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BOOK REVIEW

"NO LAW . . . ABRIDGING"

JOEL M. GORA*

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I. INTRODUCTION

In the summer of 1972, three old-time dissenters came into the offices of the New York Civil Liberties Union in Manhattan and told an extraordinary story. In May of that year they and a few like-minded others had drafted and sponsored a two-page advertisement that appeared in the *New York Times*. The advertisement was sharply critical of Richard M. Nixon, the President of the United States. The ad claimed that President Nixon had authorized the secret bombing of Cambodia, in violation of international law, and should be impeached and removed from office. The ad set forth the text of an impeachment resolution that had been introduced in the House of Representatives and contained an "Honor Roll" listing eight House members who had co-sponsored that resolution. The advertisement cost approximately $17,850, and the ad hoc group called itself the National Committee for Impeachment. Before the ink on the ad was barely dry, the group was sued by the United States Justice Department for running the advertisement.

When Randolph Phillips, one of the sponsors of the ad, told this story to the lawyers at the New York Civil Liberties Union, we were incredulous. How could a group of citizens be sued by the Federal Government for publishing a criticism of the President of the United States? After all, this was 1972, and First Amendment law seemed at its most vigorous in the protections of public speech, one of the shining legacies of the Warren Court.[1] What possible justification could the

1. For example, eight years earlier the Court had granted unprecedented protection from libel sanctions to the most vigorous citizen criticism of the conduct of public officials. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See generally* ANTHONY LEWIS, MAKE NO LAW (1991). Three years earlier, the Court had upheld the right to engage in advocacy of revolution and law violation.

government have for suing this small group of protesters? We soon discovered the answer: campaign finance reform. The government was proceeding under the brand new Federal Election Campaign Act of 1971.[2] Becoming effective in April 1972, the Act constituted a major revamping and expansion of the federal laws governing campaign funding. Those earlier campaign finance laws, which President Lyndon B. Johnson once referred to as "more loophole than law,"[3] had largely been ineffective in regulating campaign funding, and reformers were able to push for change in part because of the perception that campaign advertising had gotten out of control.[4]

The Act had two features that were relevant to the impeachment group: First, it defined a political committee as any group that spent more than $1,000 in a calendar year "for the purpose of influencing" the outcome of any federal election and subjected such a group to new and substantial regulatory requirements. Second, it had a special provision targeting use of the media for any communication that was "on behalf of" or "supported" or was "in derogation of" any federal candidate. Before accepting any such advertising, a news medium was required to receive a statement from the candidates supported

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Brandenburg v. Ohio, 395 U.S. 444 (1969). And just the year before, the Court had invalidated a prior restraint against publication of the Vietnam War secrets contained in The Pentagon Papers, New York Times Co. v. United States, 403 U.S. 713 (1971), and had held that the public expression of even the most offensive content could not be suppressed by government. Cohen v. California, 403 U.S. 15 (1971).

2. Pub. L. No. 92-225, 86 Stat. 3 (1971) (codified at 2 U.S.C. §§ 431-41 (2000)). Ironically, the lawsuit was triggered by an administrative complaint filed by Common Cause against the impeachment ad group. Common Cause has supported the regulation of such issue advocacy ever since.

3. *Raid on Election Reform*, N.Y. TIMES, Oct. 3, 1972, at 44. The FECA of 1971 inaugurated the first serious regime of disclosure of contributions. So effective was the disclosure law expected to be that there was a frenzy of last minute fund raising by Nixon's Committee to Re-elect the President to try to get those contributions in before April 7, 1972, the effective date of the law. Some of the undisclosed funds so raised would be used to subsidize the Watergate burglary and lead to the sweeping campaign finance restrictions enacted two years later and challenged in *Buckley v. Valeo*, 424 U.S. 1 (1976). Many have suggested that the pre-April 7 frenzy of fundraising was strong evidence that a disclosure-only regime would be very effective in deterring improper contributions. But we never had a good chance to find out. There was also a spasm of last-minute fundraising on the Democratic side as well. *See generally* Joel M. Gora, *Campaign Finance and the Nixon Presidency: End of an Era, in* RICHARD M. NIXON, POLITICIAN, PRESIDENT, ADMINISTRATOR 299 (Leon Friedman & William Levantrosser eds., 1991).

4. One inspiration for the statute was the best-selling book by Joe McGinniss called SELLING OF THE PRESIDENT, 1968 (1969).

or the opponents of the candidate opposed stating that the expenditure would not cause the benefited candidate to exceed statutory limits on candidate media expenditures. The government's theory was that the impeachment ad rendered the ad hoc group a "political committee" subject to all the law's requirements, that the ad did not comply with the law, and that until the group filed with the government and disclosed its contributors, it could be enjoined from making any further public statements.

Thus, the federal government sued a group of citizens for spending their own funds to sponsor a newspaper advertisement criticizing the President of the United States and urging his impeachment. The government's reasoning, that the ad might change people's minds about the President and thus influence the outcome of that year's elections, and that this would justify treating the group as political and subjecting them to government regulation, resonates with the same themes that contend in today's debates over campaign finance reform. One can almost hear Senator John McCain referring to the impeachment group's speech as a "sham issue ad," a "corrupt" attempt by rich partisans of George McGovern to corrupt the system and tilt the playing field. Surely, though, it is outrageous for government to try to regulate core political speech in that fashion.

A district court thought not, accepted the government's theory and summarily granted an injunction—an extraordinary prior restraint in the era of *New York Times Co. v. United States.*[5] The Second Circuit quickly reversed, in the first decision of the modern era striking down provisions of the federal campaign finance laws because of First Amendment concerns.[6]

Thus emerged the modern clash between campaign finance controls and First Amendment rights. In *Unfree Speech: The Folly of Campaign Finance Reform,* Professor Bradley A. Smith tells the story of the constitutional, political, and policy battles that have raged ever since over one of the most pressing public policy questions of our time. Bedeviling the nation's political community for almost thirty years, the dispute over how best

5. 403 U.S. 713 (1971).
6. United States v. Nat'l Comm. for Impeachment, 469 F.2d 1135 (2d Cir. 1972).

to regulate political campaign funding—and hence political campaign speech—has pitted free speech advocates against good-government reformers, Democrats against Republicans, and courts against legislatures. It has been a Thirty Years War involving Congress, the courts, the political parties, the press, and a host of organizations contending on one side or the other. This year's pitched battles over the McCain-Feingold Bill are the annual renewal of that war. Professor Smith's book navigates all these cross currents in a highly readable and balanced way that informs the reader of the basic elements of the debate, while deftly skewering the key components of the conventional wisdom, to wit, that sharply limiting political campaign funding will prevent corruption of politics and afford all citizens equal political opportunity.

Professor Smith, now Federal Election Commissioner Smith, tells the historic, factual, doctrinal and political story of that struggle: how to reconcile and harmonize valid concerns about the way we finance our politics with the values and traditions of the First Amendment. It is difficult to identify a public policy question enmeshed in constitutional concerns over which more ink has been spilled. The clashes over campaign finance reform tend to be played out on our national political stage. Certainly they have been in the last several years, with the primary proposed legislation so prominently identified with a national political figure like Senator John McCain.

Professor Smith has been one of the most prominent campaign finance scholars in America and certainly the most prolific of those scholars who have argued against the conventional wisdom. His has been a distinctly eloquent voice on the side of the debate which argues that campaign finance controls and limitations cut too close to the core of the First Amendment's purposes and that, indeed, such controls may often be counterproductive to the very democratic goals that are claimed to justify them.[7] Smith's goal is to place concerns

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7. Smith's articles, which provide the basis for many of the themes in the book, include *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996); *Money Talks: Speech Corruption, Equality and Campaign Finance*, 86 GEO. L.J. 45 (1997); *The Sirens' Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POL'Y 1 (1997). Other scholars whose writings take a similarly critical view of campaign finance restrictions include Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and*

about the Constitution, the First Amendment, and freedom "back at the fore" of the campaign finance debate:

> For many years now, the bulk of both legal scholarship and popular writing on campaign finance has been a literature of regulation, not freedom. The nation's editorial pages pound a steady drumbeat in favor of proposals to restrict campaign contributions and spending, while the nation's law journals are filled with articles, often sadly divorced from any empirical analysis of campaign giving and spending, that suggest ever more creative ways to regulate political speech, on increasingly specious constitutional grounds. But as I have taught and written about election law over the last decade, I have become increasingly convinced that almost everything the American people know, or think they know, about campaign finance is wrong. Campaign spending is not exploding, but in fact is rising at a slower pace than advertising for most categories of consumer goods. Although campaign spending is important, it does not "buy" elections, and limits on spending seem to destroy electoral competition. Far from corrupting the legislature, campaign contributions seem to have remarkably little effect on legislative behavior. And far from empowering ordinary citizens and political outsiders, campaign finance regulations have struck hardest at grassroots political involvement. Furthermore, I have come to conclude that, in fact, the bulk of campaign finance regulation is unconstitutional.[8]

The purpose of this essay is to assess the impressive way Professor Smith achieves his ambitious agenda.

II. FIVE EASY CASES

The introductory chapter of Professor Smith's book begins with the previously mentioned impeachment ad case and then surveys four other cases in which citizens sought to speak their

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Campaign Finance Reform, 73 CAL. L. REV. 1045 (1985); Joel M. Gora, *Campaign Finance Reform: Still Searching Today for a Better Way*, 6 J.L. & POL'Y 137 (1997); Stephen Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18 HOFSTRA L. REV. 216 (1989); L.A. Powe, *Mass Speech and the First Amendment*, 1982 SUP. CT. REV. 243; Daniel D. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1; Roy A. Schotland, *Proposals For Campaign Finance Reform: An Article Dedicated to Being Less Dull than Its Title*, 21 CAP. U. L. REV. 429 (1992); Kathleen Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997). The bulk of scholarly commentary, however, tends to favor the constitutionality and desirability of campaign finance limitations.

8. BRADLEY A. SMITH, UNFREE SPEECH x-xi (2001).

minds or get their messages out and found themselves ensnared in campaign finance laws.

A woman from Ohio printed up some homemade leaflets opposing a local referendum to increase school taxes and handed them out outside a public meeting of the school board. A school official was offended at her leaflets and reported her to the state election commission, which took her to court because she had not put her name on the leaflets. It took a decision of the Supreme Court of the United States, one invoking the memory of *The Federalist Papers* written under pseudonyms, to declare that the First Amendment's protections safeguarded her right to hand out anonymous leaflets critical of government.[9]

A man from Long Island, together with a few friends, spent $135 to print up and hand out some leaflets informing citizens about the record of their local Congressman on tax issues. The Congressman's aide complained to the Federal Election Commission, which instituted federal enforcement proceedings against the informal ad hoc group. It took an en banc decision from the United States Court of Appeals to rule that the Commission had grossly exceeded its authority in proceeding in that fashion.[10] A concurring Circuit Judge was even moved to observe that the agency had "failed abysmally" in its duty to enforce campaign laws consistent with the First Amendment.[11]

In all three cases the speakers prevailed because they were engaged in "issue advocacy," which the courts have held cannot be regulated by campaign finance laws, as compared to "express advocacy" of a candidate's election or defeat, which the courts have held can be regulated.[12] One of Professor Smith's contributions to these issues is to ask why we would even permit this distinction under an unrestrained view of the

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9. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 362 (1995) (citing Talley v. California, 362 U.S. 60, 64-65 (1960)).

10. Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm., 616 F. 2d 45 (2d Cir. 1980) (per curiam).

11. *Id.* at 55 (Kaufman, C.J., concurring).

12. Buckley v. Valeo, 424 U.S. 1, 45 (1976). The Court's constitutional express advocacy doctrine was thereafter codified in Section 431(17) of the FECA, which defines an "independent expenditure" as an expenditure "by a person expressly advocating the election or defeat of a clearly identified candidate." 2 U.S.C. § 413(17) (2000).

First Amendment. The courts fashioned the "express advocacy" doctrine as a positive barrier to limit the reach of campaign laws to candidates, their committees, and those who explicitly urge their election or defeat, so that those laws will not spill over to flood and drown all discussions of public questions. Professor Smith's final two representative cases illustrate the problems we face, however, when we make First Amendment protection turn on such fine distinctions.

In 1998, Leo Smith, a Connecticut man who supported President Clinton in resisting impeachment, took issue with his local Congresswoman, a Republican, who favored impeachment. Smith created his own website to express his views and linked the site to other locations which also contained commentary critical of Republicans. A modern day electronic pamphleteer, one would think, acting in the grand tradition of a Tom Paine. Yet, the Federal Election Commission determined that the cost of his website constituted a partisan expenditure subjecting Smith to the enforcement rigors of the federal election campaign laws.[13]

Another successor to Tom Paine, albeit a much richer one, got the same message from the government. Steve Forbes, heir to the publishing empire, wrote a monthly column on public policy issues for *Forbes*, his family magazine. He used the column to speak out on all kinds of issues, particularly the evils of the graduated income tax and the values of a flat tax proposal. But as soon as Steve Forbes became a candidate seeking the Republication nomination for President—a move he was forced to take in order to proselytize his tax reform message because he was barred by law from contributing his own funds to Jack Kemp, the candidate who would best carry that message—the Federal Election Commission decided that the value of his monthly columns, which the government bureaucrats calculated was approximately $94,900, constituted an illegal corporate contribution to the Forbes presidential campaign. The law allowed Forbes to spend $28 million of his own money, which he made from his corporation, on a campaign to express exactly those ideas, while threatening to punish him for using a slight portion of that same corporate

13. *See* SMITH, *supra* note 8, at 8.

money to make the same point in the form of a magazine column. Forbes's right of free speech was surrendered the day he became a candidate for the highest office in the land. As Professor Smith puts it: "[A]s a candidate, Steve Forbes had fewer rights under the First Amendment than he did before declaring his candidacy. Such a theory seems preposterous, for it is hard to imagine a time when one would more want or need to exercise First Amendment rights than when one is running for office."[14]

How could it be, in a country with a First Amendment which declares in unqualified terms that "Congress shall make no law . . . abridging the freedom of speech or of the press" that we have come to this pass? We have rules which require citizens to register with the government in order to criticize the government. We have a set of federal campaign finance laws—a speech code for political speech—whose distinctions and categories of permissible and prohibited speech and exceptions and qualifications would gladden the heart of a tax lawyer. Under those rules, the right to criticize the government in any meaningful way may turn on whether the activity is deemed a contribution or an expenditure, express advocacy or issue advocacy; whether the speaker is a corporation or a union or another kind of organization or an individual or a committee; whether the speaker is a corporation that makes widgets or a corporation that makes widgets and also owns a newspaper; whether a person's contribution to the political party he or she believes in was "hard money" or "soft money"; whether the party uses that donation to support their candidates or to support their candidates' ideas. Similarly, the right of groups or individuals to petition the government for a redress of grievances would turn on whether their conversations with their elected representatives could be deemed "coordination" with the next election campaign of those representatives.[15]

Professor Smith's book assays the answer to those questions.

14. SMITH, *supra* note 8, at 9.

15. *See* The Bipartisan Campaign Reform Act of 2001, S.27, 107th Cong. § 214 (passed by Senate April 2, 2001). The so-called McCain-Feingold Bill contains an expanded definition of the kinds of contacts between federal candidates and outside groups or individuals that can render the latter to be in "coordination" with the former and subjects any subsequent speech by those groups or individuals that pertains to that candidate to the limits of the FECA.

And in the very process of asking those questions, he forces us to think outside the box of the current debates over "soft money" and "express advocacy" and "coordination" and to come to grips with first principles. What is the best way to finance politics in a democracy? What are the best rules to honor the First Amendment's promised protections for political speech? Is it really true, as prominent political figures have suggested, that we have to choose *between* "two important values in direct conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy[?]"[16] Professor Smith thinks not. He believes, rather, that you cannot have one without the other. There cannot be a healthy democracy without unfettered free speech. His book is a compelling narrative of what has gone wrong, both constitutionally and politically, and brought us to the point where leaders tell us we have to choose between free speech and democracy.

Part I of the book, "The Costs of Campaigns and the Price of Reform," starts out with a brief outline of the history of campaign finance regulation to show how we got to our present impasse. Then Professor Smith moves into his major theme, which explores the bizarre nature of the campaign finance system that we have devised, asking whether that system serves or undermines the democratic values it claims to advance. Do we need the convoluted creature we have created in order to serve democracy, deter corruption, and expand political opportunity? Part II on "Constitutional Matters," explores the doctrinal debates about campaign finance controls: Are limits on money limits on speech? If they are, can they be justified by the concerns with preventing the corruption of officeholders? Can they be justified by the argument that political equality requires campaign funding equality? Finally, Part III addresses "Real and Imagined Reform of Campaign Finance," discussing pending legislative proposals like the McCain-Feingold Bill and Professor Smith's practical and doctrinal alternatives that, perhaps, are more in keeping with the teachings of the First Amendment.

16. SMITH, *supra* note 8, at 10 (referring to remarks of House Democratic Minority Leader Richard H. Gephardt).

III. FINANCING POLITICS: HOW WE GOT TO WHERE WE ARE

Professor Smith begins the main portion of his book with an interesting history of campaign spending, regulation, and reform efforts from Colonial times until the present. One emerges with the clear sense that campaign finance problems have been with us from the early days of the Republic and that current debates over legislative proposals are re-enactments of battles waged a century ago. Is it corruption for people or institutions to fund the campaigns of candidates with whom they are in ideological agreement in the hope or expectation that if such candidates are elected, they will pursue policies with which their supporters agree? Is that "corruption," or is it simply "politics"? Should it be condemned or praised?

A. A Page of History

For the first fifty years of our nation's history there was little campaign financing because there was little campaigning. The electorate was small and narrow, and most campaign activity involved party-sponsored partisan newspapers and pamphlets. In the 1828 Andrew Jackson election, Martin Van Buren created what we would now call a grassroots campaign which "involved newspapers, pamphlets, rallies and candidate travel in an effort to have the campaign communicate directly with large number of voters."[17] In the first of what will be the many ironies, paradoxes and unintended consequences that particularly bedevil the campaign finance area, the creation of the first popular mass campaign to elect Jackson required an unprecedented amount of campaign funding to get the message out and rally the troops. From the very beginning, the expansion of democracy and the concomitant need for expanded campaign funding went hand in hand. Similarly, as the scope of government regulation expanded, so did campaign funding by groups seeking to elect candidates who would favor resisting such regulation.[18]

17. *Id.* at 19.

18. Thus, for example, in connection with the 1832 re-election campaign of President Andrew Jackson, the United States Bank, which Jackson had tried so hard to extinguish, spent approximately $42,000—an enormous sum in those days—on literature and advertisements in an effort to defeat Jackson. The Bank's efforts were the forerunner of what today is called issue advocacy, i.e.,

As the 19th century progressed, campaign funding of elections grew in importance. By the latter part of that century, most government jobs were based on the patronage or "spoils" system, and a major source of campaign funding was from government workers, who were often assessed a regular percentage of their salaries as political contributions to sustain the party in power. Concerned with the coercion inherent in such a contribution system, Congress enacted the Pendleton Act of 1881, which created the civil service system and prohibited any federal employee from soliciting campaign contributions from any other federal employee. This was the first campaign finance bill, and the restriction was upheld by the Supreme Court.[19]

Ironically, the Pendleton Act and similar state laws caused parties to lose the support provided by those assessments and to turn increasingly to wealthy individuals to make up the difference with large contributions. Thus, the reform of limiting contributions by government employees opened the door to the unintended consequence of making parties more dependent on a small number of large contributors rather than relying on a larger number of small donors. As a result, "fat cats" took on an even larger role in party funding, and a number of well-known captains of industry, such as Jay Gould and John Jacob Astor, made the equivalent of six figure contributions to the Republican Party, which actively solicited such contributions with the message that their party supported policies more friendly to business. As more corporate money came into politics, more money was spent on campaigns.[20] Although both major parties had and relied primarily on large contributors by this time, the Republicans were far more

"advertising that discusses political issues with the hope that voters will oppose politicians who hold contrary views, without specifically calling for the election or defeat of any particular candidate." *Id.* at 19-20.

19. *Ex parte* Curtis, 106 U.S 371 (1882). One Justice believed the restriction violated the First Amendment because it hindered the ability of a person "to promote the views of himself and his associates freely, without being trammeled by inconvenient restrictions." *Id.* at 377 (Bradley, J., dissenting).

20. Presidential spending peaked when Mark Hanna of Ohio systematized fund raising in an unprecedented manner by urging the necessity to business of a victory over the populist "radical" William Jennings Bryan. Business contributed "not in the expectation of policy favors but out of fear of the consequences of a Bryan win, and in the firm conviction that a McKinley victory would benefit the economy generally." SMITH, *supra* note 8, at 22.

successful at soliciting this group.

B. One Good Turn Deserves Another

By the beginning of the 20th century, a backlash against corporate giving developed after the populist William Jennings Bryan was defeated in his 1896 presidential bid. Four states, all liberal pro-Bryan strongholds, enacted bans on corporate contributions in part to retaliate against corporate support of Bryan's opponents. As Professor Smith observes, "[s]upporters of these measures certainly thought that they were acting to promote good government. Their idea of good government, unfortunately, involved silencing those with whom they disagreed."[21] This resonates today, with much of the impetus for new campaign finance restrictions based on the claim that progressive or liberal legislation cannot be enacted because of corporate or business lobbying and campaign contributions. For example, the opponents of the Bankruptcy Reform Act of 2001 repeatedly and explicitly insisted that the votes for that bill were heavily influenced by political contributions by banks and credit card corporations, even though eighty-three Senators, including thirty-six Democrats, voted for the bankruptcy law revisions that passed the Senate.[22]

Concern with corporate contributions to political parties led to passage of the first federal law prohibiting such contributions, the Tillman Act of 1907, a law pointed to today as justifying a ban on soft-money contributions by corporations to political parties. Laws requiring modest post-election disclosure of contributions by Congressional candidates were enacted, as were spending limits on House and Senate elections, justified in part by the concern that only rich people or people willing to take money from groups interested in legislation could run for office. For various technical and interpretive reasons, these laws, though quite ambitious on their face, wound up having a minimal impact in restraining federal campaign funding. Thus, another pattern was established that we recognize today: Individuals and groups

21. *Id.* at 23.

22. *See* Phillip Shenon, *Senators Adopt Tougher Rules on Bankruptcy*, N.Y. TIMES, Mar. 16, 2001, at A1; *see also* 147 CONG. REC. S2327 (daily ed. Mar. 15, 2001) (statement of Sen. Wellstone).

are extremely resourceful in marginalizing campaign finance restrictions, finding lawful ways to get around these restrictions, using their resources to support their candidates and causes.

The Teapot Dome corruption scandal, like its Watergate successor fifty years later, had little to do with campaign finance abuses. Nonetheless, it galvanized the cry for campaign finance reform and resulted in the Corrupt Practices Act of 1925, which attempted to tighten up reporting requirements. Once again, the pattern of finding loopholes began almost immediately. In the forty-six years it was the law, before it was superseded by the Federal Election Campaign Act we have today, there was not one successful prosecution for violation of its provisions.[23]

Up to now, almost all campaign finance reforms were efforts by liberals, progressives, and Democrats to restrain the campaign finance practices favorable to conservatives and Republicans. The next two campaign finance reforms, however, were imposed by Republicans on Democrats and their campaign finance practices and supporters. First came the Hatch Act of 1940, which expanded the ban on soliciting contributions from government workers and prohibited civil service employees from taking "an active part" in partisan political activities. The Republicans' primary purpose was to prevent President Franklin D. Roosevelt's Democratic Party from using the greatly expanded federal bureaucracy as a political campaign force. The Act also tried to tighten contribution and expenditure limitations, but these limits were soon easily avoided. Once again, reforms led to resistance and loopholes.[24]

The Republicans also pushed for restrictions on giving and spending by labor unions, which, by the 1940s had become a potent political force and had spent money extensively to help ensure Roosevelt's 1944 re-election. A key provision of the anti-labor Taft-Hartley Act of 1947 banned union contributions to candidates and also prohibited all union expenditures on

23. *Id.* at 26-27.

24. *Id.* at 27. The challenge to the Act's restrictions on partisan political activity by civil service employees was rejected in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

political activity, even including internal communications with members. This unprecedented restraint on free speech was challenged by the CIO News, indicted under the new law for publishing an editorial in support of a local Democratic congressional candidate. The Court avoided addressing the severe constitutional problems raised by this attempt by Congress to limit the political speech of its opponents by holding that Congress did not intend the law to do what it clearly did. Instead, the law was interpreted as inapplicable to *internal* union communications.[25] When unions tried to test Taft-Hartley further by making *external* political communications, the government sued them once again. This was the first time there had ever been a proceeding to haul a group into court for speaking directly to the public about political issues. The matter ended inconclusively, and the Supreme Court did not rule on the merits.[26] Despite these rulings, unions remained powerful political forces whose internal communications were unrestrained and whose political action committees ("PACs") were growing each year with money from automatic paycheck deductions.

C. Watergate and Reform

Campaign funding regulation remained dormant for the next quarter-century, though campaign funding certainly did not. By the time of Richard Nixon's high-spending 1968 presidential campaign, including an eye-popping $2.8 million contribution from insurance executive Clement Stone and his wife, the pressures were building for another round of reform. The result was the Federal Election Campaign Act of 1971, the first systematic revision of our campaign finance laws in almost fifty years. Operating on the assumption that effective disclosure would minimize or eliminate political quid pro quos, the Act significantly tightened disclosure and eliminated disclosure loopholes. The potential efficacy of disclosure as an

25. *See* United States v. Congress of Indus. Org., 335 U.S. 106 (1948). Four Justices would have ruled that the Act did intend to ban such communications, in violation of the First Amendment. *Id.* at. 156-68. Had one more Justice joined them, we would have had an early constitutional victory for the proposition that union "independent expenditures" cannot be suppressed by government.

26. United States v. United Autoworkers Union, 352 U.S. 567 (1957).

anti-corruption device was impressively attested to by the frenzied flood of contributions that swamped Republican committee headquarters in the days before the Act went into effect. The Act also contained an unprecedented targeted restriction on the amount that federal candidates could spend on media communications, a provision legitimizing the use of union members' dues to defray the costs of operating union PACs, and a counterpart provision allowing corporations to use their treasury funds to subsidize their PACs as well. At the same time, the new law contained no effective limits on individual contributions or candidate expenditures. The media limit provision was later declared unconstitutional,[27] while the PAC provision would give rise to the explosion of PACs in the last thirty years, from a few hundred in 1972 to several thousand in 2001. As Professor Smith observes: "Once again, the results of reform were surprising: a measure intended to strengthen union political activity led instead to increased, and institutionalized, corporate political activity."[28]

It is ironic and frustrating that the disclosure provisions of the 1971 Act were never really given an entire election cycle to work. Once the courts had declared that the Act could not be broadly applied to non-partisan issue groups and advocacy, the disclosure provisions might have proven to be an effective and focused antidote to undue influence and corruption—and a remedy with only some First Amendment downside.[29] Coupled with the existing bans on direct labor and corporate contributions to candidates, disclosure might have made a distinct difference. The rush to beat the disclosure deadline seems to have proven that point.

But a disclosure-centered regime was not to be. Watergate insured that. Even though not all of the abuses that we put under the rubric of "Watergate" involved illegal or

27. ACLU v. Jennings, 366 F. Supp. 1041, 1054 (D.D.C. 1973) (3-judge court), *vacated as moot sub nom.* Staats v. ACLU, 422 U.S. 1030 (1975). That court also followed the lead of the Second Circuit in the impeachment ad case by holding that the disclosure provisions of the Act could not be applied to the issue-advocacy activity of issue-oriented organizations. *Jennings*, 366 F. Supp. at 1057.

28. SMITH, *supra* note 8, at 31.

29. The Court had held, after all, that compelled disclosure of the names of contributors and supporters of cause organizations was a violation of the First Amendment rights of freedom of speech and association. *See* NAACP v. Alabama, 357 U.S. 449 (1958).

questionable campaign funding, Watergate seemed to have become at least in part a poster child for campaign finance excess and corruption. Revelation of the extremely large and sometimes illegal contributions that came in before the new disclosure rules went into effect helped energize a Democratic Congress to push through sweeping changes in the fall of 1974, shortly after Richard Nixon's resignation as President.

Those changes had four basic elements: (1) even more enforceable disclosure provisions; (2) for the first time, public financing of presidential campaigns—with matching funds in the primaries and full public funding for the nominating conventions and general election campaigns—but with the condition that the candidate agree to statutorily-prescribed spending limits; (3) severe limitations on contributions; and (4) similarly severe ceilings on expenditures by candidates, campaigns, parties, and even independent groups or citizens. To monitor these new rules and regulations, Congress created a new Federal Election Commission, a majority of which was controlled by Congress.[30] To those at the ACLU, these new restrictions seemed not to be reforms but to constitute an "Incumbent Protection Act," and the creation of an enforcement mechanism wholly dominated by the incumbents in Congress drove home that point. Just at a time that the courts seemed to be infusing some First Amendment wisdom into interpretation of the Act, Congress passed a statute that pulled out all the stops and almost dared the Court to find it unconstitutional.

D. Buckley v. Valeo *and the Law Today*

That set the stage for the landmark challenge to these sweeping restrictions in *Buckley v. Valeo*. The most intrusive and restrictive parts of the law were the severe limitations on contributions—no more than $1,000 to any federal candidate from an individual or $5,000 from a political committee. Equally severe were overall limitations on the amount that any

30. In addition, the 1974 Amendments had one other objectionable feature which would be found unconstitutional: a disclosure provision targeted not at candidates but at independent issue-oriented groups that rated the performance of politicians. That provision, 2 U.S.C. § 437a, was struck down, as going beyond the proper purview of campaign finance controls, by a unanimous Court of Appeals that had *upheld* all other provisions of the new law. Buckley v. Valeo, 519 F.2d. 821, 843-44 (D.C. Cir. 1975) (en banc).

federal candidate could spend on his or her campaign—expenditure limits set at such low levels that they were guaranteed to insure that no challenger could ever defeat an incumbent possessing all the perks of office unless that incumbent were convicted of bribery or child molestation. Also disruptive of political freedoms were disclosure requirements which meant that any person who gave as little as $15 to a political candidate or cause could have his name publicly disclosed and his political privacy breached. Perhaps the most outrageous limitation was a $1,000 overall *annual* ceiling on political expenditures by groups or even individuals that would make it a federal felony for a citizen to run a small ad in the newspaper criticizing the President of the United States and urging his defeat at the polls. The impeachment ad which the government claimed could not be run without registration and disclosure now could not be run at all without the sponsors committing a federal crime. If the new law seemed a modern reincarnation of the Sedition Act of 1798, which made it a crime to criticize the government, provisions like this were the reason.

The law was challenged by a "strange bedfellows" coalition of liberals and conservatives. Senator Eugene McCarthy relied on a small number of large contributors in 1968 to help him and his "people's campaign" unseat President Lyndon B. Johnson because of the war in Vietnam. His candidacy gave voice to the anti-war opposition within the Democratic Party, but his funding would now be criminal under the post-Watergate reforms. Senator James Buckley, a conservative from New York, was another candidate not part of the establishment who had to look to outside sources for campaign support. They were joined by an assortment of groups on either side of the political spectrum, such as the New York Civil Liberties Union and the American Conservative Union, who claimed that these laws suppressed their ability to criticize government and its officials in ways that undermined the whole purpose of the First Amendment's rights of free speech and association.

The Court addressed these claims by rendering a Solomon-like "split decision."[31] The Court struck down limitations on

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

campaign expenditures, personal campaign expenditures, and independent individual and group expenditures. These, the Court reasoned, cut to the bone of the First Amendment by limiting the quantity and quality of vital electoral speech. The less candidates, causes, and individuals could spend, the less they could say. Yet the Court upheld the statutory limitations on contributions to candidates, on the ground that such "large" contributions to candidates, even if properly and promptly disclosed, could pose too much of a danger of corruption or the "appearance of corruption." Likewise, the Court upheld deep and intrusive disclosure of even the most modest contributions to candidates, their campaigns, and those who "expressly advocated" their election or defeat, but struck down provisions or interpretations that would impose disclosure and reporting requirements on those who engaged solely in "issue advocacy." The Court also upheld the provision of public funds for presidential campaigns, rejecting claims that this was an improper use of the Spending Power and that the formula for eligibility benefited the Democrats and Republicans at the expense of independent insurgent and third-party candidates in violation of the Equal Protection Clause. At the same time, the Court struck down the composition of the Federal Election Commission, chosen by members of Congress, as a violation of separation of powers; at least the foxes would not be guarding the hen house.

These split decisions would guarantee several unintended consequences. First, since demand for campaign funds was now unlimited, while supply was closely controlled, the beneficiaries would be those candidates who had a Rolex or a Rolodex, i.e. those who were independently wealthy and could fund their own campaigns, like Steve Forbes and Senator Jon Corzine, and those who were well-connected, like incumbents, and could easily raise funds in $1,000 and $5,000 chunks from individuals and political committees. Indeed, while forty incumbents lost their seats in the 1974 elections before this law went into effect, it is much more unusual for incumbents to lose today. As Professor Smith points out, the imbalance between fund raising by challengers and incumbents has been

exacerbated and the fund raising gap has grown.[32] It is harder now for newer voices to be heard. Because of the contribution ceilings, candidates spend more time than before fund-raising and dialing for dollars. Interest groups arose to fill the funding breach. This is why the 1980s witnessed the rise of PACs, which in turn generated a variety of legislative proposals to sharply curtail or even outlaw them.

The second consequence of the compromise ruling in *Buckley* was that, with candidate contributions so closely controlled, other, less-regulated sources of funding for campaign-related activity and communication would become vital. Hence the Court planted the seeds of what we now call soft money and issue advocacy. The lynch pin and dividing line between these two regimes of regulation and non-regulation would be the "express advocacy" concept: expenditures by candidates, their campaigns, and those who expressly advocated their election or defeat would be subject to contribution controls, deep disclosure and other regulatory restraints. Other forms of activity and communication by parties, independent groups, and issue organizations which did not engage in "express advocacy" would be wholly or largely free from campaign finance regulation.

Those distinctions and divisions, though necessary to give as much free speech protection as possible, had two fatal flaws. First, they inaugurated an elaborate and bizarre free speech code where the right to use funds to speak about politics and government would turn on who you were, what you said, and perhaps even when you said it. Second, they would guarantee the instability that our campaign finance system has experienced in the twenty-five years since then.

By the mid-1990s the regulatory battleground shifted to issue advocacy and soft money, as interest groups, corporations, labor unions, and individuals began more direct communication to the public, but in messages that did not expressly advocate electoral outcomes, and thus were free from any governmental controls. Likewise, the rise of party use of soft money permitted wealthy individuals, corporations, and labor unions to make largely unregulated contributions to

32. SMITH, *supra* note 8, at 69.

political parties so long as the money was not used in direct support of candidates' federal elections. These funds support the most basic political party activity in a democracy: grassroots organizing, get-out-the-vote drives, voter registration, candidate recruitment, issue development, and advocacy. But their increase has led to renewed concerns over undue access and influence by wealthy individuals and powerful interests, which has led to the agitation over proposals like the McCain-Feingold Bill, which would seek to shut down all of this funding and the First Amendment activity it sustains.

Throughout this twenty-five year period, the Supreme Court, despite several invitations to do so, has declined to tamper with the basic *Buckley* framework: expenditures are free, contributions can be limited; express advocacy can be regulated, issue advocacy is privileged; individuals can spend to speak, corporations and labor unions can be restrained.[33]

As the comedian Joey Lewis always asked: "Is *everybody* happy?"

IV. THE CONVENTIONAL WISDOM

The unhappiness that most people feel about the current state of affairs in the campaign finance arena has of course sparked the ongoing public and legislative debates over proper campaign finance policy in this area, a debate which almost immediately proceeds directly to first premises and principles. Professor Smith claims that these premises and principles call into question the conventional wisdom about the merits of regulating campaign funding and demonstrate, counter-intuitively and almost perversely, that campaign funding controls undermine the very goals they are claimed to achieve. In Chapter 3 he powerfully debunks the conventional wisdom about the values of limiting campaign funding, showing the fallacies of four faulty assumptions upon which campaign finance controls are predicated.

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33. *See, e.g.*, Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985); Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990); Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 516 U.S. 604 (1996); Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897 (2000).

The first faulty assumption is that campaign spending is too high. When one examines the overall amounts spent on campaigning—perhaps $4 to $5 billion in 2000—that seems like a lot of money.[34] As a result, the average citizen may think it makes sense to reduce campaign spending directly, (by outlawing soft money or issue advocacy), or indirectly, (by providing public financing or other benefits to candidates only on condition that the recipient candidates agree to limit their overall campaign spending). In any event, Professor Smith shows that in terms of dollars spent per eligible voter, the amount of campaign funding is much more modest and works out to approximately $15 per eligible voter. By another measure, total United States political expenditures constitute just .05 percent of gross domestic product, which, on a per-voter basis, is less than is spent on political activity in many other democratic countries.[35] When one considers the enormous stakes that every eligible voter has in the outcome of the political process, that seems like a paltry sum indeed.[36]

The second faulty assumption underlying campaign finance controls is that campaigns funded by large contributors are undemocratic, whereas campaigns based on small donations are more representative of the people. First, we do have widespread participation in campaign funding. Professor Smith estimates that approximately 18 million Americans make some financial contribution to a candidate, party or PAC in an election cycle. Next to voting, political giving is the most common method by which voters connect to candidates, parties and causes. Moreover, even candidates who raise large sums in small contributions are not necessarily more mainstream or representative. Indeed, more often than not, they are ideologically extreme, which is why their intensely devoted supporters are willing to contribute. Candidates like

34. Senator Mitch McConnell, an ardent foe of campaign spending limits, frequently observes that we spend less on politics than on purchasing potato chips. *See* 147 CONG. REC. S3234 (daily ed. Apr. 2, 2001) (statement of Sen. McConnell).

35. *See* SMITH, *supra* note 8, at 42.

36. Ironically, while one consequence of coercing spending limits is that the public will get less information than it needs (or more of it proportionately from the news media not subject to these limits), with limits, more advertising will tend to be negative, because with less to spend, it is more effective to spend it by "going negative." *Id.* at 43-44.

Barry Goldwater, George McGovern, and Oliver North fit this profile. Conversely, candidates with a small number of large contributors can often use those funds to amplify the views and wishes of much larger groups. That is what Senator Eugene McCarthy did in his 1968 anti-war campaign against President Lyndon Johnson. Funded by a few rich liberals, his campaign gave a voice to hundreds and thousands of liberal anti-war Democrats who wound up unseating a sitting President. Ross Perot used his millions of dollars in 1992 to give voice to millions of Americans who believed his anti-government message. He got 19% of the total vote cast and was thus largely responsible for the electoral defeat of another sitting President, George Bush *pere*. In these instances, large contributions served a highly democratic purpose.

Nor is it correct that money "buys" elections—i.e., that candidate expenditures determine electoral outcomes, thus making the right to vote meaningless. Professor Smith demonstrates that there is often a chicken and egg problem. While there is a strong correlation between spending and winning, it may be because donors like to back winners, rather than because winners win because they have big donors. That certainly accounts for the success of most incumbents. It is campaign prowess and the prospect of electoral victory that attract contributions, rather than contributions which generate prowess and potential victory. Often, Big Spenders are Big Losers. In 1994, for example, a bad year for incumbents, thirty-five Republican challengers who defeated Democratic incumbents spent on average just two-thirds of what their opponents did. And in the 2000 Senate races, of the ten most expensive races, the person who was outspent nonetheless won four of the ten elections. As Smith notes, "Given the inherent advantages of incumbency, this is powerful evidence that a monetary advantage alone does not mean electoral success."[37] Of course, there are occasional candidates like Jon Corzine who do seem to rise to public prominence and electoral victory because they have been able to spend large amounts of money, but these are the exceptions that tend to prove the contrary rule.

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37. SMITH, *supra* note 8, at 49.

Finally, the most deeply held belief that animates campaign finance reformers is that money corrupts the legislative and governing process. It is difficult to quarrel with this aspect of the conventional wisdom about money and politics, since the Supreme Court has put its seal of approval on the concept without requiring any significant showing of the causal relationship between campaign contributions and legislative action. The Court, like the reformers, has been content to accept the assertion uncritically rather than demand proponents carefully prove the connection.[38] Professor Smith refuses to let that assertion off the intellectual hook. In a number of ways he undermines the premises of that pillar of the conventional wisdom.

First, "corruption" does not mean quid pro quo corruption in the strict sense of campaign dollars in exchange for votes or other political favors. In this context, it means responsiveness or influence—i.e. that a representative will vote a given way on a bill to please his supporters, particularly his financial ones. Nowadays, almost any newspaper report on a legislative battle contains a sidebar showing the campaign contributions made by groups that support the legislation, with the clear implication that the contributions played a role in the outcome. But the unspoken predicate is that the representative is voting that way *because* of the contribution, and that without the contribution the representative would vote differently. Correlation does the work of causation. It is the classic fallacy *post hoc ergo propter hoc*: If Y follows X, Y must have been caused by X. But usually the policy comes before the contribution; the person has taken a stand on a given issue, and

38. *See* Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897 (2000). Justice Souter, writing for the Court, dismissed "academic studies" such as Smith's which indicated that "contributions do not actually result in changes in candidates' positions" by citing other studies which "point the other way." *Id.* at 908. Accordingly, the Court concluded, given the conflict among the studies "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Id.* Ironically, barely one month later, in a nude dancing case, Justice Souter dissented on the ground that the government had not proven the harm flowing from such speech in a convincing enough fashion: "[I]ntermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity . . . ." City of Erie v. Pap's A.M., 120 S. Ct. 1382, 1404 (2000) (Souter, J. concurring in part and dissenting in part).

the contributors like that stand and support the person who takes it in the expectation that he or she will continue to do what he or she would has done in the past. Proof or even an assertion that a *specific* legislator was influenced by campaign contributions to vote differently than he otherwise would have is never forthcoming from groups or politicians who claim that money "corrupts" politicians. When pressed to name individual Senators who have been corrupted by campaign funds, the reformer's response is that it is not any one person who is corrupt, but "the system" that is.[39]

Not only do these anecdotal moments tend to refute the reformers' claims, but academic studies have shown that campaign contributions play a minor role in legislative behavior. What controls official behavior is party agenda, personal ideology, and constituent desires, as revealed in polls, letters, calls, and conversation with voters.[40] Moreover, contributions often go hand-in-hand with electoral support; the National Rifle Association ("NRA") makes extensive campaign contributions to representatives, but they also have over three million avid members. Representatives who vote against gun control are probably much more impressed by the NRA's electoral strength than their financial support. Conversely, other groups have a great deal of political influence though they have no PAC and make no contributions; the American Association of Retired Persons ("AARP") and the American Bar Association ("ABA") are classic examples. In short, the case that contributions influence votes has never been made beyond the realm of intuition. Nonetheless, the mantra that contributions corrupt the system is repeated without limit, and the nostrum of campaign finance reform is prescribed as a cure-all for the policy ills that bedevil the Congress.

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39. *See* 147 CONG. REC. S2936 (daily ed. Mar. 27, 2001) (statement of Sen. Wellstone); *see also* 147 CONG. REC. S3236 (daily ed. Apr. 2, 2001) (statement of Sen. Kohl). In the recent approval of bankruptcy reform legislation, the airwaves were replete with allegations that banks and credit card companies, which overall had made seven figure contributions to candidates and parties, had basically "bought" the policy outcome that favored creditors and harmed debtors. Yet, to credit that assertion, one would have to believe that many of the eighty-three Senators who voted for the bill, thirty-six of whom were Democrats, did so primarily because of campaign contributions and were willing to face the wrath of credit card users in the next election.

40. *See* SMITH, *supra* note 8, at 55.

If contributions do not in fact buy outcomes, do they at least buy access, which is the other reform mantra? Again, the facts are counterintuitive, but they show, as Professor Smith observes, "the vast majority of campaign contributors never seek access, and legislators meet regularly with people who have never made contributions. Nor does every contributor who seeks access get it."[41] And even if contributors do gain access, it may be for reasons unconnected to their contributions. Broadcasters make contributions to candidates, but also control television. Which one gains them the access? Indeed, if there were no private contributions, the access by broadcasters would be even more forthcoming. Yet, the media, and through them the public, glibly and unthinkingly repeat and believe the assertion that contributions buy access and influence. Smith's careful argumentation clearly shows otherwise.

In sum, Professor Smith shows that, contrary to the conventional wisdom, it is not a good idea to limit political spending, campaigns based on small contributions are not necessarily more democratic than ones funded by large contributions, and the case has not been made that money "buys" elections or that campaign money corruptly influences the legislative process. This chapter should be required reading for everyone who think that there is "too much money in politics."

V. THE FOLLY OF "REFORM"

So too, the next chapter dealing with the folly of reform and the consequences of campaign finance regulation is a must read. This chapter is a stunning indictment of the most illiberal consequences of campaign finance controls. If Ted Koppell devoted just one episode of *Nightline* to these themes, if Dan Rather had just one segment on *The CBS Evening News* presenting these points of view, the terms of the entire campaign finance debate might change significantly. Once again, Professor Smith shows that, despite popular and media misconceptions, campaign finance limits, rather than reducing the influence of wealthy individuals or expanding political

41. *Id.* at 59.

opportunity, actually exacerbate that influence and reduce that opportunity. His indictment of the folly of the present system is stark:

> Specifically, campaign finance reform efforts, based on ever-increasing regulation of the political process, have entrenched the status quo; reduced the choices of both candidates and issues available to the electorate, while contributing to the negativity of campaigns; made the electoral system less responsive to popular opinion, while favoring special interests; strengthened the power of select elites; and limited opportunities for grassroots political activity.[42]

The winners of the current system have been incumbents and highly organized interest groups, be they business or labor—the very individuals and groups whose influence reform is supposed to counteract. Likewise, contribution limits, in tandem with the fact that the Court has ruled that the First Amendment bars expenditure limits, clearly reduce the number of candidates and favor wealthy candidates. Smith also points out, again counter-intuitively, that contribution limits, which force candidates to rely on a large number of contributions, have the effect of restraining change, because candidates are loath to offend their many contributors. Historically, those candidates funded by a relatively small handful of financial angels have often been freer to take bold stands on policy.

Campaign finance limits entrench the status quo by favoring incumbents, making it relatively more difficult for challengers to raise money and make credible runs for office. Except for the occasional self-financed multimillionaire like Senators Jon Corzine or Maria Cantwell, challengers, faced with sharp contribution limits, have a very difficult time raising the money to get out the kind of message needed to challenge a well-heeled and well-connected incumbent who can bring so many of the perks of office to bear on the campaign. Contribution limits make it impossible for challengers to rely on a few financial supporters to support any message of change or reform, and make it extremely burdensome for challengers to raise adequate funds in limited amounts. Incumbents are more

42. *Id.* at 66.

readily connected to the networks of interest groups that supply contributions in $1,000 and $5,000 bites far more efficiently. Even public financing schemes may be of little help, since they almost all require those who accept public benefits to agree "voluntarily" to limit their expenditures to a set ceiling that is usually too low to mount an effective campaign.

The result of these restraints is to reduce the number of candidates and to facilitate campaigns by the very wealthy. Corzine, Forbes, and Perot have achieved prominence in the world of politics because of their ability to spend the millions of dollars they earned in the world of business. In the case of Forbes and Perot, their money has sparked important national debates about their issues, but the system can hardly be praised for limiting the ability to raise those issues to the very wealthy. Of course, had *Buckley* not been decided the way it was, such rich self-financed candidacies would be illegal. But then we would not have had the benefit of the national public discussions those campaigns raised, and the "public discourse" on vital public issues would be set at the extremely low and meager level that a Congress full of incumbents chose in 1974.

Not only do funding restrictions limit the quantity of debate, they also skew its content and quality. As Smith observes, while there is a certain democratizing effect in making candidates reach out to large numbers of contributors because of low contribution limits, the result is that candidates have to mute and moderate their message in order to appeal to a large number of small contributors. This counters the "uninhibited, robust and wide-open" public speech we are supposed to have.[43] Were it not for the sharper messages made possible by the funds of a Perot or Forbes, our national debate might not have included the importance of reducing the deficit (Perot) or lowering taxes (Forbes). Two Presidents in the past decade, Clinton and Bush *fils*, have taken those messages and made them winning tickets to fashion governing electoral majorities. As a result, Democrats are budget balancers and deficit fighters

43. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). The Supreme Court understood a comparable centrist-forcing phenomenon in recently rejecting blanket primary election arrangements where party nominees were chosen by the entire electorate. Having to appeal to a larger group for support would ineluctably cause candidates to water down their messages in order to do so. *See* California Democratic Party v. Jones, 120 S. Ct. 2402 (2000).

and Republicans feel safer being tax cutters. This parallels the days when third parties, backed by a few financial angels, could slowly change the terms of our national debate and give respectability and credibility to once-radical ideas like social security.

Just as campaign funding limits restrain the development of new political ideas, so too do they tend to entrench the practices that campaign finance reformers claim to be opposing. Contribution limits induce contributors to reject an "electoral strategy" of trying to influence electoral outcomes so that the candidate preferred by the contributor wins: with a cap on contributions, each person or group's donation will likely not make a difference. Instead, those limits push contributors into adopting a "legislative strategy" of backing the likely winner, usually the incumbent, to ensure access after the election. Of course, that is the very problem of influence-peddling that reformers claim to be addressing with contribution limits. Limits also make the system less responsive to the need for change since groups and individuals cannot communicate or signal the felt need for change by making large contributions to candidates. Finally, limits also produce "shirking" by representatives in the form of having to spend too much time fund-raising, thus neglecting their legislative duties and avoiding taking stands that will offend organized contribution sources.[44]

The final irony is that funding limits favor selected elites who can bring influence to bear on political processes in avenues *outside* the area of regulation. The media are the prime example. Because of statutory exemptions from campaign finance regulation (and one would hope constitutional immunity as well), the press can "influence the outcome of an election" twenty-four hours a day, seven days a week, through coverage, emphasis, and editorial endorsement. So, far from

44. One prominent First Amendment scholar has suggested that even campaign spending limits might be upheld to serve a compelling interest of elected officials not having to spend so much time raising funds. *See generally* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994). Surely a less restrictive alternative would be simply to raise the contribution limits a reasonable amount, say from $1,000 to $3,000, even if just to keep up with inflation. Then, politicians would have to spend much less time raising money.

being a populist bonanza, campaign finance controls simply give more power to the rich who own or control news media. Similarly, celebrity is not subject to campaign finance controls, and many in Hollywood have been quite willing to donate theirs to favored candidates and causes without restraint. Barbara Streisand, Jane Fonda, and Martin Sheen readily come to mind, as does Charleton Heston. On the other hand, the millions of people who join together and pool their resources through issue organizations and political action committees have their influence restrained through laws which regulate the funding and activities of their groups. What happened to one person one vote?

The anti-democratic flaw in campaign finance limits is that although they purport to level the playing field, equalize political opportunity, and give a preference for populism, they have precisely the opposite effect. Smith concludes his bill of particulars as follows:

> Campaign finance regulation has been packaged as a means of returning power to "ordinary people." In truth, however, such regulation has had the effect of excluding ordinary people from the political process in a variety of ways: It has insulated incumbents from the voting public, in both the electoral and legislative spheres; it has increased the incentives for legislative "shirking"; it has increased the ability of certain elites to dominate the debate by eliminating competing voices; it has placed a renewed premium on personal wealth in political candidates, and limited the number of candidates and the types of issues they discuss; and it has hampered grassroots political activity.[45]

VI. ONE POSSIBLE SOLUTION?

One set of proposals offered to counter the current campaign finance problems is generally grouped under the rubric of "public financing," or as Smith somewhat critically calls it, "government financing" of political campaigns. Public financing has long been offered as a panacea for both the

45. SMITH, *supra* note 8, at 86. Professor Smith has recently reprinted a number of telling anecdotes which reflect how the bureaucratic obstacles of having to comply with campaign finance regulatory red tape can chill and deter authentic and spontaneous grassroots political participation and activity. Bradley A. Smith, *McCain-Feingold Will Hurt the Little Guy*, WALL ST. J., Mar. 20, 2001, at A22.

corruption and equality concerns that animate many campaign finance reformers. If candidates and their campaigns were funded with public money, concerns with corruption would diminish and the playing field among candidates would be leveled somewhat because each candidate would receive the same amount in campaign funds, or at least candidates would receive enough of a grubstake to run an effective campaign, even if they faced a high-spending, privately-financed opponent. Moreover, the argument goes, public funding would "free" candidates from the chore of having to raise money from private groups and individuals.

Public financing can take many forms: direct grants of funds to candidates; matching funds to supplement private contributions; provisions of a variety of benefits candidates can use for their campaigns, including free mailing privileges during an election season, free radio or television time, government vouchers to purchase radio or television time, and tax credits or deductions. Public financing usually but not necessarily involves the candidate's accepting "voluntary" expenditure ceilings as a condition of getting the public funds or benefits. This traces back to the *Buckley* decision which upheld—although not against an unconstitutional conditions contention—the presidential spending program where candidates agreed to spending limits in order to get the federal funding.[46]

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46. The Presidential public financing system at issue in *Buckley* gave matching funds for the primary elections and full funding for the general elections. It required recipient candidates to agree not to exceed various state-by-state ceilings and an overall national spending ceiling in the primaries, as well as a nationwide spending ceiling in the general fall election. The funding program was challenged on Spending Clause grounds as an impermissible use of federal funds and on Equal Protection Clause grounds because of the discriminatory eligibility formulas that penalized certain candidates and groups. No argument was directly made that the scheme involved an unconstitutional condition—i.e., surrendering the right to spend funds on one's campaign in exchange for the receipt of federal subsidies for that campaign. In the course of the opinion, the Court stated:

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on the agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private funding and accept public funding.

Buckley v. Valeo, 424 U.S. 1, 57 n.65 (1976). There are, of course, First Amendment limits on the ability of government to wield its spending power. *See, e.g.*, Legal Services Corp. v. Velazquez, 121 S. Ct. 1043 (2001). Finally, the Presidential public funding has in many ways been Exhibit A for the flaws in limits-based public

My favorite public financing scheme was put forward by the public policy journalist Jonathon Rauch.[47] Under his proposal, a candidate in a typical House of Representatives race would have two basic choices about how to raise campaign funds. First, the candidate could raise money privately, in unlimited amounts and from any source, even from corporations such as Polluters, Inc., but with instant disclosure. Alternatively, the candidate could receive a serious amount of public funding, say $500,000, but not raise or spend a penny privately on top of that. The latter candidate of course would have a powerful campaign issue: "I'm the 'clean' candidate. I haven't taken a dime in special interest money." Rauch thought that the political capital a candidate would get might very well offset a big spending campaign funded in part by Polluters, Inc. Of course, no pending bill contains Rauch's ingenious scheme, which is an extremely interesting marriage of the favorite proposals of the left (full and significant public financing) and the right (no limits on contributions). I suspect that is because this is a decidedly *anti*-incumbent measure.

In practice, however, public financing has taken more limited forms. Part of the problem with public financing is the paradox of having the government finance the very politics which is designed to control the government. Or, as Senator Gene McCarthy liked to put it, explaining why he challenged Presidential public funding in the *Buckley* case: Having the government finance political campaigns would be like having the Founding Fathers ask King George to finance the American Revolution.[48] Also, as a political matter, the "strange bedfellows" coalition put together in recent years to oppose bills like McCain-Feingold, which currently have no public financing provisions, would quickly come apart over public funding proposals, which liberal groups tend to favor as an antidote to the inequalities of private financing, but which conservatives tend to see as "food stamps for politicians."

Assuming one can bridge these political divides, is public

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financing. *See* discussion *infra* Part VII.

47. Jonathon Rauch, *How To Repair the Campaign Finance System, Part I. Give Politicians Free Money, No Rules,* U.S. NEWS & WORLD REPORT, Dec. 29, 1997/Jan. 5, 1998, at 54-56.

48. *See* John Lichfield, *Notebook: Square Pegs Aim for the Oval Office,* INDEP. (LONDON), Dec. 29, 1991.

financing the solution to the campaign finance dilemmas and conundrums? Professor Smith says that any public financing system should be judged by how it performs on five factors: (1) it should be easy to administer; (2) be flexible enough to accommodate changed political realities; (3) encourage political opportunity for newcomers; (4) allow competitive races, particularly against incumbents; and (5) provide candidates with adequate funds to communicate with the voters. He is willing to acknowledge that government-financed campaigns may address some of the campaign finance problems such as inequality and candidate independence, but he is not particularly confident that such programs will either work or be enacted in good faith. Among his concerns are that government-funded programs will tend to have eligibility formulas that are geared to and reward past electoral success, while being unresponsive to current electoral needs or strengths (for example, a party gets funding if it polled more than 5% in the *last* election, but not if it currently has support of more than 5% of the voters). This can distort politics and lock in certain candidates and parties. The ugly battle in 2000 over who was the proper heir to Ross Perot's Reform Party and its $11 million federal presidential subsidy, based on the Party's 1996 performance, is an example of that problem.

Smith's main concern is that the government programs will be rigged either to discourage participation by new points of view or to force almost all candidates into the government system. The former concern is achieved by funding arrangements that set thresholds for eligibility high, yet spending ceilings relatively low. This way incumbents can make it hard for newcomers to qualify, but ensure that if they do, they will not be able to mount much of a campaign. Some schemes try to coerce candidates into the government system by employing mechanisms that make public funding the only reasonable alternative unless one is a millionaire. One device is to set contributions limits extremely low, so that it will be all but impossible to raise private money for a high-spending campaign, thus effectively forcing candidates into the system. Another device to keep them in the public financing system is to allow the spending ceilings to be raised if certain triggers are tripped by nonparticipating candidates or even outside groups

that run extensive campaigns.[49] In addition, with candidates dependent on government as with any other public benefits or subsidies program, the possibility of political manipulation can have a speech-suppressing effect. For example, Mayor Rudolph Giuliani's recent efforts to prevent New York City from offering an extremely generous $4 to $1 match for contributions has threatened to wreak havoc in the fledgling campaigns of a number of new candidates for seats on the New York City Council. Another problem is whether public financing schemes are designed only to benefit the two major parties and freeze out any other electoral competition.[50]

Another problem is whether public financing will actually increase political competitiveness. Smith observes that our track record at using campaign finance regulation to increase political participation and opportunity is a spotty one. Before the passage of the FECA, challengers in House races tended to raise about sixty-seven cents for every one dollar raised by incumbents. After FECA that number ultimately dropped to an all time low of twenty-five cents for challengers for every one dollar for incumbents, hardly a blow for reform.[51] Early experiments with public funding in Wisconsin and Minnesota do not contain clear evidence of a positive impact on increasing electoral competition. Whether newer schemes will produce more positive results remains to be seen. Perhaps we will have less "corruption" with public funding, but it is not clear that we will necessarily have more electoral competition.

There is one final problem with public financing. A real-

49. This describes Maine's "Clean Election" system, which was upheld against the challenge that it was designed to have the effect of forcing candidates into the limits-based public funding system by making it extremely difficult to raise private funds and by allowing a public match against any private candidate who tried to mount a strong privately-funded campaign. *See* Daggett v. Comm'n on Governmental Ethics and Election Practices, 205 F.3d 445 (1st Cir. 2000). Although that scheme made it relatively easy to meet the eligibility requirements, participation levels so far have apparently been a disappointing 35%. In the 2000 legislative elections, only 116 out of 352 candidates participated in the public funding system. *See* Mark Sappenfield, *Where It Pays To Fundraise*, CHRISTIAN SCI. MONITOR, Apr. 12, 2001.

50. That is what then-Justice William H. Rehnquist referred to in *Buckley* when he said the law "enshrined the Republican and Democratic Parties in a permanent preferred position." Buckley v. Valeo, 424 U.S. 1, 293 (1976) (Rehnquist, J., concurring in part and dissenting in part).

51. *See* SMITH, *supra* note 8, at 99.

world example suggests that public financing does not work. In one particular election there is full public funding, not a dime of private contributions, in which candidates can only spend what they receive from the government, yet it has led to what many claim are enormous abuses. I am referring to the system of presidential public financing, which has helped to spawn the soft money and issue advocacy systems which current legislation would try to outlaw or control. The reason is obvious: Despite the enormous public funds available for the major parties' presidential campaigns, the parties and concerned interest groups still feel the need to raise and spend more to get their messages out. While limits-driven public funding may work in some isolated local levels—New York City is frequently credited with having a "model" public financing program—on a national basis it is questionable whether limits will work as a central feature of such a plan.

Finally, there is an alternative approach which Professor Smith does not elaborate but which might serve both reform and free speech goals. That is a program of "floors without ceilings." It would make public benefits and resources available equally to all qualified candidates, but without requiring the acceptance of "voluntary" limits in return. All candidates would be eligible for a variety of benefits, not just a government check for their entire campaign, so that they are not dependent on just any one source. The public funds may not mean that much to the well-heeled candidate, but can provide a vital platform to the candidate without ample personal or other resources. While such a proposal has been called politically naive and with little chance of passage, how happy are people with the private system for funding congressional elections? Or with the presidential public funding system? Floors without ceilings may be the First Amendment-friendly way to provide public resources to candidates and campaigns. On the other hand, current legislative proposals, which are only about limits and contain no basic public benefits for candidates, can more properly be thought of as "ceilings without floors."

VII. HONORING THE CONSTITUTION

Having concluded that, as political and policy matters,

restrictions on private financing of campaigns do not work and that public financing of campaigns is problematic, Professor Smith then turns his attention to the constitutional arguments against restrictions on private financing.

This part of the book revisits the constitutional issues that were first raised and resolved in *Buckley* and which have not changed substantially since. *Buckley* has gotten bad press over the years, being compared to notorious cases such as *Lochner v. New York*[52] and *Plessy v. Ferguson*,[53] cases where the Court is thought to have veered off track by reading its own prejudices into the Constitution, requiring a generation before later courts could bring about a course correction. Three lines of attack have been advanced: (1) that it was wrong to treat limits on campaign funding as limits on campaign speech and thereby subject them to strict scrutiny; (2) that it was wrong to recognize "corruption or the appearance of corruption" as the only compelling interests which might justify controlling campaign funding—the Court should have allowed government to prevent the reality and appearance of undue influence as well; and (3) similarly, that the Court's refusal to allow government to "restrict the speech of some elements of our society in order to enhance the relative voice of others" was a failure to temper First Amendment rights with countervailing Equal Protection, one person one vote principles. In three crisp and well-reasoned chapters, Professor Smith addresses and, I think, effectively answers these critics of *Buckley*.

A. Is Money Speech?

That of course is not the question, but framing it that way has allowed *Buckley* critics to attack the ruling as saying that money is speech. Back then, as now, some took the position that the FECA did not limit speech, it simply limited the use of property, and therefore was subject to much less exacting judicial scrutiny.[54]

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52. 198 U.S. 45 (1905).

53. 163 U.S. 537 (1896).

54. That view was most prominently associated with Circuit Judge J. Skelly Wright, who sat on the appeals court that upheld all of the Act's funding limits and who wrote two law review articles condemning the *Buckley* ruling. *See* J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982); J. Skelly Wright, *Politics and the*

There were two arguments in *Buckley* as to why limiting political funding was not a direct limiting of political speech warranting strict scrutiny. The first was that giving and spending funds on political activity was "conduct," not speech, thereby subject to reasonable regulation like the hours of a parade.[55] A related argument was that limiting the amount of money spent on speech was akin to limiting the volume from a bullhorn: It regulated decibels not speech.[56] The "money is not speech" argument seems to be the weakest attack on *Buckley.* A law which says a person may not spend more than $1,000 on a newspaper ad is a law that limits that person's speech once that amount has been spent. Once the ceiling is reached, the limit acts as a continuing and permanent restraint on the person's ability to publish his opinion. True, a person remains free to utter and write words on the subject, but the costs of amplifying one's voice beyond one's immediate audience is effectively shut off and the speaker silenced.[57]

The Court took this common sense approach in noting that all of the essentials of effective communication in an age of mass communications required the expenditure of funds to be effective: money to print leaflets, banners, rent a hall, hire campaign aides, provide office expenses, all of which are necessary to get the message out. In the Court's analogy, campaign funding limits are like being free to exercise your right to travel and drive a car as far as you can on only one single tank of gas.[58] The Court rejected treatment of funding as

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Constitution: Is Money Speech?, 85 YALE L.J. 1001 (1976). In the current Court, Justice Stevens has squarely declared that regulation of campaign funding is merely regulation of property and easily subject to regulation: "I make one simple point. Money is property; it is not speech." Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897, 910 (2000) (Stevens, J., concurring).

55. *See Buckley,* 424 U.S. at 16-17 (relying primarily on United States v. O'Brien, 391 U.S. 367 (1968), which upheld prosecution for burning a draft card in symbolic protest against the war in Vietnam).

56. *See Buckley,* 424 U.S. at 18 n.17 (relying on Kovacs v. Cooper, 336 U.S. 77 (1949), which had upheld the authority of a municipality to ban sound trucks which emitted "loud and raucous" noises).

57. By the same token, a law which said a person could spend no more than $1,000 in a year on his or her religious activities or contribute no more than $1,000 a year to the church of his or her choice, would surely be found to "prohibit the free exercise" of religion. No less should be said of a law which abridges the parallel rights of free speech in a comparable way. With regard to both religious activity and political speech, the First Amendment commands that government be neutral and agnostic.

58. *See Buckley,* 424 U.S. at 19 n.18.

though it were conduct, reasoning that the limits directly restrained speech: "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[59]

Treating limits on funding as limits on speech was also consistent with cases the Court had decided before *Buckley* and that the Court has decided since. For example, the challengers in *Buckley* centrally relied on the landmark citizen-advocacy case of *New York Times Co. v. Sullivan*,[60] a case which is often celebrated even by those who have disdain for *Buckley*,[61] where the Court held that just because a civil rights issue advertisement in a newspaper had been purchased did not turn it into a regulatable commercial transaction or otherwise deprive it of First Amendment protection. Since *Sullivan*, the Court has repeatedly recognized the crucial link between limits on funding and limits on speech. When New York said that publishers could not pay convicted criminals for writing about their crimes, the Court dispatched the restraint handily even though the restraint was less stifling than *Buckley*'s funding limits. Under the New York statute, the convicts could still publish as long as they were not paid.[62] The Court had no trouble finding the law a content-based restraint on speech requiring and failing strict scrutiny.[63] Likewise, when Congress said that federal employees could not receive moonlighting fees for "an appearance, speech or article," another restraint that in no way prevented an article from being written or a speech from being given, the Court found that this prohibition on being paid "unquestionably impose[d] a significant burden on expressive activity,"[64] and struck it down even though it

59. *Id.* at 19.

60. 376 U.S. 254 (1964).

61. *See, e.g.*, ANTHONY LEWIS, MAKE NO LAW (1991).

62. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991).

63. *Id.* at 116-18.

64. United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 468 (1995). The majority opinion was written by Justice Stevens, who thinks that in the campaign finance setting money is property, not speech; yet, he was not willing to tell the government worker that the ban on speech honoraria was only a property restriction.

involved government employees, who generally have fewer or lesser First Amendment rights than other citizens.[65]

Lastly, there are critics of *Buckley* who do not hesitate to invoke the First Amendment when the government withholds funds from certain groups on certain conditions that interfere with those groups' expression. So, for example, when the government said that public funds could not be used to counsel abortion, it was argued to be an impermissible restriction of speech,[66] and when government said that legal-services organizations could not use government funds to make certain arguments on behalf of clients in court, that was similarly claimed to violate the free-speech guarantee of the First Amendment.[67] But, when government tells private citizens and groups that they may not use their *own* funds to spread their own message, that is dismissed as a regulation of conduct rather than a restriction on speech. I don't think one can have this argument both ways.

B. Are Campaign Finance Limitations Subject to Strict Scrutiny?

Once it is determined that limits on the giving or spending of campaign funds are limitations on the campaign speech they support, the remaining question is whether the law is a content-based restriction that can withstand strict scrutiny. On its face, a campaign finance limitation is based on content because what triggers it is giving or spending money "for the purpose of influencing" the outcome of an election or for "expressly advocating the election or defeat" of a federal candidate.[68] The explicit political content of the speech or activity subjects it to the rigors of the law. Also, the desire to regulate campaign expenditures is triggered by the impact the message will have on the audience. For these reasons, the

65. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) ("[The] State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in [regulating] the speech of the citizenry in general.").

66. *See* Rust v. Sullivan, 500 U.S. 173, 193 (1991). Nevertheless, the Court in *Rust* ruled the government action constitutional.

67. The Supreme Court, happily, agreed. *See* Legal Servs. Corp. v. Velazquez, 121 S. Ct. 1043 (2001).

68. *See* 2 U.S.C. §§ 431(8)(a) (defining contribution), (9)(a) (defining expenditure), (17) (defining independent expenditure) (2000).

restraints are content-based.[69]

There is even a credible argument that campaign finance restrictions are viewpoint-based, the most suspect form of government regulation, in that they are motivated by a desire to suppress certain ideas. The debates over campaign finance reform are replete with references to the "special interest" money that dictates legislative outcomes. In almost all instances, the outcomes "dictated" are conservative outcomes and the special interests assaulted are right-wing or business and commercial interests. Thus, campaign finance reform is claimed to be necessary before we can have meaningful gun-control policies, meaningful environmental regulation, and a real patients' bill of rights. Without campaign finance reform, it is asserted, we are defenseless against laws that benefit the telecommunications industry, the pharmaceutical industry and, most recently, the banking and credit card industry, with its campaign contributions and lobbying for the bankruptcy reform bill. Although eighty-three Senators voted for that bill, thirty-six of them Democrats, we were still treated to nightly arguments that the bill was passed only because of campaign contributions by the big banks and credit card companies.[70] According to this criticism, banning these contributions could have prevented those bad bills. Rarely does one hear that we need campaign finance controls in order to advance conservative or business interests; one might suspect that campaign finance limits are basically a cover for liberal attacks on conservative interests.

Smith's conclusion concerning strict scrutiny seems unexceptional:

> Gifts of money, and the expenditure of money, are forms of speech. Across-the-board regulation of monetary gifts and spending is not content neutral, and if it were, one suspects that many of the most ardent campaign finance regulation proponents would lose interest in the subject. Campaign finance regulation attempts to limit speech precisely for its communicative value, and does so in ways that are not content neutral. Furthermore, it significantly interrupts the

69. *Cf.* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); United States v. O'Brien, 391 U.S. 367 (1968).

70. *See* 147 CONG. REC. 2324-27 (daily ed. Mar. 15, 2001) (remarks of Senator Wellstone).

> flow of information by silencing certain voices and limiting the total amount of communication between candidates and the public. Thus strict scrutiny, as provided for in *Buckley*, is entirely appropriate.[71]

Unfortunately, as Professor Smith's book shows, the *Buckley* Court applied strict scrutiny in a less than strictly consistent way.

C. Do Campaign Finance Limitations Survive Strict Scrutiny?

1. The Interest in Controlling "Skyrocketing" Campaign Spending

Three interests were claimed by supporters of the limitations in *Buckley* to be sufficiently compelling to justify the across-the-board restraints on political giving and spending that Congress had imposed.[72] The first interest asserted was the putative need to control skyrocketing costs that had made political campaigns too expensive, causing them to degenerate into "Romanesque political extravagances."[73] That interest was rejected as illicit by the Court with a burst of First Amendment absolutism: "In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign."[74]

2. The Interest in Preventing "Corruption" or the "Appearance of Corruption"

The one interest the *Buckley* Court held to be compelling was the interest in guarding against "corruption" or "the appearance of corruption." While this interest could not sustain limits on personal expenditures, campaign-committee expenditures, or independent-group expenditures because the link to corruption was too attenuated,[75] the interest could

71. SMITH, *supra* note 8, at 121 (citing Buckley v. Valeo, 424 U.S. 1, 16 (1976)).
72. *See* Buckley v. Valeo, 424 U.S. 1, 25-26 (1976).
73. *Id.* at 26; *see also* Buckley v. Valeo, 519 F.2d. 821, 897 (D.C. Cir. 1975) (en banc).
74. *Buckley*, 424 U.S. at 57.
75. *See id.* at 45-46, 53, 55-56.

sustain limits on "large" contributions.[76] The Court comforted itself in drawing the much-criticized expenditure/contribution distinction by reasoning that contributions to a candidate or cause are somehow lesser speech—"symbolic" or "proxy" speech that is less deserving of protection. Making a political contribution, however, is the most wide-spread form of political participation, next only to voting. Moreover, anyone who has been angered by something on the evening news and then dashed off a small check to some cause addressing that issue knows how making a contribution to a candidate or cause is a fundamental political act, like voting, signing a petition, or writing a letter to the editor. By putting the "proxy speech" label on contributions, the Court was able to give the restriction indifferent scrutiny.

This lesser scrutiny took the form of accepting the claims, based on intuition and anecdotal evidence, that large *disclosed* contributions were inherently likely to corrupt and required a prophylactic ceiling, regardless of the circumstances of the contribution or the motivation of the contributor. The Court accepted the incantation, repeated today like a mantra, that contributions "corrupt the system," and "large contributions" improperly buy access and influence. In these claims of corruption, no specific representative is charged with acting corruptly, but "the system" is corrupt or corrupting. The allegation is simply made that large contributions by interested industries to candidates and parties skew legislative outcomes. For example, such claims were made during this season's debate over bankruptcy reform, but none of the eighty-three Senators who voted for the bill has been identified as corrupt. These allegations are similar to claims made a generation ago, also with little effort to identify individual perpetrators, that communism was "corrupting" the government.[77] Likewise, the

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76. *See id.* at 26-27.

77. *See* George Will, *Drops in the Bucket*, WASH. POST, Mar. 21, 2001, at A29.

> McCainism, the McCarthyism of today's "progressives," involves, as McCarthyism did, the reckless hurling of imprecise accusations. Then, the accusation was "communism!" Today it is "corruption!" Pandemic corruption of "everybody" by "the system" supposedly justifies campaign finance reforms. Those reforms would subject the rights of political speech and association to yet further government limits and supervision, by restricting the political contributions and expenditures that are indispensable for communication in modern society.

Court's watered-down deferential standard in the face of claimed "corruption" is reminiscent of formulas used to sustain investigations of communism and subversion a generation ago.[78] The normal First Amendment insistence that there be a direct link shown connecting the speech and the harm allegedly flowing from the speech[79] has been short-circuited. Perpetuating the contribution/ expenditure distinction with minimal inquiry and treating contributions to candidates as a First Amendment stepchild has forced the law in this area into the detailed speech code and "covert speech" phenomenon that Justice Kennedy bemoaned in his *Nixon v. Shrink Missouri Government PAC* dissent.[80]

Professor Smith, on the other hand, points to studies that "have consistently found little or no connection between campaign contributions and legislative action."[81] Unfortunately, the Court brushed aside such studies in its recent decision in *Shrink Missouri Government PAC*.[82] Requiring of the government little more than assertion and intuition, the Court upheld a $1,000 contribution ceiling on donations in state elections. The Court reasoned that the government was to be given deference in trying to protect not just against "corruption," but also against "the perception of corruption" in a system where there are large private contributions to political candidates.[83] Professor Smith concludes that "the weakest portion of the *Buckley* decision and its progeny, from a standpoint of constitutional doctrine, is not that portion which struck down spending limits but rather that portion which relies on the anti-corruption rationale to justify limits on contributions."[84]

Id.

78. For an example of the Court's reasoning in the communism cases, see *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

79. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Brandenburg v. Ohio, 395 U.S. 444 (1969).

80. 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting).

81. SMITH, *supra* note 8, at 127.

82. *Shrink Mo.*, 528 U.S. at 377 (2000).

83. *Id.* at 390.

84. SMITH, *supra* note 8, at 136.

3. The Interest in "Equalizing" Political Speech

To the extent that the concern with contributions is about unequal access by contributors to politicians, rather than undue influence, the concern is not about corruption, but about equality, the other argument claimed to sustain systematic campaign finance controls.[85] For example, the current push to ban soft money and restrict independent-advocacy campaigns, based in part on the corruption claim, is also based on the proposition that rich people and organizations are "drowning out" other voices.

The goal of equalizing political voices was the third compelling interest asserted by supporters of the limitations in *Buckley*.[86] This claim was rejected by the Court as an impermissible objective:

> [T]he 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, *which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"*[87]

The part of *Buckley* that draws the greatest ire is the first part of this passage, in which the Court states that limiting one person's speech in order to enhance that of another is "wholly foreign to the First Amendment." Frequently omitted in these arguments, however, is the rest of the sentence, which emphasizes that the reason for this is to insure that the public receive as much information as possible from a variety of diverse and antagonistic sources.

Justified rhetorically by phrases like "leveling the playing field," that rich people shouldn't "buy elections," and honoring the principle of "one person, one vote," the campaign finance advocates and their enablers in the academy have been pressing for limits on campaign funding on the claim that democracy and the First Amendment each embody an

85. *See* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997).

86. Buckley v. Valeo, 424 U.S. 1, 25-26 (1976).

87. *Id.* at 48-49 (emphasis added) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964) (citations omitted)).

egalitarian imperative that justifies, if not compels, such restraints. It takes a good deal of intellectual heavy lifting to transform the libertarian, negative text, and doctrinal history of the First Amendment, as well as the Equal Protection Clause, into a theory that permits government management and modulation of the free marketplace of ideas.[88] Based on "republican" or "communitarian" concepts of the need to accommodate individual rights to societal needs, two approaches have emerged to justify campaign funding controls on equality or egalitarian grounds.[89]

One approach, described as the "enhancement theory," holds that there some ideas and speakers are under-represented and under-heard and that government is partly responsible for creating the property rights framework in which some have greater economic resources enabling them to speak or publish while others remain silenced. Because government is partially responsible for this imbalance, it is permissible for government to take steps to right the balance by testing campaign finance restrictions through the prism of a "democracy-centered" reading of the Constitution. This concept, however, reintroduces the same problem of whether the interests of equal participation can justify restraining individual speech. In particular, this theme raises two problems: (1) how to identify

88. The effort was first attempted in the late 1960s under the rubric "access to the media." The theory was that, because the ownership of the news media was concentrated in a few corporate hands, the government had to guarantee individual access in order to prevent corporate owners from monopolizing the marketplace of ideas. For a forceful articulation of this theory, see Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). Aided by the physical limitations on the number of television frequencies, the theory had a modicum of success in the broadcasting area. *Compare* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding an FCC order that a broadcaster must provide reply time ito the object of a personal attack in a program) *and* CBS, Inc. v. FCC, 453 U.S. 367 (1981) (holding that broadcasters must provide "reasonable access" to a candidate for federal office), *with* Columbia Broadcasting, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (holding that broadcasters were not required to accept paid editorials). The theory failed spectacularly in the print media context when the Court unanimously rejected a newspaper "right of reply" statute sought to be justified on a modulating theory of the First Amendment. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

89. *See* SMITH, *supra* note 8, at 138 (citing Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055 (1999); Cass Sunstein, *Free Speech Now*, *in* THE BILL OF RIGHTS AND THE MODERN STATE (Geoffrey R. Stone et al. eds., 1992)).

which ideas or speakers have been under-represented; and (2) how to develop governmental mechanisms to make that assessment and administer the enhancement.

Deciding whose speech is underrepresented under such a regime raises intractable First Amendment concerns. What about the speech of rich people that seems to favor the despised and the disenfranchised? Does that become privileged because of its objective? If you lavishly fund a campaign finance "reform" organization, that is democratic speech. But, if you fund an organization that opposes campaign finance limits on the ground that it will harm democracy, is that subject to democratic restraint? Carried to the extreme, these enhancement theories become the worst kind of excuse for government censorship of views on "the right," i.e., bald-faced viewpoint-based suppression of speech.

Another problem with these theories is that the government mechanism would have to be all encompassing, equalizing, or enhancing, not only of speech by candidates and parties, but of speech by issue organizations and the media as well, in order to make sure no one group or individual has too much influence because of their wealth and resources.[90] The kind of war-time-style regime necessary to manage this system seems "wholly foreign to the First Amendment." Although some of the rhetoric in support of a ban on soft money or well-funded issue advocacy within two months of an election is steeped in the equality rational, even those heavy regulatory campaign finance bills are tame by comparison to some of these proposals.

Finally, there is an even more ambitious, egalitarian approach that Professor Smith assesses. This approach, anchored in the theory that such action is not only permitted by the First Amendment but required by the Equal Protection Clause, would seek equal speech status for all voters or citizens by outlawing all private financing of politics. Instead, the government would fund all partisan politics either with direct and equal grants to all viable candidates or by providing voters

90. One scholar, Richard Hasen, has honestly pursued the theory to its logical extreme and would include the news media and their owners in campaign finance controls and regulations in order to pursue the egalitarian ideal. Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999).

with vouchers that they could give to the party or candidate of their choice, who could use only those vouchers for their campaigns. This is basically a proposal to nationalize politics. Neither the state action doctrine, the "one person, one vote" rule, the right to vote, nor the combination of all of those concepts can comfortably be stretched so far as to require treating candidates, parties, and issue groups as though they were government employees and political speech contrary to government as though it was government speech. "One person, one vote" is a rule for the ballot box, not the soap box, and cannot support a regime of "one person, one paragraph."

VIII. FACING THE FUTURE

Well, as Lenin once asked, "What is to be Done?" If corruption, equality, sound public policy, and democratic values cannot justify campaign finance limits, and public financing is a flawed and partial remedy, what does Professor Smith propose instead? Part III of his book addresses this question. Anyone who has read this far will not be surprised at his proposed solutions.

A. The Dead Ends of Regulatory Reform

Chapter 9, "Unfree Speech: The Future of Regulatory 'Reform,'" is a reprise of Smith's criticisms of the regulatory approach to campaign finance and a critique of the current proposals that embody that approach, most notably the McCain-Feingold Bill. Smith begins by noting that as government grows and elections proliferate there is a need for more campaign finance rather than less, especially in the United States, which "spends" less on campaigns and campaign communication per eligible voter than many other modern democracies.[91] Elections matter more than ever before, so why would we possibly want to conduct them with fewer resources than ever before? That is why bills like McCain-Feingold, which are avowedly about getting certain kinds of money "out of politics," seem to be such a big step in precisely the wrong direction.

In various incarnations, such bills serve to limit speech and

91. SMITH, *supra* note 8, at 42.

insulate incumbents from challenge. First, in various ways, they would reduce the amount of funds available to candidates. Some provisions would pressure candidates to accept "voluntary" spending ceilings by offering various incentives like free or sharply reduced television rates or increased contribution limits. Usually, the "voluntary" limits are pro-incumbent because they are set at just the level where challengers could start waging competitive campaigns against incumbents. Other provisions would ban PACs entirely or prohibit candidates from receiving contributions from out-of-state or out-of-district. While many PACs represent entrenched and powerful interests, others are vehicles that give voice to hundreds of thousands, if not millions, of individual Americans. PACs allow these individuals to pool their relatively small contributions into larger and more effective voices that will support challengers or candidates ideologically-attuned with the contributors.

Second, the bills would attack "issue advocacy," which has long been held constitutionally immune from the reach of campaign finance laws. As the courts have made clear, from the impeachment ad case through *Buckley* and dozens of later decisions, independent groups and individuals who comment on, criticize, praise, support, or oppose the actions or stands of candidates may not be subject to campaign finance regulation unless their speech "expressly advocates" the election or defeat of those candidates.[92] This rule, properly compelled by the First Amendment, is necessary to protect vital issue discussion from the campaign finance regulatory machine. In recent years the reform movement has attacked this rule by arguing that many issue ads are really "sham issue ads" or "phony issue ads" that are the functional equivalent of campaign ads. The critics claim that the ads are designed to affect electoral outcomes while steering clear of regulation by avoiding what are pejoratively called the "magic words," such as "vote for" or "vote against." Instead, the ads often criticize a candidate and then urge citizens to contact that candidate. The proposed remedy: Regulate or even ban any advertisement broadcast or run

92. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 42-45 (1976); FEC v. Christian Action Network, Inc., 110 F.3d 1049 (4th Cir. 1997); FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45 (2d Cir. 1980) (en banc).

within sixty days of an election that even mentions the name of a person who is running for federal office.[93]

Such an incredibly overbroad rule would insulate politicians, especially incumbents, from much effective criticism of their records or positions during an election season. It would also prevent any effective public commentary on legislative proposals pending during that blackout period because one could not mention the name of any legislator, either a sponsor or the one to contact. Thus, for example, it would be a crime to run an ad criticizing the McCain-Feingold Bill if either McCain or Feingold were a candidate for federal office. Had Senator McCain's bill been the law during the 2000 presidential primary season (a series of federal elections spanning six months), any organized public criticism of the McCain-Feingold Bill would be potentially illegal. Therefore, a bill that Senator McCain had premised his entire presidential campaign on could not be publicly challenged by those who questioned it. While there have been some recent academic efforts to justify such a restraint,[94] the courts have spoken with almost one voice in rejecting legislative or administrative attempts to water down the express advocacy doctrine.[95]

Finally, perhaps the most well-known feature of these reform proposals is the effort to ban soft-money fund raising by political parties. This too would benefit incumbents and hurt challengers. Parties raise soft money from sources that are barred from directly contributing to candidates—corporations, unions and rich individuals and use it for activities not directly

93. Section 201 of the McCain-Feingold Bill defines an "electioneering communication" as "any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office; [and] is made within 60 days before a general, special, or runoff election for such Federal office; or 30 days before a primary or preference election or caucus of a party that has authority to nominate a candidate, for such Federal office; and is made to an audience that includes members of the electorate for such election, convention, or caucus." S.22, 107th Cong. § 201(3)(A) (2001) (passed by Senate April 2, 2001). Because of the breadth of coverage, the section has to explicitly exempt broadcast media themselves. *See id.* at § 201(B)(i).

94. *See* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751 (1999); Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265 (2000). *But see* Lillian R. BeVier, *Mandatory Disclosure, "Sham Issue Advocacy," and* Buckley v. Valeo*: A Response to Professor Hasen*, 48 UCLA L. REV. 285 (2000).

95. *See* cases cited *supra* note 92.

connected with federal campaigns, such as issue advocacy, recruitment and development of candidates at the state and local level, printing slate cards, bumper stickers, and other party paraphernalia, voter registration activity, and get-out-the-vote drives. All of these activities, many of which are also engaged in by corporations, unions, and even church groups, are the stuff of democracy. In addition, parties are particularly helpful in supporting challengers to incumbents. Yet, the proposed bills, because of the insistence that soft money contributions to parties "corrupt the process," would completely outlaw such funding and thereby eliminate the parties' ability to engage in all of this grassroots activity. To starve political parties out of concern for the attenuated possibility of undue influence or, more likely, special access, is a remedy that throws out the baby with the bath water.

Nor, Professor Smith suggests, should we start down the road of total public funding of campaigns, which will result in less speech and which will inevitably result in pressures to regulate outside voices that are not subject to the limits that will inevitably accompany full public funding. After all, why limit the candidates through conditions on public funding while outside groups and the news media remain free to campaign and effect electoral outcomes without limit? How long do you think politicians will stand for that wild card? Even worse and bordering on totalitarian are schemes, so far happily confined to the pages of law reviews, that would assign to each citizen a government voucher representing a small and equal amount of campaign resources, say $100 per person.[96] The citizen would then give that voucher to a candidate, party, or cause, or perhaps spend that $100 themselves, for political speech or activity. No other funding of politics would be allowed. All citizens would be allowed $100 of political input and influence—no more, no less. This would not, however, deal with the problem of privately-owned-and-funded issue organizations, foundations, news media, and internal membership communications by corporations, labor unions, and enormous groups like the League of Women Voters or AARP, which could seriously influence the climate of

96. *See* SMITH, *supra* note 8, at 153.

public opinion. Beyond that, there would also be the problem of funding speech about ballot questions and initiatives, not to mention the funding of all lobbying activity, which can certainly impact legislative outcomes. Some of the proposals would require newspapers to fund their editorial endorsements out of individual citizen coupons or vouchers.[97] One hardly knows whether to label such proposals utopian, quixotic, or totalitarian. Winston Smith might find them familiar,[98] but James Madison certainly would not.[99] It is hard to imagine anything further from the minds of the framers than such total government control over political speech.

B. Open Roads

So, then, what can be done? Professor Smith's book concludes with a number of prescriptions. First, he urges us to abandon the fixation that limiting or eliminating private financing of campaigns will achieve equality, level the playing field, deliver the promise of "one person, one vote," or otherwise achieve an egalitarian nirvana. Getting the money out of politics will result in the injection into politics of things controlled by other elites: media elites, including reporters, writers, editors, and publishers, who control the channels of communication and who, are often decidedly partisan in their views; entertainment elites who can command popular support and attention; professional elites who provide critical political advice and counsel; and academic and cultural elites who can change the political and social culture in which politics goes forward and thereby set the terms of the public debate. It is a chimera to try to go from equality of vote at the ballot box on election day to equality of political influence all year long.

Second, we should stop equating attempts to use one's

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97. *See, e.g.*, Hasen, *supra* note 90.

98. *See* GEORGE ORWELL, 1984 (1948).

99. *See* THE FEDERALIST NO. 10, at 405 (James Madison) (Clinton Rossiter ed., 1961).

> Liberty is to faction, what air is to fire, an ailment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

Id.

resources to influence the outcome of elections or the passage of legislation with "corruption." That is not corruption—it is politics and democracy. "[W]e must recognize that campaign contributions are not the same as votes. Money is not stuffed into ballot boxes; winners are not determined by counting donations or net worth."[100] Instead, "we must make an honest assessment of the level of corruption that exists in government," and realize that campaign finance does not involve legislators' lining their pockets for their personal use and rarely involves legislators changing their position on legislation in direct response to campaign contributions or support.[101]

If limits are not the answer, is disclosure? Chief Justice Warren Burger thought that disclosure was a less drastic and more appropriate remedy for the concern with corruption and undue influence flowing from campaign contributions.[102] The ACLU has supported disclosure of large contributions to mainstream party candidates for similar reasons.[103] Professor Smith, however, flouting conventional wisdom on this point as well, reminds us that disclosure as a solution also has serious problems. Disclosure violates the right to engage in or support speech anonymously that protects the speaker or the supporter against retaliation and chilling effect. By Smith's lights, *McIntyre v. Ohio Elections Commission*,[104] which rejected the need for and the validity of disclosure of the name of a person who printed and distributed leaflets, should be the norm. Indeed, other than the *Buckley* Court's upholding of disclosure of the names of persons who gave even as little as $11 to a political campaign, the only other time the Court has upheld disclosure of political activity is in *Communist Party v. Subversive Activities Control Board*,[105] where the Court, in what was not its finest

100. SMITH, *supra* note 8, at 215.
101. *Id.* at 217.
102. Buckley v. Valeo, 424 U.S. 1, 236 (1976) (Burger, C.J., concurring in part and dissenting in part).
103. *See* American Civil Liberties Union, Policy #35: Free Speech for Government Officials and Personnel Policy, *in* Policy Guide of the American Civil Liberties Union 75, 75-76 (1986) (unpublished document) (on file with the Harvard Law School Library).
104. 514 U.S. 334 (1995).
105. 367 U.S. 1 (1961).

hour, upheld government registration and disclosure of the American Communist Party. The better rule is the one fashioned in *McIntyre* and a line of cases protecting the right of the NAACP and other organizations to not disclose the identities of their members and supporters.[106] That should be the constitutional norm.

In Smith's refreshing perspective, we should judge candidates on the basis of their ideas, their stands on issues, and their actions in office, not on the basis of who supports them. After all, as Curtis Gans likes to point out, the most progressive and far-reaching liberal legislative achievements of the last half of the 20th century, including public policy landmarks like the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Medicare Act, the Clean Air Act, and the Clean Water Act, were passed in a time when politicians often received campaign contributions in cash in brown paper bags with no disclosure whatsoever.[107] The link between campaign finance controls and good government is not inextricable.

So, no limits, no public funding, and, it turns out, no disclosure. What is left to provide our campaign finance rules and serve as our system for funding and managing our politics? Professor Smith has an answer:

> There is a system, however, that can meet the criteria of a successful regulatory system—that is, one that is flexible and easy to administer; that provides adequate information to voters; that lowers barriers to political activity and fosters competitiveness; that combats alleged influence peddling and increases official accountability; and that promotes true equality. It is one with which Americans are familiar, even if it has, at times, been forgotten in the enthusiasm to regulate campaign finance in recent years. . . .[108]

It is, of course, the First Amendment. It would not just be, Smith observes, a libertarian barrier to government regulation of speech, although it is surely at least that. It would also serve as a governing document that sets the terms in which elections should be conducted: freedom of speech and press are assured

106. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449 (1958).

107. *See* 143 CONG. REC. S10, 133-35 (daily ed. Sept. 29, 1997) (statement of Sen. Bennet) (quoting Curtis Gans).

108. SMITH, *supra* note 8, at 225.

to ensure that voters will get as much information as possible to make an informed choice at the polls; government is kept out of the political debate as much as possible in order to assure a full debate and a minimum amount of incumbent self-dealing; and excessive regulation of political activity is prohibited so that grassroots and citizen advocates can be heard. Professor Smith concludes that, since 1907, we have attempted to regulate political speech in the guise of campaign finance reform and that this has been folly. The solution to this folly, as well as the best campaign reform law ever written, is readily at hand. It begins: "Congress shall make no law . . . ."