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SPEECH AND CAMPAIGN REFORM: CONGRESS, THE COURTS AND COMMUNITY

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I. INTRODUCTION

Investigation following Watergate revealed the integrity of our political system to be threatened by corporate and other special interest money to a degree unmatched since the turn of the century, when the exploits of political boss Mark Hanna and the financial power of the corporations gave birth to the Populist and Muckraker reform movements.¹ Then Progressive Republicanism joined with liberal Democratic currents to create a flood of legislation to preserve the autonomy of government.² Whether the branches of the federal government can meet the current challenge to democratic government remains to be seen.³ This article treats congressional

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¹ Alexander, *Rethinking Election Reform*, 425 ANNALS 1, 3 (1976).

² The Tillman Act of 1907, ch. 420, 34 Stat. 864 (repealed 1909) placed a prohibition on corporate contributions and expenditures. Scandals involving the use of personal fortunes by very rich candidates to purchase votes led to legislation which contained disclosure and reporting provisions later re-enacted in the Federal Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1070 (the Act of June 25, 1910, ch. 392, 36 Stat. 822, and the Act of August 19, 1911, ch. 33, § 2, 37 Stat. 26). Criminal penalties for offering money to influence voting were enacted in the Act of October 16, 1918, ch. 187, 40 Stat. 1013. Expenditure limits on campaigns for House and Senate races were set out in the Act of August 19, 1911, ch. 33, § 2, 37 Stat. 25, 26. (In 1940, these limits were extended to include total expenditures of political committees and gifts to political committees; Act of July 19, 1940, ch. 640, 54 Stat. 767). See generally G. BENSON, *POLITICAL CORRUPTION IN AMERICA*, at 177-80 (1978); G. THAYER, *WHO SHAKES THE MONEY TREE*, at 24-65 (1973).

³ It appears that some progress is being made. At the beginning of his administration, President Carter proposed and Congress passed legislation giving him authority to reorganize the federal government. Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 (hereinafter cited as the Reorganization Act). Under this authority, the President and Congress have accomplished:

Abolishment of the Civil Service Commission and establishment of the Office of Personnel Management, and the Mint System Protection Board. This was the most comprehensive reorganization and reform of the Civil Service in nearly a century. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. Technically this reform

campaign reform, an issue narrow in scope but essential to the good working of government. We offer the observations of direct participants in our election process as congressional candidate and campaign manager challenging an incumbent in the 1978 elections.¹ The experience left us with many scars, not the least of which is substantial debt; much greater understanding of our political system; and at least one firm conclusion: present law and the absence of law together have allowed and even encouraged inequalities and corruption which, if unchecked, will pervert democratic government.

In examining all other congressional campaigns in 1978 and other recent congressional elections, it became apparent that our experience had been repeated in races throughout the country, particularly when the election involved an incumbent. In many such situations, ossification of the system seems in late stages, precisely when challenges to lawmakers — in arms limitation, energy, the environment, the economy, and in health care — demand the highest creative capacity possible. The advantages of incumbency, discussed hereafter, are almost impossible to overcome; unless an incumbent "self-destructs" he will be re-elected. And the incumbent's newest and strongest weapon, very quickly to be felt with awesome power and consequences, the Political Action Committee (PAC), is still in its infancy with an almost unlimited capacity for growth. Left without community control through law, PACs will at best insure the inviolability of incumbency and the maintenance of the status quo, with change coming only through death or retirement. At worst they

did not come under the authority granted by the Reorganization Act. Creation of the Federal Emergency Management Agency by combining and streamlining federal disaster and emergency agencies (Statute at Large has not yet appeared). Reorg. Plan No. 3 of 1978. U.S. Code Cong. & Ad. News, 95th Cong., 2d Sess. 9810. Reduction in the executive office of the President (91 Stat. 1633); Reorg. Plan No. 1 of 1977. Streamlining of the USIA and combining it with the cultural functions of the State Department, (91 Stat. 1636); Reorg. Plan No. 2 of 1977. Elimination of the duplication in the enforcement of the Employee Retirement Income Security Act. U.S. Code Cong. & Ad. News, 95th Cong., 2d Sess. 9815; Reorg. Plan No. 4 of 1978.

Congress has recently passed additional legislation to reform the legislative branch. Among the reforms are:

Financial disclosure, and outside income limitations (Ethics in Government Act of 1978. Pub. L. No. 95-521, 92 Stat. 1824);
Sunshine (open meeting) laws, (Government in the Sunshine Act of 1976, Pub. L. No. 94-409, 90 Stat. 1241).

¹ In Utah's Second Congressional District opposing incumbent Republican Congressman Dan Marriott.

may move in monolithic form in one particular ideological direction to threaten the legitimacy and the sovereignty of democratic government.

The failure of Congress to provide partial public funding of congressional campaigns denies to that part of our political process the cleansing rehabilitation that presidential campaigns have enjoyed since public funding.² As proof, if any were necessary, that any law is not necessarily better than no law, current election law, to some extent thrown out of balance by the Supreme Court through partial invalidation,³ has contributed to our present situation. It has placed intolerable burdens on the candidate and merely created new channels for the flow of special interest money. Our own proposals are based in part upon the necessity of working within alternatives for legislation left open by Supreme Court decisions.

Another line of related Supreme Court decisions, also based upon the First Amendment's speech clause, has granted corporate "speech" unprecedented constitutional protection and thereby seriously limited the control of the community over corporate political activity.⁴ This misguided precedent may lead to yet other limitations upon the community's capacity, through law, to distinguish between the commercial huckster and the political spokesman, or to regulate in other ways the abuses of money in the political system.

The Supreme Court in *Buckley v. Valeo*⁵ and in *First National Bank v. Bellotti*⁶ reveals a sensitivity toward corporate and other monied interests and a corresponding aloofness toward egalitarian considerations of the identity of the speakers and the quality and

² Federal Election Campaign Act of 1971. Pub. L. No. 92-225, 86 Stat. 3, as amended by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 and by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 425. The extent to which public funding's cleansing action may be defeated by particular candidates' behavior must await public response to announcements like this: "[John] Connally announced last week that he would forgo the federal matching funds that start flowing to presidential candidates in January. Instead, he plans to finance his campaign entirely with private contributions — thus freeing himself from the spending limits imposed on candidates who accept government money." NEWSWEEK, December 24, 1979, at 31. See note 30 *infra*.

³ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁴ *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977); *Virginia Board of Pharmacy v. Virginia Citizens' Consumer Council*, 425 U.S. 748, 769 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

⁵ 424 U.S. 1 (1976).

⁶ 435 U.S. 765 (1978).

quantity of speech which further erodes the capacity of the democratic community to preserve its own legitimacy. Another brand of marketplace economics, or perhaps only a warmed-over version of the old one, would appear to be in the process of canonization as constitutional dogma some 40 years after Adam Smith's ghost was exorcised from the Fourteenth Amendment. Saint Paul said that the love of money was the root of all evil.¹⁰ The inability or the refusal of the Court to distinguish between money and speech¹¹ threatens to render the community unable to limit by legislation the corruptors of our political system short of their own capacity for rapacity.

An examination of the values, both primary and instrumental, which underlie the First Amendment reveals no basis for the limitations upon Congress as the representatives of the community's interest imposed by the Supreme Court in *Buckley* and *Bellotti*. We would hope that scholarly debate and creative lawyering in later cases will lead to a change in direction.

We propose, in part, the public financing of congressional elections, both primary and general. This is an ambitious proposal, but we believe it is the only solution left open by the Court to the problems of rising campaign costs, the phenomenon of Political Action Committees, and the impact of current law which places the burden of campaign financing too heavily on the candidate and threatens to turn the House and the Senate increasingly into private clubs for the rich.

The focal point of our concerns and proposals is our belief that *ideas* and not money should be the motivating factor in the political decision-making process. Ideas have become increasingly obscured as campaigns have become more and more dependent on money and the pursuit of money. Our proposals would make it possible for real issues once again to gain prominence in the political arena, and would allow the candidate to wage a campaign based on ability to serve the people rather than ability to raise money. In addition, once elected, he or she would be free to make decisions based more completely on merit rather than the contribution ledger.

The 1978 election provides a unique and important opportunity to examine the full impact of election law reform, as well as the effects of the 1976 Supreme Court decision in *Buckley*. An examination of election reform legislation will be helpful in understanding

¹⁰ 1 Timothy 6:10.

¹¹ See Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

the current problem and what reforms may be accomplished within the framework established by the Supreme Court.

II. CAMPAIGN LEGISLATION

Congressional authority to regulate federal elections is clear.¹² Since 1867¹³ Congress has used this constitutional platform to launch several attempts to insure the legitimacy of the political process in the eyes of the electorate.¹⁴ From 1925 to 1971, however, little was accomplished. The Federal Corrupt Practices Act of 1925¹⁵ was poorly enforced or simply ignored for almost half a century.¹⁶ Public concern about American campaign financing practices did not produce further congressional action until the Federal Election Campaign Act of 1971.¹⁷ The public outrage kindled by Watergate was reflected in Congress' modification and expansion of the 1971 federal regulation of political campaigns in the Federal Election Campaign Act Amendments of 1974.¹⁸

The 1974 amendments contained four basic reforms. First, Congress limited *contributions* made to a candidate in any "election" (defined so as to permit separate contributions prior to a convention, a primary, and the general election). Individual contributors and authorized campaign committees were limited to \$1,000 contributions; political committees contributing to several candidates were limited to \$5,000 contributions. Individuals were limited to a \$25,000 aggregate contribution level to federal candidates in any calendar year.¹⁹

Second, *expenditure* limitations in the 1974 amendments reflected Congress' determination that only by limiting *both* contributions and expenditures could the corrosive effects of money upon the

¹² U.S. CONST. art. I, § 4 provides that "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof: but Congress may at any time by law make or alter such regulations except as to the places of choosing senators."

¹³ The Naval Appropriations Act of 1867, ch. 172, § 3, 14 Stat. 492, provided that "no officer or employee of the government shall require or request any workingman in any navy yard to contribute or pay any money for political purposes, nor shall any workingman be removed or discharged for political opinions."

¹⁴ See note 2 *supra*.

¹⁵ Ch. 368, tit. III, 43 Stat. 1070.

¹⁶ See BENSON, *supra* note 2, at 178.

¹⁷ Pub. L. No. 92-225, 86 Stat. 3 [codified in scattered sections of 2, 18 and 47 U.S.C. (Supp. II, 1971)].

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

¹⁹ 18 U.S.C. § 608(b) (Supp. IV, 1974) (repealed 1976).

political system be curtailed. Congress limited expenditures by individuals on behalf of but independent from a candidate to \$1,000; it limited a candidate's own expenditures (or his contributions to his own campaign) or expenditures by his family to \$25,000; and it limited aggregate expenditures from whatever source in any election.²⁰

Third, Congress provided *reporting and disclosure requirements* for political contributions.²¹

Fourth, the 1974 amendments provided *partial public funding of presidential elections*.²²

The day after these amendments became effective, persons of diverse political persuasion²³ subjected them to constitutional challenge in *Buckley v. Valeo*.²⁴ The plaintiffs in *Buckley* attacked the limitations on the giving and spending of money in political campaigns as violative of the basic First Amendment rights of free speech and association. The Court began its discussion of this charge by noting that the limitations operated "in an area of the most fundamental First Amendment activities."²⁵ Further, the Court refused to concede that since the Act limited usage of money only, the effect on speech would be incidental.²⁶ From these premises, the Court proceeded through a point by point investigation of the plaintiffs' contentions.

The Court had little difficulty in upholding the provisions for disclosure and public funding of presidential elections. The disclosure requirements were distinguishable facially from *NAACP v. Alabama*;²⁷ the enormous and compelling state interest in revelation

²⁰ *Id.* at § 608(a), (c). The difference between contributions and expenditures should be made clear. A contribution involves giving anything to another to help that person express his views. An expenditure, on the other hand, involves spending money to publish one's own views.

²¹ 2 U.S.C. §§ 431-56 (Supp. IV, 1974) amending 2 U.S.C. §§ 431-56 (Supp. II, 1972).

²² 26 U.S.C. §§ 9001-13 (Supp. IV, 1974) amending 26 U.S.C. §§ 9001-13 (Supp. III, 1973).

²³ The plaintiffs included Senators James Buckley and Eugene McCarthy, the Conservative Party of the State of New York, Civil Liberties Union, the American Conservative Union, and the Libertarian Party.

²⁴ 424 U.S. 1 (1976).

²⁵ *Id.* at 14. See Fleishmann, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Elections Campaign Act of 1971*, 51 N.C.L. REV. 389, 409-33 (1973).

²⁶ "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." 424 U.S. at 16. For an argument that such a statement effectively equates money with speech, see Wright, *supra* note 11.

²⁷ 357 U.S. 449 (1958). In that case the Court held unconstitutional Alabama's demand that

of contributions to avoid fraud and improper influence upon a candidate and potential officeholder was held to outweigh any facial infringement upon rights of association. This does not preclude, of course, later plaintiffs showing that these provisions of the amendments, as applied in a particular case, might infringe impermissibly upon those rights as proscribed by *Alabama*.

The plaintiffs in *Buckley* also attacked the Act's reporting and disclosure requirements on grounds of overbreadth. It was argued that since the Act required reporting by minor party and independent candidates and extended its coverage to small contributors, the governmental interest in the information was not pressing enough to validate such restrictions on First Amendment rights.²⁸ The Court disagreed and concluded that the interests of gathering information and of preventing corruption or the appearance of corruption were, again, enough to justify the disclosure requirements.²⁹

Finally, the plaintiffs urged the Court to hold the Act's presidential public financing provisions unconstitutional. In summarizing these provisions, the Court noted that a candidate was obliged to abide by expenditure limitations in order to be eligible for public funds.³⁰ Nevertheless, the provisions were upheld against arguments that they were contrary to the general welfare³¹ and violative of the First³² and the Fifth³³ Amendments. Public financing was characterized as a "congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing society."³⁴ The endorsement of public fund-

the NAACP reveal the names and addresses of its Alabama members and agents.

²⁸ 424 U.S. at 71. See generally Note, *The Constitutionality of Financial Disclosure Laws*, 59 CORNELL L. REV. 345 (1974).

²⁹ 424 U.S. at 68-72. Disclosure laws were seen to be "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68 (footnote omitted). For a recent discussion invalidating an extensive disclosure law, see *New York Civil Liberties Union, Inc. v. Acito*, 459 F. Supp. 75 (S.D.N.Y. 1978).

³⁰ 424 U.S. at 88. These expenditure ceilings were identical to those struck down earlier in the Court's opinion.

³¹ *Id.* at 90.

³² The plaintiffs argued "that by analogy to the Religious Clauses of the First Amendment, public financing of election campaigns, however meritorious, violates the First Amendment." *Id.* at 92.

³³ Since the provision supplied larger and equal sums to candidates of major parties, limited new party candidates to post-election funds, and denied funds to candidates of parties receiving less than 5% of the vote in the last election, the plaintiffs felt that invidious discrimination was present. *Id.* at 97.

³⁴ *Id.* at 92-93 (footnote omitted). Not all would agree with this view. See Sterling, *Public Financing of Campaigns: Equality Against Freedom*, 62 A.B.A.J. 197 (1976).

ing of federal elections by the Court — one might almost say the invitation issued Congress to move in this direction in place of the stricken expenditure limitations — should not be overlooked by Congress.

The plaintiffs in *Buckley* attempted a far-fetched analogy to the establishment clause to assert that public funding of presidential elections entangled the government in partisan campaigns and thereby "established" a particular party or candidate. The Court simply observed that the First Amendment prohibited any law respecting an establishment of religion but that no such prohibition existed for the speech clause; the enhancement of speech was not proscribed, only its abridgement.³⁵

More serious issues were raised by the contributions and expenditures provisions. The Court ultimately upheld all contribution limitations and found all expenditure limitations to be unconstitutionally intrusive upon protected speech. First, the impact upon speech was found to be less central when contribution limitations were at issue. Contribution limitation entails only a "marginal restriction upon the contributor's ability to engage in free communication,"³⁶ *i.e.*, a contributor who is not a candidate has many other means of expression, most of them most likely more central to his deepest fulfillment than contributing money to another's campaign. Accordingly the infringement upon speech is real but limited.

Second, the contribution limitations were upheld since "the Act's primary purpose — to limit the actuality and appearance of corruption resulting from large individual financial contributions . . ." ³⁷ was a state interest sufficiently compelling to permit real but limited infringements upon speech rights.

Finally, no less restrictive alternatives existed sufficient to meet the compelling state interest in avoiding the appearance and the reality of corruption if disclosure laws alone were insufficient;³⁸ state bribery laws only dealt with the more obvious and less subversive

³⁵ 424 U.S. at 92-93.

³⁶ *Id.* at 20-21.

³⁷ *Id.* at 26. The Court showed genuine concern for the extent to which "large contributions are given to secure political *quid pro quo* from current and potential office holders . . ." *id.*, but would not extend its analysis to include the "ancillary" interests promoted by the Act — *i.e.*, that the limits served to mute the voices of affluent persons and groups in the election process and thereby equalized the relative ability of all citizens to affect the outcome of elections. See Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, WISC. L. REV. 323, 327-400 (1977).

³⁸ 424 U.S. at 27-28.

and insidious forms of corruption.³⁹

In disallowing all expenditure limitations, the Court determined that the compelling state interests in avoiding the appearance or the reality of corruption of the political system had been met substantially by the other provisions of the 1974 Act or other provisions of law. The Court, in effect, found the contribution limitations to be a less restrictive alternative to the expenditure limitations and therefore struck the latter as being intolerably burdensome to political speech.⁴⁰ Most important, the Court found that, unlike the contribution limitations which only "marginally" infringed upon speech rights, expenditure limitations "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech."⁴¹

The Court decried any egalitarian role for government by rejecting the government's contention that expenditure limitations, including provisions limiting candidates' "contributions" to their own campaigns, increased correspondingly the potency of the speech of many non-wealthy speakers and, perhaps, rendered the "marketplace of ideas" more equitable.⁴²

Four justices dissented in part, all but Mr. Rehnquist objecting to the majority's disallowance of the expenditure limitations.⁴³ Justice White wrote most realistically of the political process:

The congressional judgment, which I would also accept, was that other steps [in addition to contribution limitations] must be taken to counter the corrosive effects of money in federal election campaigns. One of these steps is § 608(e), which, aside from those funds that are given to the candidate or spent at his request, or with his approval or cooperation, limits what a contributor may independently spend in support or derogation of one running for federal office. Congress was plainly of the view that these expenditures also have corruptive potential; but the Court strikes down the provision, strangely

³⁹ *Id.*

⁴⁰ *Id.* at 46-47, 51.

⁴¹ *Id.* at 19.

⁴² *Id.* at 48-49. The government's other argument, that the expenditure limitations were "necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities" was held inadequate since "controlled or coordinated expenditures are treated as contributions rather than expenditures." *Id.* at 46.

⁴³ Burger, C.J., White, J., Marshall, J. and Rehnquist, J. wrote separately concurring in part and dissenting in part.

enough claiming more insight as to what may improperly influence candidates than is possessed by the majority of Congress . . . and the President.⁴⁴

The reformer's belief that expenditure and contribution limitations would provide for more equal access to the political forum was rejected as an inappropriate consideration by government; the congressional and presidential experience that contribution limitation without expenditure limitation as well would lead to the subversion of the former through exploitation of expenditures only formally free from candidates' control was eviscerated.

The Court in *Buckley* was torn between competing paradigms. On the one hand, the fact that First Amendment rights are at issue means that the Court must give such legislation most careful scrutiny, regardless of the fact that legislative findings have been made or can be assumed.⁴⁵ This is because the First Amendment is indeed "first" as the container of the Constitution's most fundamental rights.⁴⁶ Therefore, more intense judicial scrutiny will be given as a matter of course.⁴⁷

Yet the subject matter of the legislation — the manner in which the political branches conduct campaigns — would seem to draw most appropriately upon the political wisdom of the political branches. Though this is not a "political question" as that phrase is used as a term of art,⁴⁸ many of the same practical considerations which underly that doctrine would seem to mitigate in favor of a degree of judicial deference to the political branches in their deter-

⁴⁴ 424 U.S. at 260-61.

⁴⁵ *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-43 (1978). In repudiating the Court's reliance on "the clear and present danger" test, Chief Justice Burger stated:

Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from a particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other methods will serve the States' interests should also be weighed.

Id. at 842-43. See also *Dennis v. United States*, 341 U.S. 494, 503-08, 510 (1951); *Whitney v. California*, 274 U.S. 357, 373-74, 376, 378-79 (Brandeis, J., concurring) (1927).

⁴⁶ *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937); *Whitney v. California*, 274 U.S. 357, 373, 377 (Brandeis, J., concurring) (1927); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877 (1963).

⁴⁷ *Supra* note 45; *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

⁴⁸ See Firmage, *The War Powers and the Political Question Doctrine*, 49 *U. COLO. L. REV.* 65, 75 (1977).

mination of how the integrity of the political process is best preserved.⁴⁹

While more broadly philosophical criticism of this case will await this article's analysis of the money spent in the 1978 elections, the emergence of political action committees (PACs) and the curtailment of the commercial speech doctrine by the Burger Court, more specific criticism of *Buckley* can be quickly noted.

First, the Court's jaunty assurance that the corrosive effect of dollars in our money-drenched political system can be met by the contribution limitations, rendering the expenditure limitations unnecessary, is breathtaking in its lack of reality.

Second, both the Warren and the Burger Courts have made generally unwise distinctions, between speech and conduct specifically, or symbolic speech, or "speech-plus."⁵⁰ The latter categories, not constituting "pure speech," are accorded a lesser level of protection and often competing governmental interests in the legislation in question overpower the speech-related interests. Now, in a case when such a distinction makes sense, the Court refuses to distinguish between "pure speech" and money. It is passing strange that a Court that sees the potent symbol of a burning draft card as "conduct" rather than speech⁵¹ cannot distinguish between money and speech.⁵² We do not believe that symbolic speech deserves less

⁴⁹ Addressing the question of Congressional power to regulate elections, Justice White quoted from *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934):

The power of Congress to protect the election of President and Vice-President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for Congressional determination alone.

Buckley v. Valeo, 424 U.S. 1, 258 (White, J., dissenting in part). Justice White added that the Court struck down the expenditure limits

strangely enough claiming more insight as to what may improperly influence candidates than is possessed by the majority of Congress that passed this bill and the President who signed it. Those supporting the bill undeniably included many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years.

Id. at 261.

⁵⁰ *Buckley v. Valeo*, 424 U.S. 1 (1976); *Spence v. Washington*, 418 U.S. 405 (1974); *Schacht v. United States*, 398 U.S. 58 (1970); *Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576 (1969); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *United States v. O'Brien*, 391 U.S. 367 (1968); *Brown v. Louisiana*, 383 U.S. 131 (1966); *NAACP v. Button*, 371 U.S. 415 (1963).

⁵¹ *United States v. O'Brien*, 391 U.S. 367 (1968).

⁵² *Buckley v. Valeo*, 424 U.S. 1 (1976).

protection than verbal speech because symbols often speak more deeply to the human soul than words. Witness the symbol of the cross. But *money is not symbolic speech*. Distinction between speech of any form — action, symbolism or words — and money seems clear. Protection from the speech or debate clause is not given the Senate elevator even when it carries Senator Goldwater, speech in hand, to the Senate floor. A means of providing speech is still simply a means. The same means can be turned against the furtherance of speech interests with as much force as the reverse; therefore, the need for community control arises. If this distinction between money and speech is accepted, it follows that less demanding findings than "compelling state interests" should suffice in order that the legislation in question passes judicial muster.

Third, the content-neutral nature of the expenditure limitations³³ should also have mitigated in favor of a less stringent degree of judicial scrutiny. There was no intent, nor any visible effect, likely to inhibit or restrain a particular ideology or message.

Fourth, the anti-egalitarian attitude of the Court in refusing to consider the entire effect of the expenditure limitations upon political speech was unfair. The Court refused to consider the possibility that the effect of the Act might be to increase the opportunities for speech for many while restricting speech rights for relatively few. The Court's position — that such a Robin Hood role was inappropriate for government — hardly comports with what government must do every day in almost every decision. Happy is the lawmaker, be he or she legislator, executive, or judge, who can make a decision without infringing upon the rights of one group as the rights of another are expanded. This is true of speech rights as with all others. Reputation rights of one group contract and libel law is narrowed³⁴ as speech rights of another expand. Privacy rights contract as speech rights expand with the contraction of what constitutes "fighting words."³⁵ Speech rights contract and property and privacy

³³ *Id.* at 259 (White, J., dissenting in part).

³⁴ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

³⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The Court unanimously upheld the conviction of a man who had gotten into a fight on a sidewalk after shouting derisive language at a policeman. In doing so, the Court affirmed that "fighting words," those "which by their very utterance inflict injury or tend to incite an immediate breach of peace," are not entitled to speech protection. The Court singled out certain categories of speech as not representing speech protected by the First Amendment because they are "no essential part of any exposition of ideas." *Id.* at 572. In *Feiner v. New York*, 340 U.S. 315, 316-18 (1951), the Supreme Court upheld a conviction of disorderly conduct resulting from a street corner orator's refusal

interests expand as cities are permitted to zone institutions which peddle sexually explicit material.³⁶ Privacy and sanctity of the home advance and speech contracts as prior restraint on radio broadcasts is approved.³⁷

In *Buckley*, the competing speech interests of many people of modest means were defeated by the speech interests of the wealthy few. Surely the metaphor of a "marketplace" becomes suspect when one party has cornered the market in the means to broadcast the message. There will be more on the revealing metaphors and economic implications of *Buckley* later; it is sufficient here simply to ask whether the exacting judicial scrutiny reserved for abridgements of speech is warranted when the net effect of the legislation is to increase the opportunity for meaningful speech for most people.

Finally, even if it is granted that the most intrusive level of judicial review should be given legislation that affects First Amendment rights as directly as do the 1974 Amendments, the necessity of controlling the effects of money in the political system is sufficiently compelling to allow such legislation to survive the most exacting judicial scrutiny. The Court's distinctions between the need for and the effects of the expenditures and the contributions limitations are artificial. In addition, the Court's rejection of the congressional determinations that both expenditure and contribution limitations in tandem were necessary to assure the survival of either as a prophylactic against corruption of the political process is irresponsible. The Court often and appropriately demands legislative findings before the means chosen to reach a legislative end are accepted. In an area so clearly within the greater competence of the political branches, the Court should offer some modicum of evidence beyond judicial

to obey a police command that he cease speaking. The speaker gave the impression to the police that he was endeavoring to stir up the blacks in the crowd against the whites. In both cases, the state interest involved in the decisions was the curtailment of violence — the fear that the words alone would so provoke an individual or audience that violence could result. The "fighting words" theory focused largely on the content of the speech and not the context within which it was spoken.

More recent Supreme Court decisions indicate that application of the "fighting words" doctrine must depend as much on the circumstances involved as the actual words uttered. This approach is best shown in the more recent case of *Cohen v. California*, 403 U.S. 15 (1971), in which the Court refused to classify offensive words worn on a jacket in public as "fighting words." The words were considered in light of the context in which they were used. The audience was not captive, the words were not aimed at a particular person and the words did not "intrude on the privacy of the home." Except in those instances, the government may not purge public dialogue of unwelcome words or prohibit unwelcome ideas. *Id.* at 21-22.

³⁶ *Young v. American Mini-Theatres*, 427 U.S. 50 (1976).

³⁷ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

assertion that in fact the corruption of the political process by unregulated money can be avoided by disclosure and contribution limitations without corresponding expenditure limitations. A carefully balanced and intricate piece of legislation was mangled by the Court and then left to totter on, notwithstanding that one leg is now three feet shorter than the other.

The 1976 revisions of the Federal Election Campaign Act were promulgated quickly in an effort to comply with *Buckley*. The basic contribution limitations of FECA 1974 were retained.⁵⁸ However, the fear that these limitations could be too easily circumvented⁵⁹ prompted Congress to go further and impose new limits on contributions to political committees.⁶⁰ FECA 1976 also discarded those provisions governing limitations on expenditures.⁶¹ Consistent with *Buckley*, the new Amendments condition all remaining expenditure limitations on acceptance of public funding.⁶² Public financing tragically was not extended beyond presidential races. It appears, then, that FECA 1976 does little more than preserve the *post-Buckley* status quo.

It is undeniable that the reforms of the last eight years have cleaned up the system to some degree, particularly in the publicly financed presidential elections. We need only to remember that just seven years ago the presidential race involved "fund-raising that approached extortion, satchels of cash passed by shadowy figures, the selling of ambassadorships, and many blatantly criminal activities."⁶³ However, the incomplete reform in congressional races in the

⁵⁸ The section of FECA 1974 that dealt with contribution limitations was repealed. FECA 1976 § 201(a)(4) (codified at 2 U.S.C. § 431(e) (1976)), but these limitations were transferred into FECA 1971 by creating a new section. *Id.* § 112(2) (codified at 2 U.S.C. § 441a-j (1976) amending 2 U.S.C. § 441).

⁵⁹ See H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 57-58 (1976).

⁶⁰ FECA 1976 § 112(2) (codified at 2 U.S.C. § 441a-j (1976)). The 1976 amendments prohibit individuals, political committees and associations from contributing more than \$1,000 per election to a candidate and his committees. *Id.* at § 441a(a)(1)(A). A multi-candidate committee is limited to contributions of \$5,000 per candidate per election. *Id.* at § 441a(a)(2)(A). Contributions to parties may not exceed \$15,000 from any multi-candidate committee or \$20,000 from any other person. *Id.* at § 441a(a)(2)(B). No individual or organization may give more than \$5,000 per year to "any other political committee". *Id.* at § 441a(a)(1)(C), a(a)(2)(C). Total contributions to candidates and committees by any individual are limited to \$25,000 per year. *Id.* at § 441a(a)(3).

⁶¹ What was left was transferred into FECA in 1971, 2 U.S.C. § 441a-j (1976).

⁶² *Id.*

⁶³ *Public Financing of Congressional Elections: Hearings Before the Comm. on House Administration, 95th Cong., 1st Sess. 40 (1977) [hereinafter cited as 1977 Hearings]* (statement of Fred Wertheimer, Vice-President for Operations, Common Cause).

wake of the Supreme Court decision in *Buckley* and the lack of any further action by Congress⁶⁴ have permitted the growth of excess in congressional elections, particularly in the areas of campaign financing and special interest influence.

III. THE 1978 ELECTIONS — MONEY AND THE SYSTEM

A. How Much Was Spent

A survey of 180 candidates in 90 races in 1978⁶⁵ shows enormous increases in spending for congressional elections over past years. The study indicates that nearly half of these candidates (80, or 44%) spent more than \$200,000 in 1978. That represents a 30% increase over 1974 when only 20 candidates spent in excess of \$200,000. Similarly, the number of candidates spending more than \$250,000 on their campaigns rose from 8 in 1974 to 47 in 1978 — an increase of 475%.

While in 1974 no candidate spent more than a half million dollars on a House race, in 1978 six candidates exceeded that amount in their attempts to gain a \$57,000-a-year job.⁶⁶

Federal Election Commission reports, released June 29, 1979, show that House and Senate candidates in 1978 *nearly doubled*⁶⁷ the amount raised in 1976. In 1976, House and Senate candidates raised

⁶⁴ A bill to provide partial public funding for congressional elections (H.R. 1, 96th Cong., 1st Sess. (1979)) failed to make the House floor. It was defeated in the House Administrative Committee by a vote of 17 to 8.

⁶⁵ Figures compiled by the Democratic Study Group and released by the chairman of that group, Rep. Abner Mikva (D-Ill.), January 15, 1979, on the floor of the House on introduction of H.R. 1.

⁶⁶ *Id.*

⁶⁷ In particular, media related campaign expenditures continue to escalate. MacNeil, *The People Machine — The Influence of Television on American Politics*, at 231-32, 235 (1968). During television's infancy, in 1952, NBC and ABC offered to sell time to legally qualified candidates and the practice established that year has continued and escalated. In 1962, candidates for off-year election spent \$20 million on broadcasting. By 1966, broadcast charges had risen to \$32 million. Most candidates spend 60-70% of their funds on television, and costs for such advertising have gone up 50% in the past four years. *TIME*, *infra* note 72, at 35. This is the major factor in the tremendous increase in campaign expenditures, and has contributed heavily to the need for reform.

Senator Edward Kennedy (D-Mass.) has described television as being "like a colossus of the ancient world, [standing] astride our political system, demanding tribute from every candidate for major public office, incumbent or challenger. Its appetite is insatiable, its impact is unique." *Hearings on the Federal Election Campaign Act of 1971 Before the Subcomm. on Communications of the Senate Comm. on Commerce, 92d Cong., 1st Sess. 172-73 (1971).*

\$104.8 million; in 1978, \$199.4 million.⁶⁸

In my own election campaign, I spent \$140,000 during the general election (and \$90,000 to win the nomination from a field of 5 candidates and the primary election). My opponent, an incumbent Congressman, more than doubled that by spending over \$300,000 in the general election alone.⁶⁹ In addition to being a dramatic example of the rise in campaign spending, my particular race also served as an example of other problems that plague the election process and beg for reform: the increased influence of Political Action Committees, the growing advantages of incumbency, the unlimited amount of money a candidate may contribute to his or her own campaign and the escalating costs of media exposure.

B. *Financing by the Candidate*

Closely related to the problem of the rapidly rising costs of getting elected is the enormous advantage enjoyed by the wealthy candidate under current campaign laws and the concomitant burden those laws place on the candidate of average income.

Buckley invalidated the limits on the use of a Congressional candidate's personal wealth which had been in effect since 1972.⁷⁰ The inequities caused by this decision were apparent immediately. For example, in the 1976 Senate campaign in Pennsylvania, the winner, Senator Heinz, outspent his opponent by about 3:1, using \$2.5 million of his own money.⁷¹ In the 1978 elections, examples of the use of personal wealth are plentiful. In Manhattan, William Green, an heir to the Grand Union supermarket chain, retained his seat in Congress by defeating Democrat Carter Burden, an heir of the Vanderbilt family. The pair spent over \$850,000 on the race, of which about half came from their personal resources.⁷²

Personal sources of wealth are particularly valuable in the beginning of a campaign when an unknown candidate, whose chances for success are uncertain, has great difficulty obtaining contributions. The wealthy candidate has the advantage of using his own money

⁶⁸ See FEC Press Release, June 29, 1979.

⁶⁹ See reports of the Firmage for Congress Committee, and the Committee to Re-elect Congressman Marriott, filed with the FEC in Washington, D.C. and with the Secretary of State of Utah.

⁷⁰ 424 U.S. 1, 51-54 (1976). Any limits would be contingent on acceptance of public financing.

⁷¹ 1977 Hearings, *supra* note 63, at 36.

⁷² *Time*, Nov. 20, 1978, at 35.

during this period, while the candidate of more modest means struggles for contributions.

While these obvious abuses of wealth are of serious concern, a problem of equal merit is the dilemma the candidate of modest means faces because, under current law, he is the only one who can contribute an unlimited amount to his own campaign. As the only lawful single source of substantial credit, the pressures upon the candidate to deficit finance parts of his own campaign are enormous. Assurances are given at the time, of course, that "later fundraising will retire the note well before election day." But the failure rate for political fund-raisers approximates that of the rhythm method of birth control. And after defeat, money-raising capacity declines from that high point. I cite my own case as an example: following convention and primary contests which eliminated four other candidates, my campaign was already in debt going into the general election. Because of a late September primary, we were unable to build an early campaign treasury and so we went into the general election with no money. We had been forced to spend all the money we raised in defeating four other candidates in convention and primary elections. I was faced with a difficult decision: in order to reserve television advertising time for the general election, an immediate \$53,000 was necessary. Only one person was capable of infusing that kind of money into the campaign quickly: me. One could argue for more self-restraint, but it is difficult to make the kind of emotional and mental commitment required by a campaign, to have others depending on you, and to then give up directly after receiving your Party's nomination because of lack of money. In addition, members of the finance committee were aware of campaign law provisions after *Buckley* which left me exposed as the only source of credit without the protection of a contribution or expenditure limit. This not only led to pressures upon me to extend credit to the campaign, but it naturally took much of the pressure off them to raise quick emergency money. I am confident that my experience is not unusual, particularly for challengers. At the time of the election, I had a personal debt remaining of \$57,000,⁷³ and while promises of help have been made, very little has been forthcoming. I still face a financial crisis. The point of this personal example is that because of the imbalance in the law, in part arising from the imbalance

⁷³ My overall campaign debt is currently about \$40,000. See reports of the Firmage for Congress Committee, filed with the FEC in Washington, D.C., and with the Secretary of State of Utah.

ance in election law caused by *Buckley*, a non-wealthy challenging candidate is uniquely vulnerable to pressure to extend credit to his campaign. He may be faced with extreme personal sacrifice to meet the financial obligations of his campaign to offset an incumbent or wealthy opponent.

D. *The Growing Paper of Corporations and Political Action Committees (PACs)*

Common Cause has called the success of public financing in the presidential election a "quiet revolution."⁷⁴ The impact of special interest money on congressional campaigns, however, is rapidly increasing, in part because the presidential general election is now publicly financed, thus causing the special interests to divert a majority of their money into congressional campaigns.⁷⁵ In Congressional campaigns, Political Action Committees (PACs) are the fastest growing influence,⁷⁶ proliferating rapidly under the present campaign finance laws. Formed primarily by business and labor, non-party non-candidate-affiliated PACs have increased from 753 in the 1976 elections to 1,938 in the 1978 elections.⁷⁷

1. *The Legislative and Judicial History.* The growing involvement of PACs has increased the likelihood that the vast economic interests they represent could so dominate the political process as to jeopardize the integrity of that process.⁷⁸

Concern over big business and union influence in politics has been the catalyst for most election finance reform legislation since the early 1900s,⁷⁹ and the need for reform has never been more urgent

⁷⁴ 1977 Hearings, *supra* note 83, at 10.

⁷⁵ *Id.* at 12 (statement of Rep. Phillip Burton (D-Calif.)).

⁷⁶ *Id.* at 32 (statement of Fred Wertheimer, Vice-President for Operations, Common Cause, quoting Bill Brock, Chairman of the Republican National Committee).

⁷⁷ Federal Election Commission press release of May 10, 1978, "FEC Releases Year-End 1978 Report on 1977-1978 Financial Activity of Non-Party Political Committees."

⁷⁸ See, e.g., Epstein, *Corporations and Labor Unions in Electoral Politics*, 42B ANNALS 33, 35 (1976).

⁷⁹ President Theodore Roosevelt was so convinced of the corruption and improper influence of corporations in the presidential election of 1904 that he urged Congress to ban all political contributions by corporations. 40 CONG. REC. 96 (1905). The evidence of extensive corruption and excessive corporate influence was so overwhelming that Congress passed the Tillman Act of 1907, ch. 420, outlawing all corporate political contributions. 34 Stat. 864 (repealed 1909). Congress went a step further to limit the power of wealth in 1910 by requiring campaign committees to report and disclose contributions and disbursements in congressional elections. Act of June 25, 1910, ch. 392, 36 Stat. 822. In 1925, Congress passed the Federal Corrupt Practices Act, ch. 368, tit. III, 43 Stat. 1070. The Tillman Act, with some revisions, became codified as § 313 of that Act, which was codified as 18 U.S.C. § 610. See Sproul, *A Primer for Corporate and Union Political Action Committees — Part I*, 24 PRAC. LAW 39, 41-42 (July 15, 1978).

than it is today. We must find a way to control, within the framework provided by the Court, the growing influence of money in the electoral process, and the threat to the system created by the biggest political growth industry today, the Political Action Committee.

The *Buckley* Court noted the potential for proliferation of PACs but indicated that no limit should be placed on the number of funds that may be formed through the use of subsidiaries or divisions of corporations or of local banks and regional units of national labor unions.⁸⁰ In taking this position, the Court cited with approval the FEC's advisory opinion in response to a request by Sun Oil Company regarding the organization of its corporate political action and

Prior to 1943, labor unions utilized monies taken directly from treasuries to make campaign contributions and expenditures. The resulting unprecedented surge of labor political activity prompted demands for legislation curtailing it. A. HEARD, *THE COSTS OF DEMOCRACY*, at 190 (1960). Congressional response to these demands was first seen in the War Labor Disputes (Smith-Connally) Act of 1943, ch. 144, 57 Stat. 163, passed as a wartime measure. The Act extended the prohibition against corporate campaign contributions to labor unions for the duration of World War II. With the passage of the Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, § 304, 61 Stat. 136, 159, the restrictions on union political contributions were made permanent. By 1956, labor had adjusted to the prohibition as exhibited by the launching of the Committee on Political Education (COPE) which handles monies coming from individual contributions and accounts for such monies separately from other union accounts. COPE replaced the AFL's Labor's League for Political Education (created in 1947) and the CIO's PAC (created in 1943). See H. FALLKNER & M. STAN, *LABOR IN AMERICA* at 322 (1957).

Until 1971, no major changes were made in the laws governing the political activity of corporations and labor organizations, and for the most part, the existing laws were almost completely ignored. During this entire period, corporate and labor campaign contributions and expenditures played an increasingly important role in the election process, reaching the candidate in a variety of indirect ways. Epstein, *supra* note 78, at 36-38. In 1971, a law was passed which made such contributions difficult to disguise. The legislation required the disclosure of major gifts. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3. However, it did not take effect until April of 1972, and because of a loophole in the law, only contributions from that time on had to be disclosed. This led to a race, particularly in the Nixon campaign, to obtain massive contributions before that date. As a result, at least \$20 million was collected before the deadline and nearly \$1.5 million of that amount was laundered to conceal its source. See Epstein, *supra* note 78, at 44, and Kirschten, *Corporate PACs — the GOP's Ace in the Hole?*, 10 NAT'L J. 1899, 1901 (1978).

The Federal Election Campaign Act of 1971 contained significant amendments to § 610. Sproul, *A Primer for Corporate and Union Political Action Committees — Part I*, 24 PRAC. LAW., at 41-42 (July 15, 1978). Political Action Committees were given the green light by this Act and guidelines were provided for their operation. Largely as a result of Watergate, the 93rd Congress, in 1974, passed amendments to strengthen FECA. *Supra* note 18. With respect to corporate and union activity, the legislation increased the fine for violation of § 610 and amended § 611 to affirm that corporations and unions having government contracts could set up segregated funds.

⁸⁰ 424 U.S. 1, 28 n.31 (1976). The Court noted that in 1972 approximately 1,824,000 active corporations filed federal income tax returns. In the same year, 71,409 local unions were chartered by national unions. *Id.*

employee political giving program.⁸¹ Epstein has noted that the FEC's decision in the Sun Oil case is significant because "it provides clear guidelines for the establishment of both Political Action Committees and employee political donation plans."⁸²

The Court's sweeping language in *Buckley* prohibiting limitations on political expenditures prompted some commentators to predict the unconstitutionality of the prohibition on partisan expenditures by corporations and unions.⁸³ Other analysts predicted that the prohibitions would survive constitutional scrutiny as a reasonable regulation of corporate and union political activity.⁸⁴ A recent case has further complicated the picture.

In *First National Bank v. Bellotti*,⁸⁵ the Supreme Court addressed the constitutionality of a statute prohibiting corporate political expenditures for the first time.⁸⁶ At issue was a Massachusetts statute that prohibited corporations from making contributions or expenditures "for the purpose of aiding, promoting or preventing the nomination or election of any person to public office or . . . [of] influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."⁸⁷ Appellant corporations wanted to spend

⁸¹ Federal Election Commission, Advisory Opinion 1975-23, 40 Fed. Reg. 56581-56588 (1975). See also Epstein, *supra* note 78, at 53. The ruling construed the application of § 610 to corporations and made it clear that employees and stockholders could be solicited for voluntary contributions, and that corporate funds could be used for administration. Kirschen, *supra* note 79, at 1902. With the Sun Oil decision, the corporations finally had a clear legal basis for soliciting and disbursing political contributions through their Political Action Committees. Since the Sun Oil decision permits corporations to solicit contributions to PACs from employees as well as stockholders, a much larger base exists for solicitation than is available to unions.

⁸² Epstein, *supra* note 78, at 55.

⁸³ E.g., Clagett & Bolton, *Buckley v. Valeo, Its Aftermath and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VAND. L. REV. 1327, 1372, 1376 (1976).

⁸⁴ Note, *Corporate and Union Political Contributions and Expenditures Under 2 U.S.C. § 441(b): A Constitutional Analysis*, 1977 UTAH L. REV. 291.

⁸⁵ 435 U.S. 765 (1978).

⁸⁶ The court had dealt with such prohibitions previously but had avoided their constitutional implications. See, e.g., *Pipefitters Local 562 v. United States*, 407 U.S. 385 (1972) (approving corporations or union controlled segregated funds, used for political purposes, to which contributions are voluntarily made); *United States v. UAW*, 352 U.S. 567 (1957); *United States v. CIO*, 335 U.S. 106 (1948) (holding that a statute did not prohibit expenditures made to publish a periodical distributed to union members containing political statements).

⁸⁷ MASS. GEN. LAWS ANN. ch. 55, § 8 (West 1978).

money to publicize their views in the referendum on a proposed tax.⁸⁸

In declaring the Massachusetts statute unconstitutional, the Supreme Court began with the question, "whether [the statute] abridges expression that the First Amendment was meant to protect."⁸⁹ This approach to the issues in the case required a separation of the speech involved from the speaker. The speech proposed by the corporations in *Bellotti* involved discussion of governmental affairs and, as such, fell squarely within the parameters of the First Amendment's strongest protection.⁹⁰ Such speech, the Court held, could be prohibited only if the state could show a compelling interest.⁹¹ Neither the corporate identity of the speaker nor the argument of Massachusetts that the prohibition promoted the role of the individual in the electoral process,⁹² nor the argument that the prohibition protected shareholders of a corporation by preventing the use of corporate funds to promote views inconsistent with those of shareholders⁹³ was enough to tip the scales of exacting scrutiny in favor of the statute.

Juxtaposition of *Bellotti* with the prior case of *Buckley v. Valeo*,⁹⁴ where federal statutory limitations on individual expenditures were held invalid, prompted Justice White to observe: "As I understand the view that has now become First Amendment jurisprudence, the use of corporation funds, even for causes irrelevant to the corporation's business, may be no more limited than that of individual funds."⁹⁵ Such analysis would make the constitutional invalidation of federal prohibitions on corporate expenditures for partisan elections all but inevitable.⁹⁶ Even though the Court covered its flanks on this point by noting that "Congress might well be able to demonstrate the existence of real or apparent corruption in independent candidate elections . . ."⁹⁷ there is serious doubt whether such a

⁸⁸ 435 U.S. at 769.

⁸⁹ *Id.* at 776.

⁹⁰ *Id.* at 776-77. See *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940).

⁹¹ *First National Bank v. Bellotti*, 435 U.S. at 786.

⁹² *Id.* at 788-92.

⁹³ *Id.* at 792-95. The Supreme Court in the flag salute and New Hampshire license plate cases, found the compulsion of speech to be akin to restraints upon speech and hence an infringement upon speech rights protected by the First Amendment. *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁹⁴ 424 U.S. 1 (1976).

⁹⁵ 435 U.S. at 821 (White, J., dissenting).

⁹⁶ 2 U.S.C. § 441b (1976).

⁹⁷ 435 U.S. at 788, n.26.

showing would be viewed as a compelling interest sufficient to justify the restriction on corporate political speech.

The Court in *Bellotti* was quite appropriately sympathetic to the rights of the hearer to hear the message. But other issues of controlling importance were overlooked by the Court. The protection given the corporate speaker by the *Bellotti* decision is not mandated by the First Amendment nor by wise public policy.

First, the most fundamental reasons given for the preferred position of First Amendment rights,⁹⁸ manifest in searching judicial

⁹⁸ Cardozo in speaking of what came to be called the "incorporation doctrine" (he called it "absorption"), referred to those rights so fundamental that they were "implicit in the concept of ordered liberty," "the very essence of a scheme of ordered liberty." The first of such rights he identified with the First Amendment: "This is true . . . of freedom of thought, and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 325-27 (1937). See Brandeis' classic statement of these fundamental values — both ultimate and instrumental — which underlie the First Amendment, in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

Justice Holmes in dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919), observed that:

[p]ersecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that, the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

John Milton, addressing Parliament in the famous *Areopagitica* — A Speech for the Liberty of Unlicensed Printing (1644), stated:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worst, in a free and open encounter? Her confuting is the best and surest suppressing.

Id. at 409.

John Stuart Mill, in his classic argument for the freedom of opinion in *ON LIBERTY* ch. 2 (1859), stated that such freedom is necessary to mental well-being because:

First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility. Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied. Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner

scrutiny of legislation and a corresponding diminution of majoritarian principles, simply do not apply to corporations. The focus in *Bellotti* on the rights of hearers to the exclusion of an analysis of the nature of the speaker and the speech led the Court seductively down a path it should not go. Basic First Amendment rights — of speech, association and religion — are all based upon the necessity of the soul for human dignity, freedom of conscience, self-fulfillment, choice: the full expression of personhood. These are the ultimate values for which speech is essential; they underlie the religion and association provisions as well as the speech clause and provide coherence and integrity to that greatest of amendments. These rights, by their nature, inhere to human beings. They do not attach to corporations artificially constructed and protected by the state as money-making and investing institutions designed for particular and limited purposes. To remove community control over its own creature is to loose the monster.

Second, both *Buckley* and *Bellotti* fail to survive an analysis of their advancement of First Amendment purposes based on instrumental as well as primary values. The most accepted defense of the preferred position of the First Amendment based upon instrumental values has been its seminal role in democratic government and the political process.⁹⁹ Justice Holmes spoke of a "free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market."¹⁰⁰ Justice Brennan noted our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, wide-open . . ."¹⁰¹ Justice Brandeis in *Whitney* justified the pre-eminence of the First Amendment not only on the basis of its primary values, but also on the basis of its instrumental political role: "freedom to think as you will and to speak as you think are means indispensable

of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct.

See also *New York Times v. Sullivan*, 376 U.S. 254 (1964); *United States v. Caroline Products Co.*, 304 U.S. 144 (1938); *Gitlow v. New York*, 268 U.S. 652 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁹⁹ A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); *United States v. Caroline Products Co.*, 304 U.S. 144 (1938); *Stromberg v. California*, 283 U.S. 359 (1931); *Whitney v. California*, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

¹⁰⁰ *Abrams v. United States*, 250 U.S. 616, 630 (1919).

¹⁰¹ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

to the discovery and spread of political truth. . . ."¹⁰²

But it is futile to talk of a "marketplace of ideas" or "free trade in ideas" if corporate or industrial wealth comes to hold a monopoly over the means of political expression. The Court's rejection of the egalitarian argument made in *Buckley*, that the overall impact of the 1974 amendment to the Federal Election Campaign Act would increase the impact of political speech for many more than it would affect in the opposite way the rights of a few, has a rough analogue in *Bellotti*. The qualitative judgment underlying in part our contentions is that the corporate political message is to political dialogue what military music is to music. That element of rich political dialogue in which "deliberative forces prevail over the arbitrary,"¹⁰³ in which "freedom to think as you will and to speak as you think,"¹⁰⁴ has little to do with a massive corporate huckstering campaign. The rationale supporting the instrumental political value of the First Amendment protection of speech is no less dependent upon human qualities of cognition and dialogue than the more fundamental and primary values associated with the full development of personhood and human dignity.

The compelling state interest in preserving the integrity of the political system from being corrupted or co-opted by enormous sums of money available to corporate managers, if unchecked by the state, should prevail over whatever degree of protection the First and Fourteenth Amendments afford corporations. Here again, the sensitivity of the Court to monied and corporate interests is all the more dramatic in contrast to its insensitivity to the egalitarian argument: it is imperative that the Court should play a decisive role in assuring that the various checks and balances and interest groups within our governmental and economic systems do not become so disparate as to render any metaphor of the "marketplace" completely unrealistic.

Finally, the Court in *Bellotti* could have recognized that corporate political speech was not entirely unprotected by the First Amendment, even though the value to society of such speech and hence the level of protection was markedly lower than that of other forms of political, artistic and cultural expression, and could still have upheld the Massachusetts statute. To the extent that the First Amendment is designed to protect our system of representative

¹⁰² *Whitney v. California*, 274 U.S. 357, 375 (1927).

¹⁰³ *Id.* at 375 (Brandeis, J., concurring).

¹⁰⁴ *Id.*

democracy, any expression that causes the electorate to ponder, form, and express its will in that process should be accorded First Amendment protection.¹⁰⁵ Clearly, however, the Court's analysis in *Bellotti* stopped at this first step of what should be a two-step analysis. Because the statute in question in *Bellotti* promoted the political participation of individuals while, at the same time, inhibiting such expression by corporations, these competing interests should simply have been weighed. At this stage of analysis, the Court would have been able to see that the Massachusetts statute ultimately could only promote the political system that the First Amendment protects.

In a series of statements from the flag salute case¹⁰⁶ through its most recent reaffirmation in *Wooley*,¹⁰⁷ the Supreme Court has equated the power to compel speech with the power to censor speech. It may be questioned whether the real corporate owners — the stockholders — are any less compelled by corporate managerial decision to speak political words they would not otherwise support in factual situations such as *Bellotti* than the citizens forced to serve as mobile billboards by the New Hampshire law.¹⁰⁸

Bellotti's refusal to consider the destructive potential that corporate political speech has for a healthy individual-oriented political arena may not be surprising to some. The Court has recently granted First Amendment protection to another heretofore unprotected type of corporate speech, commercial speech.¹⁰⁹ The commer-

¹⁰⁵ See Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 9-14 (1979).

¹⁰⁶ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

¹⁰⁷ *Wooley v. Maynard*, 430 U.S. 705 (1977). Here, the court invalidated a New Hampshire law which required passenger car license plates to bear the state motto "Live Free or Die."

¹⁰⁸ Even the recent court pronouncement in *Hudgens v. NLRB*, 424 U.S. 507 (1976), overturning *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968), supports the proposition that the First Amendment forbids forced expression. The Court's rationale, in brittle fashion, turned on whether a suburban shopping mall was more like a company town, where First Amendment speech guarantees would be protected, [*Marsh v. Alabama*, 326 U.S. 501 (1946)], or more "normal" private property, akin to one's home, where the rights of others under the First and Fourteenth Amendments normally would not intrude. The Court found a shopping mall to be more akin to the home than to the company town. A more defensible rationale from a First Amendment standpoint for holding that corporations will not be compelled by the First and Fourteenth Amendments to allow labor picketing on corporate property would be that of *Wooley* and *Barnette*: the First Amendment forbids the compulsion of speech as it forbids the censorship of speech.

¹⁰⁹ "Although the Court never has defined [commercial speech] with precision, its meaning is reasonably settled. 'Commercial speech' refers to business advertising that does no more than solicit a commercial transaction or state information relevant thereto." Jackson & Jeffries, *supra* note 105, at 1.

cial speech doctrine, begun by the Court in *Valentine v. Christensen*,¹¹⁰ allows greater regulation of commercial speech than would normally be permitted. The Court's recent elevation of corporate political and commercial speech to its current protected status can be seen as a different but parallel example of an unfortunate and constitutionally unsound concern for the First Amendment rights of wholly artificial entities.

Although it can be conceded that political speech, from whatever source, is important enough to be accorded First Amendment protection,¹¹¹ commercial speech is not at all concerned with any of the reasons we have discussed for protecting the freedom of speech: it has precious little to do with human dignity or individual self-fulfillment, it does not contribute significantly to the marketplace of ideas, and it does not qualify as political speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹¹² the Court brushed aside classic First Amendment analysis and prohibited Virginia's regulation of the advertising of prescription drug prices by pharmacists. Instead, an economic discussion reminiscent of the discredited substantive due process doctrine was employed.¹¹³ Although it would appear that the Court is open to persuasion on the degree of protection to be accorded commercial speech,¹¹⁴ *Virginia Board of Pharmacy*, when combined with *Bellotti*, reveals a disturbing constitutional capitulation to a society increasingly dominated by corporate manipulation.

It is hoped that the Court would move toward greater latitude for state control of corporate activities, including commercial speech, and recognize pre-eminent congressional competence in election reform: recognizing that money and speech are not synonymous,¹¹⁵ thus narrowly reading both *Buckley* and *Bellotti*. At the very least, the Court must recognize through realistic case law the potential for enormous corruption of the political system by the influx of corpo-

¹¹⁰ 316 U.S. 52 (1942).

¹¹¹ For a cogent argument that all corporate speech is at base commercial and should not be accorded First Amendment protection, see Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 82 IOWA L. REV. 1 (1976). "The crucial consideration is not the content of the speech but whether the speech can be attributed to the choice of a free agent." *Id.* at 35.

¹¹² 425 U.S. 748 (1976).

¹¹³ See notes 147-51 and accompanying text *infra*. See Jackson & Jeffries, *supra* note 105, at 25-40.

¹¹⁴ The court recently upheld a Texas statute that prohibited the practice of optometry under a trade name. *Friedman v. Rogers*, 440 U.S. 1 (1979).

¹¹⁵ *Wright*, *supra* note 11.

rate money unrestrained by law, in candidate elections,¹¹⁶ as distinguished from the strict *Bellotti* holding relating only to issue elections, thus preserving what is left of community control over corporations in the election process after *Bellotti*. To do less, very likely not to do more, will result in the capture of the political process by the corporate interests of the country.

2. *PAC Contributions*. In May 1976, Congress enacted new election law amendments to conform with the Court's ruling in *Buckley*.¹¹⁷ Section 610 was modified and transferred from Title 18 to Title 2.¹¹⁸ With all legal roadblocks removed, political action committee activity began to skyrocket. In 1972, only \$8.5 million was expended by PACs in races for the Senate and House. By 1974, that figure had risen to \$12.5 million, and by 1976 the figure was \$22.6 million.¹¹⁹ A summary of the year-end 1978 figures, released by the FEC on May 10, 1979,¹²⁰ indicates that of the 1,938 PACs involved in the 1978 elections, 1,459 of them contributed a total of \$35.1 million to federal candidates. The following is a breakdown of who received that money:¹²¹

Type Candidate	Support in Millions	Type Candidate	Support in Millions
House	24.92	Open Seat (no incumbent)	7.37
Senate	10.13	Democrats	19.73
Presidential	.05	Republicans	15.35
Incumbents	19.98	Minor Party & Independents	.02
Challengers	7.75		

¹¹⁶ See notes 83-84 and accompanying text *supra*; notes 94-97 and accompanying text *supra*.

¹¹⁷ Pub. L. No. 94-283, 90 Stat. 475 (1976).

¹¹⁸ PACs were limited to \$5,000 contributions to candidates, to party committees, and all other political committees, in addition to the previous limit on candidates. 2 U.S.C. § 441a(a)(2). Additional rules governing corporate and union political activity are found in regulations drafted by the Federal Election Commission, 11 C.F.R. ch.1 (adopted by Congress on April 13, 1977), and in recent advisory opinions of the Commission. See Sproul, *supra* note 79, at 42.

¹¹⁹ 1977 Hearings, *supra* note 63, at 32 (statement by Fred Wertheimer, Vice-President for Operations, Common Cause). In 1976 only 23 labor-related PACs and 9 corporate or business-related PACs either received or expended more than \$100,000. FEC Disclosure Series #8, *Corporate Related Political Committees Receipts and Expenditures*, 1976 Campaign, 3 (Sept. 1977); and FEC Disclosure Series #10, *Labor Related Political Committees Receipts and Expenditures*, 1976 Campaign 1 (Jan. 1978).

¹²⁰ FEC Press Release, *FEC Releases Year-End 1978 Report on 1977-78 Financial Activity of Non-Party and Party Political Committees*, May 10, 1979, p.1.

¹²¹ *Id.* at 1.

The following figures detail contributions according to committee type¹²² (figures are in millions of dollars):

Committee Type	Type of Candidate			Party Affiliation			Candidate Status		
	Pres.	Sen.	Hs.	Dem.	Rep.	Ind.	Inc.	Chal.	Open
Corporation	.01	3.6	6.1	3.6	6.1	.0	5.8	2.0	2.0
Labor	.03	2.8	7.4	9.7	.6	.007	6.1	2.2	2.0
No connected organizations									
Ex-Citizens for the Republic	.001	.7	1.9	.7	1.9	.023	.7	1.1	.7
Trade/Membership/Health									
Ex-American Medical Political Action Committee/Gun Owners of America	.002	2.8	8.7	5.0	6.5	.005	6.7	2.3	2.5
Cooperative									
Ex-Mid-America Dairymen, Inc.	.009	.2	.7	.6	.2	0	.6	.08	.2
Corporations Without Stock									
Ex-Northwestern Mutual Life PAC	0	.03	.1	1	.04	.0005	.07	.02	.03
	.05	10.1	24.9	19.7	15.3	.015	19.9	7.7	7.4

Some interesting conclusions may be reached from an examination of these figures. Labor PACs contributed almost exclusively to Democrats, making them the only category of PAC to demonstrate a strong party loyalty. \$9.7 million went to Democrats, while only \$.6 million went to Republicans.

When the corporate campaign committees are joined with the traditional trade association and business related committees, it becomes apparent that such business-related groups can now heavily outspend labor. The May 10, 1979 figures show that while the labor committees spent only \$10.33 million in federal races, the combined business-related PACs spent \$22.25 million.¹²³

The influence of corporate and business PACs is just beginning to be felt. Labor is not likely to increase much over the unions now politically active, while business-related PACs could proliferate by the thousands.¹²⁴ In addition, some companies will probably begin new forms of political involvement, such as payroll deduction plans, and registration and all-out get out the vote drives.¹²⁵

Ideological and single-issue groups have been organizing PACs with great success although in much smaller numbers than either labor or business. The most successful have been the radical right

¹²² *Id.*

¹²³ *Id.* at 3. This figure is obtained by combining the figures for corporations, trade PACs, cooperatives and corporations without stocks.

¹²⁴ See note 80 *supra*.

¹²⁵ Epstein, *An Irony of Electoral Reform*, 39 AEI J. ON Gov. & Soc. (1979).

groups such as the Committee for the Survival of a Free Congress, the Citizens for the Republic, and the National Conservative Political Action Committee. These three committees alone contributed nearly \$1 million to candidates. Such ideologically motivated political action committees can influence the political process by financially supporting or opposing a candidate or issue. No limits are placed on the amount the committee can spend when it is independently supporting or opposing a candidate. For example, the National Conservative Political Action Committee (NCPAC) plans to spend \$700,000 over the next year to defeat five liberal Democratic Senators.¹²⁶

3. *PACs and Incumbency.* The ideology of most PACs seems to be the "ideology of incumbency."¹²⁷ Aside from the impact of the dollar amounts, the most important statistics in the FEC report deal with incumbents. Incumbents received \$19.98 million from PACs in 1978, while challengers received \$7.75 million (open seat candidates received \$7.37 million).¹²⁸

In 1978, for example, corporate political action committees gave \$5.8 million to congressional incumbents and \$2 million to their challengers. The political committees associated with trade, membership and health groups gave \$6.7 million to incumbents and \$2.3 million to their challengers.¹²⁹

Although it was widely believed that Republicans would dominate corporate contributions, an analysis of the facts reveals that all categories of PACs are attracted by incumbency. In 1976, not surprisingly, contributions to Republican incumbents in the House and the Senate, for example, strongly outdistanced corporate contribu-

¹²⁶ CBS Evening News, Monday, Sept. 10, 1979. NCPAC plans to use print, radio and television, and to direct mail aimed at particular groups of voters. *Id.* Such an influx of special interest money can obviously seriously distort a given contest. *Id.* at 4. (All such ideological groups contributed only \$1.2 million in 1976; see 1977 Hearings, *supra* note 63, Wertheimer, at 34.) In 1978, Ronald Reagan's PAC, Citizens for the Republic, contributed \$433,486 to conservative Republicans. The committee expanded his ability to contribute and to accumulate IOUs for a possible future presidential try. His lead has been followed by George Bush, John Connally, and Robert Dole, who established PACs and made contributions in the 1978 elections. See III Cong. Insight, Feb. 16, 1979, at 3 (Cong. Insight is published by Cong. Q., Inc.). Possibly a more telling demonstration of the increasing power of ideological PACs is the amount of money such committees received from contributors. The three committees previously mentioned list gross receipts of over \$8 million (FEC Press Release, *supra* note 120 at 5).

¹²⁷ See 1977 Hearings, *supra* note 63, at 33 (statement of Fred Wertheimer, Vice-President for Operations, Common Cause).

¹²⁸ FEC Press Release, *supra* note 120, at 1.

¹²⁹ *Id.* at 3.

tions to their Democratic challengers. But Democratic incumbents in the House and the Senate also outdrew their Republican challengers in corporate contributions.¹³⁰ The incumbent advantage in receiving special interest contributions is, in a very real sense, a circular situation: "incumbents win because they get most of the money, and they get most of the money because they are incumbents."¹³¹

One PAC observer explained away 1979's interim figures which, as previously noted, indicate that the bulk of business PAC money goes to incumbents by pointing out that "it is only natural that the early money goes to incumbents. They have a 24-month fundraising cycle that never stops . . .", but once the general election challengers begin to gain support, "the late money will go to those

¹³⁰ 1977 Hearings, *supra* note 63, at 33.

¹³¹ *Id.* at 34. Campaign financing is only one of the self-perpetuating advantages enjoyed by incumbents. Incumbents seeking re-election have been successful at rates over 90% for several years. In 1978, 94% (377 of 396 incumbents running) were re-elected. TIME, Nov. 20, 1978, at 19. The services available to incumbents such as offices, staff assistance and the franking privilege cost the taxpayer, according to one estimate, an average of \$610,000 per year for each representative. Hoyt, \$610,000: Annual Cost Per Member of Congress, Christian Science Monitor, Jan. 29, 1975, at 1, col. 1. This estimate was substantiated by Lewis Perdue in an article entitled *The Million Dollar Advantage of Incumbency*, 9 Wash. Mo. 50 (Mar. 1977).

One of the most important perquisites of an incumbent is the frank. The franking privilege is simply the procedure by which members of the House and Senate, by affixing their signatures, may send certain matter free through the mail. For an extensive discussion of how the franking privilege conflicts with fair elections, see Note, *Congressional Perquisites and Fair Elections: The Case of the Franking Privilege*, 83 YALE L.J. 1055 (1974). For example: "The \$46,000 that the average member of Congress spent in 1972 in order to frank mail was one-and-one-half times the total campaign fund of the average major party challenger to a United States Representative." *Id.* at 1061 (footnote omitted). In 1978, House members sent franked mail at a public cost of \$47 million (information from the House Franking Committee). In addition, each house of Congress maintains private radio and television studios, built and fully equipped at the cost of millions of taxpayers' dollars, for the exclusive use of its members at minimal cost. The uses include not only television or radio reports to constituents, but also simulated panel discussions or press conferences. 2 U.S.C. § 123(b) (1976). See *Hearings on Appropriations Before the Subcomm. on Legislative Branch Appropriations of the House Comm. on Appropriations*, 91st Cong., 1st Sess., 410-13 (1969). A national newspaper has labeled the process by which members of Congress perpetuate themselves by producing and circulating their own cabled "news" as the "Incumbent Broadcasting System." *Christian Science Monitor*, 10 *Broadcasting* 47 (June 1974). The "Incumbent Broadcasting System" has gone a step further recently. On February 22, 1979, the House began live broadcasts of their proceedings. However, what was widely anticipated as a reform has become simply another packaged production. The House has refused to allow coverage by any of the networks and instead will run its own coverage and make tapes available to the networks. (*Deseret News*, Feb. 23, 1979, A-11, col. 1). House Speaker Tip O'Neill has ruled out any shots of empty seats, or members sleeping, etc., and so once again a congressman has an opportunity to present a packaged image.

Republicans who look like they might be able to win."¹³²

It cannot be disputed that Political Action Committees reflect an investment character.¹³³ While both labor-related committees and business-related committees give most generously to incumbents, they give first and most heavily to those incumbents they believe or know will be most sympathetic to their interests.

4. *PACs and Congressional Committees.* Fred Wertheimer of Common Cause noted that if incumbency is the "primary ideology of most special interest giving, then congressional committee jurisdiction may be its secondary ideology."¹³⁴ While substantial campaign contributions may not actually "buy" votes, they do ensure easy access to public officials and create an unhealthy atmosphere of familiarity.¹³⁵

Interest groups are certainly aware of the importance of congressional committees. The campaign records of the members of various committees reveal that special interest political money closely follows their congressional committee assignments.¹³⁶

The Senate Finance Committee, which deals with all tax measures, is a perfect example. A Common Cause study of the seven members of the Finance Committee who ran for re-election in 1974 revealed that they had received total contributions of \$3,129,000 for their campaigns. Approximately 45% of that total (\$1,390,137) came from large individual givers and special interest groups. This total included substantial sums from oil interests, labor groups, medical groups and real estate interests.¹³⁷

The financially interdependent relationship between political

¹³² Statement of Stevenson Walker, an official of the Public Affairs Council, *reprinted in* Kirschten, *supra* note 79, at 1903.

¹³³ Jesse Unruh, CBS television interview, April 27, 1972: "Most people who put money into political campaigns aren't contributors — they're investors." *Reprinted in* FEIGERT & CONWAY, *PARTIES AND POLITICS IN AMERICA* 263 (1976).

¹³⁴ 1977 Hearings, *supra* note 63, at 35.

¹³⁵ *How Money Talks in Congress, a Common Cause Study of the Impact of Money on Congressional Decision-making*, 2 (Oct. 1978).

¹³⁶ *Id.* at 20-21. For further discussion and examples, see *id.* at 5-23. Since Congress is currently considering important energy-related legislation, contributions from the growing number of PACS (130) affiliated with oil and gas interests is of particular concern. For example, a *Congressional Quarterly* survey found that more than \$65,000 in contributions from oil and gas PACs went to members of the Senate Energy Committee in 1977-78. The survey also revealed that in the House, members of the two major committees writing energy legislation, the Ways and Means Committee and the Subcommittee on Energy and Power, received \$94,700 and \$138,000 respectively from oil and gas PACs. (Energy PACs: Potential Power in Elections, *Cong. Q.*, November 3, 1979, p.2456).

¹³⁷ *Id.* at 19-20.

contributors and congressmen and lawmakers casts increasing doubt on the validity of the decision-making process and calls into question the value of the final legislative product.¹³⁸

IV. PROPOSALS FOR REFORM

A. *The Court and Campaign Law Reform*

We recognize at the beginning that not all of our proposals for reform of laws governing political campaigns match in scope or efficiency the weaknesses in our system as we see them. We hope that our essay may serve in some modest way to encourage dialogue on this vital topic so that other better proposals will be offered and enacted. We recognize also the limits of the law: the American penchant for seeking a legal solution to every problem, however longstanding¹³⁹ and universal¹⁴⁰ an inclination, is flawed. The law is a blunt instrument. Many problems of the political process will be met by political and social solutions rather than statutory or court-made law and other weaknesses will remain without resolution. Nevertheless, much can be done through law to accomplish reform of the political campaign process.

First, the Supreme Court's decisions in *Buckley* and in *Bellotti* do not reflect an accurate perception of the compelling interest of the community to control the appearance and the reality of corruption of the political system through the effect of unregulated money upon campaigns. Empirical evidence of such an effect of money without regulation is difficult, and in many cases impossible, to produce. Yet many who have run for office or participated directly in elective politics recognize the corrosive reality of this situation. This area of concern — the electoral process — is one with which Congress and the executive are better equipped to deal than is the judiciary. Substantial discretion should be exercised by the courts

¹³⁸ *Id.* at 22. The former chairman of the House Merchant Marine Committee, Representative Edward A. Garmatz (D-Md.), when asked why he accepted huge campaign contributions from maritime shipping interests, replied: "Who in the hell did they expect me to get it from, the post office people, the bankers? You get it from the people you work with, who you helped in some way or another. It's only natural."

¹³⁹ Alexis de Tocqueville in *DEMOCRACY IN AMERICA*, when discussing the American penchant for legal solutions, stated: "There is hardly a political question in the United States which does not sooner or later turn into a judicial one Legal language is pretty well adopted into common speech; the spirit of the law, born within schools and courts, spreads little by little beyond them; it infiltrates through society right down to the lowest ranks

¹⁴⁰ *Romans* 3:20; *Galatians* 3:19-25; 4:21-27.

before altering by judicial decision the political judgment of the political branches on reform of the campaign process.

In addition, the primary and the instrumental values protected by the First Amendment are better served by a reconsideration by the Supreme Court of its decision in *Buckley* disallowing individual and aggregate expenditure limitations on candidates and campaigns. Money is not speech, symbolic or verbal. Its power to corrupt the system is total; unrestrained by law, it most certainly will corrupt.

The Court further errs in its continuing expansion of first amendment protection accorded so-called corporate speech. In *Bellotti*, exclusive focus on the rights of the hearer, without modification by a consideration of the nature of the (corporate) speaker or the message, is unrealistic. Business corporations are artificially created and specially protected institutions for making and investing money. We see no basis in law or logic for Justice Powell's assertion that "if a legislature may direct business corporations to 'stick to business,' it also may limit other corporations — religious, charitable, or civic — to their respective 'businesses' when addressing the public."¹⁴¹ The law has distinguished business corporations from the other corporate forms specified by Justice Powell in constitutional law, tax law and virtually all other branches of law.¹⁴² The state interest in corporate regulation is of the highest order.¹⁴³

¹⁴¹ *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 785 (1978).

¹⁴² See I.R.C. § 501(c)(3) which indicates that "[c]orporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes . . ." are exempt from taxation.

NAACP v. Button, 371 U.S. 415, 428-29 (1963) (where a state permits the organization of a corporation for explicitly political purposes, its rights of political expression are entitled to constitutional protection). *But see Hague v. CIO*, 307 U.S. 496, 514 (1939) (ACLU did not enjoy freedom of speech and assembly).

The doctrine of cy-pres, used in the trusts field, further illustrates how the law treats different types of corporations differently. Under this doctrine, a testamentary gift to a charitable corporation could be saved even though the original object of the gift is no longer possible (*i.e.*, if the intended charitable corporation has dissolved at the time of the testator's death). A testamentary gift to a business corporation, on the other hand, could not be saved by cy-pres if the donee corporation is no longer in existence at the time of the testator's death. See *Montclair Nat'l Bank and Trust Co. v. Seton Hall College*, 90 N.J. Super. 419, 217 A.2d 897 (1966); *In re Connolly's Estate*, 48 Cal. App. 3d 129, 121 Cal. Rptr. 325 (1975); *In re Black's Estate*, 211 Cal. App.2d 75, 27 Cal. Rptr. 418 (1962).

¹⁴³ *Language in Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council*, 425 U.S. 748, 769-70 (1976), would seem to deny state regulation of commercial speech that was not illegal or misleading. State regulation of advertisements of liquor, cigarettes, prescription drugs and other products, absent a showing of illegality or falsehood, would seem to be prohibited by the First Amendment.

We agree with Justice White in dissent in *Bellotti*: primary First Amendment values adhere primarily to individuals, not corporations; and the danger of unrestricted corporate activity in the political system may outweigh the value to society of corporate political speech.¹⁴⁴

[G]overnment interest in regulating corporate political communications, especially those relating to electoral matters, [raises] considerations which differ significantly from those governing the regulation of individual speech. Corporations are artificial entities created by law for the purpose of furthering certain economic goals. The special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process [The state interest] is not one of equalizing the resources of opposing candidates [a reference to and a distinction from *Buckley*, where the Court denied an egalitarian role for government in campaign regulation] but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process, especially where, as here, the issue involved has no material connection with the business of the corporation. The State need not permit its own creation to consume it.¹⁴⁵

Justice Rehnquist, in a separate dissent in *Bellotti*, noted that "the Fourteenth Amendment does not require a state to endow a business corporation with the power of political speech."¹⁴⁶ He argued, and we agree, that corporations, unlike natural persons, are state-created institutions and are limited to the functions ascribed to them by the state. It did not follow he said, that "the right of political expression is [essential] to carry out the functions of a

¹⁴⁴ "[A]n examination of the First Amendment values that corporate expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not." Corporate speech does not further "the principle function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment." 435 U.S. at 804 (White, J., dissenting).

¹⁴⁵ *Id.* at 809.

¹⁴⁶ *Id.* at 826, n.6 (Rehnquist, J., dissenting).

corporation organized for commercial purposes."¹⁴⁷

Statements by the Court in *Bellotti*¹⁴⁸ and in *Virginia State Board*¹⁴⁹ reveal the "free market" economic base for the corporate speech cases of the Court. In *Virginia State Board*, Justice Rehnquist noted in dissent that he did not doubt that fostering wide public discussion of pricing practices, creating a "free flow of commercial information" may aid the poor, the sick, and the aged.¹⁵⁰ But we agree with Justice Rehnquist that however desirable such a public policy may be, such a decision is a concern for the state legislature.¹⁵¹ Justice Rehnquist further noted that however wise a public policy may be, based upon laissez faire economics, "there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions" ¹⁵²

The "marketplace" and "free trade" in ideas are themselves loaded metaphors based upon classical economics, whose hand — heavy or invisible, as you will — has been felt before upon the Constitution. A new form of economic substantive due process,¹⁵³ based in the First rather than the Fourteenth Amendment, would seem to be near birth unless a merciful interruption of the term can occur. It is admitted that the metaphors of free speech case law lend themselves to the law of the marketplace; the "marketplace of ideas," the "free trade in ideas" of Holmes¹⁵⁴ invite uncritical acceptance beyond the situation of political speech by individuals,

¹⁴⁷ *Id.* at 825.

¹⁴⁸ 435 U.S. 765 (1978). In his dissent, Justice White stated that Massachusetts could conclude that not imposing limits on political activities of corporations could cause the state to depart from neutrality and assist in the propagation of corporate views because of the advantages its laws give to the corporate acquisition of funds to finance such activities. Justice White asserts that such expenditures may be viewed as "seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas." *Id.* at 810.

¹⁴⁹ 425 U.S. 748 (1976). Justice Blackmun, speaking for the Court, states: "[W]e observed that the 'relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.'" *Id.* at 760 (quoting *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975)).

¹⁵⁰ 425 U.S. at 783-84 (Rehnquist, J., dissenting).

¹⁵¹ *Id.* at 783-85.

¹⁵² *Id.* at 784.

¹⁵³ *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

¹⁵⁴ *Abrams v. United States*, 250 U.S. 616 (1919). Justice Holmes in dissenting stated: "[M]en . . . may come to believe . . . that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market" *Id.* at 630.

where such metaphors were given, to the real marketplace of commercial buyers and sellers. But such a literal application of metaphor into the field of corporate speech would make even a fundamentalist preacher pause.

There is no constitutional base, nor any history before *Virginia State Board* and *Bellotti*, for according First Amendment speech protection to corporate speakers. Nothing in the Constitution requires the states to grant a protected position to marketplace economic practice in matters of commercial speech any more than in other areas of economic regulation.¹⁵⁵ Neither does the Constitution require that the states unbridle the potentially overwhelming artificial "voice" of corporate political spending.

Grant Gilmore in the *Storrs Lectures* noted:

[The] symbiotic relationship between the academic establishment, which provides the theories, and the economic establishment, which appreciates being told that the relentless pursuit of private gain is, in the last analysis, the best way of serving the public interest.¹⁵⁶

The Court in *Buckley* denied any egalitarian role for government in recognizing and in some degree modifying the imbalance in bargaining power for media; yet without some consideration of relative bargaining position, any concept of a "market," or some Darwinian or Spencerian political survival of the fittest, is hopelessly skewed. Similarly, in *Bellotti*, the Court underestimated the compelling interest of a community in regulating corporate speakers. Such speakers possess vast wealth due to state indulgence and protection, allowing the accomplishment of the economic reasons for corporate creation. Such wealth, translated into political power without community regulation, would again dislocate the necessary balance between the participants in the "market." (The rationale of these cases bears the same apology for unrestrained "individualism" at the expense of community interest as did labor law, contract, and tort law in earlier phases of the industrial revolution.) This perversion of individualism ignores the relative positions of the actors in the political, legal, and economic order and, indeed, the differences in the fundamental nature of the actors. The power of the wealthy alone or in corporate form to act to the detriment of the community,

without the ability of the community to regulate such activity, is justified by the Court on the basis that such actions somehow rebound to the public good; or at least that the deleterious effects of such action must be endured since those actions are joined like Siamese twins at vital organs to those truly individualistic rights that human beings enjoy and which are protected by the First Amendment.

The Court in *Buckley* and *Bellotti* responded to the threat of enormous money corrupting the political process like Grant Gilmore's lawyers (who made even the classical economists envious):

Lawyers who could see that the case of a working man bargaining with his corporate employer over wages and the case of a Vermont farmer dickering with a summer resident over the price of a cord of firewood could both be reduced to the paradigm of A who voluntarily contracts with B.¹⁵⁷

The see-no-evil attitude of the Court to the emergence of massive corporate and other special interest money in the political system and its corrosive effects upon American democracy is made the more breathtaking in relief when contrasted with its delightfully anti-quarian interpretation of another First Amendment provision, the establishment clause. In the latter situation, the Court protects us, through its interpretation of the relationship between the religion clauses, from the threat of an establishment of religion as if a credible alternative to the secular and pluralistic state, in the form of theocratic government, in fact existed 200 years from the dimming of the Enlightenment. It is suggested that the real threat to republican government is not an established church but rather an established corporate state. Jefferson and Madison saw the necessity of a diffusion of power through informal and formal checks and balances and protected but limited voluntary associational rights. While it may be futile to speculate on what dead men would perceive if living 200 years later, we doubt that Jefferson would perceive an episcopal establishment as the gravest threat to republican rule today.

The judiciary should allow greater congressional and state legislative control over the uses of private and corporate money in the electoral process. The judiciary, in part because of its own nature and processes, finds itself riding a warhorse backwards, observing

¹⁵⁵ *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Loughlin Steel*, 301 U.S. 1 (1937).

¹⁵⁶ Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 *YALE L.J.* 1022, 1028 (1975).

¹⁵⁷ *Id.* at 1027.

the landscape over the hindquarters and therefore possessed of a Maginot Line complex, ready dutifully to fight the last war. The real threat to individual liberty and the democratic process is ahead.

B. Public Financing of Congressional Elections

We have attempted to demonstrate that current election finance laws are not only inadequate but, in many cases, counter-productive in their attempt to correct abuses in the financing of federal election campaigns. We offer a proposal for reform which, we believe, will help correct the deficiencies previously noted, and hopefully begin to restore public confidence in the integrity, openness, and validity of the election process.

Our election reform proposal borrows from several sources in an effort to create a single comprehensive plan rather than a piecemeal partial solution.

The heart of the current political dilemma is the accountability of officeholders to financial backers. That accountability belongs more properly to those who vote for the officeholder, and he owes those voters his best unfettered independent judgment. With this ideal as a goal, the cornerstone of any proposal for meaningful reform must be publicly financed congressional elections accompanied by several other less central reforms. Our proposal calls for matching funds from the dollar check-off for congressional elections, both primary and general.¹⁵⁸

Public financing may appear to be too drastic an approach, but it must be remembered that the Supreme Court's decision in *Buckley* left us no alternative. The less sweeping and more appealing approach embodied in contribution and expenditure limitations has been foreclosed. The Court has further indicated in *Bellotti* that attempts at reform which operate to restrict money and speech will be held up to the strictest scrutiny and often invalidated. The current condition of election finance laws warrants our proceeding in the only direction the Court has left open to us. The time for public financing of congressional elections has come.

In accordance with *Buckley*,¹⁵⁹ a candidate who accepts matching funds would agree to abide by spending limitations. With respect

¹⁵⁸ While a primary subsidy is obviously more costly and complicated, it is necessary to prevent the inevitable diversion of special interest money to the primary races.

¹⁵⁹ 424 U.S. 1 (1976). The Court upheld expenditure limitations in presidential elections conditioned on the candidate's acceptance of public funding.

to House races, the spending limit would be \$150,000 for the general election¹⁶⁰ with a \$75,000 limit for candidates in a primary contest. No more than half (\$75,000 in the general election and \$37,500 in the primary) could come from federal funds. House candidates accepting public financing could spend no more than \$25,000 of their own money in the aggregate.

In order to qualify for matching funds, a primary candidate¹⁶¹ would need to raise a threshold of \$15,000 with no more than \$125¹⁶² of each contribution counting toward that threshold. A candidate would then receive \$15,000 in matching funds with up to \$22,500 more ($\frac{1}{2}$ the total allowable expenditure for a primary) in increments of \$7,500 each as the matching requirements are met.

Following the primary elections, we recommend that a flat grant be given to each successful major party candidate¹⁶³ (minor party candidates could also qualify using the same kind of formula presently used in determining minor party eligibility for the general election subsidy in presidential elections).¹⁶⁴ Such a grant would enable the candidate to get his general election campaign underway immediately.

Each major party candidate would receive \$10,000 which would count against the \$75,000 total of public funds available to a candidate. Following the grant, each contribution would be matched dollar for dollar in increments of \$7,500 to a total of \$75,000 in match-

¹⁶⁰ 1977 Hearings, *supra* note 63, at 37. According to Common Cause, \$150,000 is an adequate amount. We believe the spending ceiling must be this high so that it does not unduly limit the ability of the challenger to mount a serious campaign against a firmly entrenched incumbent. In addition, in the general election, a qualified political party committee [2 U.S.C. § 441(a)(3) (1976)] could spend \$10,000 on behalf of a House candidate and \$20,000 on behalf of a Senate candidate.

¹⁶¹ Any candidate qualifying to be on the ballot in the primary or general election would be eligible to attempt to qualify for matching funds. Contributions collected before April 30 would not be eligible for matching funds, but would count against the overall primary spending limits. Hopefully these restrictions will help to discourage extended campaign time without restricting it.

¹⁶² A primary candidate would need 120 contributors of \$125 each to reach the matching threshold. Obviously it will take considerable effort and support to get contributors in such numbers; but this is necessary protection to prevent frivolous candidates from qualifying too easily for matching funds during the primary elections. The \$125 matching ceiling also encourages a candidate to seek out more small contributors, thus retaining individual participation.

¹⁶³ The initial flat grant is one of the proposals of the American Bar Association Special Committee on Election Reform which was approved by the ABA House of Delegates in August of 1975. Information from the prepared statement of Joel L. Fleischmann, Professor of Law, Duke Law School, 1977 Hearings, *supra* note 63, at 189.

¹⁶⁴ 26 U.S.C. §§ 9003(c), 9004 (1976).

ing funds for the general election.¹⁶⁵

The same basic structure will work for senatorial elections as well with some modifications in the expenditure ceilings. Congressional districts are all very similar in population but, of course, senatorial districts vary tremendously in area and population. It will obviously cost much less to campaign in Rhode Island than in New York or Texas.¹⁶⁶ Therefore no single dollar limit on expenditures would be equitable. We propose that senate primary candidates accepting matching funds could spend no more than an amount equal to 15 cents times the voting age population of the state or \$200,000, whichever is greater.¹⁶⁷

Primary candidates for the Senate would qualify for matching funds by raising a threshold amount equal to 10 percent of their computed spending limit. No more than \$225 of each contribution could count toward that threshold.¹⁶⁸ A candidate could then receive an amount equal to the threshold raised and further matching funds on \$225 of each contribution up to one-half of their spending limit.¹⁶⁹

In the general election, senatorial candidates accepting public funds could spend no more than an amount equal to 20 cents times the voting age population of the state or \$300,000, whichever is greater.¹⁷⁰

Upon nomination, major party candidates would be entitled to receive an initial grant equal to 20 percent of their spending limit with additional matching funds on the first \$250 of each contribu-

¹⁶⁵ See 1977 Hearings, *supra* note 63, at 191. In order to offset the FEC paperwork delay in qualifying contributions for matching fund eligibility, Professor Fleischmann suggests providing for certification by the candidate and the campaign committee treasurer to the effect that bona fide contributions have been raised in the amount and below the ceiling required by the law. With this certification, the FEC could authorize the Treasury to disburse the subsidy funds. A detailed verification would be done subsequently, and in the case of discrepancies, the treasurer and the candidate would be held liable for reimbursement to the Treasury. *Id.* at 192.

¹⁶⁶ For example, in the 1976 census the voting age population of Rhode Island was 626,000; in Texas it was 8,254,000; and in New York 12,281,000. Information contained in a joint statement by Senator Dick Clark (D-Iowa), Edward Kennedy (D-Mass.), Alan Cranston (D-Calif.), Charles Mathias (R-Md.) and Richard Schweiker (R-Pa.), CONG. REC., S.926, 95th Cong., 1st Sess., 123 CONG. REC. S.3599-600 (daily ed. March 7, 1977).

¹⁶⁷ *Id.* at S.3599. The formula proposal we suggest is similar to S.926 but varies in percentage and contribution levels.

¹⁶⁸ As in the case of the House, this qualifying standard helps to prevent frivolous candidates from receiving matching funds.

¹⁶⁹ Once a minor party candidate reaches the threshold and qualifies for matching funds, he may count only the first \$250 of each contribution toward further matching funds.

¹⁷⁰ *Supra* note 165, at S.3599.

tion up to half the total general election spending limit.¹⁷¹ Minor party general election candidates would be eligible for matching funds after raising 20 percent of their spending limit. They would not receive the initial grant, but in order to reach the threshold for receiving matching funds, a minor party candidate could count each total contribution.¹⁷² Senate candidates accepting public funds could spend no more than \$50,000 of their own money in the aggregate.

It is important to maintain the matching funds plan for both primary and general elections because it makes the system less costly; more importantly, it encourages small contributions.

As stated, funds for congressional public financing would come from the existing dollar check-off on federal income tax returns¹⁷³ and the program would be administered by the Federal Election Commission. The estimated cost of financing all Senate primary and general election campaigns is \$25.4 million, and the estimated cost of financing all House primary and general elections is \$67.7 million.¹⁷⁴ Assuming the present rate of tax check-offs continues, there will be adequate funds — approximately \$190 million, according to the FEC — to finance the 1980 presidential and congressional elections.¹⁷⁵

Public financing of congressional campaigns through the matching system we have proposed would allow the continuation of private contributions, encourage a candidate to obtain many small contributions, and act as a screening process for frivolous candidates who do not have broad support. The legislation would greatly lessen the impact of special interest group money and control the rising costs of a campaign.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ I.R.C. § 6096(a).

¹⁷⁴ 1977 Hearings, *supra* note 63, at 56. Statement of Rep. Matthew McHugh (New York) in support of H.R. 5116/6209 which would establish a matching system similar to the one we propose. It must be stated that estimates of the cost of such legislation vary greatly. In addition, \$72 million was spent in the 1976 presidential campaign. Fifteen candidates received public funds.

¹⁷⁵ *Id.* at 40. If necessary, Congress could increase the dollar check-off slightly without creating an undue burden on the Treasury. Even with the increase it would still be a bargain when weighed against the high price we pay now as a result of distorted public policy decisions and the lack of public confidence in our elected officials.

C. Contribution & Expenditure Limitations

In conjunction with public financing, changes must be made in the individual contribution limits.¹⁷⁶ With the proposed spending limits and public funding combined, \$1,000 is a sizable contribution. We suggest a reduction of the individual contribution limit to \$500 per election, with no individual allowed to contribute more than \$15,000 in the aggregate in a calendar year.¹⁷⁷

As mentioned previously, restrictions must also be placed on the amount a candidate may contribute to his own campaign (\$25,000 for House candidates and \$50,000 for Senatorial candidates). This limitation would act as a protection for the candidate of modest means and would have an equalizing, democratizing effect on the election process.

A major loophole in the law following *Buckley* is the elimination of restrictions on independent expenditures. Providing an individual or group is not authorized by a candidate and does not coordinate in any way with a candidate or any representative of a candidate, the individual or group may make independent expenditures on behalf of a candidate, not subject to the limits of committee contributions. The potential for abuse is obvious as is the difficulty in enforcement.¹⁷⁸

D. Restrictions on PACs

Retention of the existing contribution limit on political action committees¹⁷⁹ will greatly advantage incumbents. We favor lowering the PAC ceiling from the present \$5,000 to \$2,500 per election.

In addition, we believe that § 441(b)¹⁸⁰ of the present law should be amended to provide that corporations and labor unions that establish political committees cannot use corporate funds or union

¹⁷⁶ 2 U.S.C. § 441a(a)(1)(A) (1976).

¹⁷⁷ Current law allows an individual to contribute \$1,000 to any candidate or his committee per election [2 U.S.C. § 441a(a)(1)(A) (1976)]; \$20,000 to a national party committee [§ 441a(a)(1)(B)] or \$5,000 to any other political committee [§ 441a(a)(1)(C)]. But the aggregate of all contributions must not be more than \$25,000 in any calendar year [§ 441a(a)(3)].

¹⁷⁸ A timely example of the difficulties we can expect as a result of independent expenditures was the recent situation in Florida. A draft Kennedy committee soliciting funds in Florida could accept contributions of \$5,000 from an individual rather than the \$1,000 which would be allowed for an authorized committee. Because Kennedy disavowed the committee, it had a favored status in the fundraising market, regardless of whether Kennedy later decided to run. Germond & Witcover, *Giving Apple Pie A Bad Name?*, *The Salt Lake Tribune*, Aug. 23, 1979, at 14, Section A, col. 3.

¹⁷⁹ 2 U.S.C. § 441a(a)(2)(A) (1976).

¹⁸⁰ *Id.* at § 441b(b)(2)(C).

dues to pay for the costs of administering such committees or soliciting funds for them. This would eliminate an advantage that § 441(b) committees currently have over other political committees which must pay their solicitation and administration costs out of the campaign funds they raise.¹⁸¹

Finally, with regard to Political Action Committees, we would suggest that, for reporting and disclosure purposes, each PAC must supply the name of the corporation, trade association, labor union, or ideological group with which it affiliates. Many PACs currently use euphemistic names designed to camouflage the special interest they represent.¹⁸²

E. Alleviating the Incumbency Advantage

Aside from the financing issue, the most difficult problem to solve is the increasingly excessive advantage provided by incumbency. Much of that advantage is simply inherent: for example, name recognition and media attention and the ability to serve constituents. However, those advantages which flow from perquisites of the office should be regulated as much as possible to prevent them from being an additional unequal campaign subsidy. In particular, changes must be made in the use of franked mail. No franked mail should be sent out 90 days prior to an election.

The House Committee on Congressional Mailing Standards and the Select Committee on Standards and Conduct of the Senate are authorized to prescribe rules and regulations to assure conformity to the provisions of Title 39.¹⁸³ These committees should require more restraint on the part of members with regard to the content of franked mail and its frequency; otherwise more restrictive legislation will be necessary. This is a major area of abuse.¹⁸⁴

Probably more damaging in impact upon the chances of challengers to incumbents is the gross abuse by incumbents of those rules forbidding the use of office equipment and personnel for campaign purposes. These rules are routinely violated in congressional and senatorial elections. Monitoring and proving such abuse is difficult

¹⁸¹ 1977 Hearings, *supra* note 63, at 38.

¹⁸² For example, Voluntary Contributors for Better Government is the PAC for International Paper Company; Civic PAC is General Motors; and Citizens for the Republic is a conservative PAC formed by Ronald Reagan.

¹⁸³ 39 U.S.C. § 3210(a)(5)(D) (1976).

¹⁸⁴ In 1978 members of the House and Senate sent out \$47 million worth of franked material.

at best and, in many cases, is impossible. Tighter control over the incumbent's office personnel and equipment, however, can and should be accomplished.

V. CONCLUSION

The proposals we have suggested are not seen as a panacea and indeed may likely result in new problems;¹⁸⁵ but the steps must be taken. The existing system of campaign financing — the rising costs, the dependence on wealthy and special interest contributors, the narrow base of contributors, corporate power and the emergence of political action committees of almost limitless number and wealth, and the monopoly held by incumbents — must be changed if we are to rid ourselves of the scandalous influence of big money in politics and more nearly achieve the goal of competitively elected government representing the American people with integrity.

We share the commitment to reform announced by Theodore Roosevelt:

The voice of great events is proclaiming to us: Reform if you would preserve. Wise and prudent men, intelligent conservatives, have long known that in a changing world, worthy institutions can be conserved only by adjusting them to the changing times. . . . I am that kind of conservative because I am that kind of liberal.¹⁸⁶

¹⁸⁵ For example, opponents of public financing argue that it would reduce candidates' dependence on political parties and thus further weaken party unity and discipline. We share this concern because we believe that political parties have become the major influence in organizing effective majorities in Congress. Thomas Jefferson maintained that parties are necessary in a democracy because they serve as a "safety valve" for conflicting opinions. *THE WRITINGS OF THOMAS JEFFERSON*, Vol. 10 at 44 (Washington, D.C., The Thomas Jefferson Memorial Association, 1903) (quoted in *FEIGER & CONVOY*, *supra* note 133, at 2). However, we believe parties must adapt to their changing role in society, and that parties will not be weakened if the financing plan contains a provision to allow parties to spend an additional amount of money on the party's candidate and to conduct voter registration and organizing activities on a candidate's behalf in addition to the limit.

¹⁸⁶ *1977 Hearings*, *supra* note 63, at 7 (testimony of Rep. Morris Udall).