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Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform

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In recent years, under the banner of reform, Congress has enacted legislation that has profoundly affected the way in which federal election campaigns are financed. Some observers believe that the system of campaign finance that has emerged from these reforms remains fundamentally defective, while others attribute many of the faults of the present system to the reforms themselves.¹ Those who would continue to try to reform the system by legislation confront not merely an unsympathetic political climate but also a frustrating legal reality: the power of legislatures to purify campaign finance practices is severely limited by the Supreme Court's interpretation of the Constitution. In a series of cases beginning with *Buckley v. Valeo*² and culminating this past Term with

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1. The literature evaluating the present system is extensive. For a general and well-documented study of recent reform efforts, see HOUSE COMM. ON HOUSE ADMINISTRATION, 96TH CONG., 1ST SESS., AN ANALYSIS OF THE IMPACT OF THE FEDERAL ELECTION CAMPAIGN ACT, 1972-78 (Comm. Print 1979) (prepared by The Institute of Politics, John F. Kennedy School of Government, Harvard University) [hereinafter cited as HARVARD STUDY]. A variety of analytical perspectives is reflected in MONEY AND POLITICS IN THE UNITED STATES (M. Malbin ed. 1984); PARTIES, INTEREST GROUPS, AND CAMPAIGN FINANCE LAWS, (M. Malbin ed. 1980), and the symposia *Political Action Committees and Campaign Finance*, 22 ARIZ. L. REV. 351 (1980) and *Money and Politics: Political Campaign Finance Reform*, 10 HASTINGS CONST. L.Q. 463 (1983). For an appraisal by a highly regarded journalist offering prophecies of doom should sweeping reforms not be enacted soon, see E. DREW, POLITICS AND MONEY (1983).

2. 424 U.S. 1 (1976) (per curiam).

Federal Election Commission v. National Conservative Political Action Committee,³ the Court has insisted that first amendment rights are put so much at risk by laws regulating political giving and spending that such laws must undergo the almost always fatal process of strict judicial scrutiny. It is the purpose of this Article to suggest a perspective from which this sometimes controversial first amendment interpretation appears, at least in its general outline, not merely plausible but probably correct.

Campaign finance reforms have often been justified merely as means to prevent political corruption.⁴ Many participants in the debate about reform, however, have clearly signalled a more ambitious desire, namely to bring about systematic political equality through campaign finance regulation.⁵ Defenders of reform in the name of either corruption prevention or equality have steadfastly maintained that legislative enactment of their programs could involve no genuine conflict with well-established first amendment principles. In order to justify discounting the first amendment stakes involved, reformers have had to press for some highly problematic doctrinal interpretations and to disregard a number of critically important institutional issues.

In this Article I shall pursue a first amendment analysis that generates quite different conclusions from those reached by the defenders of

3. 105 S. Ct. 1459 (1985).

4. In several of its campaign finance reform decisions, the Court has accepted the argument that prevention of corruption is a compelling interest. See, e.g., *id.*; *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

5. See, e.g., E. DREW, *supra* note 1 (analysis and discussion of present system, decriing the influence of money as providing an unfair advantage that ought to be eliminated); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 13-27 to -31, at 800-11 (1978) (contribution and expenditure limitations promote speech by redressing distortion caused by wealth); Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 55-73 (1980) (discussion of *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (increasing voice of financially powerful corporations means net loss of human freedom); Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory, and the First Amendment*, 29 U.C.L.A. L. REV. 505 (1982) (contribution limits in referendum contests required to promote political equality); Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815 (1974) (large political contributions violate the equal protection rights of voters of modest means); Patton & Bartlett, *Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WIS. L. REV. 494 (corporate contributions reduce ability of others to be heard in political arena); Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982) (campaign contributions reduce ability of others to be heard in political arena). But see H. PENNIMAN & R. WINTER, *CAMPAIGN FINANCES: TWO VIEWS OF THE POLITICAL AND CONSTITUTIONAL IMPLICATIONS* (1973) (campaign finance reform legislation is ineffective and violates first amendment); 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, 455-65 (1973) (government interest in equal political opportunity not compelling); Powe, *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243 (political equality rationale should be rejected).

For a rigorous analysis of the likely effects of the "egalitarian" proposals that have tended to dominate reform efforts, see Fleishman & McCorkle, *Level-Up Rather Than Level-Down: Toward a New Theory of Campaign Finance Reform*, 1 J.L. & POL. 211 (1984).

reform. As the framework for the analysis, I shall consider whether the Court should engage in strict judicial review of legislation that either prohibits or severely limits the amount of monetary contributions to, or expenditures in connection with, election campaigns.⁶ The level of judicial scrutiny of particular legislation of course does not resolve the fundamental question of the law's constitutionality. The level of review decision reflects instead the resolution of critically important preliminary issues, such as the extent to which a case generally implicates constitutional rights, the substantive content of those rights, and the Court's relative institutional capacity or obligation vis-a-vis the legislature to balance conflicting interests and give operational content to constitutional values.⁷ By considering the appropriate level of scrutiny for campaign finance reform legislation, I intend to bring precisely these kinds of questions to the surface. Such "middle-level questions"⁸ are neither purely theoretical nor narrowly doctrinal. Instead they concern matters of implementation and institutional context that are genuinely significant⁹ but usually ignored.¹⁰

Another reason for focusing upon the issue of judicial scrutiny is that several of the most prominent and articulate proponents of campaign finance reform—Archibald Cox,¹¹ Laurence Tribe,¹² and Judge

6. Contribution and expenditure limitations of course are not the only kind of campaign finance reforms. Disclosure requirements and public-funding provisions also find themselves on many reform agendas. I confine my attention to giving and spending restrictions, however, for two reasons. First, they represent the cornerstone of most reform efforts. Second, analysis of the scope of review issues they present is a means of making some valid general points about campaign finance reform. To consider other particular kinds of reforms might enrich the analysis somewhat but would not change its substantive thrust and would unduly lengthen the Article.

7. Cf. the debate about strict scrutiny with respect to benign racial discrimination, *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978), and gender classifications, *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

8. Cf. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1521 (1982) ("At the risk of becoming cannon fodder, I [too] have deliberately adopted provocative positions on a series of important, middle-level legal issues.").

9. This Article accepts the modes and methods of conventional—as opposed to "critical"—legal scholarship. In addition, it accepts in principle the basic legitimacy of the existing legal order. For a different perspective, see Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273 (1983).

10. The several excellent articles in the symposium *Freedom of Expression: Theoretical Perspectives*, 78 NW. U.L. REV. 937 (1983), exemplify the tendency to give relatively short shrift to issues of implementation and institutional context. An even more vivid example is Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 U.C.L.A. L. REV. 671 (1983). But see Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984) (proposing a comparative institutional approach to constitutional law).

11. Cox, *supra* note 5, at 69-70 (judiciary should not substitute its judgment for the expertise of the legislature).

12. L. TRIBE, *supra* note 5, § 13-27, at 801-03 (because restrictions are aimed at "evils independent of message" and are designed to "enhance freedom of speech, the exacting review reserved for abridgements of free speech is inapposite.").

Skelley Wright,¹³ for example—have explicitly defended judicial deference to such laws *in principle*. In denying the necessity of strict scrutiny of campaign finance reform legislation, these commentators make two basic arguments. The first disparages the extent to which spending and contribution limitations seriously injure important free-speech interests. The second asserts Congress' superior institutional capacity with regard to the governmental interests that the limitations are alleged to serve.¹⁴ On the one hand, the reformers argue that the interest in political equality is itself derived from the first amendment, and that the Court should defer to the *legislative* balance of competing first amendment claims. On the other hand, they suggest that corruption or the appearance of corruption pose such substantial threats to the polity that Congress is likely to be more aware than the Court of the need for prophylactic measures. This defense of judicial deference has gone relatively unchallenged in the literature, yet it rests on premises that cannot, I believe, withstand analysis.

Part I of the Article briefly reviews the campaign finance cases and summarizes the doctrine that has emerged. Part II describes and evaluates the defenses of judicial deference to campaign finance reform legislation that discount the first amendment claims of the givers and spenders. Part II also demonstrates that regulations of political giving and spending directly implicate fundamental first amendment freedoms. Proceeding to a more doctrinal analysis, it suggests that what have been aptly labelled the "pleas in mitigation"¹⁵ should not be deployed to deflect strict scrutiny in this area and that the Court was correct to reject them in *Buckley v. Valeo*.¹⁶ Finally, Part II briefly addresses the argument that contribution limitations, because they affect only "speech by proxy," generate less intense first amendment concerns than do expenditure limitations.¹⁷

13. Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005-06 (1976) (political spending and giving are not pure speech, but rather a form of conduct related to speech; laws regulating these activities do not demand highest level of judicial scrutiny).

14. In a very real sense, of course, both arguments amount to the same position: there is no first amendment right to be free from spending and contribution limitations that serve certain kinds of government interests. It is useful to analyze the first amendment arguments separately from the governmental interest arguments, however. The separation follows doctrinal and analytic convention. Furthermore, it helps distinguish the two variables in the constitutional equation, namely the extent to which the Constitution has set the particular activity somehow outside the sphere of normal legislative discretion (the first amendment side) and the extent to which the societal interests advanced by this particular legislative act should be permitted to override the interest in freedom (the governmental interest side).

15. Professor Powe first applied the label. Powe, *supra* note 5, at 266.

16. 424 U.S. 1 (1976) (*per curiam*).

17. The Article will not discuss whether strict scrutiny should be accorded to campaign finance regulations because of their impact upon the individual interest in self-realization or self-fulfillment. I am persuaded that self-fulfillment lacks justification as a first amendment principle. See BeVier,

Part III examines the governmental interest side of the judicial scrutiny issue, emphasizing institutional and enforcement considerations. Defenders of lenient judicial scrutiny for campaign finance reform legislation argue that the interest in equalizing access to the political process is itself derived from the first amendment. They suggest that when constitutional values are at stake, the legislature is an institutionally trustworthy agent of systemic change whose decisions are entitled to deference. The first section in Part III reflects on this suggestion and challenges the conclusion that considerations of institutional capacity warrant judicial deference to reform legislation.

Defenders of judicial deference also argue that reform legislation prevents quid pro quo corruption of candidates and office holders.¹⁸ They have proffered the governmental interest in "corruption prevention," rather like others have done with the interest in preserving national security, as a "talisman of immunity"¹⁹ from searching judicial scrutiny. The second section in Part III argues that giving legislatures a relatively blank check to adopt infringing prophylactic measures to prevent corruption is an unjustified departure from prevailing first amendment enforcement strategies.

The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle, 30 STAN. L. REV. 229, 317-22. More importantly, the Court itself largely has ignored these individual interests in the campaign finance reform context, as in other contexts. Cf. Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 913 (1979) ("It is clear . . . that the Court does not adhere to the liberty model.") The prevailing opinions in the campaign finance reform cases have assumed that the degree of judicial scrutiny was a function not of individual interests in self-fulfillment but rather of systemic considerations derived from the implicit requirements of representative democracy.

For a provocative debate about campaign finance reform issues between two self-realization theorists, see Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646 (1982); Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678 (1982).

18. The Court has validated not only the governmental interest in preventing corruption but also that in preventing the appearance of corruption. See *Buckley*, 424 U.S. at 27. I will, however, confine my analysis to the question of strict scrutiny of corruption-prevention measures. I argue that the Court should strictly scrutinize measures that are alleged to prevent corruption itself. See *infra* notes 169-211 and accompanying text. A fortiori, strict scrutiny of similar measures that supposedly prevent the lesser evil of the mere appearance of corruption is appropriate.

19. Cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1963).

Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

Id.

I

CASE SUMMARIES AND JUDICIAL DOCTRINE

The Court first addressed the scope of review issue in 1976 in *Buckley v. Valeo*²⁰ when it considered a multipronged challenge to the Federal Election Campaign Act (FECA) Amendments of 1974.²¹ These amendments, designed to purify and equalize federal elections, placed stringent limitations upon the amounts of money that individuals were permitted to contribute and spend upon campaigns for federal office.²² In *Buckley*, the Court sustained the contribution limitations and invalidated the expenditure ones. It indicated, however, that both forms of limitation are, at least in theory, entitled to strict judicial scrutiny.²³

In the five campaign finance reform cases decided since *Buckley*, though, the Court has struggled with scope-of-review questions and has failed as yet to articulate a fully satisfactory approach. In *First National Bank v. Bellotti*,²⁴ widely known as the "corporate speech" case, the Court invalidated a Massachusetts law that prohibited banks and business corporations from making expenditures to influence the vote on referendum proposals that did not materially affect their business, property, or assets.²⁵ Having strictly scrutinized the asserted state interests in the prohibitions, the Court concluded that there was an insufficient means-end relationship to justify the limitations.²⁶ *California Medical Association v. Federal Election Commission*²⁷ sustained Federal Election Commission limits upon the amount of money that an unincorporated association is permitted to give to a multicandidate political committee.²⁸

20. 424 U.S. 1 (1976) (per curiam).

21. Pub. L. No. 93-443, 88 Stat. 1263 (1974).

22. As originally enacted, these requirements limited political contributions to candidates by an individual to \$1,000, *id.* § 101, 88 Stat. at 1263, and by a political committee to \$5,000 to any single candidate per election, *id.*, with an overall annual limit of \$25,000 by an individual contributor, *id.*; limited expenditures by candidates for federal office, *id.*, 88 Stat. at 1264; and limited expenditures by individuals or groups "relative to a clearly identified candidate" to \$1,000 per candidate per election, *id.*, 88 Stat. at 1265.

23. The *Buckley* literature is extensive. Among the most useful commentaries are Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323, and Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1.

24. 435 U.S. 765 (1978).

25. See generally Nicholson, *The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures*, 65 CORNELL L. REV. 945 (1980); O'Kelley, *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti*, 67 GEO. L.J. 1347 (1979).

26. *Bellotti*, 435 U.S. at 786-95.

27. 453 U.S. 182 (1981).

28. An insightful student note anticipated the issues that the Court decided in *Cal-Med*, but reached the opposite conclusion. See Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments*, 86 YALE L.J. 953 (1977).

In this case, the Court engaged in lenient review because "the challenged limitation [did] not restrict the ability of individuals to engage in protected political advocacy."²⁹ In *Citizens Against Rent Control v. City of Berkeley*³⁰, the Court apparently engaged in strict scrutiny when it invalidated a limitation on contributions to committees formed to support or oppose ballot measures.³¹ In *Federal Election Commission v. National Right to Work Committee*³² the Court deferred to congressional judgment about the need for prophylactic measures to prevent corruption and narrowly construed the solicitation rights of the NRWC under a section of the FECA that limited NRWC to solicitation of "members." As so construed, the section survived a first amendment challenge. Most recently, in *Federal Election Commission v. National Conservative Political Action Committee*,³³ the Court after rigorous scrutiny invalidated section 9012(f) of the Presidential Election Campaign Fund Act,³⁴ the section that prohibited political committees from making independent expenditures in excess of \$1,000 to support the election of a presidential candidate who had opted to receive public financing.

These cases support the following doctrinal generalizations. Limitations on political giving and spending, because they represent governmentally imposed constraints on political activity, infringe upon freedoms of speech and association. The Court has suggested that they therefore should receive strict first amendment scrutiny. The restrictions merit the Court's attention even when they are directed at corporations instead of individuals or groups. Contribution limitations, however, may evoke less first amendment concern than limitations on independent expenditures. Indeed, the latter kind of restriction may well be found unconstitutional regardless of the context or purported justification.

Some members of the Court refer to contributions almost pejoratively, as "speech by proxy,"³⁵ and the per curiam opinion in *Buckley* suggested that limiting contributions "entails only a marginal restriction upon the contributor's ability to engage in free communication."³⁶ In the context of candidate elections, the Court has held that contribution limitations are constitutional if their purpose is to prevent corruption or the appearance of corruption. The Court has described corruption-

29. *California Medical Ass'n*, 453 U.S. at 199 n.20.

30. 454 U.S. 290 (1981).

31. The most thorough analysis of the issues in *CARC* is Nicholson, *The Constitutionality of Contribution Limitations in Ballot Measure Elections*, 9 *ECOLOGY L.Q.* 683 (1981); see also Lowenstein, *supra* note 5, at 583-608.

32. 459 U.S. 197 (1982).

33. 105 S. Ct. 1459 (1985).

34. 26 U.S.C. § 9012(f) (1982).

35. *California Medical Ass'n*, 453 U.S. at 196.

36. *Buckley*, 424 U.S. at 20.

prevention as a "single narrow exception to the rule that limits on political activity were contrary to the First Amendment."³⁷ Whether the exception is really so narrow as the Court implied was cast in some doubt by the Court's declaration in *National Right to Work Committee* that it would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."³⁸ In *Federal Election Commission v. National Conservative Political Action Committee*,³⁹ however, the Court appeared to reassert its authority to scrutinize corruption-prevention justifications, at least when they were proffered for expenditure limitations. "When the First Amendment is involved," Justice Rehnquist said, a "rigorous" standard of review is called for and the implication of the opinion was that deference is proper only "where the evil of potential corruption had long been recognized."⁴⁰

In the context of ballot-measure elections, the first amendment probably prohibits both contribution and expenditure limitations. Both infringe on first amendment rights without countervailing benefit, since "there is no significant state or public interest in curtailing debate and discussion of a ballot measure."⁴¹ In addition, the Court apparently has rejected equalization as a permissible justification for giving and spending restrictions. In *Buckley*, the Court observed that "the concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."⁴²

II

THE FIRST AMENDMENT STAKES

This Part will argue that limitations of election campaign contributions and expenditures impinge significantly on core first amendment rights. It is important to consider this seemingly familiar issue for a number of reasons. First, the Court has been surprisingly cryptic in announcing its rationale for strict scrutiny of campaign reform legislation. In addition, arguments supporting judicial deference in this area continue to depend heavily, if implicitly, upon the premise that such laws simply do not implicate significant first amendment rights. Finally, an

37. *Citizens Against Rent Control*, 454 U.S. at 296-97.

38. 459 U.S. at 210.

39. 105 S. Ct. 1459 (1985).

40. *Id.* at 4299.

41. *Citizens Against Rent Control*, 454 U.S. at 299.

42. *Buckley*, 424 U.S. at 48-49. Not everyone would agree that the Court has rejected equalization as a permissible justification for giving or spending restrictions in all contexts. See, e.g., Lowenstein, *supra* note 5, at 588-90 (arguing that neither *Buckley* nor *Bellotti* ruled out the possibility that contribution limits in referendum elections could be sustained on an "equalization rationale," and that the Court in *Citizens Against Rent Control* failed to consider the issue).

intelligible analysis of the important first amendment enforcement issues that are intrinsic to judicial review of election reform laws requires that certain fundamental assumptions about the amendment be made explicit at the outset.

This Part will begin by describing and defending the Court's decision in *Buckley* to engage in careful scrutiny of the FECA Amendments of 1974. It will then consider the first amendment interest in political contributions, an issue that has become more sharply focused in the reform debate following *Buckley*.

A. *Buckley v. Valeo*

1. *The First Amendment Vision*

The precise issues raised by the 1974 amendments were so novel that it was not at all clear what level of scrutiny the Court would apply to them. Never before had Congress undertaken such an ambitious effort to reform the electoral process. Moreover, those subjected to the campaign finance restrictions that were in effect prior to enactment of the FECA had lacked the incentive to press their constitutional claims, since the restrictions either could be readily avoided or had been emasculated by courts.⁴³

Despite the novelty of the precise issues, however, the Court surprised no one when it observed "that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs,"⁴⁴ and asserted that contribution and expenditure limitations "operate in an area of the most fundamental First Amendment activities."⁴⁵ Giving money to political campaigns, after all, long had been a customary and peaceful way of expressing political preferences and thereby of participating in the free discussion of governmental affairs.

The first amendment protects the free discussion of governmental affairs because the "Constitution establishes a representative democracy,"⁴⁶ which is a "form of government that would be meaningless with-

43. For a useful summary of the political and judicial history of pre-FECA regulatory efforts aimed at corporations and labor unions, see Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 ARIZ. L. REV. 373, 374-402 (1980); see also Cohan, *Of Politics, Pipefitters, and Section 610: Union Political Contributions in Modern Context*, 51 TEX. L. REV. 936 (1973) (history of union political activity, regulation thereof, and combination of evasion and judicial emasculation of the regulations).

44. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

45. *Id.*

46. BeVier, *supra* note 17, at 308 (1978). Reasoning from the constitutional establishment of representative democracy is a familiar means of generating conclusions about the categories of speech that are most clearly within the first amendment's ambit. See, e.g., Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (because Constitution establishes representative democracy, first amendment must protect political speech, but no other category of speech

out freedom to discuss government and its policies."⁴⁷ In terms of the function that freedom of speech plays in our system, the constitutional establishment of a representative democracy is significant because it assures that victory at the polls carries with it the right to govern.⁴⁸ Freedom of speech helps citizens to become informed so that they can vote intelligently for those who will represent them.⁴⁹ Free discussion functions also to permit citizens to persuade one another. Moreover, it allows them to communicate with their representatives at the same time that it allows candidates and their backers to garner the electorate's support. In other words, free discussion is critically important for affecting political outcomes and achieving political victory. This, in turn, is the first step to securing the adoption of desired governmental policies.⁵⁰

This discussion of the function of freedom of speech in a representative democracy suggests that the Court in *Buckley* correctly asserted that limitations on political campaign giving and spending involve "the most fundamental First Amendment activities."⁵¹ Those who give to and spend on election campaigns are intrinsically legitimate participants in the ongoing process of representative democracy at least insofar as they wish, like other participants, to "see [their] views become public pol-

is protected in principle). Such reasoning however, has been used less often in considering the function of freedom of speech in our political system and whether there are occasions when courts ought to defer to legislative decisions to encroach upon it.

47. Bork, *supra* note 46, at 23.

48. Given the complexity of the task of governing, it would undoubtedly be more accurate to say that victory at the polls carries with it the right, temporary and subject among other important constraints to accountability at the next election, to exercise somewhat more actual governing authority than does loss at the polls.

49. The "informing function" of free political speech has received elaborate if ambiguous rhetorical embellishment in recent Supreme Court opinions.

Our precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." . . . And we have recognized that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."

Board of Educ. v. Pico, 457 U.S. 853, 866 (1982) (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978), and *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), respectively).

50. *But cf.* Baker, *supra* note 17, at 674 ("[N]othing about the political context requires that political contributions or the candidate's personal expenditures be designed only to purchase winning speech, as opposed to speech that promotes their views or values."). Professor Baker may be correct that the political context does not necessarily *require* individuals to purchase speech. It is hard to see, however, why someone committed to a set of "views and values" would not—given a context in which winning is possible—prefer winning to losing. In his analysis of the political context, moreover, Professor Baker seems to ignore the complex and often powerful effects that minor parties and other sure losers can in fact exert upon political outcomes. *See generally* J. ROSENTONE, R. BEHR, & E. LAGARUS, *THIRD PARTIES IN AMERICA* 8 (1984) (arguing that third parties "affect the content and range of political discourse, and ultimately public policy, by raising issues and options that the two major parties have ignored").

51. *Buckley v. Valeo*, 424 U.S. 1, 14 (per curiam); *see also* Note, *Regulation of Campaign Contributions: Maintaining the Integrity of the Political Process Through an Appearance of Fairness*, 56 S. CAL. L. REV. 669, 677-81 (1983).

icy.”⁵² The Court must carefully police legislative attempts to limit such activities because the activities themselves are constitutionally valuable.

2. *Doctrinal Maneuvers and United States v. O'Brien*

The advocates in *Buckley* who defended judicial deference to the contribution and expenditure limitations acknowledged that the limitations involved first amendment concerns. However, they refused to accept the corollary proposition that strict first amendment scrutiny was appropriate. They attempted to deprecate the first amendment arguments of those who challenged the limitations by invoking a series of doctrines whose central import is to reduce the level of judicial scrutiny.

The defenders of judicial deference made two primary arguments. First, they argued that the limitations imposed by the FECA did not involve central first amendment issues because the limitations “deal[t] only with conduct, [or] with the transfer or use of money and other material resources”⁵³ and not “with speech directly.”⁵⁴ Second, they argued that the restrictions were content-neutral. Consequently, the restrictions allegedly did not seriously threaten first amendment values. Indeed, advocates of this position analogized the restrictions to genuine time, place, and manner regulations, which, like decibel restrictions on sound trucks, seem designed to regulate evils quite divorced from communicative significance.⁵⁵

Proponents of deference in *Buckley* relied heavily on *United States v. O'Brien*,⁵⁶ the draft-card burning case. The Court there held that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”⁵⁷ It then announced a comparatively undemanding test for determining when a government regulation of the “nonspeech element” is “sufficiently justified.” The test implied that lenient review was appropriate if the governmental interest in regulating the nonspeech ele-

52. Brief of the Appellant at 48-49, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

Of course, those who contribute money to a candidate hope to further their political, social and economic views—just as those who engage in demonstrations and rallies, write books on political issues, organize like-minded citizens, draft and circulate petitions, buy advertisements, publish periodicals or newspapers, make speeches, sponsor seminars or teach-ins, or engage in litigation hope to further their political, social and economic views. Such activities are the hallmark—as well as the indispensable precondition—of a free society.

Id. at 50-51.

53. Brief of Senators Hugh Scott and Edward M. Kennedy, Amici Curiae, at 24, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

54. *Id.* at 26.

55. *Id.* at 30.

56. 391 U.S. 367 (1968).

57. *Id.* at 376.

ment "is unrelated to the suppression of free expression."⁵⁸

a. Speech vs. Nonspeech and Campaign Contributions

In *Buckley*, the Court rejected the draft-card burning analogy. The Court asserted that "[t]he expenditure of money simply cannot be equated with such conduct as destruction of a draft card."⁵⁹ Unfortunately, the Court failed to articulate its rationale for this conclusion.

In *O'Brien*, two purported characteristics of the draft-card burning statute influenced the Court to apply a lenient standard of review. First, the Court indicated, the statute's operative effects could be analytically carved up and its impact upon the nonspeech element of *O'Brien's* behavior considered separately from its impact upon the speech element. Second, the statute's purpose in regulating the nonspeech element could plausibly be regarded as "unrelated to the suppression of expression."⁶⁰ For the Court's refusal in *Buckley* to follow *O'Brien* to be justifiable, therefore, the spending and contribution limitations of the FECA must possess one or the other of these characteristics.

A conceptual problem immediately arises. The supposed distinction between the speech and nonspeech elements—of either draft-card burning or political spending—lacks analytic utility. The Court has long been unable to render a coherent account of the implications of the first amendment's textual limitation to abridgements of speech.⁶¹ On the one hand, the Court has refrained from extending the amendment's ambit to cover everything the dictionary might define as speech.⁶² On the other hand, the Court has also extended first amendment protection to expressive activities other than speaking.⁶³ In these cases, the Court may have been influenced by a conception, albeit a not fully articulated one, of

58. *Id.* at 377.

59. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (per curiam).

60. *Cf. Alfange, Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 17. Alfange argues that even though the Court begged the speech-conduct question, the result in *O'Brien* is defensible because of the nature of the governmental interest promoted by the statute.

61. *See generally* Schauer, *supra* note 17.

62. *See* Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 267-82 (1981) ("Not every case is a first amendment case."). Accordingly, the Court has occasionally construed first amendment speech not to include verbal behavior that would certainly seem to be speech in any ordinary meaning of the term. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . .") (footnote omitted).

63. *See, e.g., Brown v. Louisiana*, 383 U.S. 131 (1966) (silent standing in library); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (refusal to salute flag); *Stromberg v. California*, 283 U.S. 359 (1931) (display of red flag).

what the amendment was designed to protect.⁶⁴ Whatever the conceptual motivation, however, the Court often has extended first amendment protection to activities that seem at first glance quite unspeech-like.

In *O'Brien*, the Court avoided confronting these parallel but conflicting lines of authority. The Court, claiming to synthesize past cases, developed a doctrinal formulation that purported to preserve intensive review for regulations of "pure" speech and to reserve more relaxed scrutiny for rules directed at nonspeech. Reaching a rare consensus, commentators agreed that there was a fatal flaw in the new test: the "speech" and the "conduct" that the Court purported to distinguish were in fact "an undifferentiated whole."⁶⁵ Thus, the distinction between the speech and nonspeech elements of conduct does not genuinely serve to indicate the appropriate intensity of first amendment concern.⁶⁶

The Court's assertion in *Buckley* that "[t]he expenditure of money simply cannot be equated with such conduct as destruction of a draft card"⁶⁷ is flawed because it rests upon a specious distinction between conduct and speech. As was true with the draft-card burning in *O'Brien*,

64. Unfortunately, the Court has not been scrupulous to explain why these activities could claim freedom from regulation by the terms of a constitutional provision protecting speech. In other cases the textual limitation to speech appeared as a convenient device for reining in the amendment's coverage. The Court simply labeled some forms of nonverbal communicative activity "conduct," thus rendering a superficially plausible account of its decision to permit particular inhibitions. See, e.g., *Cox v. Louisiana*, 379 U.S. 559, 563 (1965). The Court in *Cox* held that a statute governing the conduct of picketing and parading did not infringe free speech.

The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited. . . . "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." A man may be punished for encouraging the commission of a crime, or for uttering "fighting words." This principle has been applied to picketing and parading in labor disputes.

Id. at 563 (citations omitted).

65. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496 (1975). To generalize from that insight, "[a] constitutional distinction between speech and nonspeech has no content. A constitutional distinction between speech and conduct is specious. Speech is conduct, and actions speak." Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968); see also L. TRIBE, *supra* note 5, § 12-7, at 599 ("The trouble with the distinction between speech and conduct is that it has no real content."); Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. REV. 29, 33 (1973) ("Any attempt to disentangle 'speech' from conduct which is itself communicative will not withstand analysis.").

66. The Court ought to be concerned whenever legislation inhibits conduct or applies in contexts that, according to any intelligible conception of the first amendment's purposes, ought to be kept relatively free from regulation. The speciousness of the distinction between speech and conduct combines with its false clarity and its aura of determinacy to deflect inquiry from the most difficult but only important questions: whether, pursuant to the first amendment and in this context, regulations of *this conduct* ought to be strictly scrutinized by the Court, and with what conception of the amendment's essential function would strict scrutiny in *this case* be consistent. Cf. Henkin, *supra* note 65, at 77 (arguing that the Court has never done what it ought to do, namely relate the distinction between speech and conduct to the language and purposes of the first amendment).

67. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (per curiam).

the speech and conduct involved in campaign contributions and expenditures represent an undifferentiated whole. Not only does money permit the purchase of communication, but—more importantly for purposes of this part of the analysis—political giving and spending are themselves communicative acts. Their message of support (presumably their speech element) is quite inseparable from “the transfer or use of money” (presumably their conduct element). Thus, in *Buckley*, the attempt to separate conduct from speech is neither more nor less arbitrary than was the similar attempt in *O’Brien*. The purported distinction simply does not reflect a useful predicate for reasoning about the appropriate intensity of first amendment scrutiny. Therefore, another approach is necessary.

b. Government Interests Unrelated to the Suppression of Free Expression

John Hart Ely once offered a convincing way out of the conceptual black box into which laws that regulate speech and conduct seem to fall. One of the *O’Brien* conditions for lenient scrutiny of regulations of communicative conduct was that the governmental interest served be “unrelated to the suppression of free expression.” Ely translates this to mean that deference is warranted only if “the harm that the state is seeking to avert is one that . . . would arise even if the defendant’s conduct had no communicative significance whatsoever.”⁶⁸

Tested by this formulation, neither of the two principal purposes proffered in *Buckley* to support the contribution and expenditure limitations of the FECA Amendments could be deemed “unrelated to the suppression of free expression.” The regulations sought to prevent harms that would only arise if giving and spending money has communicative significance.⁶⁹ They therefore required strict scrutiny.

The first purpose advanced in support of the FECA contribution and expenditure limitations was preventing political corruption. Campaign contributions can be the effective equivalent of bribery and thus be considered corrupt when they are given not as a signal of support “but in expectation of influencing or changing [candidates’] positions” on specific issues.⁷⁰ When this is the case, they harm the political process because they distort the motivations of public decision-makers in determinate and improper ways. “To the extent that large contributions are given to secure political quid pro quos from current and potential office

68. Ely, *supra* note 65, at 1497; cf. L. TRIBE, *supra* note 5, § 12-7, at 601 (“For whatever reason the distinction [between speech and conduct] survives, it may be taken at most as shorthand for an inquiry into the aim of the government’s regulation.”).

69. But see Cox, *supra* note 5, at 59.

70. H. ALEXANDER, FINANCING POLITICS—MONEY, ELECTIONS AND POLITICAL REFORM 79 (2d ed. 1980).

holders, the integrity of our system of representative democracy is undermined.”⁷¹

The systemic harm that stems from political quid pro quos would never eventuate if the payment of money had no communicative significance. Not only does the payment identify the terms of the arrangement but also it indicates that at least one party believes that the deal itself will be or has been made. Without this communicative effect, it could neither harm our system of representative democracy nor undermine the integrity of an officeholder's public decisionmaking. Thus, insofar as the harm prevented by the regulation of campaign giving and spending is corruption, it is a harm that arises only because the regulated behavior has communicative significance. To this extent, therefore, the regulation is not “unrelated to the suppression of free expression.”

The second purpose of the FECA, conceptually distinct from corruption prevention, was to equalize the relative ability of individuals and groups to influence election outcomes. The harm to be prevented by equalizing regulations is also systemic, but more broadly so, for the targets of such regulations are not merely officeholders or voters, but the entire political system. This equalization goal is more ambitious than just preventing specific instances or opportunities for abuse of the public trust by public officials. It is to reallocate political power throughout the entire electoral system. Rather than seeking to prevent corrupt political deals, legislation that pursues an equalization goal seeks to shift political outcomes away from those favored by persons who presently have “too much” political power and toward those favored by persons whose present share of political power is deemed “too little.”

The harm prevented by such legislation—the exercise or possession of “too much” political power by some individuals or groups—could not arise unless the giving and spending of money has communicative significance. The whole point of giving and spending money in election campaigns is to communicate: to signal support, to persuade (or purchase the means of persuasion), to participate in the effort to get a message to elected officials or to the voting public, and thereby to affect political outcomes. Moreover, only if money has communicative significance can individuals or groups achieve “too much” political influence simply by spending it on or contributing it to election campaigns.

The conclusion that “money talks” thus seems inescapable. That it talks not too loudly but too well ⁷² explains why reformers want to regu-

71. *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam).

72. A favorite analogy of reformers is between contribution or spending limitations and decibel limits. See, e.g., Freund, *Commentary*, in *FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS* 72-73 (A. Rosenthal ed. 1972) (“[J]ust as the volume of sound may be limited by law, so the volume of dollars may be limited without violating the First Amend-

late its giving and spending in political contexts. It also explains why laws that limit political giving and spending raise serious free speech issues.

c. *Content Neutrality*

Even when the defenders of deference in *Buckley* acknowledge the communicative significance of contributions and expenditures, they insist that strict scrutiny is unnecessary because the FECA's limitations upon these activities are "content neutral" and thus benign in first amendment terms. "The FECA," they argued, "is not concerned with what is said, how often it is said, or who speaks. . . . The evils which Congress addressed are the corrosive influence of large contributions and expenditures of money—dangers in nowise resulting from the ideas expressed or the volume of expression."⁷³ Justice White, dissenting from the Court's invalidation of the expenditure limitations, similarly concluded that "the contribution and expenditure limitations are neutral as to the content of speech and are not motivated by fear of the consequences of the political speech of particular candidates or of political speech in general. . . ."⁷⁴

Defenders of deference note that contribution and expenditure limitations on their face are not directed toward any specific candidates; rather they apply across the board to the speech of all political candidates. Facial neutrality, however, does not alone justify judicial deference to such limitations.

In the first place, the FECA's facially neutral terms cannot without more establish a completely convincing case for content neutrality. Although the doctrine of content neutrality has not been applied consistently,⁷⁵ scholars generally agree that viewpoint discrimination is the

ment."'). The analogy is flawed because the evil created by too much sound is noise in a strictly physical sense, whereas that thought to be created by too many dollars is noise only in a normative sense—namely that, in the view of the person drawing the analogy, too many dollars permit certain messages to be heard too much.

73. Brief of Senators Hugh Scott and Edward M. Kennedy, Amici Curiae, at 28-29, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

74. *Buckley v. Valeo*, 424 U.S. at 259-60 (White, J., concurring and dissenting). Professor Tribe also confesses that "limitations on campaign contributions and expenditures . . . seem entirely content-neutral; they do not pass judgment on or inhibit any particular political message or even any identifiable kind of message." L. TRIBE, *supra* note 5, § 13-27, at 800-01; see also Wright, *supra* note 13, at 1009 ("[M]oney limitations, if properly drafted and administered, are uniquely manageable as content-neutral.").

75. See generally Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L. J. 727 (1980); Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) [hereinafter cited as Stone, *Content Regulation*]; Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978) [hereinafter cited as Stone, *Restrictions of Speech*].

principal first amendment evil to be prevented.⁷⁶ When the issue is viewpoint neutrality of laws that regulate speech and conduct, as do expenditure and contribution limitations, courts confront a difficult dilemma. They have tried to develop doctrinal tools capable of rooting out the evil of viewpoint discrimination in literally neutral statutes without requiring in every case full-blown inquiries into either discriminatory legislative motives or uneven regulatory effects.⁷⁷ Therefore, to suggest that a statute's literally content-neutral terms are always a trustworthy proxy for actual viewpoint neutrality is at best to oversimplify this complex doctrinal issue.⁷⁸

Secondly, contribution and expenditure limitations operate explicitly within the political arena, where the concern that government not engage in viewpoint discrimination ought to be most acute. Within this traditional first amendment protectorate, limitations on giving and spending burden certain forms of political participation rather than regulating the entire range of political activities.⁷⁹ The political realities of campaign finance reform, moreover, suggest that these activities are the target of regulation at least in part because they are closely tied to political agendas that reformers oppose.⁸⁰

Finally, changing the legal context of political activity inevitably redistributes political power. "Reform is not neutral. When the rules of the game are changed, advantages shift and institutions change"⁸¹

76. See, e.g., Farber, *supra* note 75, at 735; Redish, *supra* note 75, at 117; Stone, *Restrictions of Speech*, *supra* note 75, at 108; Wright, *supra* note 13, at 1009.

77. For a useful and perceptive analysis of this very puzzling "jurisprudential conflict between precision of analysis and clarity of doctrine," see Stone, *Content Regulation*, *supra* note 75, at 251-52 (footnote omitted). See also Schauer, *supra* note 62, at 280-81.

78. Cf. L. TRIBE, *supra* note 5, § 12-6, at 598 (when the government's goal is to suppress particular ideas, even content-neutral regulations require closer scrutiny).

79. But cf. Stone, *Restrictions of Speech*, *supra* note 75, at 109-15 (suggesting that "subject-matter restrictions" on speech, such as those at issue in *Buckley*, carry exaggerated risks of viewpoint discrimination only when they restrict speech about a specific issue or cluster of issues, and thus only then should they be strictly scrutinized.). In this respect, the Court's more deferential review of legislation restricting the political activities of certain government employees is perhaps explicable. See, e.g., *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

80. Levinson, Book Review, 96 HARV. L. REV. 1466, 1478 (1983) (reviewing *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982)). See also the candid assessment of Professor Karst, who worried that while regulation of campaign finance is "motivated by egalitarian goals of the highest order . . . at least some of the laws involve what can only be called discrimination based on speech content." Karst, *Equality as a Central Principle of the First Amendment*, 43 U. CHI. L. REV. 20, 64 (1975). Judge Wright professes to see the matter quite differently: "It is, to say the least, not immediately apparent how [contribution or expenditure] ceilings—so long as they apply evenly across the board—could be designed so as to cast a disproportionate burden on minority or disfavored points of view." Wright, *supra* note 13, at 1009 n.39.

81. H. ALEXANDER, *supra* note 70, at 15; see also M. JOHNSTON, *POLITICAL CORRUPTION AND PUBLIC POLICY IN AMERICA* 144 (1982) ("A . . . basic problem with structural reform is that . . . governmental structures . . . are almost never neutral in their impact. . . . [D]ecisions about

At the very least, whatever the motivations of their political sponsors, laws directly regulating explicitly political behavior can never have a neutral *impact*. In no case will the effects upon individuals, interest groups, and other political actors be precisely evenhanded.⁸² Indeed, it is ironic that the most forceful argument supporting campaign finance legislation praises the FECA for depriving the wealthy of the advantage of their position.⁸³ The argument implies that the chief *virtue* of reform measures is their lack of neutrality of impact.⁸⁴ Statutes that are supported precisely because they deprive a particular group of its ability to engage relatively effectively in politics, therefore, may not be as "entirely content neutral" as they seem.⁸⁵

B. "Proxy Speech"

In *Buckley* the Court distinguished between limits on contributions of money to politicians or their campaigns and limits on expenditures by citizens or candidates.⁸⁶ A contribution limit, the Court said, "entails only a marginal restriction upon the contributor's ability to engage in free communication"⁸⁷ because "the transformation of contributions into political debate involves speech by someone other than the contributor."⁸⁸ Expenditure limits, on the other hand, "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech."⁸⁹

institutional reform are still decisions about what kind of politics and policy we want, whether we realize it or not. People who *do* realize this have at times used reform as camouflage for their own political agenda."); cf. Patton & Bartlett, *supra* note 5, at 510 (Law is "not given the luxury of adopting a position which has no political consequences.").

82. Cf. Winter, *Changing Concepts of Equality: From Equality Before the Law to the Welfare State*, 1979 WASH. U.L.Q. 741, 752 ("[I]t is naive to believe that such regulation can ever be evenhanded.").

83. L. TRIBE, *supra* note 5, § 13-27, at 800-03. See generally Wright, *supra* note 5.

84. Cf. Adamany, *Money, Politics, and Democracy: A Review Essay*, 71 AM. POL. SCI. REV. 289, 296 (1977) ("If recent writing is the measure, the analysis of political finance often turns on the author's ideological perspective.").

Because political reforms cannot be neutral, to claim that spurious assertions of neutrality ought not deflect first amendment strict scrutiny is not to make any statement whatsoever about whether the particular nonneutrality itself violates or is permissible under the first amendment. The Court in *Buckley*, of course, held *both* that the contribution and spending limitations were not neutral *and* that the nonneutral purpose of equalizing political power was "wholly foreign to the First Amendment." 424 U.S. at 49.

85. Cf., e.g., Ferman, *Congressional Controls on Campaign Financing: An Expansion or Contraction of the First Amendment?*, 22 AM. U.L. REV. 1 (1972) (attempt to limit influence of wealth on campaigns is equivalent to content discrimination).

86. *Buckley*, 424 U.S. at 19-21. See generally Richards, *The Rise and Fall of the Contribution/Expenditure Distinction: Redefining the Acceptable Range of Campaign Finance Reforms*, 18 NEW ENG. L. REV. 367 (1983).

87. *Buckley*, 424 U.S. at 20-21.

88. *Id.* at 21.

89. *Id.* at 19.

Several members of the Court have used this distinction to justify less intense scrutiny where a campaign finance regulation purportedly governs contributions. In *California Medical Association v. Federal Election Commission*,⁹⁰ for example, the Court sustained FECA limits upon the amount an unincorporated association (CMA) was permitted to give to a multicandidate political committee (CALPAC). The challengers argued that the restriction was “akin to an unconstitutional expenditure limitation because it restricts the ability of CMA to engage in political speech through a political committee, CALPAC.”⁹¹ The plurality was unpersuaded: “The type of expenditures that this Court in *Buckley* considered constitutionally protected were those made *independently* by a candidate, individual or group in order to engage directly in political speech.”⁹² What CMA wanted to do, by contrast, was to engage in “speech by proxy,” a form of political advocacy “not . . . entitled to full First Amendment protection.”⁹³

The distinction between expenditures and contributions has been so severely criticized that it may no longer support a different level of scrutiny for contribution than for expenditure limitations.⁹⁴ In his separate opinion in *Buckley*, Chief Justice Burger initiated the criticism by calling the distinction a word game.⁹⁵ For him, the distinction is not a reliable barometer of the relative significance of the first amendment values at stake.⁹⁶ Moreover, he noted, the distinction is so inherently meaningless that “the contribution limitations will, in specific instances, limit exactly the same political activity that the expenditure ceilings limit, and at least one of the ‘expenditure’ limitations the Court finds objectionable operates precisely like the ‘contribution’ limitations.”⁹⁷

90. 453 U.S. 182 (1981).

91. *Id.*

92. *Id.* (emphasis in original).

93. *Id.* at 196.

94. Indeed, the distinction has been abandoned by Justice Marshall, one of its adherents on the Court. See *Federal Election Comm’n v. National Conservative Political Action Comm.*, 105 S. Ct. 1459, 1481 (1985) (Marshall, J., dissenting) (“I now believe that the distinction has no constitutional significance.”). For Justice Marshall, however, abandoning the distinction does not mean that both expenditure and contribution limitations will be subjected to more intensive scrutiny formerly deemed appropriate only for the former. Rather it means that both forms of limitation can be more readily justified.

95. *Buckley v. Valeo*, 424 U.S. 1, 244 (1976) (Burger, C.J., concurring in part and dissenting in part).

96. “[P]eople—candidates and contributors—spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utter the words.” *Id.* (Burger, C.J., concurring in part and dissenting in part).

97. *Id.* at 243-44. But see Note, *supra* note 28, at 957-61 which argues that gifts to political committees, denoted “contributions” by the FECA, are not genuinely analogous either to candidate contributions or to independent expenditures as defined in *Buckley*, and therefore should be given a different label and subjected to a different first amendment analysis.

Professor Powe has persuasively made a similar point. He observes that regulations of "proxy speech" (i.e., contributions) supposedly differ from regulations of "real speech" (i.e., expenditures) in that "proxy speech is speech by another." The difference, however, is largely chimerical.

All of the campaign finance cases involve speech by another. In some circumstances an individual gives to a committee which in turn gives to a professional or to a campaign treasury. In other cases a campaign treasury turns money over to a professional. . . . An individual choice to have a message with which he agrees prepared by professionals is no less speech. Proxy speech is simply a pejorative name for a political commercial. It is still speech.⁹⁸

In addition to the arbitrariness necessarily entailed in implementing a distinction without a difference, a rule that accords less first amendment protection to contributions than to expenditures severely infringes upon the right of association.⁹⁹ Contributions by individual citizens to candidates might be thought merely to signal the contributor's support. Contributions by individuals to groups or to political committees, however, permit the pooling of resources. This amplifies the contributors' individual voices. In *NAACP v. Alabama*,¹⁰⁰ when the Court for the first time gave explicit first amendment protection to freedom of associa-

98. Powe, *supra* note 5, at 258-59 (emphasis added). Professor Cox, discussing 26 U.S.C. § 9012(f) (1982), disagrees:

Organized fundraising, purchase of television time, and other political advertising by a political committee are clearly types of conduct affecting speech and entitled to some degree of first amendment protection. It can be argued, however, that these activities are not speech itself, and therefore do not merit the full shelter of the first amendment. The argument is given point by asking whose right of speech is abridged by the restriction. Those who give the money are not engaging in communication. As in the case of a contribution directly to a candidate, there is "only a marginal restriction upon the contributor's ability to engage in free communication" because "the transformation of contributions into political debate involves speech by someone other than the contributor." Those who constitute the committee to raise and spend the money do not engage in speech; their concern is to provide the money. Having combined contributions into a pool, the committee will simply turn it over to one or more advertising agencies to conduct an advertising campaign through the mass media. The space advertising will present the picture and slogans of the candidate. The television spots will present the visage and voice of the candidate taken from newscasts and previous television appearances. It would not be surprising to find an independent committee simply buying additional time to rerun the candidate's own spots. In short, the committee's activities are much more like the contributions held subject to regulation in *Buckley* than like the individual expenditures held immune. Furthermore, individual speech is in no sense involved because section 9012(f) applies only to the expenditures of an organized political committee.

Cox, *supra* note 5, at 62-63. For an argument along lines similar to those endorsed by Professor Cox, see Simouett, *The Constitutionality of Regulating Independent Expenditure Committees in Publicly Funded Presidential Campaigns*, 18 HARV. J. ON LEGIS. 679, 688-94 (1981).

99. See generally Young & Herbert, *Political Association Under the Burger Court: Fading Protection*, 15 U.C.D. L. REV. 53 (1981) (review of Burger Court decisions on freedom of association cases).

100. 357 U.S. 449 (1958).

tion,¹⁰¹ it recognized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."¹⁰² Limits on political contributions obviously constrain the efforts of groups of individuals to increase the effectiveness of their advocacy. The limits also limit the ability of citizens to choose for themselves the scope and extent of their political participation.

Since the legitimacy of the constitutional status of the right of political association is not in doubt, the burden of justifying judicial deference to limits upon its exercise rests with those who argue that such deference is warranted. Apart from specious distinctions between the first amendment values of contributions and expenditures, or between "proxy speech" and "real speech," the burden has yet to be borne.¹⁰³

III

THE GOVERNMENTAL INTERESTS

Many persons advocate lenient judicial scrutiny for campaign finance regulations because of the nature of the governmental interests that such regulations allegedly further. Their claims take two different forms. First, such persons acknowledge that contribution and expenditure limitations infringe first amendment rights. They claim, however, that the governmental interest in regulating the political process which is served by such limitations itself derives from the first amendment.¹⁰⁴ It

101. The fact that the right of association is only implicitly protected by the first amendment is not necessarily relevant to the question of the appropriate degree of its protection. Freedom of political association seems a wholly appropriate inference to draw from the text, structure, and history of the Constitution. Cf. Fellman, *Constitutional Rights of Association*, 1961 SUP. CT. REV. 74, 104-08, 133-34 ("The rights of association are central to any serious conception of constitutional democracy." *Id.* at 133.) It is fully consistent both with the normative vision of the first amendment in terms of which the protection of contributions and expenditures is justified and with the Court's stated assumptions about what the first amendment necessarily implies. See, e.g., *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3252 (1984) ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

102. *NAACP v. Alabama*, 357 U.S. at 460.

103. In his analysis of *Buckley v. Valeo*, Professor Polsby made an important effort to justify the distinction between contributions and expenditures. His basic conclusion was that, insofar as there was a genuine difference, it was not a first amendment difference but rather a difference in the governmental interests supporting regulation. Polsby, *supra* note 23, at 21-25. The latter kind of difference might support different results in contribution from those in expenditure regulation cases, but it would not in principle support a lower level of judicial deference for one than the other. See *supra* notes 95-102 and accompanying text.

104. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 803-04 (1978) (White, J., dissenting) (chastising the majority for its failure "to realize that the state regulatory interests in terms of which the alleged curtailment of First Amendment rights accomplished by the statute must be evaluated are themselves derived from the First Amendment"). Compare Professor Tribe's analysis:

The fear that a prevailing government might some day wield its power over political campaigns so as to perpetuate its rule generates a commendable reluctance to invest government with broad control over the conduct of political campaigns. Nonetheless, the

follows, they argue, that the Court should defer to congressional determinations of the appropriate balance to be struck among competing first amendment claims. Second, they impliedly claim, the more narrow governmental interest in preventing corruption or even the appearance of corruption, while not perhaps derived from the first amendment, nevertheless is so compelling that the Court ought to defer to Congress' determination that prophylactic measures are necessary.

The two claims rest on quite different premises. Each, however, departs rather dramatically from traditional ways of thinking about the first amendment. They both raise issues about the amendment's substantive content. In addition, they involve significant and hitherto neglected questions of institutional competence and of appropriate judicial strategies for the enforcement of constitutional norms. The purpose of this Part is to describe the claims, evaluate their premises, and consider the enforcement questions that they raise.

A. First Amendment "On Both Sides"

Advocates of the first governmental interest argument assume that campaign finance reforms serve first amendment goals because they aim to cure large-scale, systemic imperfections in the unregulated political process.¹⁰⁵ This argument proceeds from an implicit premise that the first amendment's primary function is to protect the democratic political process.¹⁰⁶

countervailing concern that completely unregulated political campaigns would degenerate in such a way that the electorate would be divested of its power to make a reasoned choice among the candidates has persuaded state legislatures to enact and courts to uphold some restrictions on campaign practices.

L. TRIBE, *supra* note 5, § 13-26, at 798.

105. See, e.g., L. TRIBE, *supra* note 5, § 13.27, at 802-03 ("If the net effect of the legislation is to enhance freedom of speech, the exacting review reserved for abridgements of free speech is inapposite."); Lowenstein, *supra* note 5, at 581-82 (public financing of ballot-measure campaigns supported by same reasoning used by Court to sustain public financing of Presidential elections, namely that it "further[s], not abridges, pertinent First Amendment values' ") (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (per curiam)); Wright, *supra* note 5, at 609 ("Campaign spending reform is imperative to serve the purposes of freedom of expression."); cf. Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV. 157, 189-90 (1980) (Campaign finance reforms support first amendment interest in "open dialogue.").

106. Cf. Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 362 (1977) (The interest underlying campaign expense regulation "is the need to maintain confidence in self-government, and to prevent the erosion of democracy which comes from a popular view of government as responsive only or mainly to special interests."). The court of appeals' opinion in *Buckley*, employed a standard of review that was strict in form but lenient in fact because the court was convinced that "the statute taken as a whole affirmatively enhances First Amendment values," *Buckley v. Valeo*, 519 F.2d 821, 841 (D.C. Cir. 1975). See Polsby, *supra* note 23, at 14-17. Professor Polsby observes that "[t]he Court of Appeals, in the end, joins Meiklejohn in hanging the right of free speech from the ceiling joists of democracy. The Supreme Court rejected that doctrinal view decisively." *Id.* at 17. I disagree with Professor Polsby's view that the Supreme Court rejected self-government as central to first amendment decisionmaking. The individual rights that *Buckley* sustained against

Advocates of judicial deference¹⁰⁷ begin their argument by equating first amendment protection with a substantive vision of an ideal political process.¹⁰⁸ The ideal they posit is not principally characterized by legal formalities such as individual political liberty or the absence of governmental restraints on explicitly political expression. Instead, its most relevant characteristics are qualitative: political debate is rational and informed, there is substantial individual participation, and political power is distributed equally among economic groups.¹⁰⁹

Next the defenders examine the "real" world. They assert that the actual political process departs significantly from the posited ideal. Debate is "polluted," individual voices are "drowned out," "special interest groups" are the key participants in the process, and some participants have greater political power than others.¹¹⁰ Most of the departures from the ideal apparently result from excessive "unregulated" campaign finance practices.¹¹¹ Because the real world departs so substantially from

collective encroachment are, I believe, themselves suspended "from the ceiling joists of democracy" in that they derive their content from the implications of self-government. See *supra* notes 46-52 and accompanying text.

107. Already frequently cited herein are two powerfully worded articles by Judge Skelley Wright, author of the majority opinion for the court of appeals in *Buckley*. These articles exemplify both in style and substance the methodology of argument adopted by the defenders of deference. See Wright, *supra* note 5; Wright, *supra* note 13.

108. The equation is most explicit in Judge Wright's analyses. "[T]he First Amendment is founded on a certain model of how self-governing people . . . make their decisions. It is a model that restores considerations of justice and morality to the political process—considerations absent from the pluralist approach." Wright, *supra* note 13, at 1018 (footnotes omitted). Moreover, "[p]olitical equality is the cornerstone of American democracy." Wright, *supra* note 5, at 625. More particularly, "[t]he concepts of political equality and self-government stand or fall together," *id.* at 626, and "equality is part of the central meaning of the first amendment and underlies each of its most important purposes," *id.* at 642.

109. The normative standards specified by Professor Lowenstein for evaluating the role of spending in ballot measure campaigns are exemplars of the "qualitative" ideal. See Lowenstein, *supra* note 5, at 514-16. One standard is the "correctness" of the result in ballot measure campaigns. "[I]f in certain elections the one-sided spending is decisive and produces a 'wrong' result, in the sense that a well-informed electorate would have voted the opposite way, then reforms should be considered." *Id.* at 515. Another standard is "fairness," which is comprised of both an "equality" standard ("[T]he campaign may be regarded as fair when both sides have a roughly equal opportunity to present their arguments to the voters." *Id.*) and an "intensity" standard ("[T]he campaign may be regarded as fair when the ability of either side to present its arguments more or less reflects the number of people who actively support that side and the strength of their feelings." *Id.*).

110. When Judge Wright surveyed the political process that has emerged since *Buckley* and *Ballotti* were decided, for example, everywhere he turned he saw "the polluting effect of money in election campaigns." He warned that "[c]oncentrated wealth . . . threatens to distort political campaigns and referenda," a threat "epitomize[d]" by the recent growth in PAC contributions to election campaigns. And he was certain that "[t]he voices of individual citizens are being drowned out" by the "unholy alliance of big spending, special interests, and election victory." Wright, *supra* note 5, at 609, 614, 622.

111. Professor Lowenstein argues that in a world in which spending on ballot measure campaigns is unregulated, "one-side spending" produces results that do not comport with "fairness." He suggests that this occurs because the process does not live up to either the "equality" or "intensity" standards by which, in his view, it is appropriately judged. Lowenstein, *supra* note 5, at 514-70.

the first amendment ideal, reform appears almost constitutionally mandated.¹¹² Accordingly, advocates of deference propose statutory reforms to cure the perceived departures from the implicit constitutional norm. Even if they infringe upon first amendment rights, the proposed legislative reforms ought not to require strict judicial scrutiny. The reason is that the reforms "promote" first amendment "values," and when it comes to balancing one set of first amendment claims against another, the legislature has a comparative institutional advantage.¹¹³

The first amendment vision implicit in this defense of judicial deference to campaign finance reform is problematic for two principal reasons. First, its assumptions about the allocation of institutional responsibility for the enforcement of first amendment norms derive little, if any, support from case law. Moreover, they conflict with the usual premises of judicial review. Second, the plea for judicial deference embraces a conception of legislative reform that is both theoretically suspect and historically unwarranted.

1. *Institutional Responsibility for Enforcing the First Amendment*

Almost without exception, the actual decisional law of the first amendment indicates that the amendment's legal force is *proscriptive* of governmental regulation. When first amendment rights are infringed, the Court carefully scrutinizes both the substantiality of the legislation's ends and the efficacy of its means.¹¹⁴ The practical effect of such strict review is of course to contract legislative power. The result is that, insofar as it applies to the political process, the first amendment restrains governmental inputs,¹¹⁵ at least when these inputs coercively limit indi-

112. In Judge Wright's view, for example, "far from stifling First Amendment values, [the FECA] actually promotes them." Wright, *supra* note 13, at 1019; *cf.* Polsby, *supra* note 23, at 14 ("The Court of Appeals received the [FECA] amendments' mass of strictures and obligations without a single note of skepticism. On the contrary, it wrote as though the reforms were all but constitutionally required.").

113. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 804 (1978) (White, J., dissenting) ("What is inexplicable, is for the Court to substitute its judgment as to the proper balance for that of Massachusetts where the state has passed legislation reasonably designed to further First Amendment interests in the context of the political arena where the expertise of legislators is at its peak and that of judges is at its very lowest.") (footnote omitted).

114. See, e.g., *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636 (1980) (A direct and substantial limitation on protected activity must serve a "strong, subordinating interest" and will be invalidated if that interest "could be sufficiently served by measures less destructive of First Amendment interests.").

115. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 375 (1969), is an obvious counterexample, but it has exerted precedential force only in the context of the electronic media and has done so there only sporadically. See, e.g., *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (unanimous rejection of a "right of reply" statute for newspapers without citing *Red Lion*); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (no first amendment requirement for broadcasters to sell time for editorial announcements).

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court unanimously sustained

vidual liberty.¹¹⁶

Those who argue that the Court should defer to the legislature's judgment whenever the legislature invokes "state regulatory interests [that are] themselves derived from the First Amendment"¹¹⁷ do not subscribe to this conventional understanding. In defending lenient scrutiny for campaign finance reform legislation, they assume that the first amendment can act as a sword, to *expand* legislative power,¹¹⁸ and they

a state constitution's free speech and petition clause that required mandatory access to privately owned shopping centers. The case may suggest that the principle described in the text is indeed susceptible to erosion, but it is far from a definitive holding on the point. As Justice Powell noted in his concurrence, the decision does not sustain a reading that it is a "blanket approval for state efforts to transform privately owned commercial property into public forums" in order to advance freedom of expression. *Id.* at 101 (Powell, J., concurring).

It is true that the rhetoric of the first amendment tends to suggest that the amendment serves *ends* in addition to, if not other than, limiting legislative power. Moreover, it is widely accepted that the amendment itself is properly conceptualized as *instrumental*. See, e.g., Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 267-68 (1973) (Court and most commentators see speech clause as "predominately instrumental," designed to assure "the functioning and survival of American democracy."). One need not reject an instrumentalist conception just because one is persuaded that the proscriptive conception of the first amendment is the accurate one. The question which ends the guarantee of "freedom from" should serve will continue to recur. It is interesting that the two most widely accepted theories of the ends served by the first amendment—sustaining representative democracy on the one hand and assuring individual self-realization on the other—are quite consistent with the view that "freedom from" is but a means. Cf., e.g., Powe, *supra* note 5, at 281 ("The theory that a speaker has the right to choose his message and the intensity and frequency of its delivery reflects the recognition that a free-for-all on public issues serves both the ideals of [f] self-government and those of maximizing individual choices.").

116. Cf. Schauer, *Is Government Speech a Problem* (Book Review), 35 STAN. L. REV. 373, 375 (1983) (reviewing M. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983)) ("Courts have not yet held that the use and abuses of government speech . . . present cognizable first amendment claims . . .").

117. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 803-804 (1978) (White, J., dissenting).

118. Many defenders of campaign finance reform do not rely exclusively on the argument that the reforms are entitled to judicial deference. Professors Lowenstein and Nicholson, for example, as well as Judge Wright, appear to believe both that campaign finance reforms serve first amendment interests and thus should *escape* strict scrutiny, and that they serve first amendment interests and thus should *survive* strict scrutiny. Lowenstein, *supra* note 5 at 587-94; Nicholson, *supra* note 25 at 987-1010; Wright, *supra* note 13, at 1010. To the extent that the latter proposition entails no more than the premise that first amendment rights can be overwhelmed by legislation that *actually* promotes constitutionally legitimate, intelligible and compelling governmental interests, it is unobjectionable in principle. When first amendment rights are offered in sacrifice to other ends, however, the Court should carefully review both the ends and the means. See *infra* notes 175-211 and accompanying text.

The idea of the first amendment as a sword in the hands of the legislature hardly can be said to represent an entirely new conceptualization. Zechariah Chafee first hinted at something of the kind in the 1940's. Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 559 (1942) ("To us [Mill's] policy is too exclusively negative. . . . We must do more than remove discouragements to open discussion. We must exert ourselves to supply active encouragements."). The idea provided a key rationale for the Court's unanimous decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), which sustained aspects of the FCC's "fairness doctrine" on the ground that regulation of broadcasters' first amendment rights would "enhance rather than abridge the freedoms of speech and press" for everybody else. *Id.* at 375; see also Chevigny, *supra* note 105, at 190 ("*Red Lion* may be read as

reject a proscriptive conception of the amendment's legal force.

Defenders of deference contend that the proscriptive conception is insufficiently rich to accommodate the full force of the amendment's normative commands. Accordingly, they embrace a conception of the amendment that, in terms of its actual bearing upon the political process, is *prescriptive* of an image of that process rather than *proscriptive* of governmental regulation. They do not interpret the constitutional directive that "Congress shall make no law abridging freedom of speech" principally not to forbid governmental *inputs* into the political process. Instead, it guarantees *outputs*: diversity of views, "orderly presentation and intelligent deliberation,"¹¹⁹ enhanced opportunities for "the self-expression of individual citizens who lack wealth,"¹²⁰ and substantial political equality.¹²¹ "Freedom" in the first amendment is not primarily concerned with the restriction of governmental power. Instead "freedom" connotes a state of affairs that is judged to be normatively desirable, one which evinces the appropriate day-to-day manifestations of an ideally operating political system¹²² and one presumably that Congress does not "abridge" by legislating to "enhance" it.

Professor Tribe's criticism of the Supreme Court for invoking a pro-

recognizing a first amendment interest in protecting a system of free expression separate from any interest in self-expression."); For a brief, useful historical analysis of the enhancement theory, see Powe, *supra* note 5, at 243-69.

Red Lion fueled the arguments in support of broad legislative power to create public rights of access to both the broadcast and the print media. See, e.g., Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1670-76 (1967). Indeed, the debate gave critics an opportunity to explore some of the potential ramifications of public rights of access. See, e.g., Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. REV. 1 (1973) (review of the right to access arguments and a skeptical look at some of the probable effects of recognizing an access right). Because it always has come garbed in familiar first amendment rhetoric, and because it plays upon the obvious truth that private power can block the effective exercise of formal free speech rights, the notion of an access right tends to appear as merely a logical if perhaps a somewhat extreme extension of well-established first amendment principles. In essence, however, the idea of the first amendment as a legislative sword is in significant if not irreconcilable tension with the hitherto prevailing view that the first amendment guarantees freedom from the exercise of legislative power. This fact of course is hardly sufficient to condemn the idea on the merits. To recognize that it is a fact, though, helps to clarify what would be at stake were the idea to become an operative legal principle.

119. Wright, *supra* note 5, at 639.

120. *Id.* at 637.

121. *Id.* at 642 ("[Political] equality is part of the central meaning of the first amendment and underlies each of its most important purposes.").

122. See Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854, 1871 n.95 (1983) ("The freedom of the community is enhanced rather than diminished by measures that ensure broader and more equal participation in public discussion."). Compare Professor Cox's analysis:

If liberty means the opportunity of the individual man or woman to express himself or herself in a society in which ideas are judged principally by their merit, increasing the relative influence of organizations with large financial resources and shrinking the attention paid to truly individual voices means a net loss of human freedom.

Cox, *supra* note 5, at 70.

scriptive concept of freedom of speech in its analysis of the FECA's contribution and expenditure limitations exemplifies this conception.

[The Court's] assumption that the situation prior to the Act's intervention [when individual contributions and expenditures were not regulated by government] was more conducive to freedom of speech than the situation the Act sought to create was itself in controversy. . . . [I]t is hard to deny that the contribution and expenditure limitations redress [the distribution of wealth] and to that extent increase freedom of speech. If the net effect of the legislation is to enhance freedom of speech, the exacting review reserved for abridgments of free speech is inapposite.¹²³

The matter is surely more complicated than Professor Tribe implies. In the first place, it is difficult to understand how, without strict judicial scrutiny of the actual effects of the statute, the Court could confidently reach a conclusion that its "net effect . . . is to enhance freedom of speech." Moreover, as Professor Karst has pointed out, "any campaign finance regulation calls for particularized balancing of the benefits it may provide by increasing diversity of political expression against its costs to political freedom. No slogan—not even Equality—can substitute for such an inquiry."¹²⁴

In addition to being unsupported by case law, the "output" conception of the first amendment departs from the generally accepted governing premises of judicial review. These premises assume that courts have both the comparative institutional advantage¹²⁵ and inescapable duty to determine "what the [constitutional] law is."¹²⁶ Apart from conclusory statements that courts should defer to campaign finance reforms because they further first amendment values, defenders of deference never have explained what it is about either the first amendment in gen-

123. L. TRIBE, *supra* note 5, § 13-27, at 801-03 (footnotes omitted).

124. Karst, *supra* note 80, at 64-65 (footnote omitted). Despite his call for careful inquiry into the costs and benefits of campaign finance regulation, Professor Karst shares Professor Tribe's implicit view that "the constitutional values of equality and liberty are fundamentally linked by the notion that equal access to certain institutions and services is a prime component of any meaningful liberty." *Id.* at 43-44.

125. The literature describing and evaluating the comparative institutional advantages of courts versus legislatures as constitutional interpreters is of course voluminous. Therefore, I shall not attempt anything approaching a comprehensive citation of authorities for the proposition in text. One can get a good sense of the extent to which modern scholars tend to assume that courts are the appropriate institutions—of first and last resort—for the resolution of constitutional conflicts from Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 228 (1980) (describing "features of adjudication" which "commend it as a plausible method for deriving and applying . . . values") (footnote omitted). See also J. ELY, *DEMOCRACY AND DISTRUST* 102-04 (1980) (recounting reasons why judges and not elected representatives are "conspicuously well situated" to perform representation-reinforcing role); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979) ("[C]ourts exist to give meaning to our public values, not to resolve disputes. Constitutional adjudication is the most vivid manifestation of this function . . .").

126. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

eral or about campaign finance reforms in particular that render the usual premises of judicial review inapplicable. The defenders of deference make an argument for lenient judicial scrutiny of campaign finance reforms that implicitly is analogous to some of the arguments for lenient scrutiny in the line of cases interpreting section five of the fourteenth amendment symbolized by *Katzenbach v. Morgan*.¹²⁷ In *Morgan*, the Court applied a very lenient standard of judicial review to Congress' judgment, reasoning that "Section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion."¹²⁸ It is important to understand, though, that the hard issues with respect to congressional regulation of campaign finance practices are no longer issues of *power* to regulate federal elections but of *limitation*. There is no reason to question the constitutional *power* of Congress to regulate federal elections. There is, however, reason to question the extent to which Congress' power is subject to limitation—or expansion—by the first amendment.

As to this question, those who defend deference to campaign finance laws on the ground that they further or implement first amendment rights bear an initial burden of justification that they have not carried. Among the questions that they have not asked, and therefore have not answered, are the following: What textual exegesis would support reading "Congress shall make no law abridging" as a positive grant of legislative power having the same effect as the language in section five that "Congress shall have the power to enforce"? Is campaign finance legislation properly conceptualized as remedial? If so, for what violations of what first amendment rights are the remedies appropriate? Do the defenders of deference mean to argue that there is a first amendment right to a certain quantum of political power and that campaign reform legislation merely remedies systemic failures of the political process to

127. 384 U.S. 641 (1966). In *Morgan*, the Court sustained congressional legislation—§ 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e) (1982)—that in effect prohibited enforcement of a state English literacy requirement for voters. The Court treated the question in *Morgan* almost exclusively as one of congressional power, under section five of the fourteenth amendment, to prohibit the enforcement of a state law. It held that, under section five, Congress had the power to override state laws both to remedy a state's violation of constitutional rights (though not to "dilute" those rights, *Morgan*, 384 U.S. at 651 n.10) and to implement its own judgment that the state laws were unconstitutional.

Morgan and its closest progeny, *Oregon v. Mitchell*, 400 U.S. 112 (1970), have provoked a rich and provocative literature. Among other questions, scholars have extensively considered the institutional issues raised by granting Congress power—subject to minimal judicial scrutiny—to define the substantive scope of the fourteenth amendment. See, e.g., Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81; Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966). I think it fair to say that the debate continues, see, e.g., *The Human Life Bill: Hearings on S. 158 Before the Subcommittee on Separation of Powers of the Committee on the Judiciary*, 97th Cong., 1st Sess. (1982), though resolving it is beyond the scope of this Article.

128. 384 U.S. at 651.

allocate power accordingly? Or is campaign finance legislation more appropriately viewed as representing Congress' judgment about the substantive content of the first amendment? And most difficult of all, what exactly are the constitutional standards that supposedly are embodied in the legislation?

The purported first amendment values that are said to be promoted by campaign finance reform surely could not be given "specific meaning" or "operational content"¹²⁹ by the courts. Although occasionally a judge or litigant seems to imply that some reforms are constitutionally required,¹³⁰ few scholars have suggested that legislatures have a constitutionally imposed affirmative duty to enact reforms.¹³¹ The values generally invoked in behalf of reform do not seem capable of generating nonarbitrary, workable criteria for evaluating political reality. When has the public received "enough" information to satisfy the constitutional value of an "informed public"?¹³² At what point does effective participation in political debate become transformed into constitutionally proscribed "undue influence"?¹³³ Is the average citizen sufficiently "active and alert"? What is the constitutional norm against which "distortions"

129. See Fiss, *supra* note 125, at 1.

130. See Polsby, *supra* note 23, at 14 (court of appeals' opinion in *Buckley* written "as though the reforms were all but constitutionally required"); cf. e.g. *International Ass'n of Machinists v. Federal Election Comm'n*, 678 F.2d 1092, 1099-1100 (D.C. Cir.), *aff'd*, 459 U.S. 983 (1982). Union plaintiffs in *International Association of Machinists* claimed that 1976 FECA amendments, authorizing corporate PACs to solicit their career employees in addition to their shareholders, were unconstitutional because they upset an "alleged long-standing [and by implication constitutionally guaranteed] balance between corporations and labor unions." *Id.*

131. In developing the thesis that unregulated methods of financing election campaigns violate equal protection, Professor Nicholson argues that the government should "be required to devise a system of campaign financing that would assure each voter a substantially equal opportunity to determine the policies which crucially affect his or her life[.]" Nicholson, *supra* note 5, at 833. She goes on to suggest, however, that "[i]f Congress or the state legislatures do not act, the possibility of a judicial remedy at some future time should not be discounted." *Id.* at 853-54.

132. Cf. BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482, 508 (1980). "[W]e enter the realm of pure speculation if we attempt to conceive of an objective measure of how much information about government would be possessed by 'well-informed' citizens of a functional democracy." *Id.* (footnote omitted).

133. It is an understatement to note, as Professor Polsby so aptly has done, that "[c]onventional First Amendment theory does not address itself to how much political influence an individual is 'entitled' to exercise." Polsby, *supra* note 23, at 19; see also Fleishman, *supra* note 5, at 464-65; cf. Bolton, *supra* note 43, at 417 ("Efforts to reduce 'undue influence' in any event do not 'restore' the political process to some balanced 'state of nature.' . . . Limiting the political influence of some groups simply enhances the relative power of other competing groups."). Professor Nicholson, a careful scholar and a committed proponent of reforms, suggests that "undue influence arises if [i.e. any time? and for whatever reason?] greater weight is given to the interests of the contributor than to the interests of other constituents." Nicholson, *supra* note 25, at 989 (footnote omitted). This analysis fails to acknowledge or discuss the possibility that contributions may be rough indicators of intensity of constituent preference. Despite the guarantee of one-person-one-vote, it seems highly improbable that the Constitution contains a norm in terms of which any amount of political influence greater than that implicit in "one vote" must be labelled "undue."

of election outcomes can be said to occur?¹³⁴ Is the concept of political equality compatible with the concept of political freedom, and if not, what does the Constitution say about how the tensions are to be resolved?¹³⁵ Does the concept of political equality embrace eliminating the impact of all the ways in which citizens can be differentially effective, or does it only refer to differences traceable to inequalities of wealth?¹³⁶ And if only the latter, why only those?¹³⁷ Specific, substantively defensible standards to apply in answering such questions do not come readily to mind.

Resistant as these values are to precise articulation, one is entitled to be skeptical about whether they do indeed have their source in the Constitution. More to the present point, one may ask the defenders of deference to explain why the legislature is institutionally better situated to articulate and implement them than is the judiciary—to whom the enforcement of constitutional norms conventionally has been entrusted.

2. *Legislative Expertise and Legislative Reform: False Positives*

Even if we were to accept in principle the legislative sword conception of the first amendment, the Court nevertheless should strictly scrutinize campaign finance reform legislation. Dean Ely has suggested that a principal function of strict scrutiny is to detect "false positives" in legis-

134. Compare Chevigny, *The Paradox of Campaign Finance* (Review Essay), 56 N.Y.U. L. REV. 206, 225-26 (1981) (arguing that compelling interest in regulating campaign expenditures stems from need to prevent distortions in the democratic process caused by money) with Baker, *supra* note 50, at 651 n.21 (arguing that difficulty is in defining norm against which "distortion" might be judged, and that enforced equality of expenditures "distorts" outcomes).

135. Commentators who support campaign finance reforms reason either from the equal protection clause, extrapolating from "one person-one vote" principles, *see, e.g.*, Nicholson, *supra* note 5, at 826, from the first amendment itself, *see, e.g.*, Wright, *supra* note 5, at 625-31, or simply from general principles of "fairness," *see, e.g.*, Lowenstein, *supra* note 5, at 514-17. The Supreme Court in *Buckley* held that, at least insofar as its achievement involved, in Professor Fleishman's phrase, "levelling down," *see* Fleishman & McCorkle, *supra* note 5, equality of political influence is an impermissible legislative goal. The Court in *Buckley* stated that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment" *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (*per curiam*); *cf.* Polsby, *supra* note 23, at 19 ("[I]t is not at all clear that equality of influence is compatible with the promise of free speech."); *id.* at 42-43 ("[S]peech is not 'free' in any very important sense if it is protected only when and to the extent that such protection is consistent with a congressionally defined notion of political equality."); Redish, *supra* note 75, at 137 ("In a perverse sense, then, . . . the more expression we prohibit, the closer we come to attaining the goal of the equality principle.").

136. *Cf.* Fleishman, *supra* note 5, at 458-65. Fleishman points out that competition for office is premised on the existence of a variety of inequalities among candidates; differences in financial resources represent but one kind of inequality, and perhaps not the most important one insofar as election outcomes are concerned.

137. *See* Adamany, *supra* note 84, at 295 ("Money is only one of many political resources; and it must be ranked as relatively unimportant compared with a candidate's personal capacities, his issues and other appeals, his institutional alliances, and his campaign organization.").

lation that infringes upon first amendment rights.¹³⁸ A judicial search for false positives implies that, while it may be acceptable in principle to require the surrender of first amendment rights to serve an occasionally more pressing social need, we may only do so if it will in fact advance a genuine social goal without gratuitously burdening first amendment loss.¹³⁹ Where the goal advanced turns out to be trivial, unintelligible, or illegitimate, it is inappropriate to burden first amendment rights in its service. Similarly, even where the goal is significant, coherent, and permissible, if the means chosen to advance it are unacceptably clumsy and inept, an infringement of first amendment rights is unwarranted.

Theoretically, the relative importance of first amendment rights alone may justify the search for false positives. In this area, courts must carefully scrutinize legislative actions because in principle only the clear attainment of actually pursued, highly significant social goals can justify infringements of first amendment rights. So long as one is convinced—as the defenders of deference are not¹⁴⁰—that first amendment rights are indeed sacrificed by limitations on political giving and spending, it is difficult to justify judicial deference to campaign finance reforms. This is so even if one concedes that there can be first amendment interests “on both sides,” since the search for false positives is designed to detect not merely illegitimate goals but also ineffectual or unnecessarily expensive legislative means.

Ely, however, does not rely upon the relative substantive value of the rights being infringed to justify the first amendment search for false positives. Instead, he justifies the search in terms of the systematic likelihood of “legislative failure” in such cases. “Courts must police inhibitions on . . . political activity because *we cannot trust elected officials* to do so: ins have a way of wanting to make sure the outs stay out.”¹⁴¹

138. J. ELY, *supra* note 125, at 105-06 (“[F]alse-positives are not to be tolerated [because] no one’s First Amendment freedoms are to be inhibited unless the inhibition of his or her freedom in particular is necessary to serve the interest the state is invoking.”).

139. *Cf.* Fleishman, *supra* note 5, at 458 (“If we are to infringe the preferred freedoms of the first amendment, we need to be certain that the facts justifying the infringement are accurate, that they constitute a threat to other constitutionally protected rights and that the proposed remedy will safeguard the latter while effectively eliminating the former.”).

140. *See, e.g.*, Justice White’s dissent in *Bellotti*, in which he expresses the view that restrictions on corporate political speech are not particularly troublesome because corporate expression does “not represent a manifestation of individual freedom.” *First Nat’l Bank v. Bellotti*, 435 U.S. at 805 (White, J., dissenting). Even if the Court recognized a legislative interest in protecting an asserted first amendment interest in open dialogue, it might reach the same result as it reached in *Bellotti* “on the ground that corporate speech does not present a substantial threat to open dialogue”—though never on the ground that the first amendment costs of regulating corporate speech might be too high. Chevigny, *supra* note 105, at 190.

141. J. ELY, *supra* note 125, at 106 (emphasis added). *But see* Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 307 (1981) (“[I]t is fanciful to suppose that incumbents would often protect their incumbency by conspiring to deny to the electorate access to . . . information and ideas . . .”).

Ely's concern is as applicable to political spending and contribution limitations as it is to other kinds of limitations on political activity, such as prohibitions of draft-card burning and armband wearing.

Commentators who defend lenient scrutiny for campaign finance reform legislation uniformly fail to acknowledge that regulation of the political process might be a context warranting distrust of elected officials.¹⁴² In this area, they not only implicitly discount the value of the first amendment rights infringed; they also ignore any systematic possibility that legislators will behave in self- rather than public-interested ways. For them, systematic considerations cut against strict judicial scrutiny because the "political arena" is one in which "the expertise of legislators is at its peak and that of judges is at its very lowest."¹⁴³

The political "expertise" of legislators, however, may not be a completely reliable guarantee of their disinterestedness in reforming the political process.¹⁴⁴ Indeed, there are reasons to believe that legislators, given free rein to inhibit political activity, might attempt to restructure the political balance of power so as principally to benefit themselves and their political allies. In fact, many political process "reforms" seem to promise tempting short-run political advantages to incumbents and their allies.¹⁴⁵ Moreover, there is considerable theoretical and anecdotal evidence that elected officials tend to act from other than purely commu-

142. Professor Tribe concedes in a footnote the possibility "that the [spending and contribution] limitations so protect incumbents that they should for that reason be suspiciously regarded." L. TRIBE, *supra* note 5, § 13-27, at 802 n.10. The very next sentence in the text of his treatise belies the concession: "If the net effect of the legislation is to enhance freedom of speech, the exacting review reserved for abridgments of free speech is inapposite." *Id.* § 13-27, at 802-03.

143. *First Nat'l Bank v. Bellotti*, 435 U.S. at 804 (1978) (White, J., dissenting) (footnote omitted); see Cox, *supra* note 5, at 70 (characterizing White's dissent in *Bellotti* as partly justified); Nicholson, *supra* note 5, at 823 (judicial deference "extremely appropriate . . . since elected representatives have firsthand knowledge"); see also Leventhal, *supra* note 106, at 380 (footnote omitted):

In matters of political structure and process, the judges properly give deference to legislators whose work requires them to be in the thick of active political engagement. For when judges, particularly those appointed for life, come to questions of political process, they almost by definition do not have the benefit of current experience.

144. One of the arguments that opponents of the FECA pressed upon the Court in *Buckley* was that the actual effect of the contribution limitations was to "work such an invidious discrimination between incumbents and challengers that the statutory provisions must be declared unconstitutional on their face." 424 U.S. at 30-31. The Court rejected the challenge because there was no record evidence to support it. My argument here is not that the actual incumbent-protecting effects of legislation warrants strict scrutiny, but rather that the systematic tendency of legislators to try to bring about such effects warrants the Court's concern.

145. Professor Tribe, an enthusiastic defender of reform and of judicial deference to reform efforts, acknowledged the incumbent-protection aspects of contribution and expenditure limitations. See L. TRIBE, *supra* note 5, § 13-28, at 802 n.10. He implicitly recognized, too, the possibility that when it enacted the statute at issue in *Bellotti*, the Massachusetts legislature may have succumbed to the temptation to secure a short-run political advantage. He called the statute "a bold attempt to silence corporate opposition to a proposed constitutional amendment authorizing the legislature to impose a graduated income tax on the income of individuals." *Id.* at 57 (Supp. 1979).

nity-regarding motives.¹⁴⁶ A judicial search for false positives—for inept legislative means or illicit legislative ends—would assure that, even if reforming legislators acted from subjectively self-interested motives, their reform agenda would not be implemented unless on balance it effectively achieved legitimate goals.

Defenders of judicial deference might attempt to discredit Ely's argument by claiming that it is not based upon a universally accepted positive theory about how legislators in fact behave.¹⁴⁷ It is far from clear, for example, that legislators singlemindedly pursue only their own interest in getting reelected or that they merely serve to broker the claims of various special interest groups. We ought to be suitably wary of a theory that would require invalidation of legislation on the basis of unproved hypotheses about the essential selfishness and untrustworthiness of legislators.¹⁴⁸ Nonetheless, the issue here is not whether campaign finance reform legislation should be invalidated but only whether such legislation arises in a context¹⁴⁹ in which judges ought to take a closer look.

Indeed, campaign finance reform legislation has been alarmingly

146. See D. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974) (representatives act so as to maximize votes); Winter, *supra* note 82, at 752 ("The Congress that attempted to impose expenditure limits on House and Senate candidates appropriated more for franked mail (used principally before elections) than challengers spent on all campaign activities."). But cf. Kau & Rubin, *Self-Interest, Ideology and Logrolling in Congressional Voting*, 22 J.L. & ECON. 365 (1979). Kau and Rubin argue that voting patterns of Congressmen cannot be explained entirely on the basis of economic interests. They claim ideology is significant in explaining voting by Congressmen on bills with primarily economic components.

147. There are at least two competing models of legislative behavior. The "social good" model sees legislators as striving to identify and then to achieve beneficent social objectives. The "public choice" model sees legislatures as simply a forum for the brokering of private interests. For brief but illuminating descriptions of the two models, see Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 17-21 (1980), and Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148-57 (1978).

148. Cf. Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487, 509 (1979) (Many political choices should be respected simply because "[p]olitics must . . . be a joint and mutual search for good or right answers to the question of directions for our evolving selves.").

There is, in any case, a gap in Ely's justification for judicial review. Even if there were a widely accepted positive theory that supported his assertion that the "ins" want to stay "in," the question remains why that fact would matter and exactly how it ought to affect the resolution of actual cases. Ely is not clear about the substantive criteria by which judges actually are to decide even first amendment cases. See Estreicher, *Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture* (Review Essay), 56 N.Y.U. L. REV. 547, 573 (1981) ("[O]ne cannot say that the Court has furthered democracy unless one has a substantive theory of what democracy requires, which itself must be independently justified and not simply attributed to the Constitution."); cf. Cox, Book Review, 94 HARV. L. REV. 700, 704 (1981) (reviewing J. ELY, *DEMOCRACY AND DISTRUST* (1980)) ("But by what criteria is [a judge] to decide? Is he to render the decision most consonant with his vision of representative self-government or is he to search for other standards? I find no answer in *Democracy and Distrust*.").

149. Cf. Estreicher, *supra* note 148, at 580 ("[P]rocess defects only help the Court identify appropriate occasions for judicial intervention.").

prone to false positives.¹⁵⁰ This fact has remained obscure because many of the justifications proffered for such legislation are unintelligible as legislative ends. By invoking high purposes—such as preventing domination of the electoral process by corporate wealth, or sustaining the active role of the individual citizen in the electoral process—reformers have forestalled rigorous analysis of what the political process would look like if the purpose were accomplished.¹⁵¹ Reformers speak often of the need for legislation to cure “distortions” of the political process. “Distortion,” of course, implies a norm, but reformers scarcely describe or defend the norm upon which they rely.

The failure to provide this norm is troublesome. Without a norm, there is no way to particularize what true positives might look like once reform measures are enacted. There is, moreover, no criteria for judging *ex ante* whether the effect on the process of money or any other particular political variable on the process is a normatively pernicious distortion or a normatively permissible effect.¹⁵² If a norm cannot be specified, a stated purpose to cure a distortion caused by money may reflect no more than subjective disapproval of certain political outcomes.

The ability of the legislature to achieve even precisely defined political reform goals also is questionable. The historical ineptitude of legislatures attempting electoral reform suggests that deference to legislative “expertise” is unwarranted. Example after example illustrates that political reformers have not yet figured out how to mold political reality into conformity with their stated political vision.

150. Cf. Powe, *supra* note 5, at 268.

To surrender the interests of individual autonomy and to attempt to tone down a debate (or one side of it) in the interests of enhancing the marketplace is to give up something that is directly traceable to the First Amendment in order to achieve a speculative gain. It is attempted on the speculative basis that a legislature knows at what points the problem of market failure is likely to surface and that enhancement is an effective means of avoiding them.

Id. See generally Winter, “The New Age of Political Reform”: Looking Back, 15 GA. L. REV. 1 (1980).

In their recent article, Professor Fleishman and Mr. McCorkle demonstrated that reformers of today do not tend to be noticeably less inept than their predecessors. Rigorously analyzing the likely effects of enactment of the reform agenda proposed by “egalitarians,” they persuasively argue that the reformers’ “levelled-down” campaign finance process would tend to perpetuate rather than reduce major egalitarian aspects of the contemporary political process. The proposed reforms would lead, *inter alia*, to the production of quantitatively less political information, to even greater concentration by candidates upon mass-media campaigning, and to increasing insulation of incumbents from ineffective challenge. See Fleishman & McCorkle, *supra* note 5, at 227-275.

151. Among the first to warn against the elusiveness of the reformers’ goals were Professors Redish, see Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. REV. 900 (1971), and Fleishman, see Fleishman, *supra* note 5.

152. Cf. Bolton, *supra* note 43, at 417 (“Limiting the political influence of some groups simply enhances the relative power of other competing groups. No one has advanced a serious rationale to justify such a redistribution, nor does anyone even vaguely understand its actual effects.”).

The story begins with the Corrupt Practices Act of 1907¹⁵³ and 1925.¹⁵⁴ The Act's inability to curb the infusion of corporate money into the coffers of political candidates is an often-told tale.¹⁵⁵ Whether the Act's lack of success was attributable to poor draftsmanship, lack of congressional will, legislative failure to appreciate the peculiar resiliency of corporate political interests, or some other reason is beside the point. The point is that the Act was an almost total failure at achieving its stated purpose.¹⁵⁶

The Corrupt Practices Act appears to be a typical, if not quite paradigmatic, example of the genre. When Congress first regulated the political expenditures of organized labor in the Taft-Hartley Labor Act,¹⁵⁷ for example, the "proscription was designed to limit labor involvement in politics."¹⁵⁸ However, "it produced just the opposite result."¹⁵⁹ More recently, during the last decade's round of political reform, labor thought it had won a number of battles in the legislature.¹⁶⁰ Despite its efforts, however, and despite the efforts of a synpathetic majority in Congress, business interests have steadily increased their electoral advantage, largely because of their ability to raise money and contribute to candidates through PACs.¹⁶¹

153. 34 Stat. 864 (1907).

154. 43 Stat. 1070 (1925).

155. See M. JOHNSTON, *supra* note 81, at 53-69. See generally Bolton, *supra* note 43.

156. E. DREW, *supra* note 1, at 7.

157. 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

158. Cohan, *supra* note 43, at 940.

159. *Id.*

160. See Bolton, *supra* note 43, at 409 ("[L]abor received most of what it sought in the FECA Amendments of 1976.").

161. There is a double irony to this emerging advantage of business. In the first place it seems to have been more a product of miscalculation about the effects of the reforms by labor protagonists than of prescient political maneuvering by business interests. For a fascinating and brief account of the political history of the electoral reforms of the 1970's, with particular emphasis on the role of organized labor, see Epstein, *Business and Labor Under the Federal Election Campaign Act of 1971* in PARTIES, INTEREST GROUPS AND CAMPAIGN FINANCE LAWS 107-15 (M. Malbin ed. 1980); see also *International Ass'n of Machinists v. Federal Election Comm'n*, 678 F.2d 1092 (D.C. Cir. 1982) (detailing the extent to which organized labor eventually perceived and tried to undo its miscalculations in this area), *aff'd*, 459 U.S. 983 (1982).

Second, and more generally, the "legislative changes of the 1970's [which made the emerging advantage of business possible] occurred in a setting of political reform, which was seeking to reduce the impact of wealthy persons and other 'special interest' groups and to enhance the influence of the average, unaffiliated citizen in the electoral process." Epstein, *supra*, at 109. Epstein noted:

Ironically, as a consequence of three rounds of election legislation during the 1970's, both labor and especially business are in a position to exert a much more direct and stronger impact upon federal electoral politics than they could at the beginning of the decade, a development neither anticipated nor desired . . . by reformers who have sought to free the electoral process from undue influence by "special interests."

Id. at 114-15. Cf. Winter, *supra* note 150, at 11 (Many persons "have been surprised by the fact that the campaign finance laws have been a boon to the New Right."). See generally Malbin, *Campaign Financing and the "Special Interests,"* in PUB. INTEREST, Summer 1979, at 21.

Perhaps the most poignant of all the examples of the lack of legislative expertise in the area of political reform involves the effects of individual contribution limitations. While the contribution limitations may have had some effect in preventing corruption, it seems far more certain that in addition they have had several unpredicted and deleterious consequences. Probably the major stimulus for the growth of campaign money from Washington-based special-interest political action committees, for example, has been "the difficulties of raising adequate funds through contributions from private individuals."¹⁶² The contribution limits have increased substantially the importance—and hence the political influence—of professional fundraisers.¹⁶³ By encouraging the formation of political action committees, which compete with political parties, the FECA has imposed "constraints upon the ability of our parties to operate."¹⁶⁴

Finally, though not unanticipated and perhaps not unintended, the contribution limitations "impose far more serious strictures on challengers than on incumbents. The challengers in particular find fund raising under the current law very difficult and time-consuming."¹⁶⁵ Research strongly suggests that anything that makes it harder to raise funds will be detrimental to challengers and correspondingly strengthen the position of incumbents.¹⁶⁶ Contribution limitations, therefore, probably increasingly insulate incumbents from changing political opinion in and strong challenges from their local constituencies.¹⁶⁷

Thus, even if the first amendment theoretically permits or even requires Congress to regulate free political expression in the name of competing goals such as equality, there is little evidence to suggest that Congress can be trusted to "do it better," and therefore that the Court should defer to Congress' judgment. To the contrary, there is reason to believe that Congress is systematically untrustworthy and a proven incompetent at genuinely reforming the political process. In the area of campaign finance reform legislation, therefore, judicial deference to the

162. HARVARD STUDY, *supra* note 1, at 2.

163. See, e.g., Malbin, *Labor, Business and Money—A Post-Election Analysis*, NAT'L J., March 19, 1977, at 412, 417 ("The importance of professional fundraisers goes up as the limits on individual contributions go down.").

164. HARVARD STUDY, *supra* note 1, at 12.

165. *Id.* at 7. Among those who predicted this effect was the author of a student note. See Comment, *The Economics of the 1974 Federal Election Campaign Act Amendments*, 25 BUFFALO L. REV. 519, 533-42 (1976): "FECA amendments create a monopoly of political incumbency." *Id.* at 533.

166. See Aranson & Hinich, *Some Aspects of the Political Economy of Election Campaign Contribution Laws*, Law and Economics Center Working Paper No. 78-4, at 23-29 (University of Miami School of Law). See generally G. JACOBSON, *MONEY IN CONGRESSIONAL ELECTIONS* (1980).

167. Estreicher, *supra* note 148, at 578 n.119.

supposed superior institutional capacity or political expertise of the legislature is unwarranted.

B. Corruption as the Evil Feared

The Court has stated relatively unequivocally that preventing "the actuality and appearance of corruption"¹⁶⁸ is a sufficiently important and legitimate government interest to override first amendment rights.¹⁶⁹ In other words, corrupt speech is in effect a category of unprotected utterance,¹⁷⁰ and legislation that prevents corruption therefore can survive strict scrutiny. Beyond this truism, however, the Court has been inconsistent about whether legislation that is *alleged* to prevent corruption must actually *undergo* searching review. Thus it is unclear to what extent the Court will permit legislatures either substantively to define corruption, to decide that it is present to an unacceptable degree within a particular electoral context,¹⁷¹ or to enact prophylactic measures.

Eschewing a rigorous definition,¹⁷² reformers have tended to imply that corruption is synonymous both with outright bribery on the one

168. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (per curiam).

169. Corruption prevention is, moreover, the only legitimate and compelling governmental interest thus far identified for regulating political giving and spending. See *infra* note 174.

170. See *Buckley v. Valeo*, 519 F.2d 821, 915 (D.C. Cir. 1975) (Tamm, J., concurring and dissenting) ("[D]onation of money or services in exchange for the promise or expectation of political favoritism after an election . . . is clearly outside the ambit of the first amendment . . ."), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976) (per curiam); *Common Cause v. Schmitt*, 512 F. Supp. 489, 498 (D.D.C. 1980) ("Any attempted exaction of a *quid pro quo* by a political committee would of course totally eliminate the constitutional protection reserved under *Buckley* for expenditures that are independent."), *aff'd by an equally divided Court*, 455 U.S. 129 (1982); cf. *People v. Hochberg*, 62 A.D.2d 239, 248, 404 N.Y.S.2d 161, 168 (N.Y. App. Div. 1978) ("No one has a constitutional right to corruptly use official position or authority to obtain political gain.").

171. Cf. *Nicholson*, *supra* note 31, at 711-18 (discussion of how litigants might establish undue influence and voter disaffection, concluding generally that "[i]t is difficult to predict when a court will find that a sufficient factual basis has been established to justify a restriction upon constitutional rights." *Id.* at 718).

172. "[C]orruption is not an easily definable phenomenon." Rottenberg, *Comment*, 18 J.L. & ECON. 611, 611 (1975). Rottenberg defines it as "the collection of a private charge for doing something that a nominal, relevant rule requires to be done without the payment of that charge, or the collection of a private charge for the *failure* to do something that a nominal, relevant rule requires to be done." *Id.* at 611-12 (emphasis in original). It has also been defined as the "abuse of a public role or trust for the sake of some private benefit." M. JOHNSTON, *supra* note 81, at 4 (emphasis in original). Professor Rose-Ackerman defines as corrupt all illegal third-party payments to agents that are not passed on to superiors. She equates it with bribery. S. ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* 7 (1978). Professor Banfield, positing a frame of reference in which an "agent serves (or fails to serve) the interest of a principal," says, "An agent is *personally corrupt* if he knowingly sacrifices his principal's interest to his own, that is, if he betrays his trust. He is *officially corrupt* if in serving his principal's interest, he knowingly violates a rule, that is, acts illegally or unethically albeit in his principal's interest." Banfield, *Corruption as a Feature of Governmental Organization*, 18 J.L. & ECON. 587, 587-88 (1975) (emphasis in original). Professor Reder thinks it would be "better to define corruption as the *unanticipated* and *unaccepted* failure of an agent to serve his principal." Reder, *Comment*, 18 J.L. & ECON. 607, 607 (1975) (emphasis in original).

hand and with the general possession or specific exercise of "too much" political power on the other.¹⁷³ The judicial decisions, however, reject such an expansive definition. They indicate that the only activity that may become the target of corruption-preventing legislation is that of securing or attempting to secure "political *quid pro quos* from current and potential officeholders."¹⁷⁴

1. "Corruption Prevention" as an End—The First Amendment Stakes

Supporters of campaign finance reform, however, do not suggest that most contributions and expenditures fall into the *quid pro quo* category. They complain instead that contributions exert more subtle, though still "undue," influence and that those with money enjoy more than their fair share of access to political decision-makers.¹⁷⁵ By propos-

173. Cf. L. BERG, H. HAHN & J. SCHMIDHAUSER, CORRUPTION IN THE AMERICAN POLITICAL SYSTEM *passim* (1976) (equating corruption with the influence of money in politics); Nicholson, *supra* note 25, at 945, 987-99 (treating "corruption" and "undue influence" as synonymous, and "undue influence" said to arise anytime "greater weight is given to the interests of the contributor than to the interests of other constituents" *Id.* at 989.)

174. Elaborating upon its conclusion in *Buckley* that limiting the actuality and appearance of corruption is a constitutionally sufficient justification for contribution limitations, the Court strongly implied that it defined "corruption" as the attempt to secure a "political *quid pro quo* from current and potential officeholders." 424 U.S. at 26. This limitation also was implied in the Court's rejecting the corruption-prevention justification for independent expenditure ceilings. Independent advocacy entails an "absence of prearrangement and coordination . . . with the candidate." *Id.* at 47. It thereby "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate," *id.*, and accordingly it does not present a genuine risk of "corruption." The clear implication of these passages from *Buckley* is that, at least insofar as giving and spending on political campaigns is concerned, the legislature's power to define and hence to prevent "corruption" is limited to *quid pro quos* from candidates and officeholders. This conclusion is reinforced by the Court's assertion in *Bellotti* that "[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790 (1978). *But cf.* Note, *Campaign Finance Re-Reform: The Regulation of Independent Political Committees*, 71 CALIF. L. REV. 673, 684-85 (1983) ("[A] reasonable definition of the type of influence the state can prohibit is that which poses a high risk of leading to illegal or unethical activity.").

Professor Nicholson acknowledges that by "corruption," the Court "clearly meant improper influence on officeholders," Nicholson, *supra* note 31, at 701, but infers that the Court in *Buckley* did not mean to limit its definition of "corruption" to *quid pro quo* arrangements and indeed that the Court used the term "corruption" as a synonym for "undue (in the sense of "too much") influence." *See, e.g., id.* n.105 ("As the Court implied, the terms 'undue influence and corruption' should encompass a broad range of situations in which the officeholder gives more weight to the interests of a contributor than to the interests of others."). The Court itself, however, did not speak in *Buckley* of "undue influence and corruption" but rather of "corruption." Moreover, the fact that the Court refused to limit Congress to the least restrictive means of preventing *quid pro quo* arrangements, on the ground that "laws making criminal the giving and taking of bribes deal only with the most blatant and specific attempts of those with money to influence governmental action," 424 U.S. at 27-28, is quite consistent with the inference that Congress' power in principle is limited to preventing *quid pro quos*.

175. *See, e.g., E. DREW, supra* note 1, at 59 ("[T]he new razzle-dazzle lobbyist fundraisers are now the most visible members of the cast. They raise money, which purchases them access . . ."); *id.* at 77 ("Why is all this money floating about? What do the investors expect? At a minimum, they

ing to limit contributions and expenditures, reformers seek to redress a perceived generalized and pervasive imbalance of political power, rather than the actual specific and localized exchange of money for votes.

The Court has stated unequivocally, of course, that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the first amendment."¹⁷⁶ The Court's narrow definition of corruption preserves this important ruling. The efforts of reformers to evade it by labeling a disfavored balance of political power "corrupt" and then regulating political activity in the name of "corruption prevention" have been unavailing.

There is another justification for the Court's adoption of a narrow definition of the permissible substantive ends of "corruption-prevention" legislation. Recall the function of the first amendment itself and the role that campaign contributions and expenditures play in a representative democracy. Attempts to influence political outcomes are fundamental functions of the system of freedom of expression. Campaign contributions and expenditures have many legitimate functions in a representative democracy. They may signal constituent support for an officeholder's past or expected future position on any particular issue,¹⁷⁷ or communicate information about the content and the intensity of voter concerns,¹⁷⁸ or attempt to inform or persuade other citizens about the merits of particular candidates or positions.¹⁷⁹ When an elected official's positions tend to be correlated with the views of the groups and individuals who either spend or contribute money in support of his election and his program, it seems hardly an occasion for alarm. Because it is the representative who will pay the price at the polls if his record is unacceptable to his constituents,¹⁸⁰ it seems as likely that he is being responsive to his political constituency¹⁸¹ as it is that he is acting in exchange for contributions

expect access. . . ."); Wright, *supra* note 5, at 617 ("[O]nce a candidate has been elected, he knows that if he wants to be re-elected it is important to give attention and deference to the views of those who helped him financially.").

176. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam).

177. *Cf. Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 137 (1961) ("[T]he whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.").

178. *Cf. U.S. v. Harriss*, 347 U.S. 612, 635 (1954) (Jackson, J. dissenting) (The constitutional system allows "the greatest freedom of access to Congress, so that the people may press for their selfish interests, with Congress acting as arbiter of their demands and conflicts.").

179. *Cf. Bellotti*, 435 U.S. at 790 ("[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it.").

180. *But cf. Fleishman, Self-Interest and Political Integrity*, in *PUBLIC DUTIES: THE MORAL OBLIGATIONS OF GOVERNMENT OFFICIALS* 52-92 (J. Fleishman, L. Liebman, & M. Moore eds. 1981) ("Our politics is impoverished, and the range of possible solutions to our problems diminished, by the tendency of many politicians to look to their own self-interest in reelection." *Id.* at 83).

181. *Cf. Peltzman, Constituent Interest and Congressional Voting*, 27 J.L. & ECON. 181, 205

or expenditures in his behalf.

2. *Lenient Review of Contribution and Expenditure Limitations as Means—The First Amendment Stakes*

In contrast to its willingness to police the ends that may be pursued under the banner of "corruption prevention" the Court has not shown a consistent commitment rigorously to examine means. Once it has been persuaded that a particular electoral context is susceptible to the risk of corruption, which it defines as quid pro quo abuse, the Court has inconsistently circumscribed Congress' power to choose the means of preventing corruption. In *Buckley* the Court offered undocumented conclusions that congressionally imposed limitations on independent expenditures were neither necessary nor effective means of preventing corruption.¹⁸² It wavered from that position in *Buckley*,¹⁸³ *Cal-Med*,¹⁸⁴ and *Federal Election Commission v. National Right to Work Committee*,¹⁸⁵ adopting a self-effacing deference to Congress' institutionally more trustworthy judgment about the need for contribution limitations and solicitation restrictions. In *Federal Election Commission v. National Conservative Political Action Committee*,¹⁸⁶ however, Justice Rehnquist suggested that such "deference to a congressional determination of the need for a prophylactic rule" would be warranted only where "the evil of potential corruption had long been recognized."¹⁸⁷

To exempt limitations on campaign giving and spending from strict judicial scrutiny simply because they are allegedly necessary to serve an important governmental end would depart significantly from prevailing first amendment enforcement strategies. Modern first amendment decisions display the Court's increasing reluctance to yield passively to legislative determinations of "the need for prophylactic measures" that

(1984) (Analysis of COPE and ADA ratings reveals "a complementarity between the interests of contributors and constituents," leading to the conclusion that "the pressures of constituents and contributors on senatorial voting seem to be reinforcing.").

182. See, e.g., 424 U.S. at 46 ("[T]he independent advocacy restricted by § 608(e)(1) of the FECA does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.").

183. See, e.g., 424 U.S. at 29-30 (rejecting overbreadth challenge and excusing "Congress' failure to engage in . . . fine tuning").

184. See, e.g., 453 U.S. at 199 n.20 (Congress not required to select the least restrictive means of protecting the integrity of its legislative scheme but is free to legislate on the basis of merely reasonable assumptions); cf. *id.* at 203 (Blackmun, J., concurring) (insisting that an appropriately rigorous standard of review makes it a "closer question . . . whether the [challenged provision of the] statute is narrowly drawn to advance [the corruption-prevention goal]").

185. See, e.g., 103 S. Ct. at 560 ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

186. 105 S. Ct. 1459 (1985).

187. *Id.* at 1471.

substantially infringe speech rights.¹⁸⁸ This phenomenon is illustrated by two developments: the steady progression in the intensity of judicial review from *Schenck v. United States*¹⁸⁹ to *Dennis v. United States*¹⁹⁰ to *Brandenburg v. Ohio*,¹⁹¹ and the overbreadth doctrine.

The progression from *Schenck* to *Dennis* to *Brandenburg* vividly portrays the judiciary's increasingly stringent supervision of legislative efforts to punish subversive speech. In these cases, the Court acknowledged that, like the goals sought by corruption-preventing legislation, the ends sought to be achieved by punishing subversive speech were not forbidden in principle. However, legislative reforms in this area, like those which arguably characterize political giving and spending,¹⁹² have been fraught with the line-drawing difficulties of accurately distinguishing between inherently valuable speech on the one hand and clearly punishable speech on the other.

Unlike the doctrine emerging from the political contributions and expenditures cases, the *Schenck-Brandenburg* progression culminated in a highly speech-protective substantive rule of law.¹⁹³ The rule assumes the primacy of first amendment values. Moreover, it is sensitive to the difficulties inherent in implementing constitutional norms in a sometimes resistant and always imperfect world.¹⁹⁴ It requires substantial judicial supervision to assure in every case that the legislatively chosen means bear a relation of imminence and likelihood to the harm sought to be prevented. The rule thus significantly reduces the occasions when speakers can be punished, *even for speech that is unprotected in principle*.

The overbreadth doctrine reflects a similar enforcement strategy of overprotection of first amendment rights. This doctrine implies a forth-

188. For a thoughtful historical account of early developments, including the unsteady beginnings of modern protective rules, see Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983).

189. 249 U.S. 47 (1919).

190. 341 U.S. 494 (1951).

191. 395 U.S. 444 (1969).

192. Cf., e.g., *Hearings on S. 3496, Amendment No. 732, S. 2006, S. 2965, and S. 3014 Before the Senate Comm. on Finance*, 89th Cong., 2d Sess. 78 (1966) (comment of Senator Russell Long) ("When you are talking in terms of large campaign contributions . . . the distinction between a campaign contribution and a bribe is almost a hair's line difference."), quoted in Cox, *supra* note 5, at 56.

193. The Court held that:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (footnote omitted).

194. For a defense of the first amendment enforcement strategy that "overprotects" speech in order to protect speech "that matters," see BeVier, *supra* note 46, at 322-31 (1978). See also Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. REV. 685 (1978).

right substantive judgment that a statute is facially unconstitutional when "in all its applications [it] directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest."¹⁹⁵ The doctrine implements the judgment that unjustified deterrence of first amendment activity is unacceptable.¹⁹⁶

The Court's frequent deference to legislative corruption prevention measures contrasts starkly with the strict means-focused scrutiny inherent in *Brandenburg* and the overbreadth doctrine. Campaign contributions are valuable first amendment activities which, in *most* instances, involve little genuine risk of corrupting public decision-making.¹⁹⁷ Contribution limitations thus systematically restrict protected, *nondangerous* activities. Prevailing first amendment enforcement strategies provide that the Court should carefully consider whether the prohibited contributions do in fact represent political expression that constitutes a "clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."¹⁹⁸ Moreover, the Court should carefully evaluate whether the means chosen of prohibiting contributions above a relatively low level really are "narrowly tailored." Instead, the Court has deprecated most calls for strict means-focused scrutiny of contribution limitations. In *Buckley*, for example, the Court simply asserted that the limitations were necessary to prevent corruption because bribery laws catch only the "most blatant" forms of corruption.¹⁹⁹ Moreover, the Court said, the tailoring of the limitations was a line-drawing task, and separating the innocuous from the potentially corrupt was a matter almost wholly within Congress' legislative discretion.²⁰⁰

195. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 104 S. Ct. 2839, 2852 n.13 (1984).

196. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (The overbreadth doctrine is premised on "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

197. The Court's rejection of the challengers' overbreadth argument in *Buckley* rests principally upon its willingness to accept Congress' judgment about the need for prophylactic measures. The Court thus appears to concede that, indeed, few individual contributions over \$1000 pose actual risks of corruption. 424 U.S. at 27-30.

198. *Schenck*, 249 U.S. at 52.

199. 424 U.S. at 29-30.

200. *Id.* The contrast between the Court's lenient stand in *Buckley* and its more suspicious approach in situations that appear to be analogous is striking. Consider, in particular, the way the Court has handled regulations of charitable solicitations in the two recent cases of *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), and *Secretary of State of Maryland v. Joseph H. Munson Co.*, 104 S. Ct. 2839 (1984). In both cases the government had attempted to regulate charitable solicitations by means of percentage limitations upon the amount of receipts that charities were permitted to spend on expenses or other noncharitable purposes. Soliciting money for charity (like contributing money to political campaigns) "involve[s] a variety of speech interests." 444 U.S. at 632. The regulations of charitable solicitation were defended as serv-

In contrast to its customary strategy of overprotecting speech in order to protect speech that matters, the Court's willingness to defer to corruption-prevention measures represents an apparent strategy of underprotecting speech in order to protect a governmental interest that matters. The Court, in effect, has permitted Congress to outlaw entirely political activity that presents no genuine danger of corruption—the substantive evil that Congress has the right to prevent.²⁰¹ Not even the prospect of an “as applied” challenge has been preserved²⁰² to persons who

ing an important public interest in protecting the public from “fraud, crime, and undue annoyance,” just as the limitations on political contributions are said to serve a significant public interest in preventing corruption. Unlike its unquestioning acceptance of the asserted means-end relationship between contribution limitations and corruption prevention, though, the Court's scrutiny of the relationship between the percentage limitations in *Schaumborg* and *Munson* and fraud prevention was a study in skepticism. The means were not “precisely tailored,” and the government's interests only “peripherally promoted.” The Court perceived flaws in the assumption that there was a “necessary connection between fraud and high solicitation and administrative costs.” Finally, the Court thought, the interest in preventing fraud could “be served by measures less intrusive than a direct prohibition on solicitation,” *Munson*, 104 S. Ct. at 2849, such as punishing fraud directly or requiring disclosure. The result of such intensive means-scrutiny was that the percentage limitations were, in both cases, declared facially invalid.

201. In fact, even when Congress limits itself to punishing *quid pro quos*, as in the federal bribery and gratuity statutes, it runs considerable risk of deterring or punishing constitutionally protected behavior. See *United States v. Anderson*, 509 F.2d 312 (D.C. Cir. 1974); *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974). See generally Note, *Campaign Contributions and Federal Bribery Law*, 92 HARV. L. REV. 451 (1978).

202. This is in stark contrast to the Court's refusal to permit, on overbreadth grounds, a blanket exemption for minor parties and independents from the Act's disclosure requirements. Even while turning aside the overbreadth claim, the Court invited later, “as applied” challenges. “There could well be a case . . . where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied.” *Buckley*, 424 U.S. at 71. The *Buckley* Court's invitation to press for an “as-applied” challenge was accepted by the litigants and honored by the Court in *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 103 S. Ct. 416, 419 (1982).

Similarly, in rejecting the facial “invidious discrimination” challenge to the public financing scheme, the Court was explicit. “[W]e of course do not rule out the possibility of concluding in some future case, upon an appropriate factual demonstration, that the public financing system invidiously discriminates against nonmajor parties.” *Buckley*, 424 U.S. at 97 n.131.

An unsuccessful overbreadth challenge generally does not foreclose future as-applied attacks. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). “It is our view that [the challenged statute] is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.” *Id.* (footnote omitted and emphasis added).

Some overbreadth attacks fail because virtually every instance of the regulated behavior presents a risk of the harm the statute is designed to prevent and virtually none of the behavior is substantively protected from regulation to prevent that harm. See, e.g., *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 104 S. Ct. 2118 (1984). In these cases, of course, the denial of the overbreadth challenge is not so much a refusal of standing as it is a decision on the merits about the substantive scope of protection of the regulated behavior. The failure of the overbreadth attack on the contribution limitations in *Buckley*, however, carried with it the Court's implicit acknowledgement that, indeed, most of the regulated behavior did not present any apparent risk of corruption. See *Buckley*, 424 U.S. at 29 (court willing to assume that “most large contributors do not seek improper influence over a candidate's position or an official's action”). Moreover, the Court's overbreadth discussion of the contribution limitations in *Buckley*, though

make non-corrupt contributions in amounts above the levels set in the statute.

The question that must be faced, then, is whether "where corruption is the evil feared," the Court should underprotect speech. Genuine corruption, of course, undermines the integrity of any government.²⁰³ Moreover, it is difficult to detect and difficult to define precisely in a statute. Therefore it arguably is impossible to prevent with narrowly drawn prohibitions.²⁰⁴ Thus, the argument would go, the Court can reasonably permit the legislature to treat the problem with broad prophylactic rules and need not impose any requirement that the government demonstrate either the rules' necessity or their efficacy.

This argument is troublesome because it treats the nature of the government interest as the only variable that determines how the Court should deal with plainly overbroad legislative rules. There is, of course, another variable to be considered, namely the fact that rules deter and punish legitimate political behavior.²⁰⁵ Strict scrutiny of legislative means is the first amendment norm, and overprotection of speech rights is a substantively and procedurally defensible judicial practice. The fact that corruption is the evil to be feared does not render political activity itself intrinsically less valuable. Moreover, no one has ever tried to explain why legislatures should in principle have more leeway to infringe upon first amendment rights to prevent corruption than they have, for example, to prevent subversion.

The legislature does not suddenly become a trustworthy regulator of the political process when faced with an allegation of corruption. To the contrary, if Professor Rose-Ackerman is correct when she observes that "the best checks on corruption are a well-informed and issue-oriented

concededly not a model of clarity, emphasizes not the Court's conviction that the regulated behavior presents the relevant risk *in fact* but rather that "Congress was justified in concluding that" it did, and that "a court has no scalpel to probe." *Id.* at 30 (emphasis added).

203. *But cf.* M. JOHNSTON, *supra* note 81, at 3.

Were we to clear individual miscreants out of government, subject our laws and institutions to the most painstaking structural reforms, and give our public officials the best training we could devise, corruption and the forces that sustain it would still play some part in our politics. This is so because government is an important source of goods, services, money, decisions, and authority in society—benefits that are vigorously pursued by many groups and most individuals. . . . To get around the bottleneck, one must use political influence—and corruption, which by definition cuts across established and legitimate processes, is a most effective form of influence.

Id.

204. *Cf. Buckley*, 424 U.S. at 27-28 ("[L]aws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts to . . . influence governmental action"). For a description of some of the specific problems inevitably encountered by drafters and enforcers of bribery laws, see sources cited in Note, *supra* note 201, at 466-68 nn.69-76.

205. For a conventional first amendment analysis of one aspect of the FECA which subjects the provisions that are defended on corruption-prevention terms to an unyielding means-focused inquiry, see Note, *supra* note 28.

electorate and a political system that routinely produces challengers ready to take advantage of lapses by incumbents,"²⁰⁶ an incumbent legislature's judgment that corruption must be checked by means that make it more difficult for challengers to be elected seems inherently suspect.

3. *Lenient Review and the Costs of Disingenuousness*

Finally, the Court should engage in strict means scrutiny of campaign giving and spending restrictions because lenient review of legislative means permits illegitimate ends to be more easily camouflaged. The Court has stated, of course, that "preventing corruption or the appearance of corruption are the *only* legitimate and compelling governmental interests thus far identified for restricting campaign finances."²⁰⁷ While spending and giving limitations have been defended as necessary means of corruption-prevention, reformers have also touted them for their capacity to equalize relative political power and prevent waste.²⁰⁸ A policy of judicial deference to supposed congressional judgments that overbroad giving and spending limitations are necessary to prevent corruption makes it less likely that these less plainly legitimate purposes for campaign finance restrictions will be acknowledged and evaluated in their own terms.²⁰⁹

Strict means scrutiny is a way, albeit an indirect one, for the Court to police legislative ends.²¹⁰ It is probably not possible, nor would it be certainly wise, for the Court to measure the constitutionality of campaign finance regulations by considering only the government interests that they are *in fact* designed to serve.²¹¹ Strict judicial scrutiny of legislative

206. S. ROSE-ACKERMAN, *supra* note 172, at 57. Thus, insofar as the supposedly prophylactic corruption-prevention measures such as limits on campaign giving and spending have the effect of protecting incumbents by making life more difficult for challengers, see *supra* text accompanying notes 165-67, they appear to be counterproductive.

207. Federal Election Comm'n v. National Conservative Political Action Comm., 105 S. Ct. 1459, 1469 (1985) (emphasis added).

208. See, e.g., *Buckley*, 424 U.S. at 25-26 (referring to the Act's alleged "primary interest" in preventing corruption and the "ancillary interests" in equalizing "the relative ability of all citizens to affect the outcome of elections" and in braking "the skyrocketing cost of political campaigns. . .").

209. Cf., e.g., Nicholson, *supra* note 25, at 995-96 (discussing the possibility that in *Bellotti* "the state perhaps attempted to disguise the equalization rationale" to avoid implication of *Buckley* that such a purpose is illegitimate).

210. J. ELY, *supra* note 125, at 153.

211. In many constitutional contexts other than freedom of speech, of course, the Court has had to grapple with the question whether the validity of legislation ought ever to turn on "actual" legislative purposes. In *Schweiker v. Wilson*, 450 U.S. 221 (1981), for example, an equal protection case in which the Court applied a rational basis standard of review, Justice Blackmun's majority opinion sustaining the challenged law stated that all the Court needed was plausible reasons for the statute even if it were not true that this reasoning in fact underlay the legislative decision. 450 U.S. at 234-39. Justice Powell, in dissent, expressed the view that prior cases such as *Flemming v. Nestor*, 363 U.S. 603 (1960), and *McGowan v. Maryland*, 366 U.S. 420 (1961), seemed to suggest that actual

means may not be able to assure that legislatures will not pursue illicit or questionable objectives, but it can make the task of camouflaging those objectives more difficult and thus less worth pursuing.

CONCLUSION

The essential thrust of this Article is that intense judicial scrutiny of legislatively enacted political contribution and expenditure limitations is both completely consistent with the first amendment tradition of political freedom and fully justified by institutional and enforcement considerations. The Article has deliberately not addressed what is of course the most profound issue: whether political freedom as we have known it can in principle be reconciled with active legislative pursuit of equality of political influence. I found it necessary instead to counter the reformers' argument that just a little bit of judicial cooperation would be enough to dissolve the tension between freedom and the pursuit of political equality. The fact is that had the Court yielded to the reformer's insistence that it relax its customary first amendment vigilance, the gain to political equality would have been highly problematic, if not wholly fortuitous. The loss of political liberty, on the other hand, would have been swift and certain.

legislative purpose is irrelevant but in reality "do not describe the importance of actual legislative purpose in our analysis. We recognize that a legislative body rarely acts with a single mind and that compromises blur purpose. . . . Ascertainment of actual purpose to the extent feasible, however, remains an essential step in equal protection." 450 U.S. 244 n.6 (Powell, J., dissenting). Also, in the context of state regulation of interstate commerce, compare *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 683 n.3 (1981) (Brennan, J., concurring in the judgment) ("actual motivation" of lawmakers "highly relevant to, if not dispositive of, the case") with *id.* at 702 (Rehnquist, J., dissenting) (argument that "the Court should consider only the purpose the . . . legislators *actually* sought to achieve . . . has been consistently rejected by the Court") (emphasis in original). For an interesting and provocative scholarly treatment of this issue, see Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 220 (1976) (The test of rationality "depends on attributing a purpose to lawmakers; but laws are often an accommodation of several unrelated purposes.").