THE 1974 FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS: THE SHORTCOMINGS OF GOOD INTENTIONS

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After six decades of basically unchanged and substantially ineffective campaign finance regulation,¹ Congress and the President managed in 1971 to agree on reform, embodying it in the Federal Election Campaign Act² and the Revenue Act of 1971.³ Using information which would not have been available absent the Campaign Act's greatly strengthened provisions for supervision and enforcement⁴ of the contribution and expenditure reporting requirements,⁵ resourceful journalists and governmental investigators were able to discover a variety of illegal contributions to the 1972 presidential campaign chests⁶ and to trace Republican campaign payments to the participants in the Watergate break-in.⁷ It is therefore not particularly far-fetched to view the 1971

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

Act of Oct. 15, 1974, Pub. L. No. 93-443, 88 Stat. 1263, *amending* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 [hereinafter cited as 1974 Amendments];

Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) [hereinafter cited as 1971 Campaign Act];

Revenue Act of 1971, Pub. L. No. 92-178, tit. VII-VIII, 85 Stat. 560-74, *as amended* by 1974 Amendments [hereinafter cited as Revenue Act];

Fleishman, *Public Financing of Election Campaigns: Constitutional Constraints on Steps Toward Equality of Political Influence of Citizens*, 52 N.C.L. REV. 349 (1973) [hereinafter cited as *Public Financing*];

Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C.L. REV. 389 (1973) [hereinafter cited as *Freedom of Speech*].

1. See H. ALEXANDER, *MONEY IN POLITICS* (1972); *Freedom of Speech* at 403-04.

2. 1971 Campaign Act.

3. Revenue Act.

4. 1971 Campaign Act §§ 104(a)(3)(C), 105, 301(g).

5. *Id.* §§ 302, 304.

6. See, e.g., N.Y. Times, Jan. 1, 1975, at 1, col. 6 (3M Company acknowledges illegal political fund); *id.*, Dec. 31, 1974, at 1, col. 2 (Ashland Oil Inc. admits \$170,000 in illegal gifts); *id.*, Oct. 12, 1974, at 1, col. 2 (Northrop Corporation official admits to secret political slush fund used to support President Nixon and others).

7. See *id.*, July 17, 1973, at 1, col. 4 (\$220,000 raised by Kalmbach for seven Watergate defendants); *id.*, July 19, 1973, at 1, col. 2 (\$450,000 funneled to Watergate defendants and lawyers); *id.*, May 18, 1975, § 3, at 1, col. 1 (summary).

Campaign Act as partially responsible for causing the eventual resignation of President Nixon.⁸

The cause-and-effect relationship, however, is not nearly as strong as the connection between the Watergate events, including the resignation, and the Federal Election Campaign Act Amendments of 1974.⁹ But for the embarrassing and widening wake of Watergate—the plethora of illegal corporate campaign contributions,¹⁰ the illegal sale of high office in return for contributions,¹¹ among others—there would very likely have been no new campaign finance reforms in 1974, much less any which constituted so drastic an innovation as, for example, the provision of compulsory 100 percent public financing for major party candidates in presidential general elections,¹² and optional public financing for presidential primary campaigns.¹³ Coming only two months after the Nixon resignation and so obviously a prescription for the ills which are generally perceived as having caused Watergate, the 1974 Amendments constituted Congress's first, and thus far only successful, attempt to give practical vent to the shame and guilt aroused by the whole sorry spectacle. Congressman Bill Frenzel was undoubtedly speaking for his colleagues when, in commenting on the amendments, he explained: "We couldn't go back to the American people and tell them that we had no answer to the abuses that they had seen. This is our answer, and we have to make it work."¹⁴

The trouble is that indignation and outrage, while frequently necessary to energize legislative action, are rarely the most favorable auspices for constructive, carefully considered lasting change. And that is even more the case when the legislative subject matter is one in which every member of Congress has a direct personal interest and with which most Congressmen are always slow to tamper—this time

8. The greater accessibility of financial reports filed by candidates for Congress, coupled with the constant monitoring of the reporting process and prodding of Common Cause, has also led for the first time in history to the prosecution of several members of Congress for violations of the reporting requirements. *See, e.g., id.*, Feb. 20, 1975, at 10, col. 3.

9. 1974 Amendments.

10. N.Y. Times, Mar. 16, 1975, § 4, at 4, col. 1 (summary of illegal corporate campaign funding); *id.*, Jan. 5, 1975, § 4, at 2, col. 2 (3M and Ashland admit illegal contributions); *id.*, July 24, 1974, at 1, col. 1 (illegal gifts by milk cooperative); *id.*, Nov. 14, 1973, at 32, col. 6 (Gulf Oil and Ashland plead guilty to illegal corporate contributions).

11. *Id.*, July 2, 1975, at 12, col. 1; *id.*, Mar. 17, 1974, § 1, at 47, col. 3; *id.*, Mar. 14, 1973, at 20, col. 3.

12. 1974 Amendments § 404.

13. *Id.* § 408.

14. N.Y. Times, May 18, 1975, at 36, col. 1.

even more so since three years earlier they overhauled electoral finance regulation for the first time in more than half a century.

Under such circumstances, the outcome was predictable: the change most necessary on the least painful terms. While the amendments embody important reforms, they are cast in the most politically palatable forms and are scarred by the pulling and hauling of legislative battles. Surely as well-intentioned as any legislation could be, the 1974 Amendments unfortunately are seriously flawed in important respects.

On January 2, 1975, the first day after the amendments became effective,¹⁵ their constitutionality was broadly challenged in an unusual court action brought by plaintiffs from both ends of the political spectrum—Senator James Buckley of New York and former Senator Eugene McCarthy of Minnesota, together with others.¹⁶ It is a challenge which aims not only, and perhaps not chiefly, at invalidating the flawed provisions of the 1974 Amendments, but also, and most unfortunately, at what appears to be the valid regulatory conceptions which underlie them. In passing upon the issues, as it almost surely will, the Supreme Court would be well advised to take great care in separating the two kinds of questions. An overly broad pronouncement of unconstitutionality could make regulation of campaign finance impossible for years to come. The other extreme—rationalization of the legislation's shortcomings in the name of a public response to Watergate—is equally undesirable. The character of political financing is far too important to the long-term survival and healthy functioning of democracy for the Court to allow the passions and pressures of the moment to perpetuate what appear to be seriously faulty modes of dealing with it.

15. *Id.*, Jan. 2, 1975, at 27, col. 1.

16. Other plaintiffs include Congressman William Steiger of Wisconsin, Stewart R. Mott, the Committee for a Constitutional Presidency, the Conservative Party of the State of New York, the New York Civil Liberties Union, the American Conservative Union, and Human Events, Inc. *See id.*, May 19, 1975, at 1, col. 7; *id.*, Jan. 20, 1975, at 18, col. 6.

In order to expedite decision and Supreme Court review before subsidy payments start being made to candidates for the presidential nomination on January 1, 1976, the District Court certified the proceeding to the Court of Appeals for the District of Columbia, a procedure specified by section 208 of the 1974 Amendments (codified at 2 U.S.C. § 437(h)). On April 14, the Court of Appeals, *en banc*, ordered the District Court to make findings of fact and certify constitutional questions to it, which the District Court completed on May 19, 1975. *See Buckley v. Valeo*, — F. Supp. — (D.D.C. 1975). The Court of Appeals then held arguments, *en banc*, and rendered its decision on August 15, 1975. *See* Civil Action No. 75-1061. The case is now on appeal to the Supreme Court.

PERTINENT PROVISIONS OF EXISTING LAW

Disclosure of Contributions and Expenditures

The 1974 Amendments made no significant changes in the Campaign Act's reporting and disclosure provisions.¹⁷ Minor revisions worthy of notice included lifting from \$10 to an aggregate of \$100 the threshold at which the occupation and principal place of business of a contributor must be reported.¹⁸ Moreover, to reinforce the accountability of each candidate for conforming to the new overall expenditure limitations,¹⁹ the new law requires a candidate to consolidate in single reports all receipts, disbursements, and transfers by all political committees supporting his candidacy.²⁰ To facilitate the discharge of that responsibility, reports of political committees, other than a candidate's designated principal campaign committee, are to be made to the principal committee²¹ rather than directly to the supervisory officer for the particular category of election, as heretofore, or to the newly established Federal Election Commission.²² The burden to report all required information on contributions and expenditures is thereby shifted to a candidate's principal campaign committee. Finally, the 1974 Amendments require that reports be made to the Federal Election Commission by anyone who contributes or expends more than \$100 in behalf of a federal candidacy other than by direct contribution to a candidate or political committee,²³ and by anyone, "other than an individual,"²⁴ who explicitly or implicitly urges the public to elect or defeat a candidate for federal office, with the exception of bona fide reporting or editorializing by broadcasters, newspapers, magazines, or other periodicals.²⁵

At the present time, then, the law requires all political committees which expect to receive or expend \$1000 in a calendar year to register with the Federal Election Commission,²⁶ to keep detailed records of contributions of \$10 or more²⁷ and of all expenditures,²⁸ and to re-

17. For a description of the reporting and disclosure provision in the 1971 Campaign Act, see *Freedom of Speech* at 393-99.

18. 1974 Amendments §§ 202(a), 204(b)(3).

19. See text accompanying notes 63-95 *infra*.

20. *Id.* § 204(b)(4).

21. *Id.* §§ 202(b), 203, 204(a) (codified at 2 U.S.C. §§ 432(f), 433(e), 434(a)).

22. Under the 1971 Campaign Act, the supervisory officers were the Comptroller General for presidential races, the Secretary of the Senate for Senate races, and the Clerk of the House for House races. 1971 Campaign Act § 301(g).

23. 1974 Amendments § 204(c) (codified at 2 U.S.C. § 434(d), (e)).

24. *Id.* § 208(a) (codified at 2 U.S.C. § 437(a)).

25. *Id.*

26. *Id.* §§ 203, 208(c)(3) (codified at 2 U.S.C. § 433).

27. *Id.* § 202(a)(2), (3) (codified at 2 U.S.C. § 432(c)(1), (2)).

port periodically to the Federal Election Commission the amounts and exact nature of all receipts and disbursements, including the names, mailing addresses, occupation, and principal place of business of contributors of \$100 or more, as well as an identification of all those to whom expenditures of \$100 or more have been made, along with a detailed explanation of the expenditures.²⁹ And the statutory disclosure scheme comes full circle with the reporting requirements newly imposed on independent actors, as described above.³⁰

Limitations on Contributions

Prior to the 1971 Campaign Act, there had been for thirty years a \$5000 annual limit on the aggregate amount of contributions to federal election campaigns,³¹ which had been easy to evade because the statutory language encouraged an interpretation of the limit as applying in the aggregate to contributions to any single political committee. One might legally contribute, therefore, the \$5000 maximum to as many different committees on behalf of the same candidate as one wished.³²

The 1971 Campaign Act repealed this totally ineffective contribution limitation, substituting for it a new, but much narrower, ceiling on the amount which might be contributed to a campaign by a candidate or his immediate family.³³ The newer provision was retained in the 1974 Amendments and broadened to include loans within the definition of contributions.³⁴ But the 1974 reform went much further, imposing a \$1000 ceiling on any individual's contributions,³⁵ and a \$5000 ceiling on any committee's contributions³⁶ to any single federal candidate in any single election,³⁷ as well as a \$25,000 ceiling on any individ-

28. *Id.* § 202(a)(2) (codified at 2 U.S.C. § 432(c)(3), (4)).

29. *Id.* § 204(b) (codified at 2 U.S.C. § 434(b)).

30. See notes 23-25 *supra* and accompanying text.

31. 18 U.S.C. § 608 (1970).

32. A. HEARD, *THE COSTS OF DEMOCRACY* 347-50 (1960).

33. 1971 Campaign Act § 203, *amending* 18 U.S.C. § 608 (1970). "Family" is defined to include a spouse, child, parent, grandparent, brother or sister, and the spouses of such persons. The ceilings imposed were \$50,000 in a presidential or vice presidential campaign, \$35,000 in a Senatorial campaign, and \$25,000 in a House campaign.

34. 1974 Amendments § 101(b)(2) (codified at 18 U.S.C. § 608(a)(3), (4) (1975)).

35. *Id.* § 101(a) (codified at 18 U.S.C. § 608(b)(1)).

36. *Id.* § 101(a) (codified at 18 U.S.C. § 608(b)(2)).

37. The limits apply separately, therefore, to each stage of the election—primary, run-off primary, and general—except that all primary elections for president in any single year are regarded as one election for purposes of this contribution ceiling. *Id.* § 101(a) (codified at 18 U.S.C. § 608(b)(5)).

ual's aggregate federal election contributions in any calendar year.³⁸

Several additional provisions were added to reinforce the stringent new contribution limitations—one limiting contributions in currency to \$100 or less,³⁹ a second requiring earmarked contributions through intermediary organizations to be treated as contributions directly to the candidate earmarked,⁴⁰ and a third prohibiting foreign nationals from making any contributions at all.⁴¹ Finally, the 1974 Amendments significantly increased to at least \$25,000 the maximum penalties for violation of all contribution limitations, whether new or pre-existing.⁴²

Limitations on Expenditures

The ineffective⁴³ pre-existing limitations on the amounts of campaign expenditures were replaced in 1971 by ceilings on each federal candidate's aggregate expenditures for communications media.⁴⁴ This first step towards candidate accountability⁴⁵—making each candidate accountable for all expenditures on his behalf—was followed by another and even larger one in the 1974 Amendments, which broadened the expenditure limitations beyond communications media alone to include all campaign expenditures.⁴⁶ Without such candidate responsibility for all expenditures on his behalf and under his control, expenditure limitations would not effectively limit. The 1974 Amendments, recognizing this, reinforce campaign centralization by requiring each federal candidate to designate a principal campaign committee⁴⁷ and

38. *Id.* § 101(a) (codified at 18 U.S.C. § 608(b)(3)).

39. *Id.* § 101(f)(1) (codified at 18 U.S.C. § 615(a)).

40. *Id.* § 101(a) (codified at 18 U.S.C. § 608(b)(6)).

41. *Id.* § 101(a) (codified at 18 U.S.C. § 613). The 1974 Amendments expanded the previous ban on contributions by agents of foreign principals into one prohibiting contributions by any foreign nationals.

42. *Id.* § 101(e)(1) (corporations, labor unions, and national banks); § 101(e)(2) (government contractors); § 101(e)(3) (foreign nationals); § 101(a) (general contribution and expenditure limitations).

43. Like contribution limitations they were ineffective because they applied to each political committee's expenditures, rather than to the aggregate of expenditures of all committees supporting a particular candidate. There was no limit on the number of committees a candidate could legally have. See notes 31-32 *supra* and accompanying text.

44. 1971 Campaign Act §§ 103, 104.

45. The 1971 Campaign Act, *see id.* § 302, reinforced the inclination toward candidate accountability by requiring the designation of a chairman and treasurer and insisting on their approval, or that of their designated agents, of the receipt of all contributions and the making of all expenditures.

46. 1974 Amendments § 101(a) (codified at 18 U.S.C. § 608(c)).

47. *Id.* § 202(b) (codified at 2 U.S.C. § 432(f)).

official campaign depositories.⁴⁸

The ceilings imposed, which apply separately to each election stage⁴⁹—primary, run-off, and general—except in presidential elections, vary from office to office. Candidates for the presidential nomination may spend an aggregate of no more than \$10 million in all stages of the nomination process, and, in any single state, no more than twice what a candidate for the United States Senate nomination may legally spend in that state.⁵⁰ In the general election for president, each presidential/vice-presidential candidate team⁵¹ may spend no more than \$20 million.⁵²

Expenditure limitations in races for Congress are computed differently. A candidate for a senatorial nomination or for nomination to the House of Representatives in a single-district state may spend the greater of either eight cents per person of voting age or \$100,000.⁵³ In the general election for the Senate, or a state-wide House seat, the expenditure limitation is the greater of either twelve cents per person of voting age or \$150,000.⁵⁴ Other candidates for nomination or election to the House of Representatives may spend \$70,000⁵⁵ at each stage of the election, except those seeking to be Delegate from Guam or the Virgin Islands, who are limited to only \$15,000.⁵⁶

These are only the base limitations and are augmented statutorily in several ways. First of all, a candidate may spend an *additional* twenty percent of his expenditure limitation on fund-raising costs.⁵⁷

48. *Id.* § 208(a) (codified at 2 U.S.C. § 437(c)). British law has long required absolute candidate accountability, *see* Representation of the People Act, 11 & 12 Geo. VI, c. 65 § 42(1) (1948), even to the point of forbidding campaign activity by independent actors. The State of Florida was the first state to adopt a mandatory treasurer and campaign depository statute in the United States, *see* Law of June 5, 1951, ch. 26819, [1951] Fla. Laws 631, *superseded by* FLA. STAT. ANN. § 106.021 (1974), which has apparently been quite effective. *See* Rody, *Ten Years of Florida's "Who Gave It—Who Got It" Law*, 27 LAW & CONTEMP. PROB. 434 (1962).

49. 1974 Amendments § 101(a) (codified at 18 U.S.C. § 608(c)(3)).

50. *Id.* § 101(a) (codified at 18 U.S.C. § 608(c)(1)(A)).

51. *Id.* § 101(a) (codified at 18 U.S.C. § 608(c)(2)(A)).

52. *Id.* § 101(a) (codified at 18 U.S.C. § 608(c)(1)(B)).

53. *Id.* § 101(a) (codified at 18 U.S.C. § 608(c)(1)(C)).

54. *Id.* § 101(a) (codified at 18 U.S.C. § 608(c)(1)(D)).

55. *Id.* § 101(a) (codified at 18 U.S.C. § 608(c)(1)(E)).

56. *Id.* § 101(a) (codified at 18 U.S.C. § 608(e)(1)(F)).

57. *Id.* § 102(d) (codified at 18 U.S.C. § 591(f)(4)(H)). Political committees, apparently contributing to many different candidates, *see id.* § 101(a) (codified at 18 U.S.C. § 608(b)(2)), may spend an unlimited amount of money in raising funds, so long as television, radio, newspapers, or other advertising directed to the public is not used for that purpose, *id.* § 102(d) (codified at 18 U.S.C. § 591(f)(4)(I)). Since there is no limit on the aggregate amount which such political committees can spend or raise anyway, one must wonder to what end subsection (I) was included in the Amendments.

These ceilings are lifted again in a second way, because national and state party committees may spend a limited amount on behalf of individual candidates in addition to what the candidate himself may spend.⁵⁸ The national party committees, for example, may spend two cents per person of voting age on behalf of their presidential/vice-presidential candidate teams.⁵⁹ Both the national party and a state party may each spend the greater of two cents per person of voting age or \$20,000 on behalf of their candidates for the Senate or a single state-wide House seat,⁶⁰ and \$10,000 on behalf of each candidate for the House of Representatives.⁶¹ In effect, then, the true minimum expenditure limitation in a general election would be \$220,000 rather than \$150,000 in a Senate race,⁶² and \$104,000, rather than \$70,000, in a House race. Moreover, the Amendments provide for an annual cost-of-living increase in all of the limitations, including the party supplements, to reflect increases in the consumer price index, calculated on a 1974 base period.⁶³

These expenditure ceilings are further increased, in effect, by various kinds of expenditures which the 1974 Amendments exempt from the definition of either "expenditures" or "contributions," or both. When an individual entertains for a candidate, in the individual's own home, the real costs of invitations, food, and beverages, and the imputed costs for the use of the real or personal property involved do not count toward either the candidate's expenditure limitation⁶⁴ or the donor's contribution ceiling,⁶⁵ up to a maximum of \$500.⁶⁶ Moreover, when an unpaid, volunteer campaign worker spends his own funds for travel on behalf of a candidate, and is not reimbursed, up to \$500 of those travel costs are treated neither as candidate expenditures nor as individual contributions.⁶⁷

In addition to expenditure limits on candidates and party committees, the 1974 Amendments impose an annual aggregate of \$1000 on direct expenditures on behalf of, or in opposition to, a clearly identified

58. *Id.* § 101(a) (codified at 18 U.S.C. § 608(f)(1)).

59. *Id.* § 101(a) (codified at 18 U.S.C. §§ 608(c)(2), (f)(2)).

60. *Id.* § 101(a) (codified at 18 U.S.C. § 608(f)(3)(A)).

61. *Id.* § 101(a) (codified at 18 U.S.C. § 608(f)(3)(B)).

62. To the base of \$150,000, add 20% or \$30,000 for fund-raising costs, and \$20,000 each from both the national and state committees.

63. 1974 Amendments § 101(a) (codified at 18 U.S.C. § 608(d)).

64. *Id.* § 201(a)(5) (codified at 18 U.S.C. § 591(f)(4)(D)).

65. *Id.* § 201(a)(4) (codified at 18 U.S.C. § 591(e)(5)(B)).

66. *Id.* § 201(a)(5) (codified at 18 U.S.C. § 591(f)(4)); *id.* § 201(a)(4) (codified at 18 U.S.C. § 591(e)(5)).

67. *Id.* § 201(a)(5) (codified at 18 U.S.C. § 591(f)(4)(E)); *id.* § 201(a)(4) (codified at 18 U.S.C. § 591(e)(5)(D)).

candidate⁶⁸ by a person acting independently of the candidate.⁶⁹ In other words, this limitation permits individuals not under the control of, or in concert with, a candidate on his campaign⁷⁰ to buy up to \$1000 of advertising a year advocating the election or defeat of a candidate, apparently without limit on the number of elections in which an individual may so intervene. Nor is there any limitation on the aggregate amount of expenditures permitted to any independently acting individual in any single year, analogous to the \$25,000 ceiling on aggregate contributions to all federal candidates.⁷¹

Public Subsidization of Federal Elections

The Revenue Act of 1971⁷² had provided the first operating federal subsidization of political campaigns,⁷³ which took three forms: 1) a tax deduction for political contributions,⁷⁴ 2) a tax credit for political contributions,⁷⁵ and 3) cash grants in support of presidential general elections⁷⁶ drawn out of a fund—the Presidential Election Campaign Fund—accumulated from a one or two dollar check-off on individual or joint personal income tax forms.⁷⁷ Under the 1974 Amendments, these three subsidies⁷⁸ remain substantially intact, although the formula by which allocations are made from the Presidential Election Campaign Fund is completely revised.⁷⁹ Instead of a major party entitlement

68. Defined by the statute, *id.* § 101(a) (codified at 18 U.S.C. § 608(e)(2)(A)), as involving publicity on which the candidate's name, photograph, or drawing appears, or from which the identity of the candidate is apparent by unambiguous reference.

69. *Id.* § 101(a) (codified at 18 U.S.C. § 608(e)(1)).

70. If candidate control were present, the expenditure would have to be counted towards the candidate's own expenditure ceiling, and the direct expenditure would be regarded as a campaign contribution, which explains why both the individual contribution limitation and independent expenditure ceiling are at the same level, \$1000.

71. 1974 Amendments § 101(a) (codified at 18 U.S.C. § 608(b)(3)).

72. Revenue Act.

73. The Congress passed the Long Act, *see* Pub. L. No. 89-809, tit. III § 302(a), 80 Stat. 1587, in 1966, providing a tax check-off and presidential election subsidy similar to the 1971 Act, but it never went into effect. *See* H. ALEXANDER, *supra* note 1, at 218-24.

74. Revenue Act § 702 (codified at INT. REV. CODE OF 1954, § 218).

75. *Id.* § 701 (codified at INT. REV. CODE OF 1954, § 41).

76. *Id.* tit. VIII.

77. *Id.* § 802, amending INT. REV. CODE OF 1954, § 6096.

78. Professor Surrey's view of tax benefits as subsidies, *see* Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970), which seemed for a time to have become "conventional wisdom," has recently been coming under severe attack. *See* Kristol, *Taxes, Poverty and Equality*, 37 THE PUB. INTEREST 3 (1974); N.Y. Times, June 1, 1975, § 6 (Magazine), at 61-62 (letter by Kristol).

79. For a concise description of these three subsidies as originally enacted, *see* *Freedom of Speech* at 397-99.

based on fifteen cents per person of voting age,⁸⁰ each major party presidential candidate is now to receive cash grants up to the level of the expenditure ceilings established for presidential general elections,⁸¹ which will be \$20 million in 1976. A minor party, defined as in the 1971 Revenue Act as a party whose candidate for president in the preceding election received between five and twenty-five percent of all votes cast in that election,⁸² will continue to receive that proportion of the Campaign Fund payments to major parties which its vote total bears to the average of the votes cast for the major party candidates:⁸³

$$\frac{\text{Election Fund Payment to Minor Party}}{\text{Election Fund Payment to Major Party}} = \frac{\text{Popular Vote for Minor Party}}{\text{Average Vote for Major Party}}$$

The principal 1974 reform in the presidential election subsidy was the creation of grants for primary election campaigns,⁸⁴ also to be financed out of funds accumulated from the income tax check-off. In order to qualify for the subsidy, an aspirant for a party's presidential nomination must raise \$5000 in each of twenty states in contributions no larger than \$250 each.⁸⁵ Once qualified for the subsidy, a candidate will be entitled to receive one federal dollar for each dollar raised from individual contributors, up to a maximum of \$250 per contributor,⁸⁶ and an aggregate ceiling of \$5 million.⁸⁷

In addition to these changes, the 1974 Amendments established for the first time a federal subsidy to political parties to finance their nominating conventions.⁸⁸ Major parties will receive \$2 million each,⁸⁹ with the stipulation that they are not to spend more than that sum on the conventions.⁹⁰ A minor party is entitled to a sum coin-

80. Revenue Act § 801 (codified at INT. REV. CODE OF 1954, § 9004(a)(1)).

81. 1974 Amendments § 404(a) (codified at INT. REV. CODE OF 1954, § 9004(a)(1)).

82. Revenue Act § 801 (codified at INT. REV. CODE OF 1954, § 9002(7)).

83. *Id.* § 801 (codified at INT. REV. CODE OF 1954, § 9004(a)(2)(A)); *see* § 9004(a)(2)(B) (slight variation in formula to be used when minor party presidential candidate in current election is same as its candidate in preceding election).

84. 1974 Amendments § 408 (codified at INT. REV. CODE OF 1954, §§ 9031-42).

85. *Id.* § 408(c) (codified at INT. REV. CODE OF 1954, § 9033(b)(3), (4)).

86. *Id.* § 408(c) (codified at INT. REV. CODE OF 1954, § 9034(a)).

87. *Id.* § 408(c) (codified at INT. REV. CODE OF 1954, § 9034(b)).

88. *Id.* § 406(a) (codified at INT. REV. CODE OF 1954, § 9008).

89. *Id.* § 406(a) (codified at INT. REV. CODE OF 1954, § 9008(b)(1)).

90. *Id.* § 406(a) (codified at INT. REV. CODE OF 1954, § 9008(d)(1)). The wording of the law does not make clear whether parties are permitted to continue the longstanding practice of choosing one city over another as the convention site substantially on the basis of services contributed free by businesses. Are such contributions legal, and, if so, are they to be counted toward the ceiling? The Federal Election Commission has now decided that, so long as such gifts are made to a fund assembled by a local non-

puted exactly as its entitlement to the presidential general election subsidy is calculated⁹¹—that proportion of the major party convention subsidy as its vote bears to the average of the major party vote in the preceding presidential election.⁹² Like the major parties, a minor party, in order to receive the convention subsidy, must agree to spend no more on its convention than a major party is permitted to spend, or \$2 million.⁹³ The convention expenditure ceilings for both major and minor parties can be waived by the Federal Election Commission if “extraordinary and unforeseen” circumstances arise.⁹⁴

Supervisory and Enforcement Mechanisms

It has long been contended⁹⁵ that the principal flaw in election campaign financing was the lack of any entity charged with supervision and enforcement of election finance laws. Prior to 1971, campaign financial reports were required to be filed with the Clerk of the House and the Secretary of the Senate, but no one had responsibility for following up failures to file, authority to audit such reports as were filed, or power to punish for violations of the filing or other campaign finance laws. The 1971 Campaign Act left supervisory authority over Senate races with the Secretary and over House races with the Clerk,⁹⁶ but lodged responsibility over presidential elections in the Comptroller General of the United States.⁹⁷ That Act also spelled out in considerable detail the duties of the supervisory officers,⁹⁸ but it was only the Comptroller General, through an Office of Federal Elections with a sizable staff, who responded in full measure to the statutory scheme, and it is partially as a result of his faithfulness to the letter of the law that much of the information about 1972 presidential campaign practices came to light.

The 1974 Amendments, in creating the Federal Election Commission, moved monitoring and enforcement of campaign finance laws

profit organization for use by the party convention, they are permitted and will not count toward the \$2,000,000 expenditure ceiling. See N.Y. Times, July 10, 1975, at 11, col. 1.

91. See notes 82-83 *supra* and accompanying text.

92. 1974 Amendments § 406(a) (codified at INT. REV. CODE OF 1954, § 9008 (b)(2)).

93. *Id.* (codified at INT. REV. CODE OF 1954, § 9008(d)(2)).

94. *Id.* (codified at INT. REV. CODE OF 1954, § 9008(d)(3)).

95. See, e.g., H. ALEXANDER, *supra* note 1, at 190; PRESIDENT'S COMMISSION ON CAMPAIGN COSTS, FINANCING PRESIDENTIAL CAMPAIGNS 21 (1962); Lindsay, *The Political Money Machine*, 12 MIDWEST Q. 41, 46-47 (1970).

96. 1971 Campaign Act § 301(g).

97. *Id.*

98. *Id.* § 308.

into an entirely new era. For the first time in the nation's history, there exists a single entity with a mandate to insure that campaigns for all federal offices are carried on in accordance with the laws that are supposed to govern them. Unlike the supervisory officers under the 1971 Campaign Act,⁹⁹ the Federal Election Commission is charged with taking initiatives if required reports are not filed, if additional information is desired, or if violations of law are suspected, and it is amply endowed with statutory powers to pursue its mission.¹⁰⁰ It can compel the attendance of witnesses,¹⁰¹ subpoena documents,¹⁰² require special reports,¹⁰³ make rules with the effect of law,¹⁰⁴ and initiate civil proceedings in its own name,¹⁰⁵ as well as receive the aid of the Attorney General in prosecuting its complaints.¹⁰⁶

The Commission is comprised of the Secretary of the Senate, the Clerk of the House, two members appointed by the President *pro tempore* of the Senate, two by the Speaker of the House, and two by the President.¹⁰⁷ The appointments of the President *pro tempore* of the Senate and the Speaker of the House are required to be made upon the recommendation of the majority and minority leaders in the respective houses. All six appointees are subject to confirmation by *both* Houses of Congress.¹⁰⁸ In order to ensure bipartisanship, the Act requires different party affiliations within each set of two appointments.¹⁰⁹

These are the principal components of existing law regulating election financing. As one might expect, there are constitutional issues at nearly every point, and we now proceed to examine them against the entire legal context in which they arise.

FIRST AMENDMENT QUESTIONS ABOUT THE 1974 AMENDMENTS

The Framework for Examining First Amendment Claims

Politics is democracy's principal means of choosing those who are to govern. As such, it constitutes the arena in which most funda-

99. *Id.* § 308(d)(1).

100. 1974 Amendments § 208(a) (codified at 2 U.S.C. §§ 437d, 437g).

101. *Id.* § 208(a) (codified at 2 U.S.C. § 437d(a)(3)).

102. *Id.*

103. *Id.* § 208(a) (codified at 2 U.S.C. § 437d(a)(1)).

104. *Id.* § 208(a) (codified at 2 U.S.C. § 437d(a)(8)).

105. *Id.* § 208(a) (codified at 2 U.S.C. §§ 437d(a)(6), 437g(a)(5)).

106. *Id.* § 208(a) (codified at 2 U.S.C. § 437g(a)(7)).

107. *Id.* § 208(a) (codified at 2 U.S.C. § 437c(a)(1)).

108. *Id.*

109. *Id.*

mental choices of governmental policy are shaped, if not actually made. In that arena, candidates, private and public interest groups, and the communications media interact with the aim of persuading the voters of the desirability of particular candidate choices. The medium of that interaction is speech—whether written or spoken, whether directly to live audiences or by means of broadcasting, whether spread at no cost to the speaker or by means of time, space, or equipment purchased by him or his supporters—and its chief facilitator for campaign purposes is political association. Because they are indispensable to self-government in general and to informed voter choice in particular, there is no doubt that political speech and association occupy a preferred place among already preferred rights guaranteed by the first amendment.¹¹⁰ Any potential infringements of their exercise are therefore scrutinized by courts with great care.

First amendment rights, however, are not absolute,¹¹¹ and despite their exalted status, political speech and association are no exception.¹¹² Indeed, their vulnerability to governmental constraint arises out of just that which gives them their preferred place—their crucial role in enabling self-government to work. There can be no elections

110. See *Freedom of Speech* at 409-10 for a discussion of the authority for this statement. See also T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 635-42 (1970); A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960); A. ROSENTHAL, *FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS* (1972); Ferman, *Congressional Controls on Campaign Financing: An Expansion or Contraction of the First Amendment?*, 22 AM. U.L. REV. 1 (1972); Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U.L. REV. 900 (1971); Comment, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 214 (1972); *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1233-98 (1975); Comment, *The Constitutionality of Restrictions on Individual Contributions to Candidates in Federal Elections*, 122 U. PA. L. REV. 1609 (1974).

111. At the outset we reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are "absolutes" not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. *Konigsberg v. State Bar*, 366 U.S. 36, 49 (1960) (citations omitted).

See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 4 (1965); Freund, *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A.L. REV. 467, 471 (1967). See generally Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256.

112. *Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973). See, e.g., *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Bullock v. Carter*, 405 U.S. 134, 140-41 (1972); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-271 (1964).

without rules to guide them, and, for more than a century at the federal level, rules have been enacted,¹¹³ and sustained by courts,¹¹⁴ which go beyond simple facilitation of election mechanics to regulate in detail how candidates and their supporters might permissibly behave. Over the past twenty years, there has been an increasing consensus that even broader rules should be made to govern the interaction of political actors so that socially unacceptable tactics might not be used in political combat and factors pernicious to democracy might not unduly skew election outcomes. That consensus grows out of, and largely rests upon, other rights guaranteed by the Constitution, principally equal protection of the laws.¹¹⁵

This does not mean that *any* rules of the game which Congress might deem appropriate would be constitutionally permissible. But it does suggest that, contrary to first impression, political speech and association may not be as impregnable to reasonable regulation as non-political speech and association may be.

What calculus, then, would the Court use in examining laws regulating this paradoxically elevated but simultaneously vulnerable area of political speech/association against claims that they violated the first amendment?¹¹⁶ Without much question, the test is actually the same as that applied to alleged infringements of other forms of speech pro-

113. Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491 (requiring the election of congressmen by geographical districts); Act of July 25, 1866, ch. 245, 14 Stat. 243 (establishing the time and mode of electing senators); Act of May 31, 1870, ch. 114, §§ 19-22, 16 Stat. 144-46 and Act of July 14, 1870, ch. 254, §§ 5-6, 16 Stat. 255-56 (a comprehensive code of regulations governing the manner of conducting congressional elections, including provisions against false registration, bribery, voting without legal right, making false returns, interfering with election officers, and so on. The entire code was repealed in 1894, Act of Feb. 8, 1894, ch. 25, 28 Stat. 36.).

114. See *Barrroughs & Cannon v. United States*, 290 U.S. 534 (1934); *Ex Parte Yarbrough*, 110 U.S. 651 (1884); *Ex Parte Siebold*, 100 U.S. 371 (1879). See also *United States v. International Union of Automobile Workers*, 352 U.S. 567 (1957) (summary of the history of federal legislation in this area).

115. U.S. CONST. amends. V, XIV. There is no doubt that the measure of equal protection against federal intrusion provided by the fifth amendment is at least as great as that provided against state action by the fourteenth amendment. "Thus, if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." *Johnson v. Robison*, 415 U.S. 361, 364-65 n.4 (1974). See *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969); *Schneider v. Rusk*, 377 U.S. 163, 168-69 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

116. See *Freedom of Speech* at 404-09. See also, Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464 (1956); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Comment, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

ted by the first amendment. The Court first examines the governmental interest which the particular regulation is claimed to serve, seeking to determine its legitimacy and the appropriate weight to be assigned to it. Next the Court probes the legislative means in order to ascertain whether the means is appropriate to the end: whether, in fact, the means is likely to be an effective instrument for attaining the ends. Finally, the Court searches among other conceivable means of achieving the governmental goal to ascertain whether the legislative means chosen is, in fact, the "least drastic alternative" available.¹¹⁷ An application of these three tests—the legitimacy and weight of the governmental objective, the appropriateness and effectiveness of the means chosen in attaining it, and the availability of less drastic alternatives to the same end—leads to the conclusion that the 1974 Amendments contain several provisions of doubtful constitutionality.

Unfortunately for simplicity's sake, the matter cannot be left there, and any doubts about the constitutionality must be qualified in three very important respects. First, it is important to distinguish between constitutional flaws in principle and constitutional faults in detail. The former involve modes of regulation that inherently and irremediably infringe constitutional rights, while the latter arise out of constitutionally faulty mechanisms for attaining constitutionally permissible regulatory goals and can be easily cured of their flaws. All but one of the defects in the 1974 Amendments are in details rather than in principle.

A second distinction must be made with respect to the balancing of the governmental interests served by particular campaign finance reforms against the first amendment infringements which they entail. Some infringements may be of only incidental nature and easily justified by a single legitimate governmental interest, while others may be so basic in character as to be incapable of being saved by any magnitude of legitimate governmental interest, however compelling, on the other side of the balance.

Finally, and perhaps most important in the context of constitutional analysis, the entire election reform law must be viewed as a whole. The principal governmental objectives which campaign finance regulations are directed at attaining—(1) diminishing the deterrence of candidates from running for office, (2) diminishing candidates' differential advantage arising from disparate access to wealth, and (3)

117. See *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *United States v. Robel*, 389 U.S. 258, 268 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

diminishing contribution-based, post-election influence on policy or in obtaining appointments to office—interact so sensitively that it is impossible, in fact, to evaluate separately the constitutionality of particular instruments for achieving them. Thus, for example, low contribution ceilings, which are designed to further the second and third objectives, seriously undercut the first by making it difficult for candidates to get campaigns started with a small number of large contributions. Low expenditure ceilings, which are directed at the first objective, severely frustrate the second by increasing the campaign advantage of incumbents. As we shall see, therefore, faults in one element—such as the candidacy deterrent effect of the contribution ceilings—may be saved by the provisions in another element, such as public subsidization of primary elections. Because of these interdependencies, and in view of the fact that Congress enacted the various provisions as a single, unified regulatory scheme, it would be unfair for the Court to assess the constitutionality of component parts in isolation from other pertinent elements of the scheme. As the Court itself has observed on several occasions in passing on laws regulating elections, it is the “laws taken as a whole” that count.¹¹⁸

Disclosure of Contributions and Expenditures

Disclosure is the least burdensome of all forms of campaign finance regulation. It requires only that political committees register with governmental authority, and that both committees and candidates report specified information about the donors of contributions and the recipients of expenditures. Such laws do not coerce particular behavior; they merely expose whatever is in their purview. We know, however, that public exposure of the names of contributors might very well deter contributions to unpopular or fringe candidates, or “chill the exercise” of first amendment rights, and indeed in several recent cases plaintiffs have alleged such a chill.¹¹⁹ Moreover, as we have regrettably seen recently, even contributors to major parties may be subjected to reprisals by a party in power,¹²⁰ and consequently to a fear of making such contributions in the first place. Nonetheless, disclosure requirements, if reasonably and narrowly drafted, are surely constitutional.¹²¹

118. *Jenness v. Fortson*, 403 U.S. 431, 437 (1971); *Williams v. Rhodes*, 393 U.S. 23, 34 (1968).

119. *United States v. Finance Comm. to Re-Elect the President*, 507 F.2d 1194, 1199 (D.C. Cir. 1974); *Pichler v. Jennings*, 347 F. Supp. 1061, 1067 (S.D.N.Y. 1972).

120. *N.Y. Times*, June 28, 1973, at 1, col. 5; *id.*, June 28, 1973, at 1, col. 6.

121. See *United States v. Harriss*, 347 U.S. 612 (1954); *Burroughs & Cannon v. United States*, 290 U.S. 534 (1934); Nutting, *Freedom of Silence: Constitutional Pro-*

Resting on the premise that "sunlight is the best disinfectant,"¹²² disclosure laws have the objective of providing voters and the press with information about who is supporting whom and in what amounts, in order to deter contribution-derived, post-election policy favors or appointments to office.¹²³ Surely to a democracy, resting ultimately on informed voter choice, these are perhaps the weightiest governmental interests imaginable. And so the courts have held them.¹²⁴

Disclosure itself thus serves first amendment values, a factor which mitigates to a considerable degree whatever first amendment interests are infringed by a possible "chill" on, or reprisal for, contributing. But what about the means chosen? It is true that the 1974 Amendments cure some of the principal defects of the 1971 Act's disclosure provisions which had raised doubts about their constitutionality.¹²⁵ Specifically, the establishment of what is likely to be an effective enforcement mechanism in the Federal Election Commission,¹²⁶ with the responsibility not only for receiving financial reports but also for disseminating the information in them to the public, substantially increases the effectiveness of the disclosure mechanism in attaining the legitimate governmental interest which justifies it. The disclosure provisions are further strengthened by the new prohibition against undisclosed earmarking,¹²⁷ a practice which permitted contributors to particular congressional candidates to avoid disclosure of their contributions and rendered the statutory scheme ineffective.¹²⁸

tection Against Governmental Intrusions in Political Affairs, 47 MICH. L. REV. 181, 204-06 (1948); Lobel, *Federal Control of Campaign Contributions*, 51 MINN. L. REV. 1, 42-43 (1966); Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. LEGIS. 359, 403-10 (1972); Note, *The Constitutionality of Financial Disclosure Laws*, 59 CORNELL L. REV. 345 (1974).

122. L. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (1933).

123. See *Freedom of Speech* at 426-30.

124. Congress, undoubtedly, possesses the power [to pass appropriate legislation to safeguard an election from the improper use of money to influence the result], as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction. . . . Congress reached the conclusion 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. . . . [T]he statute as a whole is calculated to discourage the making and use of contributions for purposes of corruption. *Burroughs & Canuou v. United States*, 290 U.S. 534, 545, 548 (1934).

See *United States v. Harriss*, 347 U.S. 612, 625-626 (1954); *United States v. Finance Comm. to Re-Elect the President*, 507 F.2d 1194, 1200-1202 (D.C. Cir. 1974); *Pichler v. Jennings*, 347 F. Supp. 1061, 1068-1069 (S.D.N.Y. 1972); *Stein v. Howlett*, 52 Ill. 2d 570, 578, 289 N.E.2d 409, 413 (1972).

125. *Freedom of Speech* at 430-33.

126. 1974 Amendments § 208(a) (codified at 2 U.S.C. § 437(c)).

127. *Id.* § 101(a) (codified at 18 U.S.C. § 608(b)(6)).

128. See Polk, *Congressional Campaign Contributions: Harder to Conceal*, NEW RE-

But for *United States v. Finance Committee to Re-elect the President*¹²⁹ and *Stoner v. Fortson*,¹³⁰ one would be tempted to question the validity of the continuing requirements of retention of records about all contributions of \$10 or more and public disclosure of all contributions in excess of \$100, amounts which could hardly purchase special policy favors or an appointment to office for a contributor. These provisions compel disclosure of the identity and political preferences of a contributor who is particularly vulnerable to reprisal, the small political giver who supports his chosen candidate not in pursuit of personal gain but out of a shared political ideology or a shared view of the public interest. While no court has yet found actual deterrence,¹³¹ surely the last two years have given us ample evidence of political reprisals against campaign contributors¹³² to create a strong presumption against unduly exposing to public view and potential pressure those whose contributions are not of sufficient magnitude to pose a danger to the integrity of elections and public policymaking. With respect to contributions of such size, the donors' right to political privacy¹³³ should outweigh the governmental interest asserted in justification of disclosure. But what is the threshold at which political influence potential begins? In view of the detailed data now available as a result of the 1971 Campaign Act, which revealed that ninety-six percent of all political contributions in 1972 were of \$100 or less, and that Nixon received 900,000 and McGovern 700,000 of such contributions,¹³⁴ one must now concede that a congressional selection of the \$100 disclosure threshold deserves respect.¹³⁵ But if the disclosure provision is flawed, it is only in detail and not in principle, and could be cured by lifting the disclosure threshold to a higher figure, perhaps \$250, or a figure set at different levels in House, Senate, and presidential races.

PUBLIC, Apr. 22, 1972, at 16; Comment, *A Constitutional Remedy for the High Cost of Broadcast and Newspaper Advertising in Political Campaigns*, 60 CALIF. L. REV. 1371, 1387 n.120 (1972); 30 CONG. Q. 713 (1972); Comment, *The Federal Election Campaign Act of 1971: Reform of the Political Process?*, 60 GEO. L.J. 1309, 1324 n.72 (1972). But see Statutory Comment, *Undisclosed Earmarking: Violation of the Federal Election Campaign Act of 1971*, 10 HARV. J. LEGIS. 175 (1973).

129. 507 F.2d 1194 (D.C. Cir. 1974).

130. 379 F. Supp. 704 (N.D. Ga. 1974).

131. See *United States v. Finance Comm. to Re-Elect the President*, 507 F.2d 1194, 1199 (D.C. Cir. 1974); *Pichler v. Jennings*, 347 F. Supp. 1061, 1067 (S.D.N.Y. 1972).

132. N.Y. Times, June 28, 1973, at 1, cols. 5, 6.

133. See *Freedom of Speech* at 410-33.

134. *United States v. Finance Comm. to Re-Elect the President*, 507 F.2d 1194, 1200 (D.C. Cir. 1974).

135. *Id.*

Quantitative Limitations on Contributions

Unlike compelled disclosure, contribution limitations in fact coerce particular behavior; they prevent an individual or group from contributing more than a statutorily permissible sum. If the behavior involved is constitutionally protected, its infringement would therefore require a weightier governmental interest in order to be sustained against attack.

We shall assume that contributing the funds which enable the candidates to speak out is equivalent to speaking out oneself. While there are no Court holdings directly on point,¹³⁶ common sense suggests that speech is effectively heard in our society only if it is cast broadly about, which requires the buying of space or time. It is sophistry to argue that limiting the money one can spend on political speech is not the same thing as limiting the "amount" of one's political speech,¹³⁷ which would be unconstitutional if the first amendment were read literally. But the first amendment has never been literally interpreted, and discovering a protected right upon which contribution limitations infringe is not dispositive of the matter.

While Professor Winter has persuasively argued that "[e]ven under a 'balancing' test, such regulation [contribution and expenditure limitations] is invalid because there is no countervailing interest (for example, preserving public peace) to 'balance' against the restriction on speech,"¹³⁸ there do seem to be several legitimate governmental objectives which may be asserted as countervailing interests in justification of what is an obvious limitation on speech. Surely if one limits the size of individual contributions, one diminishes the likelihood that contributions will be large enough to warrant being rewarded by post-election policy favors or appointments. We have witnessed enough incidents of such legal bribery¹³⁹ to know that the danger involved, far

136. See Mr. Justice Douglas' dissent in *United States v. International Union of Automobile Workers*, 352 U.S. 567, 594 (1957).

137. See, e.g., Professor Freund's contention on this point:

The right to speak is . . . more central to the values envisaged by the First Amendment than the right to spend. We are dealing here not so much with the right of personal expression or even association, but with dollars and decibels. And just as the volume of sound may be limited by law, so the volume of dollars may be limited without violating the First Amendment. Freund, *Commentary*, in A. ROSENTHAL, *supra* note 110, at 72.

138. See Winter, *Money, Politics and the First Amendment*, in H. PENNIMAN & R. WINTER, *CAMPAIGN FINANCES: TWO VIEWS OF THE POLITICAL AND CONSTITUTIONAL IMPLICATIONS* 45, 60 (American Enterprises Institute for Public Policy Research, 1971).

139. N.Y. Times, Jan. 7, 1975, at 12, col. 2 (truckers' bill included campaign contributions); *id.*, Sept. 22, 1974, § 4, at 2, col. 3 (summary of special interest groups' contributions); *id.*, Sept. 16, 1974, at 19, col. 1 (maritime unions contribute \$333,000);

from being conjectural and overstated,¹⁴⁰ presents itself with sufficient frequency to warrant direct remedy. If significant influence over policy or appointments can be acquired by means of legal campaign contributions, the equal protection guarantees are violated and public confidence in government is weakened. The author of a recent comment put it well:

To the extent that special attention is demanded by and given to the contributors of large sums of money to political campaigns, . . . representative democracy . . . is undermined. With it is undermined the confidence of citizens in the fairness and representative character of their government. . . . To that extent, regulation of campaign contributions with the aim of limiting the special influence of major contributors is a legitimate and necessary policy in a truly democratic system.¹⁴¹

It is argued, however, that the large contributors who seek *no* favors far outnumber those who expect a reward.¹⁴² Assuming that to be correct, and conceding also that those individuals and groups seeking no personal favors have a constitutionally protected right to use their own funds in order to advance their general policy preferences by supporting candidates who share them,¹⁴³ it does not necessarily follow that there should be no limit on the size of such contributions. For there is another objective besides eliminating contribution-derived policy influence, that of diminishing wealth-based differential influence in the political process. It is this objective which all of the contribution limitations—those on the candidate and his family, the individual with respect to particular races, the individual with respect to his aggregate giving, and the political committee with respect to particular races¹⁴⁴—aim at attaining. Is it a valid objective of sufficient importance to outweigh the conceded infringement of political speech? A growing body of cases and scholarship suggests that it is.¹⁴⁵

id., June 1, 1974, at 1, col. 6 (Watergate Committee links milk price support increases with contribution to Nixon); *id.*, Oct. 13, 1973, at 14, col. 7 (Howard Hughes's contributions seen as influencing SEC investigation of his business finances); Anderson, *The Senators' Oil Money*, Washington Post, Jan. 6, 1974, § B, at 7, col. 4; Washington Post, Sept. 15, 1974, § A, at 1, col. 4 (\$600,000 in AMA gifts to Congressmen).

140. See R. WINTER, *WATERGATE AND THE LAW* 8 (American Enterprise Institute for Public Policy Research, 1974).

141. Comment, *The Constitutionality of Restrictions on Individual Contributions to Candidates in Federal Elections*, *supra* note 110 at 1612.

142. R. WINTER, *supra* note 140 at 8.

143. *Id.* at 19.

144. See notes 136-171 *supra* and accompanying text.

145. See *Lubin v. Panish*, 415 U.S. 709 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). See also J. RAWLS,

It is indisputable that contributors of large campaign gifts, irrespective of any considerations of motive, have an impact on election campaigns far in excess of the impact which smaller contributors or noncontributors have. Simply because they have more discretionary capital available, they are able to help their preferred candidates and positions much more than other citizens who may feel just as intensely but who are without the resources necessary to translate their views into campaign effectiveness. This impact, which David Adamany has called multiple voting,¹⁴⁶ means that such donors affect the political process much more extensively than a one-man-one-vote principle would suggest as desirable.

In addition to this impact, large donors acquire by virtue of their contribution *some* amount of influence over the candidates they support.¹⁴⁷ Whether that influence is actually used at all by a particular contributor, if only in gaining access to an office-holder, or for a public end rather than a private interest, it is nonetheless influence which other citizens, who do not possess funds in sufficient quantity to give, do not have, and never can acquire. How different, in reality, is this influence from that which Chief Justice Burger condemned in *Bullock v. Carter*,¹⁴⁸ when striking down large Texas filing fees for nominations?

Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be and no matter how broad or enthusiastic their popular support. The effect of this exclusionary mechanism on voters is neither incidental nor remote. Not only are voters substantially limited in their choice of candidates, but also there is the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system. To the extent that the system requires candidates to rely on contributions from voters in order to pay the assessments, a phenomenon that can hardly be rare in light of the size of the fees, it tends to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor This disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is

A THEORY OF JUSTICE 225-26 (1971); Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815 (1974).

146. D. ADAMANY, FINANCING POLITICS 236 (1969).

147. See *id.* at 213; H. ALEXANDER, *supra* note 1, at 147.

148. 405 U.S. 134 (1972).

typical of inequities challenged under the Equal Protection Clause, and there are doubtless some instances of candidates representing the views of voters of modest means who are able to pay the required fee. But we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.¹⁴⁹

It is true that in the filing fee cases such as *Bullock* there was a positive state action which was held to burden access to the ballot, while here the reverse is true: the contribution limitations constitute an attempt by Congress to protect and advance, through legislation, the same interests which the Court sought to protect in its *Bullock* and *Lubin* decisions. While the Court would not have been likely to strike down campaign finance laws which *permitted* contributions of unlimited size to finance federal elections,¹⁵⁰ surely it should give great weight to a congressional enactment, expressed in reasonable ceilings on contributions, which aims at *limiting* the extent to which wealth-derived political impact and influence operate within the political process.¹⁵¹ And suppose there were a congressional determination that the constitutional values of equal protection can be attained in the political process *only* by imposing ceilings on the size of private contributions. As Professor Nicholson has suggested,¹⁵² such a determination should be most useful as part of the compelling governmental interest which must be adduced in order to justify the infringement of first amendment rights. What could be more compelling than another explicit constitutional value, particularly one as fundamental to democracy as equal protection of the laws?¹⁵³

Here, too, as in the case of disclosure, there are problems with

149. *Id.* at 143-44. The Supreme Court underscored its holding in *Bullock* by invalidating a small California filing fee in *Lubin v. Panish*, 415 U.S. 709 (1974), saying that "the process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars." *Id.* at 716.

150. See *Public Financing* at 365-69.

151. This is not to argue, of course, that congressional power to implement fifth amendment equal protection is as broad as *Katzenbach v. Morgan*, 384 U.S. 641 (1966), held its power to implement fourteenth amendment equal protection to be. See Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1966); Nicholson, *supra* note 145, at 836-42. Unlike the situation in *Morgan*, however, Congress clearly has power to regulate both presidential and congressional elections. See *Public Financing* at 369-72; Rosenthal, *supra* note 121, at 362-72, 386-87. The issue here is the extent to which Congress, in implementing its avowed authority to regulate elections, can seek to serve equal protection values embodied in the Constitution, even if first amendment rights are thereby infringed.

152. Nicholson, *supra* note 145, at 816, 822.

153. See Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 224-47 (1971).

the congressional means employed. One is cured by another provision of the 1974 Amendments and the other easily curable by further legislation. The first, and most serious, fault is the extent to which the new contribution limitations increase the difficulty for an unknown or sparsely known candidate in getting his campaign primed. It has been suggested that Senator George McGovern probably could not have launched his campaign for the Democratic presidential nomination in 1972 without large "seed" money contributions.¹⁵⁴ Even Governor George Wallace, with widespread public name recognition and extensive support, required sufficient front-money from large contributions to finance the campaign to solicit small contributions.¹⁵⁵ With our growing reliance on primaries to select nominees, the loss of large contributions, without substituting other sources for them, could be devastating to potential presidential candidates.¹⁵⁶

There is now, however, a substitute source for such funds. Another provision of the 1974 Amendments—that which establishes partial public financing of presidential primaries¹⁵⁷—considerably mitigates the candidate deterrence effect of contribution limitations. While funds available through the Presidential Primary Matching Fund Account will not entirely take up the slack caused by banning contribution of more than \$1000 by individuals and \$5000 by political committees, the Matching Fund, assuming it or something like it is sustained against constitutional attack, will add one additional public dollar to every dollar raised privately up to a maximum of \$250 per contributor and an aggregate of \$5 million per candidate. Moreover, and perhaps of even greater importance than the actual dollars, is the fact that the qualification-determining mechanism for the funds—raising a minimum of \$5000 in each of twenty states—itself constitutes an acceptable test for determining the seriousness of a presidential candidacy.¹⁵⁸ Assuming its constitutional flaws¹⁵⁹ are remedied, such a test is greatly

154. See Brief for Plaintiff at 17, 30-31, *Buckley v. Valeo*, Civil No. 75-1061 (D.C. Cir., filed June 2, 1975). But see Brief of Intervening Defendants on Certified Constitutional Questions at 106-08, *Buckley v. Valeo*, Civil No. 75-1061 (D.C. Cir., filed June 2, 1975).

155. N.Y. Times, May 23, 1975, at 1, col. 1.

156. Any contribution limitation deterrence to Congressional candidates is not likely to be serious because contributions to Senatorial and House campaigns of more than \$1,000 are extremely rare. See Common Cause, Summary of Key Findings by the Common Cause Campaign Finance Monitoring Project for 1972 and 1974 Federal Elections (mimeo, Apr. 24, 1975).

157. 1974 Amendments § 408(a) (codified at INT. REV. CODE OF 1954, §§ 9031 *et seq.*).

158. See text preceding note 212 *infra*.

159. See notes 212-29 *infra* and accompanying text.

preferable to raising large sums of money from small numbers of contributors, because it spreads the gatekeeping function for presidential races among at least 400 people in twenty states, and probably many times that number in fact. No one who could have launched a presidential campaign under the system of unlimited contributions is likely to be deterred from doing so by the combination of contribution limitations with dollar for dollar matching, and some who could not have mustered the funds heretofore will now be able to run.¹⁶⁰ While subsidization of presidential primary campaigns may result in an increase in the number of candidates, such an increase is likely to be far less extensive than the increase attributable to widespread selection of presidential convention delegates by primaries.¹⁶¹ Instead of increasing the number, it would seem that public subsidization is more likely to change slightly the kind of people who succeed in launching campaigns, giving regional and philosophically noncentrist candidates a greater opportunity to compete for the presidency. Whatever the policy wisdom of such an outcome,¹⁶² the principle cannot be faulted constitutionally.

The second flaw in the means chosen is more troubling. It would appear from the law as it currently stands that there is no limitation on the size of contributions to political parties. If that is in fact the case, such a loophole would entirely vitiate the effectiveness of the limitations on contributions to candidates in achieving the objectives set out above. Those seeking to obtain favors could simply make their unlimited contributions to the parties for use in the general elections, party administration, or candidate-oriented general party publicity, and be rewarded accordingly after the election. If this loophole exists, it would enable special interests to have far greater influence on policy decisions by spending much less money than heretofore, because the parties need so much less than candidates.

The doubt as to the existence of such a loophole is created by the statutory definition of a contribution:

160. For the argument that the high cost of soliciting substantial amounts in small contributions—and thus of obtaining matching funds—cannot be met without large gifts to finance early fund-raising efforts, see Brief for Plaintiff at 17, 30-31, *Buckley v. Valeo*, Civil No. 75-1061 (D.C. Cir. filed June 2, 1975).

161. Presidential and vice-presidential candidates are selected at national non-nominating conventions consisting of delegations from each state. In eighteen states and the District of Columbia, primary elections are mandated for the selection of delegates to national conventions. Twenty states provide parties with the option of choosing either a primary or a convention to select delegates. *Developments in the Law, supra* note 110, at 1153-54 (1975).

162. It can hardly be doubted that such fractionalization would tend to further weaken the capacity of established parties to field presidential candidates. See N. POLSBY & A. WILDAVSKY, *PRESIDENTIAL ELECTIONS* — (4th ed. 1975).

“(e) contribution”

(1) means a gift . . . made for the purpose of influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States.¹⁶³

In this definition of contribution, which governs the meaning of contribution throughout the campaign finance statutes, the emphasis is on electing a particular candidate to a particular office. Indeed the contribution limitation provisions speak even more precisely when they enjoin that “no person shall make contributions to any candidate”¹⁶⁴ and “no political committee shall make contributions to any candidate”¹⁶⁵ in excess of \$1000 and \$5000, respectively. If these limitations apply only to contributions to any candidate, what limitations apply to contributions to political parties? A careful examination of the law reveals none.

Yet it is clear that the statute envisions that the parties will spend money in behalf of particular candidates, because it places explicit ceilings on the amounts party committees can spend in behalf of party candidates for President,¹⁶⁶ the Senate,¹⁶⁷ and the House.¹⁶⁸ Those funds have to come from somewhere.

It might be argued that a contribution to a party is a contribution as defined above, on the theory that most funds collected by national, state, and district party committees are ultimately for the purpose of electing party candidates to office, many of which are federal. That is a tortured construction of the statute, however, and it leads moreover to a further dilemma—what the actual ceiling on a contribution to a party would be. The dollar limitations in the statute clearly apply to contributions directed to particular candidates. If applied also to contributions to parties, the limits presumably would permit political party donations to be used for the unrestricted and undivided benefit of all candidates the party supports—in the amount of \$1000 in the case of individual contributors and \$5000 in the case of committee contributors times the total number of candidates supported by the recipient party committee. That would clearly be an absurd result. The only

163. 1974 Amendments § 102(c) (codified at 18 U.S.C. § 591(e)).

164. *Id.* § 101(a) (codified at 18 U.S.C. § 608(b)(1)).

165. *Id.* § 101(a) (codified at 18 U.S.C. § 608(b)(2)).

166. *Id.* § 101(a) (codified at 18 U.S.C. § 608(f)(2)).

167. *Id.* § 101(a) (codified at 18 U.S.C. § 608(f)(3)(A)).

168. *Id.* § 101(a) (codified at 18 U.S.C. § 608(f)(3)(B)).

conclusion to be reached, then, is that the contribution ceilings do not apply to contributions to political parties.

Nor, it appears, do they apply to contributions to political associations—such as the National Committee for an Effective Congress or the business and labor political committees which contribute to many different candidates—unless the contribution is expressly earmarked for a particular candidate.¹⁶⁹ This means, in effect, that there is no ceiling on individual contributions to any political committee supporting more than four candidates.¹⁷⁰ The consequences of this loophole are not nearly so troubling as the omission of a ceiling on contributions to a party, because, unlike political parties, these committees are not likely to be directly involved in state and national policymaking, and will therefore not be in a position to obtain favors for the unlimited contributors. To the extent, however, that wealthy contributors can continue to make unlimited contributions to political committees, which, in turn, can contribute a maximum of \$5000 to any federal candidate, the statutory means of diminishing wealth-derived political influence and impact is flawed.

Both of these flaws can be easily cured by an amendment which, at the least, places the same \$1000 and \$5000 ceilings on contributions to parties and political committees as currently apply to contributions to candidates. If limitations on contributions to candidates are constitutional in principle, as they appear to be, such extensions of the limitations would seem equally valid. Unless the party contribution loophole is plugged, the new contribution limitations should be invalidated for ineffectiveness in attaining their legitimate governmental objective.

A final problem arises out of the definition of a political committee, an entity on which the statute imposes a contribution ceiling of \$5000 to any one candidate for federal office. In order for this ceiling to apply, the committee must have been registered with the Federal Election Commission for not less than six months, have received contributions from more than fifty people, and have made contributions to five or more federal candidates.¹⁷¹ The formation of a political committee only two or three months prior to an election would present a perplexing question under the statutory definition. Would such a group be exempted completely from the \$5000 contribution ceiling, a

169. *Id.* § 101(a) (codified at 18 U.S.C. § 608(b)(6)).

170. A "political committee" must have made contributions to five or more candidates in order to qualify for the \$5000 ceiling. *Id.* § 101(a) (codified at 18 U.S.C. § 608(b)(2)).

171. *Id.*

result which clearly would permit the frustration of the entire contribution limitation structure by late-forming groups? Or would the members of such a committee be barred entirely from making donations through the group, an alternative which raises first amendment issues?

The statute itself sheds no light on the problem, but one must assume that the former alternative was surely not the intention of Congress. Since the latter seems the correct choice, the possibility of an unconstitutional infringement of speech and association must be faced. If the individual contribution limitation is sustained, it would appear reasonable to argue that the Constitution requires no more than that each individual be permitted to contribute, by himself, the ceiling amount. The privilege of contributing through groups, then, would be within the power of Congress to withhold or to grant, thus giving to Congress the discretion to confine the availability of the political committee contribution to those groups operating for six months or more prior to an election. Citizens wishing to form such a committee within six months of election day could simply aggregate their individual contribution ceilings, candidate by candidate.

Quantitative Limitations on Expenditures by Candidates

Like contribution ceilings, expenditure limitations inevitably restrain speech; they prevent a candidate from buying space or time, for example, beyond the statutory ceiling. Unlike the flaw in the contribution limitations, however, the constitutional defect in expenditure limitations is basic and appears to be irremediable.¹⁷²

Because expenditure limitations are a restraint on speech, they must be justified by a compelling governmental interest in order to withstand first amendment attack. Some persuasive arguments have been offered in behalf of the legitimacy and weight of the governmental interest which expenditure limitations are designed to serve, principally the objective of diminishing the deterrence of candidates from running by bringing or holding down the cost of campaigns to what is regarded as a more reasonable level.¹⁷³ Most campaign finance scholars would assert, however, that our campaigns are underfinanced

172. For a more extensive discussion of expenditure limitations, see *Freedom of Speech* at 450-65. See also *Deras v. Myers*, 535 P.2d 541 (Ore. 1975); *Bare v. Gorton*, 84 Wash. 2d 380, 526 P.2d 541 (1974) (recent cases invalidating state expenditure limitation laws).

173. See, e.g., D. ADAMANY, *supra* note 146, at 7-19, 108-71; A. HEARD, *supra* note 32, at 16-19; R. WINTER, *supra* note 140, at 5-17; Fingerhut, *A Limit on Campaign Spending—Who Will Benefit?*, 25 THE PUB. INTEREST 3 (1971); *Freedom of Speech* at 455-65.

rather than too expensive, by reference both to what other nations spend per voter and to what we spend for other kinds of advertising.¹⁷⁴ Assuming the legitimacy of the objective, however, there are serious constitutional barriers to attaining it and no feasible way of surmounting them.

The Problem of Incumbency Advantage

The idea behind expenditure limitations is to equalize what candidates for the same office may spend in campaigning. If incumbents and challengers are both held to the same dollar limitations, however, challengers will inevitably be disadvantaged by the incumbents' pre-existing name recognition, campaign organization, media access, and the publicly provided staff, services, and supplies available to all office-holders.¹⁷⁵ Unless the value of such items can be figured into the incumbents' campaign expenditure ceilings—and there appears to be no conceivable means of doing so—challengers might be seriously

174. See D. ADAMANY, *supra* note 146, at 234-44; D. DUNN, FINANCING PRESIDENTIAL CAMPAIGNS 32 (1969); R. WINTER, *supra* note 140, at 6-7.

175. In 1970 a member of the House of Representatives with fewer than a half million constituents was entitled, simply by being a congressman, to the following:

- About \$125,000 per year for salaries for a staff of up to 12 employees (13 if his constituency was over the half million mark);
- \$5,500 worth of new or used office equipment;
- \$3,000 per year for stationery, supplies, and printing;
- 35,000 minutes of long-distance telephone time for a two-year term;
- 480,000 heavy-duty brown envelopes per year;
- \$700 worth of stamps per year;
- \$2,400 per year for the rental of office space in his district;
- \$2,400 per year for district office supplies, equipment, and telephone expense.

In addition, a congressman is entitled to free space in a House office building, free and unlimited franked-first class postage, a publication allowance, the services of radio-television studios for the production of tapes at a minimal rate, and a travel allowance to cover one round trip home per month, and three additional trips (one for himself and two for staff employees). He also is able to mail various government documents to his district without charge. The documents available for this purpose include the agriculture yearbook, packets of 10 publications for brides, a booklet on infant care, documents for visitors on Washington and the government, brochures, maps of the city, and so on. Penniman, *Financing Campaigns in the Public Interest*, in H. PENNIMAN & R. WINTER, *supra* note 138, at 17.

See Biden, *Public Financing of Elections: Legislative Proposals and Constitutional Questions*, 69 NW. U.L. REV. 1, 7-9, 63-65 (1974); *Freedom of Speech* at 468-71; Plattner, *Campaign Financing: The Dilemmas of Reform*, 37 THE PUB. INTEREST 118-22 (1974); Redish, *supra* note 110, at 915-20; *Campaign Controls Under the Federal Election Campaign Act of 1971*, 8 COLUM. J. LAW & SOC. PROB. 285, 306-07 (1972); Note, *Congressional Prerequisites and Fair Elections: The Case of the Franking Privilege*, 83 YALE L.J. 1055 (1974).

discriminated against by the expenditure limitations. Moreover, because high expenditures constitute the principal means of attack on incumbents by challengers, the lower the expenditure ceilings, the greater the amount of discrimination. Even if Congress were willing to enact differential expenditure ceilings which permitted challengers to spend more than incumbents, how might one determine the appropriate increment for challengers' over incumbents' expenditures?

That hypothetical question aside, identical ceilings for incumbents and challengers, such as are embodied in current law, would seem to render the expenditure limitations unconstitutional for equal protection reasons. Unfortunately, however, while the theoretical case for their favoritism to incumbents is persuasive, empirical evidence of actual discrimination as a consequence of the current levels is nonexistent. The Common Cause figures reveal that incumbents have generally been able to raise as much as several times the amounts challengers have collected,¹⁷⁶ suggesting that expenditure limitations in fact can prevent incumbents from overwhelming challengers with money.¹⁷⁷ Moreover, the principal study of 1972 senatorial campaign spending,¹⁷⁸ which concluded that the present expenditure ceilings are significantly lower than the amounts actually spent in 1972, apparently rests on incorrect data analysis.¹⁷⁹ In fact, in only a small percentage of recent elections has either candidate spent more than the current limitations would permit.¹⁸⁰

It is difficult, therefore, to conclude that expenditure limitations at the level embodied in the 1974 Amendments are unconstitutional in principle. Such a conclusion is not necessary, however, because of other seemingly incurable problems.

Even if it were theoretically permissible to equalize expenditures as between incumbents and challengers, it would be constitutionally impossible to do so in fact, for three different but related reasons.

176. *Common Cause*, *supra* note 156; see CONG. Q. 3130 (1973); Mintz, *Incumbents Outspent Challengers 2 to 1, Study Shows*, Washington Post, Sept. 14, 1973, § A, at 2, col. 1. Democratic Senator William Proxmire of Wisconsin explained one apparent reason: "The point is that the incumbent gets the big contribution because the people who are making contributions want to make them to the winners and not to the losers." 119 CONG. REC. 26093 (1973).

177. D. Broder, *Campaign Spending Law: Who Benefits?*, Washington Post, June 11, 1975, § A, at 18, col. 5.

178. R. COLE, *CAMPAIGN SPENDING IN SENATE ELECTIONS* (1975).

179. See Brief of Intervening Defendants on Certified Constitutional Questions, app. A, *Buckley v. Valeo*, Civil No. 75-1061 (D.C. Cir., filed June 2, 1975).

180. *Id.* at 132-34, 138-43.

The Independent Actor

American politics is characterized by large numbers of individuals who, on their own initiative and for their own reasons, wish to express their views on political contests. Not only are such nationally known individuals as Stewart Mott in this category, but so are thousands of other citizens of both repute and disrepute at all levels of government. They take out newspaper and television advertising on their own, and sometimes publish signed leaflets. In effect, they are attempting to communicate to their fellow citizens their own candidate preferences, hoping to convince them.

It seems clear from the cases that an absolute ban on such expression by individuals or groups, not under the control of or in collusion with a candidate, would be unconstitutional.¹⁸¹ The 1974 Amendments do not totally ban such expression, but instead impose a \$1000 ceiling on expenditures for such purposes.¹⁸² Assuming the soundness of the rationale advanced above in support of limitations on the size of contributions made to candidates,¹⁸³ a similar ceiling on direct expenditures on behalf of candidates would seem equally valid.¹⁸⁴

Even if it is constitutionally permissible to put a ceiling on the *amount* of expenditures by such independent political actors, and to require them to report their expenditures to the Federal Elections Commission,¹⁸⁵ however, there is no conceivable way of limiting the *number* of citizens who choose to express their candidate preference by buying their own newspaper, radio, and television advertisements. The 1974 Amendments do not even try to do that. If an unlimited number of independent actors—groups as well as individuals—can take sides in an election, it is impossible in fact to equalize expenditures. Since the amounts of money legally spent by and in behalf of contestants in a campaign, therefore, cannot be equalized constitutionally, expenditure limitations on candidates must fall for failure to attain their objective.

181. Cf. Bickel, *Commentary*, in A. ROSENTHAL, *supra* note 110, at 66; Freund, *Commentary*, in A. ROSENTHAL, *supra* note 110, at 75. See also R. WINTER, *supra* note 140, at 25-28; *Freedom of Speech* at 472-75; Redish, *supra* note 110, at 900; Rosenthal, *supra* note 121, at 390-93.

182. 1974 Amendments § 101(a) (codified at 18 U.S.C. § 608(b)(1)).

183. See text accompanying notes 138-53 *supra*.

184. I am indebted to Professor William Van Alstyne for pointing out that even if contribution limitations were sustained on the theory that Congress may constitutionally limit how one spends one's money, it would still be possible for the Court to strike down the direct expenditure ceiling, because the latter is spent personally in directly expressing political views.

185. 1974 Amendments § 208(a) (codified at 2 U.S.C. § 437(a)).

The Anti-Candidate Committee

The second flaw in a system of expenditure limitations arises from the problem caused by an anti-candidate committee. This is a variant of the independent actor problem, and the argument is similar.

How is it possible, within a framework of expenditure ceilings on candidates, to take account of the expenditures of an anti-candidate committee which is not under the control of the candidate being benefited by its activities? In a two-way race, it might appear at first glance to make sense to charge the expenditures against the expenditure limitations of the benefited candidate, as the Comptroller General's regulations for the 1971 Campaign Act did.¹⁸⁶ Suppose, however, that the benefited candidate genuinely disapproves of such activities, which by the very nature of an anti-candidate committee tend to be negative, and feels that they harm him as much as, or even more than, the candidate against whom the attacks are directed. There is no constitutional way he or anyone else can prevent an anti-candidate committee from attacking his opponent. Why is it justifiable, then, to diminish the amount he is permitted to spend by the amount spent by the anti-candidate committee? In a three-, four-, or five-way race, even this unfair solution would be unavailable because there are multiple beneficiaries of the attacks.

The net result again is to render equalization of candidate expenditures impossible, and candidate expenditure limitations ineffective.

The Issue-Oriented Committee

The third source of difficulty for expenditure limitations is the issue-oriented organization. From time to time, a candidate becomes so clearly and publicly identified with a particular side of a controversial issue that an issue organization can conduct a campaign for or against him without ever mentioning his name.¹⁸⁷ This is precisely what happened, for example, when the anti-gun control lobby defeated Senator Joseph Tydings.¹⁸⁸

There would appear to be no constitutional way to prevent an organization or an individual from buying advertisements, even during

186. 37 Fed. Reg. 6158 (1972).

187. If a candidate's name or likeness is used, or the candidate's identity is apparent by "unambiguous reference," see 1974 Amendments § 101(a) (codified at 18 U.S.C. § 608(e)(2)), the situation would be more appropriately treated as an "independent actor" or anti-candidate committee.

188. N.Y. Times, Nov. 8, 1970, at 35, col. 1.

a political campaign, which stress the need for citizen vigilance or action with respect to law and order, foreign entanglements, honesty in government, or any other topic. Even where an issue organization names a candidate, it would seem impossible to restrain its activity, or to account for it within the framework of candidate expenditure equalization. Thus, for example, it was held to be impossible to require that an organization promoting the impeachment of President Nixon, during the course of the 1972 presidential campaign, register as a political committee under the 1971 Campaign Act.¹⁸⁹ Similarly, another court held that an American Civil Liberties Union advertisement, opposing the Nixon Administration's anti-busing policy and listing the names of 102 members of Congress who opposed it, was not within the purview of the registration provisions of the 1971 Campaign Act.¹⁹⁰ So long as issue organizations are free to spend all they wish, and there is happily no constitutional way of restraining them, they constitute another obstacle in the way of effecting equality of candidate expenditures. Once again, therefore, the means is found defective in fact.

As a result of these three flaws, the candidate expenditure limitations enacted in the 1974 Amendments seem unconstitutional by virtue of their ineffectiveness in attaining their objective of equalizing candidate expenditures. Moreover, remembering that the underlying reasons for candidate expenditure limitations are to diminish both deterrence of candidates from running for office and differential advantage accruing from differential access to contributors, there is a much less drastic means to the same end embodied in the 1974 Amendments—the combination of public subsidization, at least with respect to presidential elections, and contribution limitations. As has been suggested earlier, neither of these provisions is faulty in principle, and both are directed, in part, at attaining the same objectives as expenditure limitations. As a consequence, we must conclude that there appears to be no feasible means of saving the candidate expenditure limitation from invalidation.¹⁹¹

189. *United States v. National Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972).

190. *ACLU v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973), *prob. juris. noted sub nom. Staats v. ACLU*, 417 U.S. 944, *stay of district court order granted pending final disposition*, 418 U.S. 910 (1974).

191. Public subsidization of political campaigns, parties, and conventions out of general revenues would, of course, also raise serious first amendment questions. See R. WINTER, *supra* note 140, at 29-34; *Public Financing* at 406-16; 78 HARV. L. REV. 1260 (1965). However, since all subsidies provided by the 1974 Amendments come from taxpayer-checked-off funds—with the explicit understanding of all taxpayers that the funds are to be divided among all recipients according to statutory formulas—the subsi-

EQUAL PROTECTION INFIRMITIES IN THE 1974 AMENDMENTS

The Framework for Examining Equal Protection Claims

There is no doubt that the fifth amendment's due process clause¹⁹² constrains federal action within equal protection norms, just as the fourteenth amendment's equal protection clause¹⁹³ constrains state action.¹⁹⁴ While the language in the cases suggests that the scope of protection by the two amendments may not be identical,¹⁹⁵ no case has been found which differentiates in its protection on the basis of the fact that it is the federal government rather than a state that is the actor involved.¹⁹⁶ The conclusion must be, therefore, as the Court observed in the leading case of *Bolling v. Sharpe*, that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than on the states.¹⁹⁷

The appropriate standard of review of equal protection claims asserted against election reform measures is somewhat less clear. We know that the Court uses two different degrees of intensity in examining for equal protection flaws—what it has in times past called the "strict scrutiny" test and the "rational relation" test—and that the constitutionality of any government action may well turn on the choice of test by which it is measured.¹⁹⁸ The lighter, highly restrained review tests only for reasonableness in the challenged action: Does the action serve a legitimate public purpose and are the means chosen reasonably calculated to attain the ends? The stringent, meticulous ex-

dies would seem to be clearly invulnerable to a first amendment challenge. For a discussion of equal protection issues surrounding such public subsidies, see notes 138-84 *infra* and accompanying text.

192. "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

193. "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

194. *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 372 U.S. 714, 721 (1963) (dictum); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

195. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

196. See Hughes, *Constitutional Limitations on Territorial Differences in Federal Food Assistance*, 4 SUFF. U.L. REV. 742, 750 (1970).

197. 347 U.S. 497, 500 (1954).

198. The Court has been less than consistent in describing the test it was applying in any given case. See Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); *Public Financing* at 384-88. Sometimes the Court doesn't even advert to the fact that it has made a choice of tests, but proceeds directly to examining the substantive issues involved. For a good example of the latter, see *Lubin v. Panish*, 415 U.S. 709 (1974), which is discussed at notes 142-50 *infra* and accompanying text.

amination adds a criterion of necessity to the test for reasonableness: Are the ends legitimate, and the means *both* reasonable and necessary?¹⁹⁹ Which of these tests the Court employs in any given case is determined by the nature of the rights allegedly infringed upon or the character of the decision criteria employed in the governmental action complained against. If what the Court calls "fundamental interests"—such as "the right to vote"²⁰⁰—are at stake, or what it denominates "suspect classifications"—such as race²⁰¹—are used, the stringent test applies. In all other situations, only the reasonableness criterion is used.

Were only such comparatively simple categories as "fundamental interests" and "suspect classifications" at issue,²⁰² it would be clear that stringent scrutiny is the appropriate standard of review for the equal protection questions raised by the 1974 Amendments. All of the problems involve impacts on candidacy for public office, and, while candidacy itself has been held not to be in principle a fundamental interest,²⁰³ the right to vote, which *is* a fundamental interest, is regarded as infringed where restrictions on candidacy significantly limit voter choice.²⁰⁴ Moreover, those provisions which utilize a monetary criterion of eligibility or benefit entitlement inherently employ a classification based on wealth, which, at least in the context of elections, has been designated a suspect classification.²⁰⁵

Our problem is more complicated, however, because of the exemption from strict scrutiny given by *Katzenbach v. Morgan*²⁰⁶ to statutes which are directed towards increasing equal protection:

In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights . . . is inapplicable;

199. *Bullock v. Carter*, 405 U.S. 134, 144 (1972). In determining whether the means chosen are in fact necessary, the Court wisely employs a "least onerous alternative" test very similar to that used in first amendment analysis. Cf. note 117 *supra* and accompanying text.

200. *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964). For a recent discussion of "fundamental interests," see Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

201. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

202. For a summary listing of "fundamental interests" and "suspect classifications," see *Public Financing* at 385-86.

203. *Bullock v. Carter*, 405 U.S. 134, 143 (1972). See *Developments in the Law: Elections*, *supra* note 110, at 1135 n.81, 1176.

204. *Bullock v. Carter*, 405 U.S. 134, 144 (1972); *Williams v. Rhodes*, 393 U.S. 23 (1968).

205. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966); *Bullock v. Carter*, 405 U.S. 134 (1972).

206. 384 U.S. 641 (1966).

for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise.²⁰⁷

Since the 1974 Amendments were clearly intended to reform political campaign financing, this ameliorative statute exception might be thought to justify a review only for reasonableness. There is an important difference, however, between the kind of reform involved in *Katzenbach*—the removal of barriers to voting—and the kind of reform embodied in the 1974 Amendments. Because the latter extensively regulate the financing of election campaigns—determining, for example, how much a donor may contribute and a candidate may spend, as well as the amount of public funds to be given to candidates and parties—and because a sizable proportion of those who are regulated by the legislation are the same as those who wrote the legislation, the *Katzenbach* reform exception to meticulous scrutiny should not apply. Instead the Court, prompted by the question “*Quis Custodiet Ipsos Custodes?*,”²⁰⁸ should be moved by the patent congressional self-interest involved to examine the Amendments with the greatest care. But for the *Katzenbach* exception, strict scrutiny would clearly apply. Obvious potential self-interest should suffice to negate that exception in this case. If it is insufficient, however, the number of points at which actual discrimination favorable to incumbents and major parties has been alleged²⁰⁹ should constitute adequate warrant for strict scrutiny.

The Subsidy in Presidential Primary Elections

If we assume that the subsidization of political campaigns is a legitimate and proper governmental purpose,²¹⁰ we can proceed to con-

207. *Id.* at 657.

208. “Who shall guard the guards?”

209. See Brief for Plaintiff at 149-63, 175-83, 204-17, *Buckley v. Valeo*, Civil No. 75-1061 (D.C. Cir., filed June 2, 1975).

210. For a decision to the contrary, see *Opinion of the Justices*, 347 Mass. 797, 197 N.E.2d 691 (1964); 78 HARV. L. REV. 1260 (1965). That decision, which was rendered long before public financing of elections was seriously contemplated, was heavily influenced by the partisan nature of the proposed legislation on which the Massachusetts Supreme Court had been requested by the Massachusetts House of Representatives to give an advisory opinion. The legislation there being considered would have appropriated funds to the two principal parties according to a formula based on each party's proportion of the votes cast in the preceding state primary, with the funds to be used by the parties on behalf of party candidates in the succeeding general election. Such an obviously discriminatory distribution formula could not be constitutionally sustained since it would favor a party with extensive primary competition over one without such fights. The Massachusetts court did not even mention that issue, but instead seems to rest on a principle of Massachusetts constitutional law that a purpose is public only if the

front the three principal issues raised by the presidential primary election subsidy:²¹¹ Is it constitutionally permissible to utilize an exclusively monetary criterion for determining eligibility for the subsidy benefits, or a requirement that the funds raised for that purpose come from at least twenty states, or an exclusively monetary criterion for determining the amount of subsidy funds to be distributed to those candidates who qualify for the subsidy?

Money as an Eligibility Determining Criterion. The rationale for using a prospective candidate's capacity to raise money privately as the means of qualifying for the presidential primary campaign subsidy is attractive on first examination. Like all of the alternative qualifying devices, its basic purpose is to establish the *bona fides* of a particular candidacy—the seriousness and extent of the support which the candidate has. Surely the willingness of supporters to donate funds is a better test of their commitment to a candidate than their willingness to sign a petition in the candidate's behalf. Moreover, the satisfaction of the qualifying test—the raising of \$100,000 in contributions of \$250 or less—is a more easily ascertainable and verifiable fact than the collection of a suitable number—probably a fairly large number—of voters' signatures, each of which would have to be checked for residency, registration and any other conditions which might be attached. Varying state registration practices would complicate the verification process, making the petition signature alternative much more susceptible to fraud and manipulation.

Despite its simplicity and reliability, however, a monetary eligibility criterion has a serious constitutional flaw. Instead of manifesting general public support for a contender, it reflects a candidate's support among those who can afford to spend discretionary income or capital on politics—a sizable, but nonetheless minority, proportion of the

agency or officers through whom it is served are a public body or public officers. As political parties had been held not to be public bodies and their officers not public officers, the court's conclusions followed. There is no similar "public purpose" restraint in the Constitution of the United States, and the "white primary" cases, such as *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953), suggest no analogous principle of constitutional interpretation. Moreover, the manifold direct subsidies to airlines, shipping companies, farmers, and railroads, among others, and indirect tax subsidies to nearly every kind of corporate enterprise provide a more than ample precedent for public subsidization of political campaigns for federal office. The only pertinent questions would seem to be two: What is the scope of Congressional power to regulate elections? What constitutional safeguards constrain the manner in which Congress exercises that power? This Article deals principally with the second question. For answers to the first, see Rosenthal, *supra* note 121, at 362-72; *Public Financing* at 369-82.

211. 1974 Amendments § 408 (codified at INT. REV. CODE OF 1954, §§ 9031-42).

population. In view of the Court's holdings and language in the filing fee cases—*Bullock v. Carter*²¹² and *Lubin v. Panish*²¹³—it is difficult to see how an exclusively monetary eligibility criterion could be sustained against an equal protection attack. In *Bullock*, the Court invalidated a Texas primary election filing fee system in which the charges could run as high as \$8,900.²¹⁴ In *Lubin*, the fee was only slightly more than \$700, but the Court nonetheless held it unconstitutional.²¹⁵ In both cases, the Court stressed the prospective candidates' inability to pay the filing fees, implying that mere unwillingness unaccompanied by inability would be insufficient to warrant a declaration of unconstitutionality.²¹⁶ The problem, therefore, is not the existence of the money eligibility criterion, but the fact that it is the exclusive mode of qualifying. For those candidates with supporters who can afford to contribute, Court decisions suggest, it is a constitutionally acceptable means of determining seriousness. For candidates whose supporters are without the requisite funds, however, it is an insuperable barrier to actual candidacy and a denial of equal protection. It would seem impossible to distinguish persuasively between paying filing fees to qualify for a ballot position and raising private funds in order to qualify for a public campaign subsidy. The purpose of the monetary qualifying criterion is to assure that only serious candidates—those who have a genuine chance to win—will be subsidized with public funds. The purpose of filing fees, as the Supreme Court has noted,²¹⁷ is analogous—to assure that only serious candidates will have their names printed on the ballot. The effects of both are similar, too. Persons who cannot afford to pay filing fees are excluded from the ballot, while persons who cannot raise the requisite amount of private campaign contributions are denied public subsidy for their campaigns, preventing them either from running entirely or from campaigning effectively.

To be scrupulous, it should be noted that this point can be argued another way. Denial of access to the printed ballot is an ultimate sanction; it effectively prevents a candidacy, even if a write-in campaign is possible, rather than merely disadvantaging it. In that sense, on an

212. 405 U.S. 134 (1972).

213. 415 U.S. 709 (1974).

214. 405 U.S. at 145, 149.

215. 415 U.S. at 710, 718.

216. 405 U.S. at 146; 415 U.S. at 716-18. See also *Adams v. Askew*, 511 F.2d 700 (5th Cir. 1975), in which candidates who paid filing fees were denied reimbursement on the theory that filing fees are unconstitutional only as applied to those who cannot afford to pay them.

217. *Lubin v. Panish*, 415 U.S. 709, 717-18 (1974); *Bullock v. Carter*, 405 U.S. 134, 145-46 (1972).

absolute scale, it is a more severe deprivation than denial of public subsidy.

Denial of campaign subsidy, however, while not as severe a sanction as denial of access to the printed ballot, is likely to be just as effective in destroying incipient candidacies.²¹⁸ With public "seed money," candidates who might never have been able to raise the funds necessary to run a campaign may gain sufficient attention to attract the necessary contributions. Denied such money, they are consigned to oblivion.

It might be argued that, because filing fees are usually paid by candidates while the qualifying sum required by the subsidy plan is provided by a candidate's supporters, the analogy between the two is defective. Such a line of attack misses the point, however, because it was the interests of the voters who might choose to vote for the excluded candidate—and not the interests of the candidate himself—which the Court was explicit in protecting in *Bullock*. In language that seems tailor-made for the subsidy-qualifying issue, the Court remarked as follows:

Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support. The effect of this exclusionary mechanism on voters is neither incidental nor remote. Not only are voters substantially limited in their choice of candidates, but also there is the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system. To the extent that the system requires candidates to rely on contributions from voters in order to pay the assessments, a phenomenon that can hardly be rare in light of the size of the fees, it tends to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor. Appellants do not dispute that this is endemic to the system. This disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause, and there are doubtless some instances of candidates representing the views of voters of modest means who are able to pay the required fee. But we would ignore

218. In this regard, it is interesting to note the extent to which the news media have seized upon the failure of candidates to qualify for the presidential primary subsidy as a principal indicator of a candidate's lack of promise.

reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.²¹⁹

The Court's heavy reliance on the interests of a candidate's prospective supporters and on their socio-economic background is even more appropriate with respect to the subsidy-qualifying mechanism than it is to filing fees. To qualify for the subsidy, a candidate must raise the necessary funds from his supporters. If his supporters are without means sufficient to contribute, it is *their* indigency which is being discriminated against in the political arena, not *his*.

Perhaps the most persuasive factor is that public subsidy of election campaigns, very unlike the passive character of regulation of printed ballot access, is an enormous governmental intervention into the political process. When the government chooses to act so influentially, decisively, and in so active a character, it cannot do so in discriminatory ways.

For this reason, what is involved in denying or granting a subsidy has consequences on voters which are at least as grave as the results of denying or granting ballot access. It is difficult to imagine, therefore, that the Court would choose to rest its decision on an extremely narrow and formalistic distinction between ballot access and public subsidy of campaigns.

Assuming that to be correct, what the Court said in *Lubin* about filing fees would seem just as applicable to an exclusively monetary subsidy eligibility criterion:

The absence of any alternative means of gaining access to the ballot inevitably renders the California system exclusionary as to some aspirants. As we have noted, the payment of a fee is an absolute, not an alternative, condition, and failure to meet it is a disqualification from running for office. Thus, California has chosen to achieve the important and legitimate interest of maintaining the integrity of elections by means which can operate to exclude some potentially serious candidates from the ballot without providing them with any alternative means of coming before the voters. Selection of candidates solely on the basis of ability to pay a fixed fee without providing any alternative means is not reasonably necessary to the accomplishment of the State's legitimate election interests. Accordingly, we hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay.²²⁰

219. 405 U.S. at 143-44.

220. 415 U.S. at 718.

The Court's prescription for remedying the constitutional flaw in filing fees—the use of a reasonable petition signature alternative²²¹—seems equally applicable to public campaign subsidy. Assuming a petition percentage requirement that is high enough to discourage frivolous candidates but sufficiently low to avoid unduly burdening serious contenders,²²² petition signatures would seem to constitute the most likely cure for the most serious fault in the subsidy qualifying mechanism. In the absence of such an alternative mode of qualifying, the presidential primary election subsidy must be regarded as unconstitutional.

Geographical Distribution as a Requisite of Eligibility. After *Baker v. Carr*,²²³ *Gray v. Sanders*,²²⁴ and *Reynolds v. Sims*,²²⁵ any political representation mechanism which rests on geographical areas rather than on population should occasion the raising of eyebrows. To qualify for the presidential primary election subsidy, a candidate must raise a minimum of \$5000 from each of twenty states in contributions of no more than \$250.²²⁶ Such a requirement obviously warrants some examination.

The only case in point is *Moore v. Ogilvie*,²²⁷ which invalidated an Illinois statute requiring that petition signatures for ballot access be geographically distributed among at least fifty counties of the state, with no fewer than 200 signatures per county. The flaw there, as the Court was quick to point out, lay in the obvious attempt by the Illinois Legislature to burden candidates from metropolitan Chicago, which contains in fewer than ten counties somewhat more than half the population of the state, with the onus of gathering signatures in counties with a tiny fraction of the state's population.

One cannot jump from *Moore*, however, to the conclusion that the presidential primary twenty-state requirement is unconstitutional. What is true within a single state—that every citizen's vote counts equally with every other citizen's vote—is not true in presidential elections. As a consequence of the structure of the electoral college, the votes of citizens in some states weigh more heavily than those of citi-

221. *Id.* at 718-19.

222. See *Jenness v. Fortson*, 403 U.S. 431 (1971); *Williams v. Rhodes*, 393 U.S. 23 (1968). See also *American Party of Texas v. White*, 415 U.S. 767 (1974); *Public Financing* at 391-95.

223. 369 U.S. 186 (1962).

224. 372 U.S. 368 (1963) (requiring that congressional districts be approximately equal in population).

225. 377 U.S. 533 (1964) (requiring that both houses of a state legislature be constituted on the basis of population).

226. 1974 Amendments § 408 (codified at INT. REV. CODE OF 1954, § 9033(b)).

227. 394 U.S. 814 (1969), *overruling* *MacDougall v. Green*, 335 U.S. 281 (1948).

zens in other states.²²⁸ Because the geographical representation inherently embodied in the electoral college has constitutional sanction, it is highly improbable that a geographical distribution requisite for qualifying for the public subsidy in primary campaigns for the presidency would be held unconstitutional. Not only is there such formal constitutional sanction; added to it also is the logic of the structure imposed on presidential elections by the electoral college. If, to win the presidential election, a candidate must capture the electoral college vote blocs of entire states on a winner-take-all basis, it is not an irrational test of candidacy seriousness to require that a candidate for a party nomination show some support in forty percent of the states.²²⁹ So long, then, as the electoral college remains intact, this requirement is likely to be protected. If the electoral college were ever abolished, such a geographical distribution requisite for subsidy eligibility, absent a qualification keying it to the actual population of the number of states required to be represented, would be unconstitutional.²³⁰ It is not a function of population distribution, but of geographical entities. As such it discriminates against any regional candidacies, whether of particular metropolitan concentrations or of particular regions of the nation.

An Exclusively Monetary Measure for Distributing Subsidy Funds.

The amount of subsidy to which qualified candidates are entitled is determined by the amount of private funds each candidate raises. Under the particular matching system of allocation incorporated in the Presidential Primary Matching Payment Account, a dollar of subsidy is paid for each dollar privately raised, up to an aggregate ceiling of \$250 from

228. Because electoral college votes are determined on a winner-take-all basis, state by state, the winning candidate will frequently have either a greater or lesser proportion of the total national popular vote for President than his proportion of votes in the electoral college. More often it is a lesser proportion.

229. Attaching a geographical distribution requirement to minor party eligibility for public subsidy payments in the general election poses a different issue. See notes 249-50 *infra* and accompanying text. The presidential nomination subsidy will invariably be used only by candidates for major party nomination. Since the major parties operate in every state, they do not suffer from a geographical distribution requirement to the same degree as a minor party which has developed an early following in one or two states.

230. Even with the electoral college intact, a viable alternative to the twenty-state minimum would be a requirement that a candidate demonstrate the requisite support in any group of states whose combined electoral votes exceed forty percent of the national total. For instance, eight states (California, New York, Illinois, Pennsylvania, Texas, Ohio, Michigan, and Florida) can supply more than the needed percentage of electoral votes, while the twenty smallest states represent only about sixteen percent of the electoral total—less than New York's and California's combined count.

any one contributor.²³¹ Basing entitlement to public funds on the amount of private funds available to a candidate obviously poses the same kind of questions raised by an exclusively monetary qualification criterion discussed above.²³² The issues are sufficiently different, however, to warrant recasting the analysis slightly.

Matching is undeniably attractive as a method of primary subsidy allocation, and is therefore much more defensible constitutionally than an exclusively monetary qualification criterion. Its virtues are perhaps best seen against the background of allocation alternatives to it, the defects of which point up why matching was chosen.

The most obvious allocation principle is one which subsidizes all candidates who satisfy the qualification criterion equally, whatever it happens to be. Such a principle rests on the assumption that all candidates who succeed in passing through the eligibility gate are entitled to a chance to compete in the primary on an equal basis insofar as publicly provided monetary resources are concerned. Moreover, the logic of an equality allocation principle is consonant with, if not dictated by, the principal objective of public financing of primaries—the reduction of contribution-derived disparities between candidates competing for the same office. Unfortunately, two persuasive factors counter the theoretical attractiveness of an equality principle. It forces one to subsidize equally all candidates of widely varying degrees of seriousness, treating the same those several candidates who are the genuine contenders for office and those who stand no chance whatsoever. If the equal protection clause permitted a fairly high qualification threshold, it would be feasible to screen out frivolous candidates at the outset. A difficult qualification test is not constitutionally possible, however,²³³ which means that an equality allocation formula will necessarily “waste” a sizable amount of subsidy funds on candidates who have no conceivable prospect of winning office.²³⁴

Related to this defect is the inevitable candidate-inducement effect of equally allocated public subsidy. Such a subsidy will not only have to support those candidates who would have run even absent the

231. 1974 Amendments § 408 (codified at INT. REV. CODE OF 1954, §§ 9033, 9037).

232. See text accompanying notes 212-22 *supra*. For a recent conclusion that matching is constitutionally suspect, see *Developments in the Law*, *supra* note 110, at 1269-70.

233. See text accompanying notes 212-22 *supra*.

234. The word “waste” is in quotation marks to emphasize that it is used with some qualifications. While subsidizing purely publicity-seeking candidates is clearly wasteful, supporting the candidacies of ideological minorities can enliven and refresh political debate in a variety of ways. The latter is surely not waste.

availability of public funds, but will incur the added burden of encouraging even more candidates to run *because* of the availability of such funds. Unfortunately not all of the candidates so encouraged will be honest, and the specter of those who might run just for the sake of getting some of that public subsidy for themselves and their friends loomed large in the congressional antipathy to an equal allocation principle.²³⁵

If one is not to subsidize all qualified candidates equally, it is necessary to discover some constitutionally acceptable basis for discriminating among them. The most reasonable basis, and the one most likely to gain Court favor,²³⁶ is one resting on the amount of pre-existing support of candidacy. Two possibilities immediately suggest themselves—one based directly on the number of individual citizens who indicate their support of a candidacy by signing petitions, and the other based on the indirect manifestation of citizen support as reflected in campaign contributions.²³⁷ The former would clearly be preferable constitutionally, as it is completely unassociated with any wealth criterion. Unfortunately, however, it is not a reliable guide to the size of public support behind particular candidates, because, as the popular saying goes, “people will sign anything.” Indeed, one guesses that many citizens, knowing that candidates’ subsidy entitlements would be based on the number of petition signatories, would be inclined to sign every petition being circulated through the neighborhood, if only to get rid of a canvasser. While it is certainly feasible to prescribe that a citizen may sign only one candidate’s petition, it is difficult to implement such a restriction. The checking of thousands of names to ensure that they are on the registration books and that there is no duplication would be costly in time and money. Moreover, no pure petition signature allocation measure is likely to be regarded by observers, or even by the signing parties, as anything more than a gratuitous accommodation. Because it is costless to the signer, its validity as a reliable indication of his candidate preferences is not strong.

235. See S. Rep. No. 689, 93d Cong., 2d Sess. 6-7 (1974); 120 CONG. REC. S. 4558 (daily ed. Mar. 27, 1974) (remarks of Senator Kennedy).

236. There is language scattered through *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Jenness v. Fortson*, 403 U.S. 431 (1971), approving preexisting support as a basis for ballot access. See *id.* at 442. There is no reason to think that a distribution principle which is acceptable for so sensitive a function would be unacceptable as a guide for subsidy allocation.

237. It would be entirely possible, of course, to use other citizen-support measures. A less troublesome version of one based on contributions would use the *number* of contributors rather than the amount they contributed.

There is one additional variant of this last differential allocation mechanism that deserves mention—a voucher system. The use of vouchers, the advantages of which have been ably urged by David Adamany and George Agree,²³⁸ and embodied in legislation by Senator Lee Metcalf,²³⁹ would entirely finesse the need for a government agency to use any allocation principle at all. By mailing a voucher redeemable for a stipulated sum to each registered voter, or every person of voting age who has a social security number, for example, citizen choice could operate directly to allocate the available subsidy funds. Moreover, such allocation decisions are not costless, because a citizen has only one voucher to give. But a voucher system has its problems, too, which discourage its use.²⁴⁰

Against the background of these alternatives, an exclusively matching allocation principle's simplicity is indeed appealing. By shifting to individual contributors the burden of making the crucial decision of how much subsidy a candidate is to receive, matching allocation avoids the need for any governmental allocation rules or decision.

But is it constitutional? In light of the discussion above,²⁴¹ one must reluctantly conclude that it is not. Making the amount of private funds raised the *sole* determinant of the amount of public funds to be received inherently frustrates attainment of the primary reason for having a subsidy in the first instance—diminishing the dependence of political candidacy upon access to private wealth. To the extent that subsidy entitlement is determined by matching, candidates without access to private funds will continue to be discouraged from running at all, and candidates with access to only limited private funds will continue to be at a disadvantage in competition with their well-heeled rivals. It should be recalled that these are two of the three principal governmental interests which are offered as justification for most campaign finance reform, including public subsidization, and against which all attempts to achieve them must be measured. Consequently, any sub-

238. D. ADAMANY & G. AGREE, *MONEY AND POLITICS: CAMPAIGN FINANCE IN THE UNITED STATES 189-92, 196-201* (1975).

239. S. 1390, 90th Cong., 1st Sess. (1967); see 113 CONG. REC. 8006 (1967).

240. A voucher system is very costly to administer, with estimates as high as \$50 million for administration expenses alone. D. ADAMANY & G. AGREE, *supra* note 238, at 201. It also is inherently favorable to candidates who are friendly to the interests of huge groups, whether organized or not, such as labor and students, which have ready manpower for collecting the vouchers. Moreover, it is not difficult to imagine that a market in vouchers might develop, with politically active citizens collecting or buying the vouchers of friends, or with apolitical citizens selling their vouchers to candidates at a discount price.

241. See notes 212-22 *supra* and accompanying text.

sidy plan which frustrates them must be said to fail the test of constitutionality.

This particular matching formula is pernicious in addition because of the comparatively high level of the matching ceiling. A \$250 matching ceiling favors large contributors and uses public funds to reinforce their candidate choices. A plan which embodies the raising of large-size contributions of money both as the exclusive mode of determining eligibility in the first place and of allocating subsidy entitlement to those who qualify must fail doubly.

This does not mean, however, that a matching allocation principle cannot be used at all, but only that it cannot be used exclusively. As was the case with the eligibility-determining mechanism, the allocation mechanism could be substantially cured by the addition of an equally distributed subsidy in a small amount to all candidates who pass the qualification hurdle. Such a subsidy—at perhaps the level of one-half cent per person of voting age, which would amount to \$700,000 for each qualifying candidate in the 1976 presidential election—would be sufficient to enable every qualifying candidate to get his campaign off the ground, and to acquire sufficient public exposure if his qualifications prove to be attractive to the public to generate the additional private contributions needed to run an adequate campaign. By providing such a floor to all qualifying candidates, it would be possible both to diminish candidate deterrence and to alleviate somewhat the most severe disparities arising out of differential candidate access to private funds.

Moreover, the cost of supplementing matching with an equally distributed low-level subsidy could be substantially recovered by lowering the size of private contributions which would be matched. If, for example, only the first \$125 of any individual's aggregate contribution were matched, the cost of the matching component could be cut by between one-quarter and two-fifths, depending on the size distribution of all contributions to be matched.²⁴² By itself, a reduction in the matching ceiling would alleviate the equal protection concern over public subsidization of candidate choices of wealthy contributors. A lower ceiling would not be as objectionable in principle, and, on balance,

242. This is merely a guess, because it is not yet known to what extent the availability of matching is going to induce private citizens to contribute more than they would have without the enticement of the subsidy. If all the contributions of a presidential candidate were at the matching ceiling of \$250, obviously a reduction of the ceiling to \$125 would cut the costs of matching in half. But not all contributions will be at the \$250 level.

might even save the use of matching from invalidation. Taking both these steps—adding an equally distributed subsidy and reducing the level of the matching ceiling—would greatly increase the likelihood that the plan will be found to be constitutional. If, in addition, the maximum size of individual qualifying contributions were similarly reduced,²⁴³ the minimum number of required contributors correspondingly increased,²⁴⁴ and a petition signature alternative added as suggested above,²⁴⁵ the constitutionality of the presidential primary election subsidy could be assured.

The General Election Presidential Subsidy: Discriminatory Treatment of Minor and New Parties

The present formula for subsidizing minor and new parties was enacted in 1971 as part of the Presidential Election Campaign Fund Act,²⁴⁶ and has been discussed elsewhere.²⁴⁷ The only serious constitutional question arises from the requirement that a minor party receive five percent of the vote, either in the preceding or present general election, in order to be eligible for any presidential general election subsidy. Because common sense requires, and the Court permits,²⁴⁸ discrimination between major and minor parties in some respects, the sole issue is whether the five percent threshold is a reasonable cut-off point. While the problem could be eliminated entirely by extending the minor party subsidy entitlement to parties obtaining as little as one percent of the vote, it is most unlikely that the Court would second-guess Congress on a judgmental matter of so small a degree, particularly when

243. Other than pure symmetry, there is no particular necessity for equating the qualifying contribution ceiling and the matching ceiling. One could easily keep the former at \$250, while reducing the latter to \$125, which would simply mean that only half of the qualifying contribution would be matched with public funds.

244. Increasing the number of required contributors would probably help allay candidate-inducement fears created by the addition of an equally distributed subsidy component. See note 235 *supra* and accompanying text.

245. See notes 221-22 *supra* and accompanying text. The addition of a petition signature alternative as a mode of qualifying for the subsidy would alone be enough to save the present eligibility-determining mechanism, irrespective of the amount of the qualifying contribution ceiling. The amount of that ceiling, however, would undoubtedly bear strongly on the Court's examination of the subsidy plan as a whole, see *Williams v. Rhodes*, 393 U.S. 23, 34 (1968), especially when the raising of money in large contributions plays such an important part throughout. A reduction in the qualifying contribution ceiling, therefore, might very well help to sustain the constitutionality of a matching allocation principle.

246. Revenue Act §§ 801-02, amending INT. REV. CODE OF 1954, §§ 9001-13.

247. *Public Financing* at 397-402; see Rosenthal, *supra* note 121, at 414-15; *Developments in the Law*, *supra* note 110, at 1121-51.

248. *Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971).

the public would undoubtedly view subsidization of tiny parties as utterly wasteful and absurd. Assuming equality of subsidy entitlement among major and minor parties is not required, the act treats minor parties in a non-discriminatory fashion and the five percent threshold is probably constitutional.

Related to this is an additional threshold burden on minor parties, the requirement that a minor party candidate, in order to qualify for the general election subsidy, be on the ballot in at least ten states.²⁴⁹ Such a provision penalizes minor parties which are just forming, and which characteristically begin in one or two states and spread in subsequent years to other states. Unless they qualify for the ballot in ten states, minor party candidates receive nothing at all, which cannot help but burden their development and growth. One must wonder whether it is constitutional to add to the five percent vote threshold this even more burdensome ten-state geographical threshold. While one or the other, standing alone, might pass constitutional muster, it is difficult to justify both together.²⁵⁰

It has been suggested that reimbursement of new parties after the election is an unconstitutional discrimination.²⁵¹ No reasonable alternative to post-election reimbursement is conceivable for new parties, however, since they were not in existence during the preceding election, when some measure of their support could have been obtained. Consequently the Court is not likely to strike down a public subsidy plan which does the best possible for new parties, even if after the election.

Party-Favoring Expenditure Ceilings

Permitting state and national party committees each to make expenditures in behalf of their party's candidates for Congress²⁵² and the presidency²⁵³ beyond the expenditure limitation on the candidates themselves unquestionably discriminates against independent candidates. No conceivable justification can be advanced in support of such blatant discrimination in favor of party candidates, and the provision is clearly unconstitutional.

249. INT. REV. CODE OF 1954, § 9002(2)(B).

250. For an argument that the geographical limitation alone is constitutionally suspect, see *Developments in the Law*, *supra* note 110, at 1268-69.

251. See Brief for Plaintiff at 175-83, *Buckley v. Valeo*, Civil No. 75-1061 (D.C. Cir. filed June 2, 1975).

252. 1974 Amendments § 101(a) (codified at 18 U.S.C. § 608(f)(1)).

253. *Id.* § 101(a) (codified at 18 U.S.C. § 608(f)(2)).

THE STRUCTURE OF THE FEDERAL ELECTIONS COMMISSION

A final major constitutional question is raised by the peculiar appointment process the Amendments prescribe for the Federal Election Commission. While Article I of the Constitution undoubtedly gives Congress the authority to establish new federal agencies,²⁵⁴ to define the qualifications of those who may be appointed to positions in those agencies, and even perhaps to designate the specific person who may be appointed to a particular position,²⁵⁵ it seems clear that Article II²⁵⁶ requires that the actual appointment be made by the President, in whom the Constitution vests the power of appointment. The 1974 Amendments, however, in addition to permitting the President to appoint two members of the eight-member Commission, require that two other members be *appointed* by the President *pro tempore* of the Senate and two appointed by the Speaker of the House.²⁵⁷

A careful search of precedents has turned up no other federal agency similarly constituted, and the present arrangement must be regarded as unconstitutional. As is the case with so many features of the Amendments, the substance of this arrangement could have been attained with more care in the drafting. So long as the President formally appoints, it is entirely permissible for the Congress to specify a nomination procedure, such as that intended by the 1974 Amendments, which would be binding on the President.²⁵⁸

There are other questions about the constitutionality of specific Commission powers—such as the power to disqualify individuals from running for federal office for periods of up to seven years²⁵⁹—which

254. U.S. CONST. art. I, § 8.

255. See E. CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION*, S. Doc. No. 39, 88th Cong., 1st Sess. 501 (1964), cited in *Hearings on Various Measures Relating to Federal Election Reform Before the Subcomm. on Privileges and Elections and the Senate Comm. on Rules and Administration*, 93d Cong., 1st Sess. 352-53 (1973).

256. And he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. U.S. CONST. art. II, § 2, cls. 2, 3.

257. 1974 Amendments § 310(a)(1) (codified at 2 U.S.C. § 437c(a)(1)).

258. E. CORWIN, *supra* note 255.

259. 1974 Amendments § 302 (codified at 2 U.S.C. § 456). The disqualification begins on the date of the Commission finding, after notice and hearing on the record, that a candidate failed to file a required report, and extends to one year after the expiration of the term of the office for which the person was a candidate. Thus, for the House, the penalty could be as much as three years; for the presidency, five years; and for the Senate, seven years.

are beyond the scope of this Article. Many of them, however, pose serious issues which merit careful exploration.

CONCLUSION

The issues generated by campaign finance legislation are among the most basic that the Supreme Court ever confronts. The nation's ultimate political decision-making structure is involved, and crucial constitutional rights are at stake. The only persuasive ground upon which the Court might rest a decision to sustain the most flawed features of the 1974 Amendments is the need to respect the congressional response to Watergate and thereby avoid further erosion of public confidence in government. When weighed against the faults of the Amendments, and the fact that they are likely to govern campaign finance for decades to come if sustained, that need is not terribly convincing. Far more important than an immediate response to Watergate is a constitutionally sound response. The burden of reacting to Watergate is properly on Congress—not the Supreme Court—as is also the burden of repairing these statutes. If the Court finds defects in the new laws, one must hope that it will give Congress some guidance in the ensuing task of remodeling a basically sound structure.