to end the filibuster; Republicans voted 8-45. See Vote Report and Bill Tracking, *Senate Campaign Finance Reform Act of 1996*, S. 1219, 104th Cong., 2d Sess (1996). After campaign finance controversies surrounding the 1996 election, the Democratic National Committee, President Clinton and Asia, the *New York Times* reported a resurgence of support for the bill. See Dane Strother, *Campaign Finance 'Reforms' Don't Work*, N.Y. TIMES, Feb. 1, 1997, at A13.

257. See Nahra, *supra* note 44, at 48. Nahra argues that Congress has "created the false appearance of regulation." *Id.* at 57.

258. *Id.*

259. See, e.g., Miller, *supra* note 25, at 59. Miller, after citing the past failures of constitutional amendment efforts by term limits supporters, flag-burning opponents, and equal rights supporters, notes the legal problem that could result from a campaign finance Constitutional amendment: "[A]n amendment that truly limited all independent expenditures could well threaten legitimate First Amendment rights." *Id.*

260. An unlikely occurrence in the foreseeable future, given the support it finds among a majority of the current justices. See *Colorado Republican*, 518 U.S. 604, xxx, 116 S. Ct. at 2312-20.

alleged and supported, it might succeed as its own justification. As an argument based on the Guarantee Clause, it would likely be insulated from court scrutiny by the potential applicability of the political question doctrine.

Secondly, evolution within the concept of corruption itself is still possible. Corruption survives recent state and federal interpretations of that compelling interest. With no clearly established definition and muddled precedents, its future is nearly unpredictable. It could be expanded to weave in elements of either the equal access justification or the representative government protection rationale.

It has been suggested the Court will take action when more states develop public financing schemes citing more currently applicable government interests.<sup>261</sup> If so, the outcome will depend on whether the Court is willing to forcibly evolve its interpretation of the First Amendment in this context and expand its conception of interests beyond the avoidance of corruption identified in *Buckley* and recast in *Austin*.

As of early 1998, twenty-two states are considering new reform packages.<sup>262</sup> While some state campaign and electoral "reforms" are simply a loosening of PAC requirements under the guise of political speech protection,<sup>263</sup> others are unlike anything ever attempted.<sup>264</sup> Frustrated by the federal courts' decisions, Missouri has given up on contribution limits, and a groundswell of support for public financing has begun.<sup>265</sup> Public financing possesses several advantages as a po-

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261. See, e.g., LOWENSTEIN, *ELECTION LAW*, *supra* note 12, at 782.

262. Arizona, Connecticut, Florida, Hawaii, Idaho, Illinois, Kentucky, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Wisconsin are all discussing bills introduced in the last 18 months, according to a Westlaw search. Of the states discussed in this note, three are debating the merits of proposed legislation, sometimes in both houses of the state legislature. The 1998 Regular Session of the Kentucky House is considering H.R. 63, 167, 173, and the state senate is considering S. 194. In Missouri, the 89th Assembly is considering bills no. 407, 779 and 1052. In Wisconsin, the 93rd Regular Session Senate is debating S. 7, while the state assembly considers bills no. 207, 937 and 1950.

263. Texas Republican Senator Kay Bailey Hutchinson's proposal from last session, S. 179, exempts some PACs from reporting requirements and decreases the contribution limit for multicandidate political committees. S. 179, 104th Cong., 1st Sess. (1996).

264. See, e.g., Richard L. Hasen, *Clipping Coupons for Democracy: an Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996). Hasen proposes a voucher system whereby every voter would receive some federal campaign vouchers to be given directly to a candidate's campaign fund or to interest groups. See *id.* Egalitarian government interests would justify the system constitutionally. See *id.* at 42.

265. Patrick Harvey, *Political Campaigns Must Be Cleaned Up With Public Financing; Limits On Spending Would Be Effective Reform*, in ST. LOUIS POST-DISPATCH, NOV. 26, 1996, at B13; see also Ellen S. Miller, *Run Elections with Clean Money*, ST. LOUIS POST-DISPATCH, Feb. 9, 1998, at B7.

tential reform; its first and foremost strength is its ready-made approval by language throughout *Buckley*.<sup>266</sup> After Maine's first full implementation in 2000, the practicality of public financing will be more manifest.

At the Nation's birth, the Framers emphasized the highest quality of representation, debating how to achieve it in every facet of the Constitution itself.<sup>267</sup> Today the phenomenon of potential candidates eschewing public service for fear of increases in campaign demands<sup>268</sup> weakens representative government. Outbreaks of factious behavior are a warning that the Constitution's delicate balance is in a precarious state. In the interest of protecting the democratic republic, we must reexamine our government's true interests to end threatening outbreaks.

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266. See 424 U.S. at 92-93 (public financing characterized as an effort "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge discussion and participation in the public process, goals vital to a self-governing people"); *id.* at 96 ("Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions"). Note that language in the latter could be used to support the principle of protecting the integrity of representative government by minimizing distractions.

267. Blasi, *supra* note 104, at 1302.

268. Richard. L. Berke, *Run For Congress? Parties Find Rising Stars Are Just Saying No*, N.Y. TIMES, Mar. 15, 1998, at 1. "The emphasis is too much on fund-raising, and that's not what led me to run in the first place," said one former New York congressman who decided not to challenge for his old seat. *Id.* at 20.

