Campaign Reform:
Politicizing the First Amendment

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FEDERAL ELECTION CAMPAIGN ACT

Prior to 1971, Congressional regulation of political campaigns was modest. In 1910, Congress enacted laws requiring disclosure of the names of all contributors of $100 or more to presidential or congressional campaign committees and identification of recipients of $10 or more of those contributed funds.

From time to time, Congress modified this statute, broadening its disclosure requirements. In 1934, the United States Supreme Court rejected a constitutional challenge to these provisions in *Burroughs v. United States,* 290 U.S. 534 (1934).

Writing for the majority, Justice George Sutherland found ample justification for the law in Congress's general "power of self protection" of the nation:

> *Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or corruption. Id.,* 290 U.S. at 545.

In addition, Justice Sutherland ruled that Congress could choose whatever means necessary for the nation's "self-protection." If Congress concluded "that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections," and that was appropriate for the nation's good, there was nothing in the Constitution to prevent that decision. *Id.,* 290 U.S. at 547-48.

In so ruling, Justice Sutherland made no reference whatsoever to the First Amendment guarantees of the freedom of speech, of the press, or the right of the people to assemble and petition the government for redress of grievances. The parties had not raised any First Amendment issue, so the Court did not address any.

It was not until after 1940, Congress having enacted the Hatch Act limiting certain government employee participation in political campaigns, that the First Amendment was invoked as a limit upon Congressional power to deal with corruption in the electoral process. Although the Court did not rule in favor of these First Amendment claims, it did recognize that the First Amendment might, in an appropriate case, limit Congress's power to regulate the electoral process. *United Public Workers v. Mitchell,* 330 U.S. 75, 111 (1947).

It was also after 1940 that the Court began to hand down a number of decisions, applying the First Amendment guarantees for the first time on a variety of exercises of government power. Among those decisions were several that affirmed the right of the people to participate in political campaigns and to associate with political parties free from intrusive government regulation. *See, e.g.*, *Cousins v. Wigoda,* 419 U.S. 477, 487 (1975).

Thus, when Congress stepped up its regulation of federal elections with the Federal Election Campaign Act of 1971 (as amended in 1974), the Court was poised to assess its constitutionality under the First Amendment.

The Act

Characterized by the United States Court of Appeals for the District of Columbia as "the most comprehensive reform legislation [ever] passed by Congress concerning" federal elections, the Federal Election Campaign Act of 1971, as amended in 1974, contained five major provisions.

First, it limited individual, group or organization political contributions to $1,000 to any single candidate per election, with an overall limitation of $25,000 during any calendar year by any contributor. A Political Action Committee was permitted, however, to contribute $5,000 to a single candidate, provided that it met three criteria: 1) The Committee was at least six months old; 2) It received contributions from more than fifty persons; and 3) It contributed to five or more candidates. Individual volunteers could contribute unlimited amounts of their time, and up to $500 of their out-of-pocket expenditures; beyond that they were limited to the $1,000 contribution level.

Second, the Act limited independent expenditures by individuals or groups "relative to a clearly identified candidate" to $1,000 per year. An expenditure ceiling was placed upon a candidate who drew from his personal funds or from funds of his immediate family: $50,000 for a presidential or vice-presidential campaign, $35,000 for a senatorial campaign and $25,000 for a campaign for election to the House. Monetary ceilings were also placed on overall campaign expenditures by candidates, the amounts varying with the office and other factors.

Third, the new law substituted an entirely new set of rules governing campaign contribution and expenditure reporting and disclosure. Campaign committees were required to keep detailed records, including the names and addresses of everyone making a contribution in excess of $10 and, if the contributions exceeded $100, the occupation and principal place of business of the donor. Quarterly reports of such data were required to be made to the Federal Election Commission. In addition, persons other than candidates or their political committees were required to report to the Commission all contributions or expenditures over $100 made for the purpose of influencing an election.

Fourth, the Act created a Presidential Campaign Fund, financed from general revenues in the aggregate amount designated by individual taxpayers who authorized payment to the Fund of $1.00 of their tax liability in the case of an individual return and $2.00 in case of a joint return. These funds were to be made available to finance party nominating conventions, primary and general election campaigns for major parties (whose presidential candidate received 25% or more of the popular vote in the most recent election) and minor parties (whose presidential candidate received at least 5% but not more than 25% of the popular vote in the most recent election).

Fifth, and finally, the new law created the Federal Election Commission composed of 8 members, two of whom were *ex officio* without any voting power. The two *ex officio* members were the Secretary of the Senate and the Clerk of the House of Representatives. The six voting members were to be selected as follows: 2 appointed by the President *pro tem* of the Senate, 2 by the Speaker of the House and 2 by the President, each to be confirmed by a majority vote of both houses of Congress, and each pair to be composed of persons affiliated with more than one political party. The Commission was established to administer and enforce the legislation.

The Case

A wide and diverse group of plaintiffs instituted a law suit in the United States District Court for the District of Columbia to challenge the constitutionality of the Act. Among the plaintiffs were a candidate for President, an incumbent United States Senator seeking reelection, the Conservative Party of the State of New York, the Republican Party of Mississippi, the New York Civil Liberties Union, the Libertarian Party, and Human Events, the conservative news weekly. See *Buckley v. Valeo,* 424 U.S. 1, 12-23 (1976).

The plaintiffs claimed that the entire Act violated the First Amendment guarantees of the freedom of speech and association and the Fifth Amendment Due Process Clause. The Speech and Association claims focused upon the adverse impact that the contribution and expenditure limits would have on the free exchange of ideas and upon the ability of the citizenry to elect those who shape the destiny of the nation.

Their Due Process claim focused on two separate and independent assertions: 1) The law, especially its criminal provisions, were unconstitutionally vague; and 2) The contribution and expenditure limits, the reporting and disclosure requirements and the public funding of presidential campaigns invidiously discriminated against independent candidates and minor parties.

In addition, plaintiffs complained that the method of appointment of the Federal Election Commission violated Article II of the Constitution which made no allowance for any administrative agency to be composed of persons appointed by members of Congress or subject to concurrence of both houses of Congress.

The Supreme Court acknowledged that the Act implicated First Amendment principles, including the right of the people to an "unfettered exchange of ideas for the bringing about of political and social changes desired by the people." *Id.,* 424 U.S. at 14. It further admitted that the Act impacted "the ability of the citizenry to make informed choices among candidates for office" which was an essential attribute of popular sovereignty. *Id.,* 424 U.S. at 14-15.

Nevertheless, the Court found constitutional the Act's limitations on contributions, its reporting and disclosure requirements, and the public funding of presidential elections. On the other hand, it struck down all of the expenditure limitations. Finally, it agreed with plaintiffs that the appointment and composition of the Federal Election Commission did not conform to constitutional principles of separation of powers.

Contribution Limits

The Court acknowledged that limiting money contributions to election campaigns would "fetter" the interchange of ideas designed to bring about political change in the country and hamper "the ability of the citizenry" to participate fully in election campaigns. But the Court concluded, such "restrictions" would be "only ... marginal." *Id.,* 424 U.S. at 17, 18 and 20.

In support of this point, the Court stated that the contribution limitation "involves little direct restraint on ... political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates

and issues." *Id.,* 424 U.S. at 21.

As for the campaign committees and candidates, a limit on political contributions, the Court wrote, would "merely ... require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of ... political expression." *Id.,* 424 U.S. at 20-21.

In addition to characterizing these impacts as "marginal," the Court found a strong countervailing government interest justifying the adverse impact that contribution limits had on the political process. That interest was to protect the "integrity of our system of representative democracy" from two dangers:

1) From the risk of actual *quid pro quo* arrangements between large contributors and the candidates that they support; and

2) From "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.,* 424 U.S. at 26-27.

As for the "quid pro quo" risk, the Court observed that actual bribery was hard to detect and to prove, so Congress was justified in cutting it off at the pass. More importantly, the Court opined, Congress had ample justification for the contribution limitations, namely, to safeguard the system against the "appearance" of impropriety.

Expenditure Limits

As for expenditures, however, the Court was not persuaded that limiting spending served the interests of protecting the government from corruption or the appearance of corruption. This was especially true, it said, with respect to the limit placed upon a person's own personal or family treasury. In such a case there is no contributor to pose any risk of corruption. *Id.,* 424 U.S. at 52-53.

Likewise, having upheld the limitations on contributions, the Court found no need to limit expenditures also, having already put the lid on potential corrupters. Thus, the Court could not find sufficient justification for the limit on expenditures out of concern for the integrity of the electoral process.

The only government interest in limiting expenditures, then, was one to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections." *Id.,* 424 U.S. at 48. The Court dismissed this argument as "wholly foreign to the First Amendment," and directly contrary to a number of its decisions commanding that the government keep its hands off the free marketplace of ideas. *Id.,* 424 U.S. at 48-51.

Elaborating on this point, the Court concluded:

> *The campaign expenditure ceilings appear to be designed primarily to serve the governmental interests in reducing the allegedly skyrocketing costs of political*

> *campaigns.... The First Amendment denies the government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In a free society ordained by our Constitution it is not the government, but the people - individually as citizens and candidates and collectively as associations and political committees - who must retain control over the quantity and range of debate on public issues in a political campaign. Id.,* 424 U.S. at 57.

Having found no legitimate interest to curb campaign expenditures, the Court's struck down the statute's expenditure limitations, finding such curbs to have placed "substantial ... restraints" on the "quantity of expression," the "depth of exploration" and the "size of audience reach." *Id.,* 424 U.S. at 19.

Reporting and Disclosure

Compelling the reporting and disclosure of every contributor of $100 or more, and every expenditure of $10 or more, posed a more serious problem for the Court. Several of its precedents had disapproved compulsory disclosure requirements as violations of the right of people to freely associate without risk of public exposure. *Id.,* 424 U.S. 63-66.

The Court found a way around these cases, however, by pointing to two countervailing government interests. First, it stated that the government had an interest in providing the electorate with information as to where political money comes from and how it is spent by the candidate "in order to aid the voters in evaluating those who seek federal office." *Id.,* 424 U.S. at 66-67.

Second, the Court claimed that such reporting and disclosure requirements aid in the enforcement of the contribution limitations which are, in turn, designed to "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.,* 424 U.S. at 67.

While this second reason did not apply to the disclosure and reporting requirement imposed on individuals who spent money outside the campaign structure of the candidate and his party, the Court still found the first reason more than sufficient. *Id.,* 424 U.S. at 80-81.

As dissenting Chief Justice Warren Burger observed, the majority believed that the disclosure provisions served "broad informational purposes, enabling the public to be fully informed on matters of acute public interest." *Id.,* 424 U.S. at 236. This interest, the majority decided, was so important that it overrode any concern that the disclosure and reporting requirements might "deter some individuals" from participating in the campaign process. *Id.,* 424 U.S. at 68.

Public Funding

Although the Court struggled some with the reporting and disclosure requirements, it had absolutely no difficulty with the public financing of election campaigns. Such funding was, the Court reasoned, clearly within Congress's power to "promote the general welfare" and to regulate federal elections. *Id.,* 424 U.S. at 90-91.

As for the First Amendment, the Court asserted that public funding did not "abridge, restrict, or

censor speech ... but rather ... facilitate[d] and enlarge[d] public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.,* 424 U.S. at 93.

Having found that public funding of presidential elections "furthers ... First Amendment values," the Court dismissed, in a footnote, the plaintiffs' concerns that "public funding will lead to governmental control, and thus to a significant loss of political freedom":

> *The concern is necessarily wholly speculative and hardly as basis for invalidation of the public financing scheme on its face. Congress has expressed its determination to avoid the possibility.* *Id.,* 424 U.S. at 93, n. 126.

Moreover, the Court found that other instances of public financing have enhanced the First Amendment, not restricted it, referring - again in a footnote - to aid to "public broadcasting and other educational media." *Id.,* 424 U.S. at 93, n. 127.

The Commission

On the other hand, the Court found the method of appointing the Federal Election Commission, and its composition, wholly outside the Constitution. The means of appointment, the Court observed, bypassed the explicit command of Article II, Section 2, Clause 2 requiring the President to nominate, and upon the concurrence of the Senate, to appoint "officers of the United States." *Id.,* 424 U.S. at 125-28.

The Commission attempted to avoid this plain language by claiming that the Constitution had reposed in Congress extraordinary authority "to regulate elections" and that, consequently, the case stood on a different footing "than if Congress had exercised its authority in another field." *Id.,* 424 U.S. at 131. The Court rightfully dismissed this contention as "novel and contrary to the language of the Appointments Clause." *Id.,* 424 U.S. at 132.

It also summarily dismissed the Commission's attempt to justify its peculiar status as necessary to insure its independence from the power of an incumbent President running for reelection. The Court simply observed that the Commission must also regulate Congressional elections and who would insulate them from members of Congress? Not this appointment scheme which afforded the majority party of the Senate and the House to appoint four of the six voting members of the Commission. *Id.,* 424 U.S. at 134.

The Dissents

The opinion of the Court was remarkably free from dissent. Only Justice Byron White dissented from the holding that the expenditure limits were unconstitutional. Justice Thurgood Marshall dissented from that portion of the opinion, but only partially. He thought that the limit on expenditures from a candidate's personal or family fortune was warranted.

Justice William Rehnquist also filed a partial dissent, limiting his objections to the failure of the public funding of presidential elections to fairly treat minor parties.

Only Chief Justice Warren Burger registered a major difference with the majority. He would have

struck down all of the contribution limits as well as the reporting and disclosure requirements. He would also have found the public financing of presidential elections unconstitutional. What he opposed, he wrote, was Congressional "rationing" of "political expression" in order to curb abuses of the democratic processes. *Id.,* 424 U.S. at 256.

"There are many prices we pay for the freedoms secured by the First Amendment," the Chief Justice concluded, "[and] the risk of undue influence is one of them, confirming what we have long known: Freedom is hazardous, but some restraints are worse." *Id.,* 424 U.S. at 256-57.

CLARIFICATIONS REQUIRED

In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Court placed its stamp of constitutional approval on Congressional limits on contributions to campaigns for election to federal office. In the same case, the Court disapproved Congressional limits on expenditures by those candidates and their supporters.

The Court based its constitutional distinction between contributions and expenditures on two factors. First, it said that contributions to a candidate created the risk of corruption, or the appearance of corruption; whereas, expenditures did not.

Second, the Court concluded that one who contributes to another's political campaign does not have as great an interest in freedom of speech as the one who spends money on that campaign. The contributor, the Court ruled, is content to allow the recipient to shape the message; whereas the spender is the shaper of the message.

Having made this constitutional distinction between contributions and expenditures, the Court soon faced a number of issues requiring clarification of their ruling. First and foremost, the Court attempted to draw a clear line between "issue advocacy" and "express candidacy advocacy." Second, it labored hard to maintain the line between contributions and expenditures. Still, twenty years later, the Court found itself significantly divided over how best to police campaign reform measures under the First Amendment.

Issue Advocacy

The distinction between issue advocacy and express candidacy advocacy arose initially in cases involving state-imposed limits on both expenditures and contributions in campaigns for the defeat or passage of initiatives aud referenda.

In *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), the Court struck down a Massachusetts law prohibiting corporations from spending any money "for the purpose 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." *Id.,* 435 U.S. at 768.

The Massachusetts authorities defended this limit, in part, as necessary to "sustain ... the active role of the individual citizen in the electoral process and thereby prevent ... diminution of the citizen's confidence in government." *Id.,* 435 U.S. at 787.

In support of their position, state authorities relied upon a number of Supreme Court precedents upholding limitations on corporate and union expenditures in campaigns for candidates for public office. *See, e.g.*, *United States v. Automobile Workers,* 352 U.S. 567 (1972).

The Court conceded that it had found that "preservation of the individual citizen's confidence m government" is an "interest ... of highest importance," necessitating rulings upholding corporate expenditure limitations in campaigns for office. The Court explained:

> *The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. Id.,* 352 U.S. at 787, n. 26.

But the Court concluded that the issue of popular confidence was not implicated in the case of expenditures made in support of, or in opposition to, a ballot measure. It found no evidence "that corporate advocacy threatened imminently to undermine the democratic processes, thereby denigrating rather than serving First Amendment interests":

> *Referenda are held on issues, not candidates for office. The risk of corruption perceived in cases involving candidate elections ... simply is not present in a popular vote on a public issue. Id.*, 435 U.S. at 789-90.

This distinction between issue advocacy and express candidacy advocacy was extended by the Court to limitations on contributions, as well as expenditures. In *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), the Court struck down a city ordinance limiting contributions to $250 per individual to any committee's or other organization's campaign in support or opposition to a ballot measure.

Defenders of the contribution limitation claimed that it "ensured that special interest groups could not 'corrupt' the initiative process by spending large amounts to support or oppose a ballot measure." *Id.,* 454 U.S. at 293.

The Court rejected this claim on two grounds. First, the Court found that such limits directly abridged "the practice of persons sharing common views banding together to achieve a common end [which] is deeply embedded in the American political process." *Id.,* 454 U.S. at 294.

Second, it observed that such limits have a discriminatory effect, thereby placing a direct "restraint on the right of association":

> *Under the Berkeley ordinance an affluent person can, acting alone, spend without limit .... It is only when contributions are made in concert with one or more others in the exercise of the right of association that they are restricted .... Id.,* 454 U.S. at 296.

Both of these reasons would appear to support a ruling to strike down limits on contributions to campaigns for government office. Yet in *Buckley v. Valeo, supra,* the Court had ruled in favor of such limits.

Instead of reconciling the *Buckley* ruling with its reasoning in the *Berkeley* case, the Court confined

its rule in the former to a "single narrow exception to the rule" that limits on political activity were contrary to the First Amendment:

> *The exception relates to the perception of undue influence of large contributions to a candidate: 'To the extent that large contributions are given to secure a quid pro quo from current and potential office holders .... Id.,* 454 U.S. at 296-97.

Express Candidate Advocacy

Having established one rule for issue advocacy and another for express candidacy advocacy, the Court has been required to make a number of fine distinctions to keep the *Buckley* exception sufficiently narrow so as not to swallow up First Amendment freedoms.

First, it has carefully circumscribed "contributions" to those moneys given directly to a candidate's campaign organization or those given indirectly "by making expenditures that they coordinate with the candidate." See *Colorado Repub. Campaign Comm. v. FEC,* 518 U.S. -, 135 L.Ed 2d 795 (1996).

Second, the Court has insisted that the contribution limits apply only to those First Amendment activities that use "express words of advocacy of election or defeat" of an identified candidate. *Id.,* 135 L.Ed 2d at 803.

These two rules have set issue organizations free from the restrictive contribution rules of both federal and state campaign reform laws, so long as they stay away from "express candidacy advocacy" or so long as they engage in such express advocacy without coordinating that advocacy with an individual candidate's campaign.

Sticky problems remain, however. One of them came before the High Court in 1996 in a case involving expenditures by the Colorado Republican Campaign Committee in support of advertisements against an already identified Democratic candidate for the United States Senate. *Id.*

The Campaign Committee admitted that its ads were "express candidate advocacy" in that they were designed to defeat a clearly identified candidate. But it denied that they were contributions to any Republican candidate because, at the time of the ads, no such candidate had been identified.

Moreover, the Committee claimed that it had not "coordinated" its ad campaign with any of the potential GOP nominees. The Federal Election Commission countered, asserting that all "express candidacy advocacy" conducted by a political party must be presumed to be coordinated with the party's candidate.

The FEC failed, however, to persuade the Court. Treating the ad campaign as an "expenditure," not a "contribution," Justice Stephen Breyer, writing for himself, Justice David Souter and Justice Sandra Day O'Connor, likened the party's ad campaign to similar campaign activities conducted by "individuals, candidates, and other political committees." Consequently, he ruled that a political party could spend unlimited amounts of money on express candidacy advocacy so long as those expenditures were not, in fact, coordinated with the candidate's campaign.

Justices John Paul Stevens and Ruth Bader Ginsburg disagreed, claiming that such unlimited party expenditures created an "interdependency" between the candidate and the party thereby creating a "special danger that the party - or the persons who control the party - will abuse the influence it has over the candidate by virtue of its power to spend." *Id.,* 135 L.Ed 2d at 825-26.

Justice Anthony Kennedy, writing for himself, Chief Justice Rehnquist and Justice Antonin Scalia, could not understand what the fuss was about. What difference did it make, he asked, whether or not the party coordinated its expenditures with an individual candidate's campaign? "We have," he answered, "a constitutional tradition of political parties and their candidates engaging in joint First Amendment activities." *Id.,* 135 L.Ed 2d at 814.

Indeed, Justice Kennedy wrote, a rule limiting a political party's support of its candidate - only if coordinated with that candidate, would make "no sense." After all, he concluded, the very purpose of a political party is to support candidates hoping that, if elected, they will further the party's political agenda. *Id.*

Justice Clarence Thomas, with the Chief Justice and Justices Kennedy and Scalia concurring, wrote a separate opinion to bring this point home by injecting a heady dose of political reality into the Court's opinions:

> *As applied ...[to] campaign funding by political parties, the anti-corruption rationale loses its force .... What could it mean for a party to "corrupt" its candidate or to exercise "coercive" influence over him? The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes .... For instance, if the Democratic Party spends large sums of money in support of a candidate who wins, takes office, and then implements the Party's platform, that is not corruption; that is successful advocacy of ideas in the political marketplace and representative government in a party system. Id.,* 135 L.Ed 2d at 824.

While Justice Thomas succeeded in wooing his three colleagues to agree with him here, he was all alone in his call for a reexamination of *Buckley v. Valeo* in order to bring the election campaign laws back into conformity with the First Amendment.

Constitutional Advocacy

Relying in part on former Chief Justice Warren Burger's dissent in *Buckley,* Justice Thomas found that the distinction between "contributions" and "expenditures" lacked "constitutional significance." *Id.* 135 L.Ed 2d at 818.

First, he argued that contributions and expenditures both contribute to the public debate on political issues which is at the core of the First Amendment:

> *When an individual donates money to a candidate or to a partisan organization, he enhances the donee's ability to communicate a message and thereby adds to the political debate, just as when that individual communicates the message himself. Indeed, the individual may add more to political discourse by giving rather than by spending, if the donee is able to put the funds to more productive use than can the individual. The*

> *contribution of funds ... thus fosters the "free discussion of governmental affairs" ... just as an expenditure does. Id.*

Second, Justice Thomas observed that "[g]iving and spending in the electoral process also involve basic associational rights under the First Amendment":

> *Political associations allow citizens to pool their resources and make their advocacy more effective .... If an individual is limited in the amount of resources he can contribute to the pool, he is certainly limited in his ability to associate for purposes of effective advocacy Id.,* 135 L.Ed 2d at 818-19.

As for the asserted government interest of guarding against corruption, Justice Thomas injected some rather healthy skepticism into the analysis. Again he made two points.

First, he wondered if the *Buckley* Court had not allowed Congress to pass "broad prophylactic" limits on contributions to political campaigns without adequate evidence that such limits were really necessary to prevent "bribery or anything resembling it." *Id.,* 135 L.Ed 2d at 822.

Second, he found no real evidence linking contribution and expenditure limits to the prevention of real corruption in government. This discovery prompted Justice Thomas to doubt that Congress enacted the limits for that purpose:

> *There is good reason to think that campaign reform is an especially inappropriate area for judicial deference to legislative judgment .... What the argument for deference fails to acknowledge is the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it .... Indeed, history demonstrates that the most significant effect of electoral reform has not been to purify public service, but to protect incumbents and increase the influence of special interest groups .... When Congress seeks to ration political expression in the electoral process, we ought not simply acquiesce in its judgment. Id.,* 135 L.Ed 2d at 823.

Even though Justice Thomas expressed these doubts about Congress and about the Court's precedents, he did not offer any alternative constitutional standard. Rather, he applied the Court's compelling interest/least restrictive alternative formula, albeit more strictly, and found the financial limits on political party financial support of a candidate's election unconstitutional - whether coordinated or not.

In applying the Court's current test, Justice Thomas missed a golden opportunity to reexamine that test and, consequently, the constitutional premises upon which it has been fashioned. For it is a false constitutional philosophy, not a misapplication of the Court's formula, that has allowed the politicization of the First Amendment. The only solution to such politicization is a return to the original meaning of the constitutional text.

UNINTENDED CONSEQUENCES

Political speech, the United States Supreme Court has often stated, is at the core of the Freedom of Speech Clause. Such speech, the Court has insisted, deserves the highest protection. Thus, it has

consistently ruled that any curtailment of political speech must be backed up by a "legitimate" and compelling or "sufficiently important" government interest.

Because campaign finance reform laws curtail political speech, the Court has applied this test of "strict scrutiny" to determine the constitutionality of such laws under the Freedom of Speech Clause. See *Buckley v. Valeo,* 424 U.S. 1 (1976).

The language used to test the constitutionality of campaign finance reform laws and other measures encroaching upon political speech is of relatively recent origin, but the rule dates back almost eighty years to a test invented by Justice Oliver Wendell Holmes, Jr.:

> *The question in every [free speech] case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. Schenck v. United States,* 249 U.S. 47, 52 (1919).

Holmes's "clear and present danger" formula required proof of two things. First, the Government was required to prove that its purpose for acting was to avert an evil that it had constitutional authority to prevent. Second, the Government was required to prove that there was a "clear and present danger" that the evil that it was trying to prevent would come to pass if it did not take action now.

To illustrate the application of his test, Holmes gave his now famous example:

> *The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theater, and causing a panic. Id.*

Neither the example nor the clear and present danger test, however, contained any helpful guidelines for future application. Neither offered a clue as to how the Court was to determine what substantive evils the Government had a right to prevent. Neither gave the Court any analytical tool to determine whether a danger was either "clear" or "present."

Both of these defects were uncovered in the next free speech case to come before the Court. In *Abrams v. United States,* 250 U.S. 616 (1919), the Court upheld a conviction of some anti-war pamphleteers charged with having conspired to interfere with America's effort in World War I by, among other things, publishing "language intended to cause contempt or scorn for the form of government of the United States."

In dissent, Holmes argued that the conviction could not be sustained. First, he claimed that no "clear and present" danger to America's war effort had been proved, there being no evidence that the opinions expressed "so imminently threaten[ed] immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Id.,* 250 U.S. at 630.

Next, Holmes argued that preventing "seditious libel" was not a substantive evil that the Government had a right to prevent. Because that was the only crime that the Government had proved in the case, the Freedom of Speech Clause prohibited the conviction. *Id*

It would take forty-five years before Holmes's view on the illegitimacy of seditious libel was adopted by a majority of the Court. *New York Times v. Sullivan,* 376 U.S. 254 (1964). It would take another five years after that before his views about the "danger" of political speech would also be embraced. *Brandenburg v. Ohio,* 395 U.S. 444 (1969). In neither case, however, did the Court reexamine the Holmes test to determine if it ought to adopt another one more suited to the Freedom of Speech guarantee.

Instead, it merely rephrased the clear and present danger test in new language. In place of Holmes's pronouncement that a statute must be designed to avert a substantive evil that the Government has a right to prevent, the Court substituted a general inquiry concerning the legitimacy of the statute's purpose. And in the place of "clear and present danger," the Court substituted the word, "compelling" or "sufficiently important."

Armed with this modern version of the Holmes rule, the Court addressed the constitutionality of campaign finance reform in the 1976 case of *Buckley v. Valeo,* 424 U.S. 1. Consequently, as was the case with the Holmes test in the past, the Court failed to apply the correct First Amendment principles to the law.

The Freedom of Speech

Campaign reform laws do not just implicate the Freedom of Speech Clause, they also involve the Right of the People to Assemble and the Freedom of the Press. But the Freedom of Speech Clause is of first importance because it lays down a threshold principle denying to Congress any power to protect the reputation of the Government.

This threshold principle is reflected in the well-established rule that the Government cannot protect its reputation through criminal prosecutions for seditious libel or by permitting any civil action for libel brought for the purpose of protecting that reputation. *New York Times v. Sullivan, supra*, 376 U.S. at 272-77.

This rule demonstrates that the Freedom of Speech guarantee does not just guard against one means by which the Government may act to protect its reputation. Rather, the Speech Clause bans any and all measures designed to protect the reputation of the existing government. For instance, a judge may not use the contempt power for the purpose of protecting the "dignity and reputation of the courts" from "criticism of the judge or his decision." *Id.*, 376 U.S. at 272-73.

Throughout history, the reason why incumbent governments have attempted to protect their reputation is to retain power over the people. As Chief Justice Holt put it in defense of seditious libel prosecutions:

> *If the people should not be called to account for possessing the people with an ill opinion of the government, then no government can subsist. For it is necessary for all governments that the people should have a good opinion of it. Rex v. Tutchin,* 14 Howell's State Trials 1095, 1128 (1704).

Under the United States Constitution, it is illegitimate for the Government to pass or enforce laws to protect its reputation because, as James Madison wrote in 1800, "[t]he people, not the government

possess the absolute sovereignty." *Sources of Our Liberties* 426, (R. Perry, ed. 1972). That is why the core purpose of the Freedom of Speech Clause is to deny to the Congress any power to protect the Government's reputation. *New York Times v. Sullivan, supra,* 376 U.S. at 274-75.

Yet, by design and effect, that is what campaign finance reform legislation does. As the Supreme Court acknowledged in *Buckley v. Valeo,* 424 U.S. 1, 27, (1976), the "primary purpose" of the Federal Election Campaign Act of 1971 was "to limit the actuality and appearance of corruption resulting from large individual financial contributions" to election campaigns.

Appearance of Corruption

As for "actual" corruption, the Federal Election Campaign Act did not forbid contributions where those contributions "secure[d] a political *quid pro quo* from current and potential office holders." *Id.,* 424 U.S. at 27. Such an exchange, if proved, would be bribery. But the Act went beyond bribery; it put limitations on contributions even though there was absolutely no evidence that the contributor sought, much less obtained, a *quid pro quo*.

Given the prophylactic reach of the statute, the Court could not justify it as prohibiting actual corruption. Rather, it concluded that Congress was justified in acting because of "the appearance of impropriety." *Id.*, 424 U.S. at 30. Thus, it found that "Congress could legitimately conclude that the avoidance of appearance of improper influence [is] critical [if] confidence in the system of representative Government is not to be [eroded] ...." *Id.,* 424 U.S. at 27. (Emphasis added.)

This is a most remarkable statement, when considered in light of the justification traditionally given in support of laws against seditious libel. In 1704, as noted above, the ban on seditious libels was justified to ensure that the people maintained a good opinion of the existing government; in 1976, the limits on contributions to election campaigns were justified to ensure that the people retain their confidence in the existing system of representative Government.

After two decades of campaign finance reform, one thing is certain - the law has helped to secure the "existing system of government." Indeed, campaign reform has played the major role in maintaining a political status quo much to the delight of incumbent office holders.

Advantages of Incumbency

"By limiting what private individuals may do in terms of giving, while leaving incumbents all the perks of office," campaign reform measures have "drastically weakened the ability of challengers to make successful races." Evans, "GOP Should Oppose Fraud of 'Campaign Reform'," *Human Events* 17 (Nov. 29, 1996)

Incumbents have "huge built-in advantages [of] tax-paid staff, name recognition, TV and radio facilities, [and] the franking privilege":

> *Given this imbalance, campaign reform as we have known it is the final, deadly turn of the rachet, further enhancing the power of incumbents, further weakening the ability of outsiders to oppose them ....*

Thus, in the aftermath of campaign reform, incumbents, who previously enjoyed a 1.5 to one advantage m raising money over their challengers, now enjoy an almost four to one advantage:

> *In keeping with these numbers, incumbent rates of reelection, already high, [have] reached stratospheric levels. Id.*

In addition, campaign finance reform has taken the eyes of the people off the real reason why special interests are willing to put so much money into political campaigns. There is so much to be gained, if one has friends in Washington, and so much to be lost if one does not.

As Sheldon Richman of the Future of Freedom Foundation has observed:

> *Much of what government does is tax the unorganized majority and distribute the money to well-organized interests. What might big campaign donors be buying? Influence over the people who write laws and run programs that bring about those transfers. They want to be sure that when the government takes from Peter and gives to Paul, they will be the Pauls who get the loot.* Richman, "All Campaign 'Reform' Plans Flawed," *Human Events* 25 (Mar. 7, 1997).

Even if the special interests were precluded by law to contribute any money to any candidate, and elections were financed wholly out of the public treasury, this would not end the corruption. As Doug Bandow of the Cato Institute has remarked:

> *As long as $1.7 trillion in taxpayer wealth is available for plundering in Washington, interest groups will spend hundreds of millions of dollars to get their hands on it.* Bandow, "If You Really Want Campaign Finance Reform," *Human Events* 20 (Apr. 11, 1997).

These post-campaign reform phenomena demonstrate why the Freedom of Speech Clause was designed to prohibit Congress from having, as its goal or purpose, the protection of the government's reputation. Such measures, whether they take the form of seditious libel or campaign finance reform, protect the governmental status quo, by making sure that the people hold a good opinion of the incumbent officers running it.

Right of Assembly

By removing from Congress the power to protect its own reputation, and the reputation of other elected and appointed officials, America's founders opened the door for the people to take control over their government. In order to make sure that the people controlled the government, and not vice versa, the First Amendment also guarantees the right of the people peaceably to assemble.

The very purpose of this right is to ensure that the people are free to choose how they will come together "to consult for their common good." The only power that the government retains over these associations or assemblies is to protect against threats to the physical peace of the community. Even then, there must be proof that the concern for the physical peace of the community is not one arising from a fear that the ideas promoted by the group stir the some in the community to anger. *See* Titus, "The Right to Assemble" (1996).

Campaign finance reform laws violate this principle in two distinct ways. By limiting contributions to political campaigns, the Government dictates how people will come together to consult for their common good. By forcing disclosure of the amount of those contributions and the names and addresses of the contributors, the Government places barriers in the way of such associations. Both kinds of limits force people to associate in ways acceptable to the Government, not to themselves.

Limitations on Contributions

Contribution limitations not only dictate the amount of money that may be given to a candidate, but the amount of time and services that a person may wish to donate to that candidate's cause. *Buckley v. Valeo, supra,* 424 U.S. at 36-38. As Justice Clarence Thomas recently observed:

> *Political associations allow citizens to pool their resources and make their advocacy more effective, and such efforts are fully protected by the First Amendment .... If an individual is limited in the amount of resources he can contribute to the pool, he is most certainly limited in his ability to associate for purposes of effective advocacy. Colorado Repub. Campaign Comm. v. FEC,* 518 U.S. --, 135 L.Ed 2d 795, 818-19 (concurring and dissenting).

In addition, contribution limitations considerably diminish the right of the people to form new political parties. Even the Supreme Court has acknowledged this, observing that "the $1,000 ceiling governing contributions to candidates will prevent the acquisition of seed money necessary to launch campaigns." *Id.,* 424 U.S. at 34, n. 40.

This discriminatory impact is compounded by the fact that newly formed political parties must expend millions of dollars just to get their candidates on the ballot. Funds that otherwise might be spent to promote the parties' candidates are diverted to this effort.

Contribution limitations make it that much harder for such parties to get on the ballot. Under other circumstances, the Supreme Court has struck down laws prohibiting the use of paid circulators to place a constitutional amendment on the ballot because of the laws adverse impact on ballot access. *Meyer v. Grant,* 486 U.S. 414 (1988).

But contribution limits are only half the story. The other major feature of campaign reform is the forced disclosure of names of the contributors and the amounts given. *Buckley v. Valeo,* supra, 424 U.S. at 60-63.

Forced Disclosures

In contexts other than election campaigns, the Supreme Court has uniformly struck down laws forcing political organizations to disclose their membership lists. *See, e.g., NAACP v. Alabama,* 357 U.S. 449 (1958). These precedents proved to be of no avail in the campaign finance reform test case, because the rule protecting nondisclosure was subject to the Court's compelling state interest test; and the Court found a compelling interest in "curbing the evils of campaign ignorance and corruption ...." *Buckley v. Valeo, supra,* 424 U.S. at 68.

As for curbing corruption, the argument here was no different than the one pressed in favor of

limiting the amounts of individual contributions. And as was the case against contribution limitations, so it is here - the Freedom of Speech Clause prohibits the Government from any law the purpose of which is to protect itself from "appearances" that threaten its "good reputation."

As for curbing campaign ignorance, the Court assumed that the Government had a right to force disclosure in order to provide "the electorate with information" as to where political campaign money comes from and how it is spent by the candidate "in order to aid the voters in evaluating those who seek federal office." *Id.,* 424 U.S. at 66-67.

The Court cited no authority supporting the legitimacy of this purpose. To the contrary, it completely ignored its own precedent which established that forced disclosure of the authors of political pamphlets "might deter perfectly peaceful discussions of public matters of importance." *Talley v. California,* 362 U.S. 60, 65 (1960). (Emphasis added.)

Because forced disclosure cannot be justified as means of protecting the community from a threat to the physical peace, there is no constitutional ground upon which such disclosure could be required. Had the Court adhered to this principle in the campaign reform area, then the rules requiring disclosure of the names of contributors, and the amounts given, would have been found unconstitutional.

Not only did the Court ignore this principle, but it ignored the history that led it to place the mantle of constitutional protection upon anonymity in political debate. Had it surveyed that history, the Court would have concluded, as it had in the past, that anonymity was constitutionally required to protect "printers, writers and distributors ... critical of the government" from Government retaliation. *Id.,* 362 U.S. at 64-65.

Such retaliation can take many different forms, including the exercise of executive discretion to hold some to the letter of campaign finance law while allowing others to go free. Such a risk of discriminatory application of the law is very real in the case of the Federal Election Commission, a Government agency composed of appointees representing the two major political parties.

Nevertheless, the Court dismissed this threat as speculative, unsupported by any evidence in the record. *Buckley v. Valeo, supra,* 424 U.S. at 69-70. But this did not stop the Court from speculating that the law's disclosure requirement would, in fact, make a positive contribution to the political debate, even though there was nothing in the Court or Congressional record that it would.

The Court simply assumed that such information would be made available to the public in time for it to be taken into consideration before ballots were cast. In addition, the Court assumed that such information would be made available in a form meaningful to the electorate. *Id* at 66-67.

In a recent case striking down an Ohio law banning distribution of anonymous campaign literature, the Supreme Court finally addressed this issue and found that disclosures of names and addresses "adds little, if anything, to the reader's ability to evaluate the document's message." *McIntyre v. Ohio Elections Comm.,* 514 U.S. --, 131 L.Ed 2d 426,441 (1995).

Moreover, in the Ohio case, the Supreme Court expressed doubt about the claim that it is legitimate for the Government to enact any regulation designed to make sure that the electorate is informed.

After all, as the Court recalled, it had struck down a law requiring "a newspaper that prints editorials critical of a particular candidate to provide space for a reply by that candidate." *Id.,* 131 L.Ed 2d at 440-41.

If an "informed electorate" is a legitimate Government purpose, then why couldn't the Government force a newspaper to give a candidate a right to reply? And if the Government cannot do that, then why may the Government force disclosures of the names and addresses of campaign contributors and the amounts of their contributions?

Furthermore, if the Government may force such disclosures, then why can't it pass regulations against "negative political advertising" that so many believe interfere with the goal of an "informed electorate"? Would not such regulations, like forced disclosures, help "curb the evil of campaign ignorance"?

Whatever the answer to this question, the Court, if it follows current precedent, would certainly find such regulations unconstitutional. *Id.,* 131 L.Ed 2d at 440-41. This is so because any regulation designed to insure an "informed electorate" violates the Freedom of the Press, for that clause forbids the Government from exercising the power of an editor. Titus, "The Freedom of the Press: An Introduction," (1995).

PRESSING ISSUES

At the heart of the current system of campaign finance regulation are laws limiting the amount of individual campaign contributions and requiring disclosure of the names, addresses, and occupations of the contributors. Such limits and disclosures are required, we are told, in order to prevent people with money from corrupting the political process and in order to inform the electorate who is giving money to whom. See Titus, "Campaign Reform: Politicizing the First Amendment," (1997).

Exempt from these controls, however, are the media -*The New York Times, The Washington Post, Newsweek, Time, US. News and World Report,* ABC, CBS, NBC, Fox. Why? They edit news stories, write editorials, and select columns that support and oppose political candidates. Indeed, in some cities the local newspaper and television can make or break a candidate.

With that kind of power, the media are just as likely to corrupt the political process as any other person or entity with power and money. Yet, there is absolutely no push by the reformers to include the media in their hard court press to put even more restrictions on the financing of political campaigns.

The reason for this silence is twofold. First, the media would strongly oppose any such proposal in the name of the Freedom of the Press. Second, the media would be right to oppose such intrusions, for the Freedom of the Press should be an absolute barrier to any such regulations.

But the Freedom of the Press, rightly understood and applied, should also be an absolute bar to government regulation of the organization and financing of political campaigns. For the Freedom of the Press is not a special privilege available only to the media, but it is a freedom enjoyed by all, including candidates for political office and their supporters.

Freedom of the Press

In 1975, Associate Supreme Court Justice Potter Stewart wrote that the "Free Press Clause extends protection to an institution":

> *[The] primary purpose of the constitutional guarantee of a free press was [to] create a fourth institution outside Government as an additional check on the three official branches. [T]he relevant metaphor [is that] of the Fourth Estate. [The first amendment thus protects] the institutional autonomy of the press.* Stewart, "Or of the Press," 26 Hastings L.J. 631, 633-34 (1975).

Three years later, Chief Justice Warren E. Burger refuted Justice Stewart's claim - and on two grounds. First, the Chief Justice asserted that "the history of the Clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege." Second, he stated that "the very task of including some entities within the "institutional press" while excluding others [is] reminiscent of the abhorred licensing system [that] the First Amendment was intended to ban." Therefore, he concluded that "the First Amendment does not 'belong' to any definable category of persons or entities. It belongs to all who exercise its freedoms." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 797-801 (1978) (Burger, C.J. concurring).

The Chief Justice was right. The Freedom of the Press antedated the Bill of Rights by nearly one hundred years. It had been gained only after a long and arduous fight against the English Crown which had claimed the right to decide what would be printed and who would do the printing.

In this battle for freedom, there was no institutional press independent of the Crown. Consequently, the institutional press was not a friend of freedom, but its foe, arguing for State licensing in order to maintain its monopoly position in the marketplace of ideas.

In opposition to the established press and its government allies, John Milton wrote his great apologia, the *Areopagitica,* calling for freedom from the Government licensing of the printing press. In 1695, Milton's ideas finally won when the English Parliament allowed the Licensing Act, which controlled the printing press, to expire. *Sources of Our Liberties* 242-43 (R. Perry, ed. 1972).

By 1769, the Freedom of the Press was so well-established in England that Sir William Blackstone referred to it as "essential to the nature of a free state." IV Blackstone, *Commentaries on the Laws of England* 151 (1769).

And what was that freedom? Blackstone wrote:

> *The liberty of the press ... consists in laying no previous restraints upon publications .... Every freeman has the undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press. Id.* at 151-52. (Emphasis added.)

The Supreme Court has always applied the Freedom of the Press consistent with this comprehensive principle. For instance, in 1938, the Court had before it a case in which a Jehovah's Witness had been convicted of violating a city ordinance requiring her to get a permit from the mayor of Griffin,

Georgia, before she could distribute a religious tract.

Writing for a unanimous Court, Chief Justice Charles Evans Hughes held that "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." Thus, the Court struck down the city's permit law as an unconstitutional prior restraint. *Lovell v. Griffin,* 303 U.S. 444, 452 (1938). (Emphasis added.)

Five years later, the Court applied the Freedom of the Press in favor of a homeowner's unfettered right to decide whether to open his door to itinerant evangelists. Under the Press guarantee, it was the right of the homeowner, not the State or City, to decide what views would be published in the home. *Martin v. City of Struthers,* 319 U.S. 141 (1943).

So the Freedom of the Press belongs, as Chief Justice Burger said, to all, from newspaper tycoon to itinerant pamphleteer, from the professional journalist to the housewife. It cannot be claimed by a privileged few and taken away from the people. Yet, that is exactly what campaign finance regulations do.

Licensing Campaigns

In order to enforce the contribution limitations on campaigns for federal office, the Federal Election Campaign Act of 1971, as amended, has established a licensing scheme designed to control entry into the campaign process. Any person who seeks federal office must establish a election campaign committee and register that committee with the Federal Election Commission. And any person or other entity who wants to support that candidate's campaign must also register with the Commission. 2 U.S.C. Section 433.

Such "political committees" must thereafter keep detailed records, including the names and addresses of all persons making a contribution in excess of $10 and, in addition, the occupation and principal place of business of any person whose contributions aggregate more than $100. *Buckley v. Valeo,* 424 U.S. 1, 63 (1976). In addition, the candidate's major campaign committee is required to make quarterly reports to the Commission. Violation of these registration and reporting rules is punishable by a fine of not more than $1,000 or a prison term of not more than one year. *Id.,* 424 U.S. at 63-64.

All of this has been justified by Congress and the Courts as necessary in order to protect the electoral process from potential corruption, and from the appearance of corruption, occasioned by the unrestricted investment of money into political campaigns. *Id.,* 424 U.S. at 7, 66-68.

What is striking about the registration and reporting requirements, and the rationale for them, is that they parallel the practices and the policies of the English press licensing system which was, presumably, outlawed by the First Amendment.

In *Near v. Minnesota,* 283 U.S. 697 (1931), a state court issued an injunction pursuant to a statute that prohibited the publication of any "obscene, lewd and lascivious" or "malicious , scandalous, and defamatory" publication. The purpose of the statute and the injunction was to protect the general welfare of the community from the threat of moral corruption.

The United States Supreme Court struck down the injunction and the statute, not on the grounds that the state could not protect the moral fiber of the community, but that it could not use the particular means chosen to reach that goal:

> *The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. Id.,* 283 U.S. at 713.

In other words, the Court ruled that the Press guarantee barred the State from imposing any prior restraint upon publications as a means to deal with corruption of the community's morals. This ban applied equally to any measure taken by the State to impose a prior restraint for the purpose of dealing with political corruption:

> *... [T]he liberty of the press ... was intended to prevent all ... previous restraints upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots toward enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse. Id.,* 283 U.S. at717.

Indeed, the English system of licensing of the press was designed to protect the realm from both moral and political corruption. Thus, the Star Chamber which had jurisdiction over the press, also had power over religion and "the conduct of municipal elections." *Sources of Our Liberties, supra,* at 130.

The goals of the Star Chamber regulations of printing were twofold: "to protect the state against nonconforming religious and political opinions and to prevent destructive trade practices." *Id* at 242. To achieve these goals, the Star Chamber enacted an ordinance providing for "an elaborate scheme of licensing designed to prevent the appearance of unlicensed books":

> *[A]ll books were to bear the names of the printer and the author; the number of master printers was limited to twenty; no one was allowed to erect a new press or cast type without notifying the Stationer's Company...." Id.*

By requiring both registration of the approved printing presses and disclosure of publishers and printers, the Star Chamber effectively precluded all unlicensed printing presses from operating. Not only did this scheme limit who could enter the printing business, it also limited the amount of money that could be expended in that business.

That is precisely what the present regulatory scheme of campaign financing does. It prevents anyone from promoting a candidate for election unless that person has a license from the Federal Election Commission. In addition, federal law, by limiting the amount that an individual may contribute to a campaign, reduces the amount of campaign publications and enforces those limits by means of registration and disclosure requirements upon candidates and their supporters. Thereby, the law imposes a prior restraint upon campaign literature as a means of combating allegedly

potential political corruption in the electoral process.

In addition, by exempting the institutional press from coverage, the current regulatory scheme of campaign financing discriminates in favor of established newspapers, magazines, radio and television, none of whom are subject to the registration, disclosure, reporting, and contribution limit requirements.

Such discriminatory financial burdens have always been found unconstitutional by the Supreme Court. In *Grosjean v. American Press Company,* 297 U.S. 233 (1936), a unanimous Court struck down a Louisiana gross receipts tax imposed upon the advertising revenues received by "any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week or displayed and exhibited ... by means of moving pictures."

The Court held the tax to be violative of the Freedom of the Press, operating as a "previous restraint" against a "selected group of newspapers." *Id.,* 297 U.S. at 249-50, 251. This principle was reiterated, and applied, by the Court in 1983 when it struck down a Minnesota use tax that had exempted most of the state's newspapers:

> *A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer generally....*
>
> *Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the $100,000 exemption is that only a handful of publishers pay any tax at all .... Whatever the motive of the legislature ..., we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such potential for abuse that no interest suggested by Minnesota can justify the scheme. Minneapolis Star and Tribune Co. v. Minnesota Comm. of Rev.,* 460 U.S. 575, 585, 591-92 (1983).

If the Freedom of the Press means anything, it must mean that the Government cannot on the one hand exempt the institutional press from campaign finance control, and on the other, impose financial limitations on candidates' campaign literature.

No Editorial Authority

At the heart of the Federal Election Commission's mandate to regulate campaigns for elective office is its authority to determine whether a communication is one that advocates the election of a candidate to office or one that advocates the taking of a position on an issue. If it is the former, then the Commission has jurisdiction, except for newspapers, magazines, etc.; if the latter, then the Commission has no jurisdiction. See Titus, "Campaign Reform: Politicizing the First Amendment," (1997).

The very nature of this decision requires the Commission to intrude upon the right of the people to exercise editorial authority over their own publications. As an intrusion upon the editorial function of the people, the Federal Election Commission violates the Freedom of the Press.

The guarantee that the Government cannot exercise editorial authority over the publications of the people is a well-established principle, recently applied by the Supreme Court to strike down Florida's "right to reply" law requiring a newspaper to provide equal space to a political candidate who had been criticized by the newspaper. *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974).

The Florida authorities defended the statute, asserting that the State had an affirmative obligation "to ensure that a variety of views reach the public." *Id.,* 418 U.S. at 247-48. The right to reply law, they claimed, was necessary to give ordinary people access to a marketplace of ideas, controlled by an economic oligopoly which blocked entry to all but those with lots of money. *Id.,* 418 U.S. at 248-51.

While the Court agreed with the State's economic portrait of the mass media industry, it disagreed with the claim that the Freedom of the Press permitted the State to enforce access to the press in order to enhance the marketplace of ideas. *Id.,* 418 U.S. at 252-54. To the contrary, Chief Justice Burger wrote that the Press guarantee forbade such "government coercion," claiming that "the Florida statute exacts a penalty on the basis of the content of a newspaper":

> *The first phase of the penalty ... is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. Id.,* 418 U.S. at 256.

As a consequence, the Chief Justice continued:

> *... [E]ditors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and editorial coverage would be blunted or reduced. Id.,* 418 U.S. at 257.

Even if there was no discernible economic impact on the press, the Chief Justice concluded, the Florida statute was still unconstitutional. It intruded, he wrote, upon "the function of editors":

> *The choice of material to go into a newspaper, and the decisions made as to the limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press .... Id.,* 418 U.S. at 258.

Editing Campaigns

What the Court does not allow in the case of a newspaper should not be allowed in the case of a political campaign. As the Florida right to reply statute adversely impacted the flow of political and editorial comment, so contribution limitations on political campaigns negatively impact the flow of information and advocacy emanating from a candidate's campaign committee.

Justice Clarence Thomas made this point in a recent opinion in which he wrote:

> *When an individual donates money ... to a partisan organization, he enhances the donee's ability to communicate a message and thereby adds to the political debate .... The contribution of funds ... to a political group thus fosters the "free discussion of governmental affairs ...."* *Colorado Repub. Campaign Comm. v. FEC,* 518 U.S. --, 135 L.Ed 2d 795, 818 (1996) (concurring and dissenting).

Likewise, when a newspaper is able to attract investment capital or advertising revenue, it enhances that paper's freedom to discuss governmental affairs, including candidates in a political campaign. There is a difference, however. The candidates are limited by law in their ability to obtain revenues to promote their candidacies, while the newspaper is not limited at all. Clearly, the newspaper has unlimited ability to obtain financial support for its favored federal candidates, but any candidate that the paper opposes is limited by campaign financing laws in his ability to raise money to counter media opposition.

Aside from the statutorily imposed economic discrimination against a candidate's campaign publications, laws limiting contributions to the political campaigns of candidates for public office necessarily require the Government to exercise an "editorial function," which is also forbidden by the Press guarantee.

When the Government places a limit on a person's ability to contribute money to a political campaign, that limit by definition intrudes upon the contributing person's "editorial control and judgment." By limiting the amount of his contribution, the Government essentially forbids the contributor from choosing to delegate to another how that money is to be spent for the purpose of advancing a candidate's cause. *Id.,* 135 L.Ed 2d at 819.

To avoid this limit, the contributor must either choose another political group that supports the candidate, such as a political party or political action committee, or to promote the candidacy by publications advocating the candidate's position on key issues, or not spend the money at all.

In this way, the Government imposes its editorial judgment upon the people, dictating the parameters within which election campaigns may be conducted, and thereby, robbing the people of the editorial authority guaranteed to them by the Freedom of the Press.

Financing Campaigns

The unconstitutional usurpation of the people's editorial authority will be compounded if some reformers get their way and establish an election campaign system supported solely by taxpayer's money. Under such a scheme, the Government becomes the publisher, exercising final editorial control over how the people's money is to be spent.

With the Federal Election Campaign Act of 1971 came the law establishing a Presidential Election Campaign Fund, "financed from general revenues in the aggregate amount designated by individual taxpayers ... who on their income tax returns may authorize payment to the Fund of one dollar of their tax liability in the case of an individual return or two dollars in the case of a joint return." *Buckley v. Valeo,* 424 U.S. 1, 85-86 (1976).

The Fund is, in turn, divided into three accounts, one for the financing of political party nominating

conventions, another for general election campaigning and a third for primary campaigns. Not all candidates for President or all parties nominating such a candidate are eligible to receive money from the Fund. Third-party candidates, new party candidates and independent candidates must obtain five percent of the vote before they can receive any money at all.

In addressing the constitutionality of this funding provision, the Government claimed that Congress had the power to establish the Fund pursuant to the "General Welfare Clause." And the Supreme Court agreed, finding that "public financing of Presidential elections as a means to reform the electoral process" was a means of "promoting" the General Welfare. *Id.,* 424 U.S. at 90-91.

In addition, the Court claimed that Government funding of a presidential campaign did not "abridge" the freedoms of speech or of press; rather, such funding "facilitate[d] and enlarge[d] public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.,* 424 U.S. at 92-93. In support of this latter point, the Court cited laws that provided for financial assistance to "public broadcasting and other forms of educational media." *Id.,* 424 U.S. at 93, n. 127.

What the Court overlooked in its analysis, however, was the central principle of the Freedom of the Press Clause: that the editorial function belongs to the people and cannot be exercised by the Government without intruding upon that constitutional guarantee.

With respect to Government financing of elections, it is the Government - not the people - who set the formula of eligibility for minor and new party and independent candidates. Indeed, the Court stated that Congress had set that formula to insure against the "funding of hopeless candidacies" and "candidates without significant public support" to the end that the nation would not be infected with "splintered parties and unrestrained factionalism." *Id.,* 424 U.S. at 96.

Such reasoning is no different from the kind of rationale that underpins a newspaper, radio or television editorial decision not to cover a particular candidacy in a presidential campaign. It is one thing for that decision to be made by a nongovernmental entity, it is quite another for it to be made by Congress. In the former case, it is the people making the decision, and therefore, it is consistent with the "self-government" principle of the First Amendment. In the latter case, it is the Government making the editorial decisions for the people.

If this is true when the funding scheme depends upon the taxpayer's decision to mark a box, sending some of his tax revenue to a Presidential Campaign Fund, - as is currently the law, it is all the more true when applied to current proposals to establish a campaign fund supported by tax revenues without the taxpayer's individual decision.

Coercing the taxpayer to support the political campaigns of aspirants to federal office runs directly contrary to the First Amendment principle initially articulated by Thomas Jefferson: "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."

As for Freedom of the Press, it is for each individual to decide whether to allocate any of his money to anyone's political campaign, not the Government's. Otherwise, the Government robs the people

of their constitutional right to edit their campaign communications, including their right not to say anything at all.

CONCLUSION

Whatever the shortcomings of the Supreme Court's decision in *Buckley v. Valeo,* and they are many, the Court did base its opinion upon a fundamentally sound constitutional premise:

> *In the free society ordained by our constitution, it is not the government, but the people - individually as citizens and candidates and collectively as associations and political committees - who must retain control over the quantity and range of debate on public issues in a political campaign. Id.,* 424 U.S. at 57.

Current campaign reform proposals, however, challenge this very premise. They assume that Congress must have the power to set "reasonable" limits on campaign spending, because the people are unable - or unwilling to do it for themselves.

What stands in the way, but the First Amendment. As House Minority Leader Richard Gephardt has observed: "What we have here is two important values in direct conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy. You can't have both." *Time* p. 25 (Feb. 3, 1997).

How remarkable! In a nation where elections are intended to control the government, the government is seeking to control the elections. That may be what Gephardt wants for America, but that is not what her founders risked their lives, their fortunes and their honor for. Rather, they agreed with Thomas Jefferson who wrote:

> *The functionaries of every government have the propensities to command at will the liberty and property of their constituents. There is no safe deposit for these but with the people themselves, nor can they be safe with them without information. Where the press is free, and every man is able to read, all is safe.*

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