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The Sirens' Song: Campaign Finance Regulation and the First Amendment

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THE SIRENS' SONG: CAMPAIGN FINANCE REGULATION AND THE FIRST AMENDMENT

Bradley A. Smith[*]

Listen with care
to this, now, and a god will arm your mind.
Square in your ship's path are Seirenes, crying
beauty to bewitch men coasting by;
woe to the innocent who hears that sound![1]

INTRODUCTION

After the elections of 1996, it is clear that the campaign finance regulation system for federal elections is not working. At the presidential level, the system is in danger of becoming a mockery. Despite spending limits designed to keep campaign costs lower, it is estimated that, upon final tally, some $800 million will actually have been legally spent on the 1996 presidential race.[2] At the congressional level, parties, candidates and interest groups have learned how to work around legal restrictions on contributions. The result is an increasingly dishonest campaign in which advertisements touting candidates are used for "party building," advertisements intended to help elect or defeat candidates pretend not to advocate such outcomes, and parties are forced to campaign independently of their candidates.[3]

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[1] HOMER, THE ODYSSEY 210 (Book 12) (Robert Fitzgerald trans., 1963).

[2] Center for Responsive Politics, *Report on 1996 Elections* (visited Oct.17, 1996) <http://www.crp.org/1996elect/statemnt.html>.

[3] *See* Colorado Republican Campaign Comm. v. Federal Elections Comm'n, 116 S. Ct. 2309 (1996) (holding that limits on political party spending in support of candidates are unconstitutional, so long as parties spend the money indepen-

Despite these problems, reform of the system is hardly a foregone conclusion. First, there is no general consensus on what, if anything, should be done. As Congress addresses the reform issue in 1997, the most popular proposed measure calls for overall limits on campaign spending.[4] However, the Speaker of the House has opined that more should be spent on campaigns.[5] Such differences of opinion are shaped, in part, by political calculation—a strong barrier to change. It is relatively easy to design campaign finance regulation so as to help one's friends and hurt one's enemies.[6] So long as each major party has sufficient Senate votes to block reform through use of the filibuster, reforms

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dently of the candidates' campaigns).

[4] *See* H.R. 493, 105th Cong. § 101 (1997). The author will refer to this bill by its popular name, Shays-Meehan, after its primary House sponsors. *See also* S. 25, 105th Cong. § 101 (1997). The author will refer to this bill by its popular name, McCain-Feingold, for its Senate sponsors. *See* James Bennett, *Congressmen Say President Will Push Campaign Reform*, N.Y. TIMES, Jan. 24, 1997, at A18 (considering the status of the Shays-Meehan bill and the McCain-Feingold bill, which are widely viewed as companion bills despite some differences, as the primary legislative proposal in the 105th Congress). It may seem ironic that the President, caught in a scandal over the financing of his 1996 campaign, should wholeheartedly endorse a campaign reform measure whose primary Senate sponsor, John McCain, was a member of the so-called "Keating Five," a group of United States senators involved in a fundraising scandal in the late 1980s. *See* LARRY SABATO & GLENN SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS 8-9 (1996). Both Senator McCain and President Clinton seem to blame "the system," rather than personal failings, for their apparent willingness to trade official favor for campaign donations. Both were easily re-elected to office.

[5] Editorial, *Newt Gingrich, Copycat*, N.Y. TIMES, Nov. 6, 1995, at A16. In the interest of full disclosure and blatant immodesty, the author notes that the Wall Street Journal reported that in calling for still more political spending, Speaker Gingrich was "following Mr. Smith." *The Man Who Ruined Politics*, WALL ST. J., Nov. 16, 1995, at A18 (the title of the editorial refers to former Common Cause President Fred Werthheimer). Speaker Gingrich, of course, has also been tripped up in finance scandals and reprimanded by the House of Representatives for improperly using tax-exempt organizations to further his campaign. *See* Adam Clymer, *House, In 395-28 Vote, Reprimands Gingrich*, N.Y. TIMES, Jan. 22, 1997, at A1.

[6] *See* Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted,* 18 HOFSTRA L. REV. 301, 335 (1989).

which disarm some groups while leaving others unscathed will remain in limbo.

Further, looming over all debates about campaign finance reform is the decision of the Supreme Court in *Buckley v. Valeo*.[7] *Buckley*, to the dismay of reformers and the delight of civil libertarians, has stood as an all but impregnable bulwark against the most ambitious campaign finance reform schemes. The Court in *Buckley*, under the rationale that only the actuality or appearance of *quid pro quo* corruption is a sufficiently compelling government interest to justify the First Amendment burdens of campaign finance regulation,[8] struck down limits on campaign expenditures made from personal wealth, limits on independent expenditures, and restrictions on "issue advocacy." *Buckley* has proven such a thorn in reformers' sides that many now seek to amend the Constitution to overrule *Buckley*.[9]

The clamor for reform is great, at least in political circles.[10] But, as the title of this symposium asks, "[w]ill anything work?" This question is asked with good reason, for this is not the first time that the United States has faced an alleged "crisis" over

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[7] 424 U.S. 1 (1976).

[8] *See* 424 U.S. at 26. The Court, in determining the constitutionality of the Federal Election Campaign Act, found that the primary purpose of the Act was to prevent real or imagined corruption from large contributors and, as such, justified a campaign contribution limitation of $1,000. *Id.* Even this rationale, however, was limited in application. While the Court saw corruption, or the appearance of corruption, as sufficient justification for the limitation of individual campaign contributions, the Court did not believe that this was sufficient justification for the limitation of independent campaign expenditures (that is, expenditures on behalf of a candidate but unconnected to the candidate's campaign). *Id.* at 26-28, 45. Moreover, the Court did not believe this was a sufficient justification for limiting the candidate's expenditure of his or her own funds. *Id.* at 26-28, 45, 53. Indeed, according to the Court's rationale, personal expenditures would reduce the probability of corruption. *Id.* at 53.

[9] The United States Senate, in a 61 to 38 vote, rejected a proposed constitutional amendment on March 18, 1997. *See* Eric Schmitt, *Senate Rejects Campaign Finance Amendment*, N.Y. TIMES, Mar. 19, 1997, at B3.

[10] The broader public seems rather ambivalent about the whole matter. *See* Bradley A. Smith, *A Most Uncommon Cause: Some Thoughts on Campaign Reform and a Response to Professor Paul*, CONN. L. REV. (forthcoming 1997).

campaign finance.[11] And, for those who remember Watergate, this is not merely the second such "crisis."[12] The question of campaign reform has been addressed at regular intervals for nearly a century. Nor is the current debate particularly unique, save for the suggestion in some quarters that a constitutional amendment be adopted to repeal the primary speech clauses of the First Amendment.[13] Though the legislative battles have usually been long and hard, after each such "crisis" of democracy our Congress has enacted a new wave of legislation, or regulation, in an effort to purge the political system of the allegedly "distorting" effects of money.[14] But, if what has been tried so far has failed to work, will anything work? For the reasons set forth in Part II of this essay, I believe not.

The problem with reform efforts is not merely that they do not work. The greater problem is the long term threat they pose to political liberty. With each new wave of campaign regulation, society has been told that the corresponding sacrifices to political freedom are small. Each wave of regulation, we have been promised, will clean up the political system, return power to the people and herald a bright new future for American political life. Yet the promise is never fulfilled. After each reform measure, the system has remained "corrupt" and "unequal." Indeed, it may have become even more corrupt and unequal. However, each time we are told that the situation could be remedied if we could plug a few

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[11] *See infra* Section II and accompanying footnotes (providing a history of campaign finance reform).

[12] *See infra* Section II (discussing crises in campaign finance in the 1830's and 1890's and steadily increasing spending levels throughout the twentieth century).

[13] *See* Wayne Berman, *12 Steps to Recovery: The G.O.P.'s Top Fund Raiser, Wayne Berman Offers His Plan to Fix the System,* TIME, July 14, 1997, at 44 (stating that some reform groups, such as the Common Cause, advocate positions that would "gut" the Bill of Rights); Cindy Richards, *Leading a Revolution by Pen, Not Sword,* CHI. SUN-TIMES, June 6, 1997, at 39 (indicating that former Senator Bill Bradley advocates amending the United States Constitution to allow federal, state and local governments to limit campaign spending).

[14] *See generally* ROBERT E. MUTCH, CAMPAIGNS, CONGRESSES, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 1-53 (1988).

more "loopholes" in the law.[15] This promise—the promise of "clean" elections, greater political equality and a return of power to "the people"—is the Siren song of campaign finance. It is pleasing to the ear and so we "crave to listen;"[16] we long to turn toward the sound. But like the song of the Sirens, which lured many sailors before Odysseus to their doom, the song of campaign finance reform is ultimately a path to the destruction of some of our most cherished freedoms.

Part I of this article briefly discusses the goals of campaign finance reform. Part II discusses the growth of political spending in America and the history of campaign finance reform efforts. This background having been established, Part III addresses the question posed by this symposium: "Will anything work?" The article concludes the answer must be "no," at least not if we value our traditional freedoms of speech and political participation. And because this is so, I suggest that, just as Odysseus had himself bound to the mast of his ship so as to resist the Sirens' call, we must bind ourselves to the First Amendment, lest we succumb to the pleasing but dangerous calls of campaign finance reformers.

I. THE AIMS OF REFORM

While those seeking greater regulation of campaign finance undoubtedly have varied and complex motives, their concerns may generally be lumped into two categories: the prevention of corruption and the promotion of equality.[17]

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[15] *See* Jonathan Rauch, *Campaign Finance: Blow It Up*, NAT'L J., Mar. 29, 1997, at 604 (noting that the effort to "plug loopholes feeds mindlessly on itself").

[16] HOMER, *supra* note 1, at 216.

[17] *See* Buckley v. Valeo, 424 U.S. 1, 25-26 (1976). Two other categories might be suggested. The first is based on principles of good government unrelated to equality or corruption concerns, such as Professor Blasi's concern about the effect on Congress of the need to devote time to fundraising. *See* 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, 1281-83 (1994). However, as this problem is largely the creation of past reform efforts limiting contributions in the name of equality and anti-corruption, it would be easily alleviated by the repeal of existing regulations.

Those who argue for campaign finance regulation in order to prevent legislative corruption generally view campaign contributions as a form of legalized bribery, at worst, or a marked constraint on a legislator's judgment and evaluation of issues, at best. Professor Strauss[18] has summarized this view as one in which "[c]andidates are 'bought' by their contributors and, in carrying out the duties of their office, they respond to contributors' wishes at the expense of other constituents and the public interest."[19] This fear of *quid pro quo* corruption seems to dominate most press reports, and corruption is also the central concern of the three highly publicized campaign finance exposés of the 1980s, as illustrated by their respective titles: Elizabeth Drew's *Politics and Money: The New Road to Corruption*;[20] Brooks Jackson's *Honest Graft: Big Money and the American Political Process*;[21] and Philip Stern's *The Best Congress Money Can Buy*.[22] This was also the type of "corruption" the Supreme Court seemed to have in mind when it upheld limits on contributions to candidates in *Buckley*.[23]

The second additional concern would be the potential for extortion of the private sector by government officials. David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 152 (1995). This concern is the flip side of the usual anti-corruption argument. Although it was once viewed as the most powerful argument for reform, it now is rarely mentioned by those seeking greater regulation, and so the author does not list it separately here.

[18] David A. Strauss is the Harry N. Wyatt Professor of Law at the University of Chicago.

[19] Strauss, *supra* note 17, at 143.

[20] ELIZABETH DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION (1983). Ms. Drew opens her book by arguing that the need for campaign funds leads candidates to "adjust their behavior in office to the need for money." *Id.* at 1.

[21] BROOKS JACKSON, HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS (1988). After an introductory chapter on the mechanics of raising money, Mr. Jackson begins his assault on political contributors with a story of outright, and clearly illegal, bribery. *Id.* at 29-30.

[22] PHILIP M. STERN, THE BEST CONGRESS MONEY CAN BUY (1988).

[23] Buckley v. Valeo, 424 U.S. 1, 26-27 (1976) ("To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.") (emphasis added).

The second concern is one of political equality. Here the argument is that equality at the voting booth is not adequate; rather, citizens must be equal at earlier stages of the political process.[24] The greatest perceived inequality, in these earlier stages, is monetary inequality.[25] Asserting that the democratic norm of "one person/one vote" is not met merely by an equal vote at the end of the campaign, reformers argue that efforts must be made to enhance the voices of some, or silence others, to assure some degree of true equality.[26] Although this view is not particularly prevalent in

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[24] *See* Edward B. Foley, *Equal Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1204 (1994) (proposing that each voter should have "equal financial resources for purposes of supporting or opposing any candidate or initiative on the ballot in any election held within the United States").

[25] *See, e.g., id.* (stating that wealthy citizens should not have greater participation in political decisions simply because of their greater wealth). *See also* David Cole, *First Amendment Antitrust: The End of Laissez Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 236-37 (1991) (discussing the way capitalism and a free market system conflict with and restrict democracy).

[26] *See* Cole, *supra* note 25, at 236, 243-44; Foley, *supra* note 24, at 1212-13, 1225-26. Some have gone so far as to argue that anti-corruption concerns are, in fact, also equality concerns. In essence, the argument contends, public officials should be responsive to the wishes of their constituents. Campaign contributions are a method by which citizens attempt to ensure that officials are responsive. Furthermore, assuming that contributions are truly spent on the campaign, and not for the personal enrichment of the candidate, they in many ways fill this role more effectively than votes. Constituents may register the intensity of their preferences with the size of their contributions and may also divide their contributions based on the extent to which they agree with the many policy positions of a given candidate. A vote, on the other hand, cannot be so divided to reflect any degree of agreement or intensity. Thus, contributions may indeed influence legislative decisions, but this is not necessarily bad. The problem is not that contributions are corrupting, but that the ability to make them is not equal. Some citizens have a better opportunity than others to purchase, if you will, policy outcomes. If, however, all citizens had equal means, the potentially corrupting effects of contributions would not be a problem. *See, e.g.*, Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian Defense of Campaign Vouchers*, 84 CAL. L. REV. 1, 14-18 (1996); Strauss, *supra* note 17, at 142-45. This view is vigorously, and, I think correctly, disputed by Professor Loewnstein. *See* Daniel Hays Lowenstein, *Campaign Contributions and Corruption: Comments on Strauss and Cain*, 1995 U. CHI. LEGAL F. 163, 165-74 (1995).

society-at-large, it enjoys a substantial popularity in legal academia.[27]

Of course, many argue that reform is needed for both anti-corruption and equality purposes, and the issues are closely linked.[28] The question that must be asked is whether either goal can be met within the constraints of a society in which people are free to speak and to participate in political activity. Answering this question first requires a brief history of campaign spending and reform efforts.

II. A HISTORY OF CAMPAIGN SPENDING AND REFORM

A. The Growth of Campaign Spending

In the colonial period and early years of the Republic, campaign finance was not an issue. In fact, most offices were not elective. Those that were frequently went uncontested and such elections as were held involved small electorates of propertied white men.[29] In George Washington's first bid for the Virginia House of Burgesses

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[27] *See, e.g.*, Cass R. Sunstein, *Free Speech Now*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 255 (Geoffrey R. Stone et al. eds., 1992); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian Public Choice Defense of Campaign Finance Ventures*, 84 CAL. L. REV. 1 (1996); Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935 (1993); Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. OF BOOKS, Oct. 17, 1996, at 19.

Neither concern, of course, is exclusively the province of one group. For example, Professor Lowenstein, one of the foremost academic writers, has made the prevention of corruption the centerpiece of several articles. *See* Daniel Hays Lowenstein, *Campaign Contributions and Corruption: Comments on Strauss and Cain*, 1995 U. CHI. LEGAL F. 163 (1995); Lowenstein, *supra* note 6, at 301; Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784 (1985). At the same time, the populist writer Philip Stern includes equality concerns in his litany of complaints. STERN, *supra* note 22, at 4-5.

[28] *See, e.g.*, STERN, *supra* note 22, at 4-5; Strauss, *supra* note 17, at 143.

[29] *See* ROBERT J. DINKIN, CAMPAIGNING IN AMERICA 1-30 (1989); GEORGE THAYER, WHO SHAKES THE MONEY TREE? 25 (1973).

in 1757, for example, there were only 391 eligible voters.[30] Washington spent thirty-nine pounds to buy "treats" for voters.[31] In those early days, such campaign expenses as existed were typically paid from the candidate's own pocket, and went for food and drink, or the occasional pamphlet or piece of campaign literature.[32]

By the last decade of the eighteenth century, the rudiments of a party system were beginning to evolve, and both Federalist and Republican interests turned to newspapers as a primary mechanism for political campaigning. Both sides subsidized partisan editors and publications, and arranged for copies of newspapers to be distributed free of charge.[33] Partisan pamphlets, or "circulars," were widely distributed in an effort to reach voters.[34] From these early beginnings, campaign expenditures have grown steadily for most of the nation's history.[35]

By the 1830s, congressional races typically cost $3,000 to $4,000.[36] The 1830 gubernatorial race in Kentucky was estimated to cost $10,000 to $15,000,[37] the equivalent of over $200,000 today.[38] The United States Bank spent approximately $42,000 between 1830 and 1832 on literature and advertisements intended, in large part, to help defeat President Andrew Jackson in the

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[30] THAYER, *supra* note 29, at 25.

[31] DINKIN, *supra* note 29, at 3.

[32] DINKIN, *supra* note 29, at 3-4.

[33] HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, & POLITICAL REFORM 77 (1992); DINKIN, *supra* note 29, at 14-16.

[34] DINKIN, *supra* note 29, at 14. Thomas Jefferson spent considerable sums publishing partisan tracts, and also raised money from Philadelphia citizens to support pro-Republican newspapers. THAYER, *supra* note 29, at 26.

[35] *See infra* notes 36-52 and accompanying text (providing a brief history of campaign finance expenditures).

[36] DINKIN, *supra* note 29, at 40.

[37] DINKIN, *supra* note 29, at 40.

[38] Throughout this article, the author has converted nominal expenditures to current dollars using a consumer price index (CPI) converter developed by Oregon State University Professor Robert Sahr. It is located on the Internet at <http://www.orst.edu/dept/polsci/sahr/cpi96.html>.Sources cited throughout the text list amounts in nominal dollars; all conversions to current dollars were made by the author, using Professor Sahr's chart.

election of 1832.[39] In the presidential election of 1860, supporters of Abraham Lincoln reportedly spent some $100,000, while Ulysses S. Grant's winning campaign of 1872 cost approximately $250,000.[40] Just four years later, in 1876, Republican Rutherford B. Hayes and Democrat Samuel J. Tilden each spent over $900,000 or more than $11 million in current dollars.[41]

Costs again exploded in the 1890s. In 1892, Chicago mayoral candidate Carter Henry Harrison reportedly spent $500,000 (approximately $8.5 million today),[42] while a Chicago alderman candidate in 1895 raised a campaign fund of $100,000.[43] Then, in the presidential election of 1896, Republican National Chair Mark Hanna systematized fundraising to an unprecedented level and raised as much as $7 million (equivalent to approximately $140 million today) to support the campaign of William McKinley.[44] This amount would not be reached again, even in nominal dollars, until 1936.[45] Hanna raised much of this money from corporations and banks,[46] but large individual donors also became increasingly important in the late nineteenth and early twentieth centuries. For example, in 1904 Democratic candidate Alton B. Parker received approximately $700,000 from longtime party supporters August Belmont Jr. and Thomas Fortune Ryan.[47] At about the same time, to satisfy the monetary demands of campaigning, both parties made major efforts to attract money from small donors, with mixed success.[48]

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[39] THAYER, *supra* note 29, at 29.

[40] ALEXANDER, *supra* note 33, at 80, Table 5-1. President Lincoln himself spent some $400 in 1860 to subsidize a Republican newspaper in Illinois. ALEXANDER, *supra* note 33, at 80.

[41] ALEXANDER, *supra* note 33, at 80, Table 5-1. Tilden had been a major Democratic party donor in earlier campaigns, contributing $10,000 to the 1868 campaign (the equivalent of over $100,000 today). THAYER, *supra* note 29, at 35.

[42] THAYER, *supra* note 29, at 40.

[43] THAYER, *supra* note 29, at 42. The candidate, "Hinky Dink" Kenna, lost in part because his campaign kitty was stolen. THAYER, *supra* note 29, at 42.

[44] DINKIN, *supra* note 29, at 106.

[45] *See* ALEXANDER, *supra* note 33, at 80, Table 5-1.

[46] MUTCH, *supra* note 14, at xvii.

[47] DINKIN, *supra* note 29, at 106.

[48] DINKIN, *supra* note 29, at 107.

Spending crept up only gradually from the turn of the century through the 1940s, dampened in part by the Great Depression and World War II, which naturally limited the resources that could be spent on political activity.[49] In inflation adjusted dollars, combined Republican and Democratic spending in the 1948 presidential election was the lowest since 1880.[50]

However, in 1952 yet another wave of spending growth began,[51] that has continued, more or less unabated, to the present. Combined political spending at the local, state, and federal levels has since grown steadily from $140 million for the two year election cycle of 1951-52, to $200 million in 1963-64, to $540 million in 1975-76, to $1.2 billion in 1979-80, to $2.7 billion in 1988-89, and finally, to 3.5 billion in 1991-92.[52] For many, this spending growth is alarming in and of itself. Reform advocacy groups such as Common Cause, the League of Women Voters and the Center for Responsive Politics regularly put out breathless press releases on the steady growth of campaign spending.[53] Such alarm

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[49] *See* ALEXANDER, *supra* note 33, at 80, Table 5-1.

[50] *See* ALEXANDER, *supra* note 33, at 80, Table 5-1.

[51] ALEXANDER, *supra* note 33, at 79. Significantly, in 1952 a government freeze on new television stations ended. ALEXANDER, *supra* note 33, at 79.

[52] ALEXANDER, *supra* note 33, at 82, Table 5-2; HERBERT E. ALEXANDER & ANTHONY CORRADO, FINANCING THE 1992 ELECTION 1 (1995).

[53] FRANK SORAUF, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 25 (1992). Common Cause is a self-described nonpartisan, citizens' lobby that advocates campaign finance reform. The organization has 250,000 members and has "waged war against the undue power of money and speech interests in politics for 25 years." Kirk Victor, *Lobbying: Lost Cause?*, NAT'L J., Mar. 1, 1997, at 410. The League of Women Voters describes itself as "a nonpartisan organization that works to promote political responsibility through active informed participation of all citizens in their government." League of Women Voters, *Voters Guide Local Elections Saturday, May 3, 1997*, FORT WORTH STAR-TELEGRAM, Apr. 21, 1997, at 2.

is not uncommon in academic writing on the subject.[54] Therefore, it may be beneficial to review the reasons for spending growth.

B. The Reasons for the Steady Growth of Spending

There is no doubt that campaign spending has increased over the past 200 years in both "real" and nominal dollars.[55] However, it is worth noting that spending growth may be overstated because, until the last half century, much political spending was all but untrackable. Thus, early estimates are unreliable and probably understated.[56] If early spending was higher than most published estimates, and there is reason to believe this is so, then spending has not increased as much as the published figures show.

Whatever the actual increase, much of that increase is due to ordinary, mundane factors. The most obvious, of course, is general inflation.[57] One dollar in 1900, adjusted for inflation, is the equivalent of approximately twenty dollars today. In recent years,

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[54] *See generally* Charles D. Fervis & L. Gregory Ballard, *Independent Political Action Groups: New Life for the Fairness Doctrine*, 36 VAND. L. REV. 929 (1983); Michael J. Garrison, *Corporate Political Speech, Corporate Spending and First Amendment Doctrine*, 27 AM. BUS. L.J. 163 (1989); Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1132-33 (1994); Adam S. Tanenbaum, Comment, Day v. Holahan: *Crossroads in Campaign Finance Jurisprudence*, 84 GEO L.J. 151 (1995).

[55] *See supra* notes 36-52 and accompanying text (detailing historical increases in campaign finance expenditures).

[56] As an example of this unreliability, George Thayer points out that most scholars believe the total cost of James Buchanan's 1856 presidential campaign was approximately $25,000; yet one prominent Democrat of the time stated that Buchanan's victory was helped by spending $50,000 *more* than his Republican opponent, John Fremont. THAYER, *supra* note 29, at 31.

[57] *See* ALEXANDER, *supra* note 33, at 79. Campaign costs began to rise rapidly with the elections in 1952, the year in which new television stations were permitted to operate. ALEXANDER, *supra* note 33, at 79. By 1956, commercial stations had quadrupled in number. ALEXANDER, *supra* note 33, at 79. The history of radio and television in political campaigns is further discussed in Herbert E. Alexander, *Financing Presidential Campaigns, in* HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1789-1968, 3873 (Arthur M. Schlesinger, Jr. & Fred L. Israel eds., 1971).

prices for such indispensable campaign expenses as paper, postage and advertising have risen faster than general inflation,[58] so one would expect political spending to rise at a rate faster than the general inflation rate.

A second reason for the general growth of campaign expenditures is the growth of the electorate. The few dozen pounds which George Washington spent on his 1757 campaign for the Virginia House of Burgesses, a race with just 391 eligible voters, would amount to over two dollars per eligible voter in 1996 dollars. Today, many, if not most, races involving small electorates are conducted for less money, suggesting that much of the spending growth in congressional and legislative races is due to larger electorates.

Pure population growth has played a significant role in the growth of the electorate. However, the electorate has grown at a faster rate than the populace, for reasons which most people quite rightly favor. In most states, early elections were limited to white, male property owners.[59] This began to change during the early-nineteenth century and accelerated through the Jacksonian era.[60] States gradually dropped religious and property qualifications for voting.[61] The Fifteenth Amendment to the Constitution eliminated formal bans on voting based explicitly on race.[62] The Nineteenth Amendment enfranchised women[63] and the Twenty-Sixth Amendment gave eighteen year-olds the right to vote.[64] Statutory changes have also expanded the franchise. Especially notable is the Voting Rights Act of 1965, a stunning success in eliminating legal

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[58] *See* DAVID B. MAGLEBY & CANDICE J. NELSON, THE MONEY CHASE 63 (1990) (reporting that the price of postage and television advertising doubled from 1982 to 1988; the cost of paper also increased "dramatically"). General price inflation over the same period was approximately 20 percent. *See* Sahr, *supra* note 38.

[59] THAYER, *supra* note 29, at 24.

[60] ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 30 (1945).

[61] THAYER, *supra* note 29, at 28. *See generally* CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY 1760-1860 (1960).

[62] U.S. CONST. amend. XV (ratified in 1870).

[63] U.S. CONST. amend. XIX (ratified in 1920).

[64] U.S. CONST. amend. XXVI (ratified in 1971).

barriers to black voter registration in the South.[65] The Supreme Court also expanded the electorate, through a series of decisions striking down "grandfather clauses,"[66] whites-only primary elections,[67] bans on voting by citizens in the military,[68] poll taxes[69] and unduly long residency requirements.[70] Thus, candidates today are required to reach a far greater number of voters than their predecessors.

These larger electorates make it less likely that a candidate will personally know a substantial percentage of the electorate, making increased advertising necessary to inform voters about the candidates. Thus, the larger electorate not only increases total advertising expenditures, but also increases expenditures on a per voter basis as well. In fact, the amount spent per voter is considerably higher than in our nation's early days. Yet, over the past twenty years, a period marked by great concern over political spending, the amount spent per eligible voter has remained quite stable.[71] On a per voter basis, political spending in the United States remains lower than in many other democracies, some of which are considerably poorer.[72]

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[65] *See* Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING 7, 21 (Bernard Grofman & Chandler Davidson eds., 1992).

[66] Guinn v. United States, 238 U.S. 347, 355 (1915).

[67] Smith v. Allwright, 321 U.S. 649, 666 (1944) (striking down an internal party rule limiting voting in primary elections to white voters); Nixon v. Herndon, 273 U.S. 536, 541 (1927) (striking down a state statute limiting voting in primary elections to whites).

[68] Carrington v. Rash, 380 U.S. 89, 96 (1965).

[69] Harper v. Virginia Board of Elections, 383 U.S. 663, 666 (1966).

[70] Dunn v. Blumstein, 405 U.S. 330, 360 (1972).

[71] For example, since 1972, after the Votings Rights Act and the Twenty-Sixth Amendment greatly expanded the electorate, the amount spent per eligible voter in congressional races, in constant dollars, has hovered in a range from approximately $2.50 per eligible voter to $3.50 per eligible voter, inching up slightly in the highly competitive elections of 1994 and 1996. *See* FILIP PALDA, HOW MUCH IS YOUR VOTE WORTH? 9-10 (1994) (analyzing data from 1972-1992). Early 1996 numbers indicated that about $800 million was spent on congressional races, or about four dollars per eligible voter. Center for Responsive Politics, *supra* note 2.

[72] MAGLEBY & NELSON, *supra* note 58, at 43 (noting that Venezuela, West Germany, Israel, and Ireland spend more per voter than the United States).

Not only has the electorate grown, but the number of political offices which are filled by popular election is significantly higher today than in the early days of the republic. A majority of offices were appointed in colonial America; only after the Constitution was ratified did states gradually shift to popular elections.[73] Notwithstanding, a majority of states did not provide for popular election of presidential electors.[74] Subsequently, spending on political activity has risen with the number of offices up for election.

A third factor in the long increase in spending is the gradual democratization of campaign methods. Early campaigns were fought out primarily through highly partisan newspapers and circulars.[75] The campaign of 1840 is notable for the first large scale use of buttons, banners, parades and memorabilia.[76] In 1860 Stephan Douglas became the first presidential candidate to campaign extensively in person, but personal campaigning remained rare until well into the present century.[77] This more intensive style of campaigning gave voters more direct exposure to the candidates and created an atmosphere in which candidates were, and to this day are, expected to communicate directly to voters. Thus, campaign costs began to rise long before the advent of radio and television, forms of mass communication that later drove costs even higher. By 1928 nearly twenty percent of the Democratic National Committee's budget went to bring presidential candidate Al Smith's

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[73] DINKIN, *supra* note 29, at 11; THAYER, *supra* note 29, at 28 (noting change from appointed to elective offices beginning in the 1830s).

[74] THAYER, *supra* note 29, at 24-25.

[75] See *supra* notes 33-34 and accompanying text (noting the increased use of newspapers and pamphlets).

[76] ALEXANDER, *supra* note 33, at 78; DINKIN, *supra* note 29, at 49-53. This trend had begun in the elections of 1828, 1832 and 1836. *See* NATHAN MILLER, STEALING FROM AMERICA: A HISTORY OF CORRUPTION FROM JAMESTOWN TO REAGAN 116-17 (1992).

[77] ALEXANDER, *supra* note 33, at 78. After Douglas, personal campaigning was again eschewed until the candidacy of William Jennings Bryan in 1896. ALEXANDER, *supra* note 33, at 78. Subsequently, advertising and modern "merchandise" campaigning gradually began to dominate. *See generally* DINKIN, *supra* note 33, at 95-198.

voice "into every home in the United States."[78] By the election of 1952, television had become as important to candidates as radio, and by the mid-1960s, most Americans relied on television as their primary news source.[79] Today, a candidate in a closely contested congressional campaign will spend one-half to three-quarters of his or her budget on television advertising.[80]

Another new expense which has driven up campaign costs is the cost of compliance with campaign finance regulations. Since the 1970s, candidates for federal office, and in many states for state and local offices, have faced substantial legal obligations to track and report on contributions and expenditures. This has created accounting, reporting and legal expenses which were unheard of in earlier days.[81] Meanwhile, limitations on the size of contributions have raised the administrative cost of raising the money.

In addition to the factors that have directly raised the cost of campaigning, campaign spending has grown because the supply of available funds has increased. The ability and desire to spend

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[78] ALEXANDER, *supra* note 33, at 82 (quoting LOUISE OVERACKER, MONEY IN ELECTIONS 28 (1932)).

[79] DINKIN, *supra* note 29, at 167.

[80] MAGLEBY & NELSON, *supra* note 58, at 62. However, while there is no denying that the need to advertise on television has added to the costs of campaigning, the increase is not, on the whole, nearly so great as these figures may make it seem. As Alexander argues, most candidates for local office do not use television. ALEXANDER, *supra* note 33, at 85. Indeed, "only serious candidates for major offices—presidential, senatorial, gubernatorial, and mayoral in big cities—make substantial use of television advertisements." ALEXANDER, *supra* note 33, at 85.

[81] For example, in the presidential election of 1992, the two major parties spent $11 million on compliance costs, or roughly ten percent of their total campaign budgets. ALEXANDER & CORRADO, *supra* note 52, at 127. The parties were each given $55.2 million in public funding to finance the general election. Compliance funds may be raised separately from that amount. It has been argued that these funds are used for regular campaign activity, not mere compliance. ALEXANDER & CORRADO, *supra* note 52, at 126-27 (noting post election complaints filed with the Federal Elections Commission by the Center for Responsive Politics). However, the $11 million figure does not include substantial compliance costs by defeated presidential primary candidates, nor, of course, for thousands of other federal, state and local offices which are subject to various campaign finance laws. *See generally* PALDA, *supra* note 71, at 20-23.

money on political activity is lower when the material standard of living is lower. As the standard of living improves, more money is available for non-essentials, such as politics. As a society becomes richer, it is likely to have more discretionary income that may be put toward political activity. Nevertheless, the amounts spent on political activity in the United States remain trivial, whether considered as a percentage of gross domestic product,[82] or in comparison to other types of advertising.[83] This alone suggests that spending will continue to rise.

Finally, there is one last factor that has contributed mightily to the growth of political spending: the growth of government.[84] The more power the government has to bestow benefits on the populace, or to regulate human endeavors, the greater the incentive for citizens to attempt to influence the government and the election of government office holders. According to studies by University of Chicago economist John Lott, eighty seven percent of the increase in federal campaign spending between 1976 and 1994 can be attributed to rising federal government expenditures.[85] Similarly most of the spending growth in state legislative and gubernatorial races can be explained by increases in state spending.[86] This is, I think, only common sense. When the federal government claims the power to nationalize whole industries, such as health care; threatens to use its powers in an effort to destroy a long-standing legal industry, such as tobacco;[87] spends over $1 trillion per year;

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[82] We now spend approximately 0.05% to 0.06% of gross domestic product on political activity, an increase from 0.03% in 1968. Robert J. Samuelson, *The Price of Politics*, NEWSWEEK, Aug. 28, 1995, at 65.

[83] *See, e.g.*, ALEXANDER & CORRADO, *supra* note 52, at 3-4; MAGLEBY & NELSON, *supra* note 58, at 40-41; Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1059-60 (1996).

[84] PALDA, *supra* note 71, at 96 (noting that political spending has risen at roughly the same rate as governmental expenditures).

[85] John R. Lott, Jr., *A Simple Explanation for Why Campaign Expenditures are Increasing: The Government is Getting Bigger*, 8 (1996) (paper on file with author).

[86] *Id.* at 17-19.

[87] In 1995, President Clinton authorized the FDA to regulate the tobacco industry's advertising that targets children. *See Union Leaders Criticize Clinton's*

redistributes income freely to politically favored groups; and regulates virtually all aspects of human endeavor, it is only natural that groups and individuals will find it worthwhile to spend large sums in an effort to influence who holds office.[88]

Of all the reasons for the growth of spending, this last may be the most important, because it is the one factor directly dependent upon government policies in other areas. Thus, Lott's studies have the most important implications for reform efforts. For those most concerned about corruption, Lott's work suggests that if efforts to block legal expenditures are not accompanied by a reduction in the size of government, they may simply result in increases of illegal and undisclosed activities. This conclusion suggests that disclosure, and disclosure alone, is the appropriate solution to concerns about corruption. Disclosure allows both individuals and groups to fulfill their desire to participate freely in the system. Although some may still want to hide their activity, doing so becomes the difference between legal action and illegal activities. Because the basic desire to participate may be fulfilled legally, so long as contributions are disclosed, most contributors and candidates will comply with disclosure requirements.[89] Disclosure, in turn, provides voters with information that should deter improper legislative behavior.

This link between the growth of government and campaign spending poses an even greater dilemma for equality minded reformers. Many of those who urge campaign finance on equality grounds also favor redistribution of wealth and an activist govern-

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Anti-Smoking Plan, U.S. NEWSWIRE, Aug. 16, 1995, *available in* 1995 WL 6619256. This new policy has been identified as the beginning of an effort to regulate and destroy the tobacco industry. *See id.*

[88] *See* Richard Epstein, *Property, Speech, and the Politics of Distrust, in* THE BILL OF RIGHTS IN THE MODERN STATE 41, 56 (Geoffrey R. Stone et al. eds., 1992); Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1265-66 (1994).

[89] Disclosure is not without its problems, as it can have a chilling effect on speech. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995); Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 191 (1982); NAACP v. Alabama, 357 U.S. 449, 466 (1958). It also smothers speech by subjecting small players to heavy regulation. For this reason, some have suggested that disclosure levels should be set at a relatively high level. SABATO & SIMPSON, *supra* note 4, at 332.

ment to assure economic equality.[90] To this extent, their efforts on the economic front will encourage more spending in the political arena. This, in turn, suggests that ever harsher regulatory measures will be required to achieve the desired political equality.

Given this relationship between government power and campaign expenditures, it is no surprise that the pressure for campaign finance reform began with the growth of government witnessed in the latter part of the nineteenth century.

C. Past Efforts At Reform

The story of reform is one of repeated efforts to limit private attempts to influence government policy, while still promoting an activist government in economic and social policy. Each reform effort has been designed to close "loopholes" left open by past reforms. Time and again, the effort has failed.

Campaign financing was unregulated through the nation's first century. Early on a few states unsuccessfully attempted to limit the practice of providing voters with food and drink, without much success.[91] Candidates and their parties were left unregulated in their attempts to raise funds. One early form of raising money was to assess officeholders a percentage of their salary as a condition of retaining office.[92] A bill was introduced to stop this practice as early as 1839, but it was not until after the assassination of President Garfield by a disgruntled office seeker that the Pendleton

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[90] *See, e.g.*, Jamin Raskin & Jon Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1163-64, 1179-80, 1185, 1203 (1994); Jamin Raskin & Jon Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 275 n.12, 301 (1993).

[91] Some states had laws against offering "Victuals, Drink or other Consideration" before an election, but these laws were rarely enforced. DINKIN, *supra* note 29, at 13 (quoting Charles S. Sydnor, GENTLEMEN FREEHOLDERS 55 (1952)). These laws did not regulate contributions to candidates or total spending by candidates, but merely prohibited offering items that might be considered bribes for votes.

[92] DINKIN, *supra* note 29, at 40, 73; MUTCH, *supra* note 14, at xvi.

Act[93] created a civil service,[94] and made it a crime for a federal employee to solicit funds from another federal worker.

Although the Pendleton Act is often considered the first campaign finance bill,[95] the motivation for the bill was the opposite of later efforts at reform. By limiting the ability of officeholders to extract contributions from those they appointed to office, civil service reform sought not to protect legislators or the government from the corrupting influence of contributions, but to protect government employees from the power of government officials. From the viewpoint of modern concerns regarding corruption and equality, a system of finance based on assessments of party officeholders seems a benign, or even a positive idea—campaigns are financed by small contributors who care most about electoral outcomes, and there is no serious danger of *quid pro quo* corruption, at least in policy making decisions, if not in staffing decisions.

The earliest laws resembling present day campaign finance reform laws were passed in the 1890s, when Nebraska, Missouri, Tennessee and Florida banned corporate contributions.[96] Significantly, each of these states had voted for William Jennings Bryan in the presidential election of 1896. The bans on corporate contributions were, in large part, an effort to retaliate for corporate support of Bryan's opponent, William McKinley.[97]

The federal government did not become involved in campaign finance for another decade. Ironically, what finally triggered federal reform was an unrelated state investigation into insurance industry practices. In 1905, the state of New York held a legislative inquiry into the financial practices of the Equitable Life Insurance Company. During the investigation, it was revealed that the

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[93] 22 Stat. 403 (1883) (codified as amended at 5 U.S.C. §1101-1501 (1994); 40 U.S.C. § 42 (1994)).

[94] MUTCH, *supra* note 14, at xvi.

[95] *See* CONGRESSIONAL QUARTERLY, CONGRESSIONAL CAMPAIGN FINANCES: HISTORY, FACTS AND CONTROVERSY 30 (1992); ALEXANDER, *supra* note 33, at 24; MUTCH, *supra* note 14, at xvi.

[96] MUTCH, *supra* note 14, at xvii.

[97] MUTCH, *supra* note 14, at xvii.

company had made large contributions to the Republican Party.[98] Though corporate support for Republicans was well known, the Equitable investigation took on an air of scandal, leading to the first federal campaign finance bill. This bill, passed in 1907, banned campaign contributions or spending by federally chartered banks and corporations. The bill's chief sponsor, Senator "Pitchfork" Ben Tillman, argued, much as reformers do today, that the American people believed Congress had become the "instrumentalities and agents of corporations."[99]

Subsequently, in 1910, passage of the Federal Corrupt Practices Act required the disclosure, in House races, of each contributor of $100 or more, approximately $1,667 today, and of each recipient of $10 or more. This procedure was extended to include Senate races the next year. The 1911 measure also limited the amount that could be spent in Senate races to $10,000 and House races to $5,000,[100] approximately $166,667 and $83,333 by today's standards. However, these spending limits had little effect because they applied only to the candidate, not to committees operating without the candidate's involvement.[101] Thus, the spending limits were easily evaded through the simple expedient of the candidate's "discreet ignorance."[102]

In 1925, in the wake of the Teapot Dome scandal,[103] Congress passed the Federal Corrupt Practices Act.[104] The Act attempted to close "loopholes" in the law by extending the ban on

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[98] MUTCH, *supra* note 14, at 2-3.

[99] MUTCH, *supra* note 14, at 6.

[100] CONGRESSIONAL QUARTERLY, *supra* note 95, at 31.

[101] *See* Newberry v. United States, 256 U.S. 232, 292-93 (1921).

[102] MUTCH, *supra* note 14, at 22 (quoting LOUISE OVERACKER, MONEY IN ELECTIONS 271 (1932)).

[103] The Teapot Dome Scandal, 1921-1922, involved President Harding's Secretary of the Interior, Albert Fall, accepting bribes to lease government lands to oil companies. 2 MARY BETH NORTON ET AL., A PEOPLE AND A NATION: A HISTORY OF THE UNITED STATES 722 (4th ed. 1994). Additionally, one oil developer gave money to the Republican Party during an "off election" year so that the contribution escaped disclosure requirements. Jennifer A. Moore, Note, *Campaign Finance Reform in Kentucky: The Race for Governor*, 85 KY. L.J. 723 (1996-97).

[104] 2 U.S.C. §256 (1925) (repealed 1972).

corporate participation to include all corporate contributions. Additionally, it required disclosure of receipts and expenditures for candidates to the House and Senate, including contributions made outside an election year, and required disclosure of contributions and expenditures by any committee operating in two or more states.[105] However, the Act was still interpreted as limiting disclosure to personal, but not committee, expenditures.[106] By establishing numerous committees, each operating in just one state, national contribution and expenditure limits were easily evaded. Furthermore, the disclosure provision lacked an enforcement mechanism and had no provision to correct errors.[107]

The 1930s witnessed a new wave of reform as Republicans and conservative Southern Democrats became increasingly concerned that New Deal programs might be used to unduly influence voting. Specifically, it was alleged that government employees in the Works Progress Administration were being forced to make campaign contributions.[108] Therefore, the Hatch Act was passed in 1939, extending the ban on political contributions to include any government employee. Unlike the earlier Pendleton Act, which aimed to protect citizens from government exploitation, the Hatch Act was intended to strike directly at Democratic Party funding and Franklin Roosevelt's political power.[109]

In 1940, the Hatch Act was expanded to include a ban on donations by federal contractors or by employees of state agencies financed in whole or in part by the federal government.[110] Additionally, contributions to any committee were limited to $5,000.[111] In 1943, fearful that excess union power might damage the war effort, Congress passed the Smith-Connally Act,[112]

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[105] ALEXANDER, *supra* note 33, at 25-26.

[106] ALEXANDER, *supra* note 33, at 25-26.

[107] ALEXANDER, *supra* note 33, at 25-26.

[108] THAYER, *supra* note 29, at 71.

[109] MUTCH, *supra* note 14, at 33.

[110] CONGRESSIONAL QUARTERLY, *supra* note 95, at 33.

[111] ALEXANDER, *supra* note 33, at 25. However, this restriction was easily avoided by donating to multiple committees. ALEXANDER, *supra* note 33, at 34.

[112] Smith-Connally Anti Strike Act (War Labor Disputes Act), ch. 144, 57 Stat. 163 (1943) (codified at 50 U.S.C. app. §§ 1501 - 1511 (1997), *repealed by*

temporarily prohibiting labor unions from contributing to campaigns. This ban was made permanent four years later under the Taft-Hartley Act.[113] However, unions circumvented this latest ban by establishing the first political action committees, or PACs, that collected money through automatic payroll check-offs.[114]

Throughout the 1950s and 1960s, and even into the early 1970s, efforts were made to pass various "clean elections" bills.[115] As usual, complaints were voiced that money has made "some citizens more equal than others," and that the political process had become "corrupt."[116] Restrictions on spending and contributions were needed because "radio and television advertising require millions of dollars."[117] Similar previous efforts to limit contributions and spending had been largely evaded through the exploitation of what would today be called "loopholes." Thus began a push for legislation that would be more heavy-handed, and subsequently more effective, than prior reform efforts. This push, helped along by the Watergate scandal, led to major reform in 1971, and especially, 1974.

The Federal Election Campaigns Act,[118] ("FECA"),was passed in 1971, replacing the 1925 Federal Corrupt Practices Act.[119] It limited total media spending in congressional races and the percentage of media spending that could be used for radio and television advertising.[120] Additionally, it significantly tightened

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Act of June 25, 1948, ch. 645, § 21, 62 Stat. 862, Act of Sept. 6, 1966, Pub. L. No. 89-554, § 8(a), 80 Stat. 651).

[113] Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-144, 151-158, 159-167, 171-183, 185-187, 557 (1997)).

[114] THAYER, *supra* note 29, at 73-74.

[115] ALEXANDER, *supra* note 33, at 26-28.

[116] JOHN GARDNER, IN COMMON CAUSE 33, 55 (1972).

[117] ALEXANDER HEARD, THE COSTS OF DEMOCRACY 388 (1960).

[118] 2 U.S.C. §§ 431-455 (1997).

[119] 2 U.S.C. § 256 (1925) (repealed 1972).

[120] Total media spending was limited to ten cents per eligible voter or $50,000 per candidate, whichever was greater. *See* CONGRESSIONAL QUARTERLY, *supra* note 95, at 87. Up to sixty percent of this amount could be used for radio and television advertising. *See* CONGRESSIONAL QUARTERLY, *supra* note 95, at 87.

disclosure requirements, eliminating most of the pre-existing loopholes in the law. Operating on the theory that disclosure eliminates political *quid pro quos*, the Act abolished the old, unenforced expenditure ceilings.[121] The Act also sanctioned the use of corporate and labor union revenues to set up and administer political action committees, or PACs.[122]

Then came the Watergate scandals of 1972 to 1974.[123] The 1971 FECA had not made clear whether contributions made between the last filing under the old Federal Corrupt Practices Act and the effective date of FECA had to be disclosed. The Nixon campaign refused to disclose contributions made during that period. Finally forced to disclose these contributions in September 1973, the Committee revealed it had received over $11 million during that period — mostly in large contributions and much of it within the last 48 hours before FECA took effect.[124] Eventually, it also became apparent that at least $10 million in illegal corporate contributions had been donated to the campaign before FECA and that campaign monies had been used to both fund and cover up the Watergate break-in.[125]

Public reaction to news of Nixon's campaign finances and expenditures was harsh. However, if these revelations proved anything, it was only that good, enforceable disclosure laws, such as those passed in 1971, would work. Had such laws been in place

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[121] *See* CONGRESSIONAL QUARTERLY, *supra* note 95, at 39-40.

[122] ALEXANDER, *supra* note 33, at 37.

[123] The author uses the term "Watergate scandals" to refer to a crisis faced by the federal government in the early 1970s. The crisis started with a break-in at the Democractic Headquarters at the Watergate Hotel in Washington, D.C. and quickly "snowballed" into a widespread cover-up involving the Federal Bureau of Investigation (FBI), President Nixon and White House personnel. Ultimately, impeachment proceedings begun in the House of Representatives against President Nixon led to the only resignation of a President in the history of the United States. *See* CONGRESSIONAL QUARTERLY, WATERGATE: CHRONOLOGY OF A CRISIS (1975) (describing in detail the events leading to President Nixon's resignation).

[124] ALEXANDER, *supra* note 33, at 31. These contributions included over $2 million from W. Clement Stone and $250,000 from Leon Hess, Chairman of the Amerada-Hess Oil Company. ALEXANDER, *supra* note 33, at 21-22.

[125] CONGRESSIONAL QUARTERLY, *supra* note 123, at 41-42.

throughout the 1968-72 period, the illegal corporate contributions and unsavory *quid pro quo* practices of the Nixon Administration may never have occurred. If such practices did occur, they would have been revealed earlier and undoubtedly been used against the President in the 1972 campaign. But rather than revel in the triumph of disclosure, reformers used the scandals to push for much tighter restrictions on campaign financing. They succeeded with the passage of major amendments to FECA in 1974.

In addition to the now familiar system of presidential campaign financing, the 1974 FECA reforms would have limited persons to spending $1,000 "relative to a clearly identified candidate."[126] However, this was one of several provisions struck down in *Buckley v. Valeo*.[127] The Supreme Court recognized that this vague provision would smother political discourse if not strictly limited to words of support or opposition to election made "in express terms."[128] Even then, the proposed FECA amendments would have limited such expenditures to just $1,000, meaning in effect that no citizen could make any significant financial effort to convince the public to support a candidate, even if done anonymously and independently of a candidate.

Save for the Court's decision, the bill would also have limited the ability of candidates to spend money on their own behalf.[129] Spending on House and Senate races would have been limited as well, to amounts wholly inadequate for modern campaigning.[130]

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[126] *See* Buckley v. Valeo, 424 U.S. 1, 43-44 (1976). The 1974 amendments also repealed the 1971 limits on media spending. CONGRESSIONAL QUARTERLY, *supra* note 123, at 44-45.

[127] *Buckley*, 424 U.S. at 39-51.

[128] *Id.* at 44.

[129] *Id.* at 51-54.

[130] *Id.* at 54-55. The House of Representatives limit, for example, was set at $75,000. Adjusted for inflation, this figure would be approximately $220,000 today, far below the amount needed to successfully challenge an incumbent congressperson. *See* Smith, *supra* note 83, at 1066. Generally, the spending level of a challenger is far more important in determining the outcome than either the spending of an incumbent or the ratio between the two. Gary Jacobson, *Money and Votes Reconsidered: Congressional Elections 1972-1982*, 47 PUB. CHOICE 7 (1985); Gary Jacobson, *The Effects of Electoral Campaign Spending in Congressional Elections*, 72 AM. POL. SCI. REV. 469 (1978).

In another important provision, the 1974 Amendments repealed the old Hatch Act provision barring federal contractors from establishing PACs.[131]

The 1974 FECA Amendments, as modified in *Buckley,* are the basic framework for federal campaign finance laws today, with one important exception. In 1979, Congress amended FECA to allow parties to spend money, without limit, for such grassroots party building activities as producing buttons, bumper stickers, brochures, posters and yard signs and holding voter registration and get-out-the-vote drives.[132]

Thus, we have been working for the betterment of campaign finance laws in this country for nearly 100 years. The first federal effort to reform campaign finance was made in 1907 and the law has subsequently been amended in 1910, 1911, 1925, 1939, 1940, 1943, 1947, 1971, 1974 and 1979. After nearly 100 years of trial and error, the ultimate question remains: Will anything work?

III. CAN REFORM WORK?

He will not see his lady nor his children
in joy, crowding about him, home from sea;
The Seirenes will sing his mind away
on their sweet meadow lolling. There are bones
of dead men rotting in a pile beside them
and flayed skins shrivel around the spot.[133]

A. The Effect of Past Efforts At Campaign Finance Reform

The effect of the 1971 and 1974 federal "reforms" and similar widespread state "reform" of the 1970s was to turn political campaigning into a heavily regulated industry. The results, however, were not so pleasing as voters had been led to believe they would be. Congressional and Presidential spending continued

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[131] ALEXANDER, *supra* note 33, at 38.

[132] 2 U.S.C. § 431(8)(B)(x),(xii), (9)(B)(xiii),(ix); *see* CONGRESSIONAL QUARTERLY, *supra* note 95, at 50.

[133] HOMER, *supra* note 1, at 210.

to rise, despite public funding provisions and voluntary limits.[134] Special interests seemed to grow, rather than decline, in influence. Incumbents increased their fundraising advantages over challengers as incumbent re-election rates reached record highs.[135] Voter turnout continued to decline.[136] Public confidence in leaders continued to fall.[137] Meanwhile, ordinary citizens found themselves hauled into court for distributing home-made political leaflets[138] and criticizing local officials for cost overruns.[139] Retirees with no legal expertise found themselves in violation of federal law for writing checks to support the political candidates of their choice.[140] Individuals who joined professional groups in order to get information on political issues found the flow of information blocked by threats of litigation.[141] Indeed, litigation became a major campaign tactic.[142]

Despite these consequences of the reform laws, including the infringement upon traditional political liberties, reformers continue to call for additional regulation. They blame the failure of the current laws on the Supreme Court's *Buckley* decision and its progeny.[143] Yet, they have steadfastly opposed repealing or

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[134] ALEXANDER & CORRADO, *supra* note 52, at 21.

[135] *See* Smith, *supra* note 83, at 1050-51, and citations therein.

[136] PALDA, *supra* note 71, at 112, Table 10.

[137] *Trust in Government Rebounds Slightly*, MINNEAPOLIS STAR TRIBUNE, Sept. 22, 1996, at 19A (including a table that shows response to a Gallup Survey on the question, "How much of the time do you think you can trust the government in Washington to do what is right?" The table shows a decline in the number of people answering "most of the time" from 47% in 1970, before FECA, to 24% in 1996.).

[138] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

[139] Pestrak v. Ohio Elections Comm'n, 926 F.2d 573 (6th Cir. 1991).

[140] Sara Fritz & Dwight Morris, *Federal Election Panel Not Enforcing Limit on Campaign Donations*, L.A. TIMES, Sept. 15, 1991, at A1 (noting that "elderly persons . . . with little grasp of the federal campaign laws," are among the most common violators of FECA).

[141] Chamber of Commerce of the United States v. Federal Elections Comm'n, 69 F.3d 600, 602-03 (D.C. Cir. 1995).

[142] STEPHANIE D. MOUSSALI, CAMPAIGN FINANCE REFORM: THE CASE FOR DEREGULATION 9 (1990).

[143] *See* David Orr, *Close Loot Loopholes*, CHI. TRIB., Apr. 6, 1997, at C16 (calling the *Buckley* decision "misguided" and blaming it for "burden[ing] our

amending the remaining portions of the FECA in order to rationalize the system. More generally, they have argued, the Herculean labor of cleaning up campaign finance has only begun; if the system seems to have failed, it is only because far more regulation is needed.

B. Current Legislative Efforts

In February of 1997, Common Cause, a leading "reform" group, announced plans to gain 1,776,000 signatures in support of two highly regulatory bills pending in Congress, commonly referred to as the McCain-Feingold[144] and Shays-Meehan bills.[145] At the same time, the sponsors of those bills began a series of high profile appearances in an effort to "drum up" support. Newspaper editorial boards, which have long backed campaign finance regulation,[146] have offered strong support for the measures.[147] In 1997,

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politics with a campaign finance system that fosters public cynicism and promotes the domination of campaigns by wealthy campaign contributors").

[144] S. 25, 105th Cong. § 101 (1997). On October 7, 1997, the Senate failed to close debate on the McCain-Feingold bill thus deferring any immediate change to the current campaign finance system. *See* Editorial, *Thunder in the Senate*, N.Y. TIMES, Oct. 8, 1997, at A22.

[145] H.R. 493, 105th Cong. § 101 (1997). *See* Common Cause press release (March 20, 1997) <http://www.cc.org/publications/032097.htm>. The bills are named for their primary sponsors, Senators John McCain and Russ Feingold, and Representatives Christopher Shays and Marty Meehan. For a discussion of the bills see *infra* notes 149-151, 161-63, 168 and accompanying text. The Common Cause signature effort flopped and was quietly discontinued. John Marelius, *Awash in Cash: The Trouble with Campaign Finance*, SAN DIEGO UNION & TRIB., July 20, 1997, at A1.

[146] SORAUF, *supra* note 53, at 26.

[147] For example, the New York Times, the Washington Post, and the Los Angeles Times, arguably the most influential newspapers in the country, each ran multiple editorials in just the first two and a half months of 1997, supporting the McCain-Feingold legislation. Editorial, *A Shot of Courage*, N.Y. TIMES, Mar. 12, 1997, at A22; Editorial, *Credibility Hill*, WASH. POST, Jan. 28, 1997, at A12; Editorial, *In Campaign Reform Issue, One Word Stands Out: Now*, L.A. TIMES, Jan. 26, 1997, at M4; Editorial, *No Excuse on Campaign Reform*, N.Y. TIMES, Mar. 17, 1997, at A14; Editorial, *Reform in Balance*, N.Y. TIMES, Feb. 16, 1997, § 4, at 12; Editorial, *The State of the Union*, WASH. POST, Feb. 6, 1997, at A22;

Minority Leader in the House of Representatives, Richard Gephardt, introduced a proposed amendment to the Constitution which would authorize Congress and the states to impose "reasonable regulations" on expenses and contributions intended to "influence" the outcome of state and federal elections and ballot initiatives. The proposed amendment included a provision authorizing Congress and the states to determine which expenditures are for the purpose of "influencing elections."[148]

Much of what is currently classified as "reform" is, in reality, the same approach reformers have tried for years. For example, the Shays-Meehan and McCain-Feingold bills would set spending limits on campaigns,[149] even though most observers agree that such limits work to entrench incumbents in office.[150] Another favorite idea is to lower the $1,000 individual contribution limit to amounts

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Editorial, *Too Little Leadership*, N.Y. TIMES, Jan. 29, 1997, at A20.

[148] H.R.J. Res. 47, 105th Cong., 1st Sess. (1997).

[149] In order to comport with *Buckley,* these limits are ostensibly "voluntary." *See* 424 U.S. 1, 57 n.65 (1976). However, they include punitive provisions—if a candidate spends more than the "voluntary" limit, his or her opponent may increase spending to match the non-complying candidate. S. 25, § 101(e); H.R. 493, § 101(f). Additionally, the non-complying candidate's opponent is allowed to accept larger contributions than the non-complying candidate. S. 25, § 101(f). These contributions are twice as large in the Senate bill. S. 25, § 105. They are eight times larger in the House of Representatives version. H.R. 493, §§ 104, 202. Section 202 of House Bill 493 limits the percentage of contributions that can exceed $250 to just 25% of the total "voluntary" spending limit. H.R. 493, § 202. There is no exception for a non-complying candidate. H.R. 493, § 202. Thus a candidate spending over the limit is restricted to receiving $250 contributions, while a complying candidate, in addition to having the spending limit raised, may accept contributions up to $2,000 without limit. H.R. 493, § 202.

[150] *See generally* PALDA, *supra* note 71, at 48-50; Jacobson, *supra* note 130. *But see* Donald Green & Jonathan Krasno, *Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections*, 32 AM. J. POL. SCI. 884 (1988). The Shays-Meehan and McCain-Feingold bills would establish spending thresholds at the very point where challengers become competitive. Shays-Meehan uses a $600,000 figure for House of representatives races: roughly forty percent of challengers who spent more won, while only three percent who spent less won. All 1994 and 1996 Senate challengers who spent less than the limits in the McCain-Feingold bill lost, but all incumbents spending less than those limits won.

as low as $100.[151] These low limits favor incumbents,[152] strengthen narrowly organized interests at the expense of broader interests[153] and encourage interests to seek legislative influence, rather than electoral results, and so work against the professed goals of reformers.[154] Lowering the individual contribution limit also requires candidates to increase the time spent fundraising which, paradoxically, then becomes a justification for more regulation.[155] Additionally, the abolition of PACs remains another goal,[156] despite, or perhaps because of, the fact that PACs allow small donors to band together to increase their political clout.

In addition to increasing the extent of these tried and failed regulations, current reform efforts are aimed at closing a variety of "loopholes" through which individuals have made political contributions despite past efforts at reform. Currently, reformers are targeting so-called "soft money," itself a part of the 1979 reforms aimed at increasing grassroots activity. "Soft money" contributions, unregulated by the FECA, are used for party activities such as voter registration drives, get-out-the-vote drives, generic advertising and slate cards.[157] Reformers view soft money as a "loophole" that allows both candidates and parties to circumvent spending and contribution limits.[158] They argue that it reintroduces *quid pro*

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[151] Section 202 of Shays-Meehan would limit most contributions to just $250. H.R. 493 § 202. *See also* Carver v. Nixon, 72 F.3d 633 (8th Cir. 1995) (striking down $300 limit on contributions), *cert. denied*, 116 S. Ct. 2579 (1996); Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) (striking down $100 limit on contributions), *cert. denied*, 513 U.S. 1127 (1995); National Black Police Ass'n v. D. C. Bd. of Elections, 924 F. Supp. 270 (D.D.C. 1996) (striking down $200 limit on contributions).

[152] Smith, *supra* note 83, at 1072-73.

[153] THOMAS GAIS, IMPROPER INFLUENCE: CAMPAIGN FINANCE LAW, POLITICAL INTEREST GROUPS, AND THE PROBLEM OF EQUALITY 173-74 (1996).

[154] Smith, *supra* note 83, at 1075-76.

[155] *See, e.g.*, STERN, *supra* note 22, at 3; Vincent Blasi, *Spending Limits and the Squandering of Candidates' Time*, 6 J.L. & POL'Y 123 (1997).

[156] *See* S. 25, 105th Cong. § 201 (1997) (banning PACs).

[157] ALEXANDER & CORRADO, *supra* note 52, at 147-48.

[158] Reformers are particularly upset that, in the 1996 election, "soft money" was used for issue advertisements which had the effect of supporting or opposing candidates for federal office. *See* Donald J. Simon, *Untitled Manuscript*, J. LEGIS. (forthcoming 1998). A defense of "soft money" and a critique of efforts

quo political corruption for candidates and works against equality by allowing wealthy individuals, corporations and unions to contribute large amounts.[159]

An additional "loophole" that reformers now seek to "plug" is the expenditure of funds on "issue advocacy," that is, political discourse that does not expressly support or oppose a candidate, but still has the potential to influence voters.[160] Proposals to limit "issue advocacy" speech are, most likely, the greatest threat to the liberty of all campaign finance regulation because virtually all political discourse is carried on in the hopes of eventually electing or defeating candidates. The Shays-Meehan proposal, for example, would allow the FEC to limit speech:

> made for the purpose of advocating the election or defeat of the candidate, as shown by one or more factors, such as a statement or action by the person making the communication, the targeting or placement of the communication, or the use by the person making the communication of polling, demographic, or other similar data relating to the candidate's campaign or election.[161]

Shays-Meehan is activated to limit such speech when the speaker spends in excess of $1,000,[162] an amount so low that it would all but end organized speech about political candidates by citizens or groups of citizens outside of the candidate's campaign. Again, the fear of such speech is that it provides an outlet for large donors and interests to end-run spending and contribution limits. Thus, it must be regulated and, if possible, shut off. In a similar vein, reformers seek to stop "independent expenditures" that are

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to ban it can be found in Bradley A. Smith, *Soft Money, Hard Realities: The Political and Constitutional Case Against A Soft Money Ban*, J. LEGIS. (forthcoming 1998).

[159] ALEXANDER & CORRADO, *supra* note 52, at 111-13; LISA ROSENBERG, A BAG OF TRICKS, LOOPHOLES IN THE CAMPAIGN FINANCE SYSTEM 3-6 (1996).

[160] ROSENBERG, *supra* note 159, at 7-8.

[161] *See* H.R. 493, 105th Cong. § 251(b) (1997). For a critique of the constitutionality of this proposal, see *Hearings on Issue Advocacy Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 105th Cong., 1st Sess. (1997) (statements of James Bopp and Bradley A. Smith).

[162] H.R. 493, § 254.

subject to federal contribution and reporting restrictions but, under *Buckley*, cannot be limited in amount. Essentially, Shays-Meehan seeks to limit such expenditures in two ways: first, by penalizing them to such an extent that they are rendered ineffective and second, by burdening the spender with excessive reporting requirements, including advance notice of the speech.[163]

These efforts to restrict soft money, issue advocacy and independent expenditures are alarming not only because of the burden that the they place on First Amendment rights, but because they flow so naturally from the assumptions and goals underlying campaign finance regulatory efforts. In fact, in the 1996 campaigns, both parties used soft money not only for traditional party building activities, but also to run advertisements that, to the average viewer, must certainly have appeared to be advertisements run by candidates Clinton and Dole.[164]

Similarly, over the last two election cycles, a variety of groups on both the "left" and "right" have learned how to produce "issue advocacy" advertisements which are thinly veiled assaults on political opponents. In 1996, the most prominent of these was organized labor's $35 million advertising campaign which aimed to "bury" the Republicans' "Contract with America."[165] Additionally, the Sierra Club, Citizen Action, National Abortion Rights Action League, Christian Coalition and various other groups also ran "issue advocacy" advertisements which seemed to target political opponents.[166] If one is attempting to prevent the possibility of *quid pro quo* trading or to equalize political participation, such

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[163] *See id.*

[164] *See* Adam Clymer, *System Governing Election Spending Found in Shambles*, N.Y. TIMES, June 16, 1996, at A1 (stating that both parties ran issue advertisements with "their presidential candidates' faces dominating the television screen" and quoting Republican candidate Bob Dole, as saying "It never says that I'm running for President, though I hope that's fairly obvious, since I'm the only one in the picture."); Alison Mitchell, *Building a Bulging War Chest: How Clinton Financed His Run*, N.Y. TIMES, Dec. 27, 1996, at A1 (describing collaboration between President Clinton and the Democratic National Committee to run advertisements featuring the President and his positions on issues and noting that President Clinton helped to edit scripts).

[165] ROSENBERG, *supra* note 159, at 9.

[166] ROSENBERG, *supra* note 159, at 9.

speech presents a danger. It upsets the carefully established monetary equality and leaves open the possibility of corruption. But is such regulation consistent with free speech?

In *Buckley*, the Supreme Court recognized that a bright line had to be drawn if such regulation was not to have a chilling effect on speech. Therefore, it limited regulation of non-candidate speech to advertisements involving such phrases as "elect," "defeat" and "support."[167] The vague definition of issue advocacy speech to be regulated under the Shays-Meehan bill,[168] fails to draw the *Buckley* bright line and instead, opens up virtually all political speech mentioning a candidate to government regulation. To distinguish, regulators will be required to probe past actions and comments by the speaker in an effort to determine the speaker's true motivation. This will have a chilling effect on speech and will further take political debates out of the electoral arena and into the courts.

However, even if the regulations could be narrowly drawn so as to catch only strongly suggestive advertisements, such as the 1996 AFL-CIO campaign, and an adequate bright line test could be established, would the solution be adequate to meet the reformers demands? It is absurd to think that private actors will ignore rents made available to them by government action.[169] It is even more absurd to think that individuals or interests will allow the government to tax or regulate them, sometimes to the point of economic extinction, without attempting to influence who holds the reins of power. Thus, if the most egregiously partisan "issue" advertisements were banned, money would most likely flow into other means of affecting elections. This might mean only slightly less obvious issue advertisements. Would these be banned as well? Large membership organizations, such as unions, the National Rifle Association or the American Association of Retired Persons, might step up highly partisan membership communications, making sure that excess copies are available and are left at strategic locations.

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[167] Buckley v. Valeo, 424 U.S. 1, 43-44, 44 n.52 (1976).

[168] H.R. 493, 105th Cong. § 251(b) (1997).

[169] *See, e.g.*, George Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. & MGMT. SCI. 3 (1971).

Outright, old-fashioned bribery might return as businesses seek to protect their interests. We might see an increase in the publication of anonymous campaign literature, which some feel is more scurrilous and less accountable than other types of publications. Another possibility is a return to the purchase or subsidy of partisan newspapers, radio and television stations. Would it then become necessary to censor these media outlets? The ingenuity of those seeking to influence political outcomes knows few bounds and, given the power wielded by government, an incentive will exist to find the inevitable "loopholes."[170]

C. The Next Wave of Reform: The Law Reviews

Although proposals such as the Shays-Meehan and McCain-Feingold bills seem comprehensive, it is apparent that they will fall short of achieving their goals. When they do, we can expect that a new wave of legislation, aiming to close "loopholes," will follow. Indeed, law reviews are already brimming with ideas to further regulate political speech.

One currently "hot" idea in academia is to limit all campaign spending, except for a small amount made available to each voter through a government issued voucher.[171] For example, under a proposal advanced by Professor Richard Hasen, each voter would receive a $100 voucher from the government; no other monetary or in-kind contributions could be expended to influence federal elections. Nor could vouchers be supplemented from private funds.[172] Interest groups could collect vouchers in order to make independent expenditures in support of candidates. However, in order to monitor the system and prevent fraud, these interest groups

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[170] For an enlightening look at the creative ways in which campaign laws are evaded, see SABATO & SIMPSON, *supra* note 4, at 39-40, 53-55, 328-29.

[171] *See generally* Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, 13 AM. PROSPECT 71 (1993); Foley, *supra* note 24; Hasen, *supra* note 27 (discussing government issued vouchers); Jeremy Paul, *Campaign Reform in the 21st Century: Putting Money Where Mouth Is*, U. CONN. L. REV. (forthcoming 1997) (calling Ackerman's proposal the "best I have seen").

[172] Hasen, *supra* note 27, at 23.

would be licensed by the federal government.[173] Professor Hasen does specify that licensing decisions may not be based on political grounds. However, given the history of abuse of the IRS and other government agencies in harassing political opponents,[174] his sanguinity may be misplaced.

Even if it is possible to have what election law attorney Jan Baran has dubbed a "benign political police,"[175] Professor Hasen's proposal, as comprehensive as it seems, would not necessarily satisfy reformers. For example, Hasen does not deal with the question of "issue advocacy" which perturbs the current wave of reformers.[176] That such a thorough proposal as Professor Hasen's is likely to fail to satisfy reformers indicates just how dangerous it is to tread down the regulatory path where political speech is involved. Further, even if Hasen's proposal were modified to include a broad, intrusive, Shays-Meehan type definition of expenditures "in support of or in opposition to a candidate," it would probably fall short of reformers' goals because Hasen excludes from his proposal political advocacy related to

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[173] Hasen, *supra* note 27, at 22-23.

[174] *See, e.g.*, Elizabeth McDonald, *The Kennedys and the IRS*, WALL ST. J., Jan. 28, 1997, at A16 (describing the Kennedy administration's use of the IRS to harass opponents); Robert Norton Smith, *Please Stop Thinking About Tomorrow*, N.Y. TIMES, Jan. 19, 1997, § 4, at 15 (describing Franklin Roosevelt's use of the FBI to pressure newspaper editors). President Kennedy also sought to use the FCC to harass conservative commentators, including the Red Lion Broadcasting Company. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). President Nixon used not only the IRS to harass opponents but also the FBI and the CIA. *See, e.g.*, SABATO & SIMPSON, *supra* note 4, at 311, 403 n.3; Tim Weiner, *Historian Wins Long Battle to Hear More Nixon Tapes*, N.Y. TIMES, Apr. 13, 1996, at A12. President Clinton may also have abused both the FBI and the IRS for political purposes, according to some reports. *See, e.g.*, Neil A. Lewis, *Whitewater Counsel Examining Use of FBI to Get GOP Files*, N.Y. TIMES, June 11, 1996, at A1; Rowan Scarborough, *NRA Won't Release Members Names: IRS Demands Confidential List*, WASH. TIMES, Feb. 3, 1997, at A4 (noting a suspiciously high number of audits since 1994 of conservative political groups critical of President Clinton).

[175] *See* SABATO & SIMPSON, *supra* note 4, at 327.

[176] Hasen, *supra* note 27, at 23 (noting that "[p]olitical activity not directly endorsing or opposing a candidate would not be subject to any limits" and indicating that he would allow most, if not all, "issue advocacy").

ballot issues.[177] Ballot issues are already a common means by which individuals seek to build support for a current or future candidacy.[178] With other forms of financial participation shut off, it is likely that ballot initiatives will be used more explicitly to promote candidacies by featuring candidates in advertisements, unless this too were precluded by a broad definition of issue advocacy. Therefore, for example, if a popular governor running for United States Senator were to oppose a state constitutional amendment, advertisements by groups opposing the amendment would likely be barred from featuring, or even mentioning, the governor's opposition.[179]

Furthermore, if the aim of reform is equality, why should restrictions not also be levied on ballot issues? If inequality of wealth "distorts" the election of candidates, thereby indirectly "distorting" the laws that are passed, should the application of wealth to politics not also be banned where it directly "distorts"

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[177] Hasen, *supra* note 27, at 23. However, Hasen would include ballot issues in his proposal if it was extended to state elections. Hasen, *supra* note 27, at 23 n.99.

[178] For example, in the 1970s, a Michigan insurance executive, Richard Headlee, achieved political prominence in the state through his authorship and promotion of a state tax limitation measure. *See* Susanna McBee, *Prop 13 Spawns Tax-Curbs Votes on 16 State Ballots*, WASH. POST, Nov. 1, 1978, at A4. In 1982, Headlee was the Republican nominee for governor. Established politicians can also use the tactic: California Governor Pete Wilson used his support for initiatives limiting affirmative action and public benefits to immigrants to boost his political fortunes. *See* Paul West, *Anti-Alien Rhetoric a Nationwide Hit: GOP Candidiates Make Points Mining Resentment Against Immigrants—Even from the Border*, SAN FRANCISCO EXAMINER, Sept. 3, 1995, at A10.

[179] For example, in 1996, Ohio Governor George Voinovich took a high profile role in opposition to a state constitutional amendment to allow gambling in the state. *See* Brent Larkin, *Five Sure Bets Not So Sure*, CLEV. PLAIN DEALER, Oct. 20, 1996, at 1C. Had he also been a candidate for federal office—or even reelection, if the same principles are applied to state election—advertisements by gambling opponents featuring the Governor would quite likely be deemed a contribution to his campaign. In fact, Governor Voinovich, though not yet an officially declared candidate, made clear before the 1996 elections that he will run for the United States Senate in 1998. *See* Joe Hallett, *Voinovich Defends Not Appearing With Dole*, CLEV. PLAIN DEALER, Sept. 12, 1996, at 1A.

laws and governance? It is for this very reason that another voucher proponent, Professor Edward Foley, argues that ballot issues should be included in any voucher scheme.[180] Like Hasen, Foley does not specifically state what he would do with "issue ads" that have the potential to affect elections. However, one might glean from his general thesis and his inclusion of ballot issues that these advertisements would also have to be limited.[181]

Even if a voucher program were applied to limit political communication involving candidates, ballot issues and issue advocacy, this would still not satisfy reformers. The issue of internal communications would remain. Groups with large memberships, such as the National Association for the Advancement of Colored Persons, the National Rifle Association, the American Association of Retired Persons, Christian Coalition and labor unions, could still have "undue influence" through their ability to spend large sums on member education and endorsements—some of which would almost surely leak into the general populace.[182] This too, we find is an ultimate concern of reformers.

For example, in the 1994 elections the United States Chamber of Commerce and the American Medical Association were threatened with prosecution if they published endorsements to thousands of their dues-paying members—many of whom joined

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[180] Foley, *supra* note 24, at 1249.

[181] Foley, *supra* note 24, at 1249-50.

[182] I leave aside here such extreme cases as a large group such as the American Association of Retired Persons using television to communicate with its members. Membership magazines and literature are easily put into the general public. Suppose, for example, that a group such as the League of Women Voters or American Association of Retired Persons urged its members to provide free copies of group literature to libraries, hotels and physician waiting rooms, or to abandon copies on buses, subways, and airplanes? Even if the casual laying around of literature might not be viewed as a problem, would an organized campaign to leave literature laying about in this fashion create a violation of the law? Or suppose the organization made it easy to download its publications from the Internet, and encouraged members to download and then post its literature to Internet sites and discussion groups? Would that violate the law? If not, would not candidates still seek out such endorsements as having special value? Would not that be "undue influence?"

precisely to get such information.[183] Newspapers and other media present another "thorny" problem. If all other avenues of financial participation are sealed, might not groups and individuals purchase media outlets for the sole purpose of promoting a partisan view, candidate or group of candidates? Hasen admits that this is a "large loophole,"[184] but would allow this because "newspapers and other news media are a valuable source of information for the public," and "help people overcome collective action problems in acquiring information, a classic public good."[185] Of course, the same is true of party, candidate and issue group advertising,[186] so the exception does not really add up. Foley recognizes this situation and therefore, includes newspaper editorials within the limits of his system.[187] Newspapers would have to "pay" with vouchers collected from the electorate to run their own editorials. However, this proposal overlooks the fact that the central purpose of newspaper editorials is to persuade, not merely reflect views already held by the citizenry.

But would even this Draconian provision satisfy the reformist goals of equality and preventing corruption? I think not.[188] For example, the primary complaints one hears about media influence do not refer to editorials, but to the slant of news coverage.[189]

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[183] United States Chamber of Commerce v. FEC, 69 F.3d 600, 602-03 (D.C. Cir. 1995).

[184] Hasen, *supra* note 27, at 25 n.111.

[185] Hasen, *supra* note 27, at 26.

[186] *See* PALDA, *supra* note 71, at 31-32 (campaign advertising increases voter's knowledge of both the issues and the candidates, with message repetition being an important part of that effort (citing Jean Crete, *Television, Advertising and Canadian Elections*, *in* MEDIA AND VOTERS IN CANADIAN ELECTION CAMPAIGNS 3 (Frederick J. Fletcher ed., 1991)); BeVier, *supra* note 88, at 1274-75 (commenting on the role of interest groups in overcoming collective action problems).

[187] Foley, *supra* note 24, at 1252.

[188] *See* Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction*, 83 MICH. L. REV. 939, 946-48 (1985).

[189] *See, e.g.*, Michael Wines, *The Presidential Race: Pools and Stars*, N.Y. TIMES, Sept. 16, 1997, at B7 (describing allegations of media bias by Media Research Center). *See also* William Claberson, *Increasingly, Reporters Say They're Democrats*, N.Y. TIMES, Nov. 18, 1992, at A20 (stating that news reporters are more likely to vote democratic than the general populace and that

Foley suggests that "[i]t will be difficult at times to tell whether what a newspaper has written is merely reporting the facts relating to an electoral race or, instead, is a thinly disguised attempt to persuade voters to support or oppose a particular candidate."[190] The author suggests that it is not only difficult, but in most cases, impossible. Foley calls the potential chilling effects of such regulation "the necessary price we must pay in order to have an electoral system that guarantees equal opportunity for all."[191] Perhaps Professor Foley's greatest contribution to the debate is to show how high that price might be.

In considering further regulation and "loopholes" that will need to be closed, I do not suggest that all reformers are hopelessly trapped on a slippery slope. For example, Hasen, unlike Foley, would not include newspapers in his scheme. Many reformers may wish to ban "soft money," but remain squeamish about attempts to redefine "issue advocacy" for precisely the types of reasons I have suggested. But, I do emphasize the quixotic nature of efforts to purify politics or equalize influence through the campaign finance system. There will always be "loopholes." If rent seeking is unavoidable under a powerful, activist state; if equal "political influence" is both a flawed and unattainable goal; and if reform measures have both failed in the past and seem unlikely to accomplish their goals in the future, we must ask if the freedoms already sacrificed are worth the gain and how far down the slope we will go in pursuit of an unattainable goal.

The potential for corruption will exist so long as the state retains tremendous power, not only over wealth, but also over personal decisions, such as the consumption of alcohol, tobacco, or drugs, the ownership of guns and the regulation of pornography. The potential for corruption will exist because the incentive to corrupt will exist. This does not mean that we must live in a libertarian state. There may be other goals besides reducing rent-seeking or maximizing economic efficiency, and it may be that we

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this may skew selection of and reporting on issues); Levinson, *supra* note 188, at 947.

[190] Foley, *supra* note 24, at 1252. Perhaps an even greater problem is a "well-disguised" effort to persuade voters to support or oppose a candidate.

[191] Foley, *supra* note 24, at 1253.

would sacrifice economic growth and property rights to achieve those goals.[192] But we do need to recognize the trade-off. One price of an activist state is that people will attempt to turn power towards their own ends.[193] In a futile effort to prevent rent seeking, reformers suggest that we should sacrifice our liberty of speech and political action, as well.[194]

Egalitarian reformers also seek to promote a type of political equality at the expense of liberty. They hold forth the dream of a world in which all people have "equal" influence, or at least the opportunity for equal participation. Yet, reaching that utopia is always, it seems, one more campaign finance "loophole" away. Some, such as Professors Fiss and Dworkin,[195] respond that they are not taking away freedom, but granting it. Dworkin argues that political practices must "treat all members of the community as individuals, with equal concern and respect,"[196] and that this requires restrictions on political participation through campaign giving.[197] But this merely begs the question: are all individuals treated with equal concern and respect when they are not allowed to equally employ the fruits of their labors and talents to political action?[198]

Although Professor Fiss' argument does not beg such questions, it is even more disturbing. Fiss argues that "we may sometimes find it necessary to restrict the speech of some elements of our society in order to enhance the relative voice of others, and that unless the Court allows, and sometimes even requires, the state to

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[192] Hasen, *supra* note 27, at 15-16. Nor were the Founders of this country blind to the problem of rent seeking, even in the minimalist state which existed at the time. Madison's Federalist No. 10 is largely concerned with how the Constitution seeks to prevent rent-seeking through federalism, separation of powers, and the size of the union. THE FEDERALIST No. 10 (James Madison).

[193] BeVier, *supra* note 88, at 1276.

[194] BeVier, *supra* note 88, at 1279.

[195] Professor Owen M. Fiss, Sterling Professor, Yale Law School; L.L.B., Harvard Law School. Professor Ronald M. Dworkin, New York University School of Law; L.L.B., Harvard Law School.

[196] RONALD DWORKIN, FREEDOM'S LAW 17 (1996).

[197] *Id.* at 18; *see also* Ronald Dworkin, *The Curse of American Politics,* NEW YORK REV., Oct. 17, 1996, at 19.

[198] Smith, *supra* note 83, at 1079-81.

do so, we as a people will never truly be free."[199] It is impossible, in the context of this paper, to address the seriously flawed premises of Professors Dworkin and Fiss.[200] But as Fiss makes clear, what he considers "freedom" is not freedom as it has historically been accepted in the United States; his is not the historic interpretation of the First Amendment.[201]

CONCLUSION: WHY THE FIRST AMENDMENT?

Steer wide;
keep well to seaward; plug your oarsmen's ears
with beeswax kneaded soft; none of the rest
should hear that song
But if you wish to listen
let the men tie you in the lugger, hand
and foot, back to the mast, lashed to the mast,
so you may hear those harpies' thrilling voices;
shout as you will, begging to be untied,
your crew must only twist more line around you . . .[202]

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[199] Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1425 (1986).

[200] The author has attempted to do so elsewhere. *See generally* Bradley A. Smith, *Money Talks: Speech, Corruption, Equality and Campaign Finance*, 86 GEO. L.J. (forthcoming 1997).

[201] *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[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. . . ."). *See also* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, *in* THE BILL OF RIGHTS IN THE MODERN STATE, *supra* note 27, at 225; Daniel D. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 43 (1976) ("Almost every country in the world, including those behind the iron curtain, can display a constitution that guarantees freedom of expression to the people — to the extent, of course, that the people's representatives may deem proper. . . . [W]e can boast that our Constitution protects something far scarcer in history than that sort of freedom. And with the knowledge of the caliber of people who sometimes get their hands on our government, it is well that this is so."); *see also* Smith, *supra* note 200.

[202] HOMER, *supra* note 1, at 210-11.

I have argued elsewhere that efforts to regulate campaign finance have, for the most part, had deleterious effects for our democracy.[203] In particular, they are anti-egalitarian, as Americans have traditionally understood the concept of political equality, and, in some ways, they actually increase the amount and success of influence seeking. Whatever the actual effects of such efforts, it should be clear that they do infringe on our First Amendment freedoms.

Since 1907, federal election law has been amended eleven times, with at least four major overhauls in 1907, 1925, 1971 and 1974.[204] When laws become complicated and difficult to follow, as the Federal Elections Campaign Act certainly is, even without such complex proposals as are included in current "reform" bills; when they fail to achieve their desired goals; and when they are in constant need of revision to plug an ever evolving series of "loopholes," one must consider the possibility that it is the laws, and not the people, which are flawed.[205]

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[206] Historically, fights over the First Amendment have focused on the extent to which this language protects commercial speech, pornography, hate speech or fighting words. Few have suggested that it does not or should not cover political speech. Yet, political speech is precisely what campaign finance reforms seek to regulate, with ever increasing scope and vigor.

Proponents of campaign finance reform are like the Sirens that so bewitched unwary sailors in Homer's Odyssey.[207] Their music is sweet—political equality, the end to corruption and scandal, and the prevention of "nasty" campaign tactics all rolled into one. But the promise is not fulfilled, and the ongoing quest brings with it a very high price. As a result of our past reforms, campaigns often turn as much on legal issues, the complexities of finance law and

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[203] Smith, *supra* note 83, at 1071-72.

[204] See *infra* Part II.C (discussing past efforts of reform).

[205] THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961).

[206] U.S. CONST. amend. I.

[207] HOMER, *supra* note 1, at 211.

the skills of lawyers and consultants, as on appeals to voters. Incumbents are unfairly entrenched in office. Office holders are forced to spend an inordinate amount of time raising money. More importantly, true grassroots efforts are being smothered by bureaucracy, and citizens are being both silenced and deprived of information which they deserve, and ought, to have. We are told that all of these wrongs may be corrected, if only we give up more of our right to participate in political activity. The problem with this "trust me" approach is that there will always be another "loophole" to plug.

In the Odyssey, Lady Kirke warns Odysseus to ignore the Sirens' call. He must be "lashed to the mast" to resist their temptations: and if tempted to give in, his crew "must only twist more line" around him, "till the singers fade."[208]

For two hundred years, the First Amendment has served as the mast to which we are lashed, restraining our worst impulses to silence the speech we do not like or find in some way dangerous. Campaign reformers are like the Sirens, singing sweet music. They call us to their shores; the solution, they tell us, is to head closer still to their song, and to close the next set of "loopholes."

And this is where we stand at the moment. We need to make a choice. Will we plug our ears to the sirens, and bind ourselves tight to the First Amendment mast; or will we continue toward the sound, risking some of our most precious liberties?

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[208] HOMER, *supra* note 1, at 211.