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RETHINKING CAMPAIGN-FINANCE REFORM: THE PRESSING NEED FOR DEREGULATION AND DISCLOSURE

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I. INTRODUCTION

The complexity of campaign-finance law—with its escalating maze of legal prohibitions, restrictions, and disclosure requirements—has developed to the point where it ranks second only to the federal tax code. This is a poor testament indeed to the First Amendment's astoundingly simple admonition that Congress shall make no law abridging the freedom of speech. Although the Supreme Court recently deferred to Congress in its ability to restrict campaign contributions,[1] the Court has also repeatedly recognized that the First Amendment has "its fullest and most urgent application to speech uttered during a campaign for political office."[2] Further, the Court has stated that it is the duty of the Court to approach such restrictions "with the utmost skepticism" and subject them to the "strictest scrutiny,"[3] and that the very purpose of the First Amendment is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[4] One justice has aptly noted:

> The federal election campaign laws, which are already . . . so voluminous, so detailed, so complex, that no ordinary citizen dare run for office, or even contribute a significant sum, without hiring an expert advisor in the field, can be expected to grow more voluminous, more detailed, and more complex in the years to come—and always, always, with the objective of reducing the excessive amount of speech.[5]

Those opposed to the bureaucratic labyrinth of campaign-finance reform point out that donations to candidates and political

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1. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93 *passim* (2003).

2. Eu v. San Francisco County Democratic Cent. Comm'n, 489 U.S. 214, 223 (1989) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

3. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 412 (2000).

4. Red Lion Broad. Co. v. FTC, 395 U.S. 367, 390 (1969).

5. *McConnell*, 540 U.S. at 264 (Scalia, J., concurring in part and dissenting in part).

parties are in fact legitimate expressions of popular interest,[6] and that often the best way to discuss the political issues of the day in the modern age is to publicize them through expensive television ads. In the minds of these individuals, complex campaign-finance regulation is not only undesirable, but ultimately futile. This is due to the fact that previous congressional efforts to address perceived electoral abuses have invariably been met with clever maneuvers designed to circumvent that legislation, which in turn has been followed by further laws to close the resulting loopholes, and so on *ad infinitum*.[7]

A far better solution is to totally deregulate the current campaign-finance system, and in its place require complete and widely accessible disclosure of all contributors and political advertising.[8] By shining the bright light of disclosure on those contributing to politicians, their parties, and other political messages, the public will clearly know whom the primary actors are and what influence they are trying to exert. It is obvious that increased campaign spending of all kinds results in a better-informed electorate, because exposing corruption, untenable platforms, or deficient character in a politician are vital in educating voters. Competition in the marketplace of ideas should be encouraged just as it is in the marketplace of goods. Justice Scalia eloquently noted the philosophical basis for a *laissez faire* attitude toward campaign contributions:

> The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If that premise is wrong, our democracy has a much greater problem to overcome than merely the influence of amassed wealth. Given the premises of democracy,

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6. "[A]n attack upon the funding of speech is an attack upon speech itself." *Id.* at 253 (Scalia, J., concurring in part and dissenting in part).

7. For a history of campaign-finance regulation, see Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 147-48 (2003) (holding that a ban on direct corporate political contributions could be applied to a nonprofit advocacy corporation); Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 437-39 (2001) (discussing the Court's first look at the Federal Election Commission Act in 1971); Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 208-10 (1982) (summarizing the history of regulating political contributions); Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) (the Federal Constitution grants Congress the power to regulate federal elections); Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 402-04 (1972) (explaining the history of campaign finance reform); United States v. Automobile Workers, 352 U.S. 567, 575-82 (1957) (concerns of campaign finance date back to the early 1900s); United States v. Cong. of Indus. Org., 335 U.S. 106, 113-14 (1948) (earliest campaign finance reform occurred in 1907).

8. For suggested changes, see *infra* Part VIII (discussing a simpler approach to campaign finance reform).

there is no such thing as *too much* speech.[9]

II. DEALING WITH POLITICAL CORRUPTION

Proposals for increasing limits on campaign contributions and expenditures rely primarily on the proposition that money "buys" elections and therefore exerts a powerful corrupting influence on politicians.[10] As a result, the primary justification for campaign-speech restrictions is the relatively vague notions of "prevention of corruption" and the so-called "appearance of corruption" of elected officials.[11] On this basis the Supreme Court upheld contribution limitations if their purpose is one of reducing corruption, which is traditionally defined as "the attempt to secure a political *quid pro quo* from current or potential officeholders."[12] Limits on contributions have thus been justified because they prevent both the "actual corruption" threatened by large financial contributors and the erosion of public confidence in the electoral process through the "appearance of corruption."[13]

At this point, a legitimate question is whether current law, as extensive as it is, is insufficient to deal with this type of corruption among politicians. After all, federal law does contain an intricate web of regulations, both administrative and criminal, which govern the acceptance of gifts and other self-enriching actions by public officials.[14] Under existing statutes, federal officials are subject to severe criminal penalties if they solicit or accept a bribe or illegal gratuity[15] while participating, in their official capacity, in a matter in which they have a personal financial interest,[16] or if they receive a supplementation of salary from any source outside the federal government.[17]

In spite of these comprehensive corruption statutes, the Supreme Court has gone further and recognized a "different type

9. *McConnell*, 540 U.S. at 259 (Scalia, J., concurring in part and dissenting in part).

10. Contribution limits are said to be grounded in governmental interests in preventing "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." *Nat'l. Right to Work*, 459 U.S. at 208.

11. *See Buckley*, 424 U.S. at 67. *See also Beaumont*, 539 U.S. at 153-54; *Nixon*, 528 U.S. at 388-89.

12. Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 297 (1981).

13. *See Nat'l Right to Work*, 459 U.S. at 208. *See also Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 440-41.

14. *See* United States. v. Sun-Diamond Growers, 526 U.S. 398, 409 (1999).

15. 18 U.S.C. § 201(b)–(c) (Supp. 2003). *See also Sun-Diamond*, 526 U.S. at 404.

16. 18 U.S.C. § 208 (2000). *See also* United States v. Miss. Valley Co., 364 U.S. 520, 548-49 (1961).

17. 18 U.S.C. § 209. *See also* Crandon v. United States, 494 U.S. 152, 158-66 (1990).

of corruption" than the financial *quid pro quo*[18]—what the Court terms the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[19] Campaign reformers have thus successfully contended that: simply too much money is spent on political advertising;[20] while television ads may enhance the quantity of speech, they diminish its quality;[21] and the volume of advertising often drowns out those unable to purchase countervailing ads. Yet none of this behavior requires even a faint showing of demonstrable corruption. In the end, the reformers succeeded in constructing a formidable array of restrictions on campaign financing—and thus on political speech itself.

III. THE FEDERAL ELECTION CAMPAIGN ACT

The Federal Election Campaign Act of 1971[22] ("FECA"), together with its 1974 amendments,[23] proposed an extensive regime of campaign-finance regulation based primarily on contribution limits to candidates.[24] The Act also sought to limit total spending on House and Senate races by setting expenditure limits on candidates.[25] In addition, it required public disclosure of political contributions.[26]

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18. Austin v. Mich. State Chamber of Comm., 494 U.S. 652, 660 (1990).

19. *Id. See also Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 441 (acknowledging that corruption extends beyond explicit cash-for-votes agreements to "undue influence on an officeholder's judgment"); *Nixon*, 528 U.S. at 389 ("[The Court has] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.").

20. *See* SMITH, *infra* note 80.

21. Justice Scalia argued in his dissent in *McConnell*: "[I]t is not the proper role of those who govern us to judge which campaign speech has 'substance' and 'depth' (do you think it might be that which is least damaging to incumbents?) and to abridge the rest." *McConnell*, 540 U.S. at 261 (Scalia, J., concurring in part and dissenting in part).

22. Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. § 431 (2000 & Supp. 2003)). The Act was called "by far the most comprehensive, reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress." Buckley v. Valeo, 519 F.2d 821, 831 (D.C. Cir. 1975), *aff'd*, 424 U.S. 1 (1976).

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

24. 18 U.S.C. § 608(b)(1)–(3) (1970 & Supp. IV). The Act also provided for public financing of presidential campaigns, and established an effective enforcement mechanism through the creation of the Federal Election Commission ("FEC"). *Id.*

25. 18 U.S.C. § 609 (1970 & Supp. IV).

26. 2 U.S.C. § 431 (2000) (citing the statute in its modern form). This led to the holding, in *Buckley*, that such disclosures "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate

In the landmark decision of *Buckley v. Valeo* the Supreme Court held that many of the provisions of FECA were impermissible under the First Amendment,[27] but the opinion did assert that the government has a compelling (though vaguely defined) interest in preventing the corruption of elected officials.[28] The Court eventually sustained the contribution restrictions, admitting that such limits do in some ways infringe the First Amendment, but finding that prevention of corruption was of sufficient governmental interest to justify such infringements.[29] It concerned the Court that large contributions might have the potential to lead to *quid pro quo* corruption.[30] The Court stated that contribution limits are permissible because they did not "directly" infringe on the speech of the spender,[31] since they left open alternate means for advocacy of political issues.[32]

The Court in *Buckley* struck down restrictions on spending by a candidate as unconstitutional,[33] which, the Court reasoned, posed no real threat of corruption.[34] Furthermore, *Buckley* rejected in the strongest possible language the notion that government could restrict political speech in order to advance political equality: "The concept that government may restrict the speech of some element of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[35]

A major purpose of the First Amendment, the *Buckley* Court explained, was "to protect the free discussion of governmental affairs."[36] The Court conceded that contribution and expenditure limitations "operate in an area of the most fundamental First

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predictions of future performance in office" and "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." 424 U.S. at 67.

27. *Buckley*, 424 U.S. at 54 ("We therefore hold that [the Act's] restriction on a candidate's personal expenditures is unconstitutional.").

28. *Id.* at 27.

29. *Id.* at 27-28.

30. *Id.* at 26-27.

31. "While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 20-21.

32. Contribution limits, the Court rationalized, entail only a "marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20.

33. *Id.* at 19 ("The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.").

34. *Id.* at 45 ("We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [the Act's] ceiling on independent expenditures.").

35. *Id.* at 48-49.

36. *Id.* at 14 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

Amendment activities,"[37] and thus such limitations were said to be subject to strict judicial scrutiny, i.e., they must serve a "compelling state interest" employing the "least restrictive means."[38] As a result, campaign contributions to candidates were given less protection than independent expenditures in support of a candidate.[39] To avoid concerns of vagueness, the Court held that FECA could reach only communications that "expressly advocate" the election or defeat of a clearly identified candidate.[40] Therefore, the use of such terms as "Elect John Smith" constituted a bright line between "express advocacy" and "issue advocacy."[41] Issue-advocacy expenditures made independently of candidates had to be reported to the public, but could not be limited.[42] Hence, this unregulated "soft money"[43] could not be used for promotion of a specific candidate, but could be directed toward more general advertising whose effect was often the election or defeat of a particular candidate.[44]

IV. THE BIPARTISAN CAMPAIGN REFORM ACT

After the *Buckley* decision, the Federal Election Commission ("FEC") and others fought hard to close what they perceived as numerous "loopholes" created by the case. The most aggressive of these efforts was the Bipartisan Campaign Reform Act of 2002[45] ("BCRA"). Among other things, the Act—commonly known as McCain-Feingold after its tireless sponsors—banned soft-money contributions that avoided federal rules because they were nominally given to political parties,[46] and it restricted "phony issue

37. *Id.*

38. *Id.* at 25; Levine v. Supreme Court of Wis., 679 F. Supp. 1478, 1494 (W.D. Wis. 1988).

39. Buckley, 424 U.S. at 44.

40. *Id.*

41. *Id.* at 44 n.52; *McConnell*, 540 U.S. at126-28.

42. *Buckley*, 424 U.S. at 44.

43. Soft money refers to unregulated and unlimited contributions made to party organizations rather than particular candidates. It was designed to be used only for "party-building" activities, such as voter-registration, but most of it was in fact sent to state parties and then to individual campaigns. *McConnell*, 540 U.S. at 122-26.

44. *Buckley*, 424 U.S. at 45-46. Interestingly enough, a few years after the passage of the 1974 amendments, incumbent reelection rates began to rise, and incumbents increased their fund-raising advantage over challengers. *Id.* at 33 n.34. Total spending on congressional campaigns also continued to increase, and special interests, instead of declining, appeared to grow in importance. *Id.*

45. *See* Pub. L. No. 107-155, 116 Stat. 81 (containing a series of amendments to FECA). *See also* 2 U.S.C. § 431 (2000 & Supp. 2003); The Communications Act of 1934, 47 U.S.C. § 151; 47 U.S.C. § 315. See also other portions of the United States Code, such as 18 U.S.C. § 607 (Supp. 2003); 36 U.S.C. §§ 510-511.

46. 2 U.S.C. § 441i(a)(b) (Supp. 2003).

ads," which purportedly advanced a cause, but which were actually an attack on a particular candidate.[47]

Congress claimed that BCRA sought principally to address the potential for corruption of federal officeholders created by soft-money donations and by the growing use of corporate and union funds for communications designed to influence elections. According to the reformers, the rising tide of soft money had all but eviscerated the limits on contributions. The Act's other main purpose was to forbid electioneering advertising in the sixty days before a general election and thirty days before a primary.[48]

The provisions of BCRA were challenged, and the Supreme Court in *McConnell v. FEC* upheld substantially all of the Act. The Court found by a narrow five-to-four majority that the loopholes in campaign-finance law had indeed done damage, and that contributions of soft money give rise to corruption and the appearance of corruption.[49] The Court ruled that Congress had the power to re-address these wrongs, since the resulting restrictions did not impermissibly infringe the rights of free speech or free association.[50] *McConnell* strongly signaled that free speech can be diminished pursuant to congressional efforts to cleanse the political system of the so-called corrupting influence of campaign money, no matter how vaguely defined that corruption might be.[51] Therefore, the opinion left in place the sweeping prohibition on soft money,[52] as well as a ban on funds for electioneering communications that mention candidates' names in the weeks before an election.[53] In the end, *McConnell* lent support to further "anti-circumvention" efforts by Congress, suggesting that whatever methods interest groups devise to avoid BCRA can be curtailed by additional legislation.[54]

However, not all members of the Court agreed. Perhaps Justice Scalia best expressed the voice of such concerns when he stated:

> It should be obvious, then, that a law limiting the amount a person can spend to broadcast his political views is a direct restriction on speech. That is no different from a law limiting the amount a newspaper can pay its editorial staff or the amount a charity can

47. 2 U.S.C. § 434(f)(3)(A)(I), (f)(3)(C) (Supp. 2003).

48. 47 U.S.C. § 315(b)(1)(A).

49. *McConnell*, 540 U.S. at 154.

50. *See id.* ("In sum, there is substantial evidence to support Congress' determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption.").

51. *Id.* at 144-47.

52. *Id.* at 154.

53. *Id.* at 201-03.

54. *See id.* at 224 ("We are under no illusion that BCRA will be the last congressional statement on the matter."). Justices Stevens and O'Connor state: "Money, like water, will always find an outlet." *Id.*

> pay its leafletters. It is equally clear that a limit on the amount a candidate can *raise* from any one individual for the purpose of speaking is also a direct limitation on speech. That is no different from a law limiting the amount a publisher can accept from any one shareholder or lender, or the amount a newspaper can charge any one advertiser or customer.[55]

V. LEVEL OF JUDICIAL SCRUTINY

The Supreme Court announced in *Buckley* that restrictions of political contributions and expenditures would be upheld only if they achieved a compelling governmental interest by the least restrictive means.[56] *Buckley* concluded that both contributions and expenditures function in an area of "the most fundamental First Amendment activities," and one in which the Constitution affords the "broadest protection" for individual expression and the "fundamental" right to associate.[57] Applying an "exacting scrutiny" level of review, the *Buckley* court distinguished between contribution limits and expenditure limits.[58] Contribution limits, said the Court, entail "only a marginal restriction upon the contributor's ability to engage in free communication"[59] because the "transformation of contributions into political debate involves speech by someone other than the contributor."[60] Expenditure limits, on the other hand, represent "substantial rather than merely theoretical restraints on the quality and diversity of political speech."[61] *Buckley*'s diluted scrutiny for campaign contributions was based on the grounds that contributions involve only symbolic speech by the contributor, that further expression is contingent on speech by someone other than the contributor, and that the burdens imposed were marginal.[62]

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55. *Id.* at 254-55 (Scalia, J., concurring in part and dissenting in part). "To reach today's decision, the Court surpasses *Buckley*'s limits and expands Congress' regulatory power. In so doing, it replaces discrete and respected First Amendment principles with new, amorphous, and unsound rules, rules which dismantle basic protections for speech." *Id.* at 287 (Kennedy, J., concurring in part and dissenting in part).

56. 424 U.S. at 25.

57. *Id.* at 14-15.

58. *See id.* at 16 ("[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.").

59. *Id.* at 20-21.

60. *Id.* at 21.

61. *Id.* at 19.

62. *Id.* at 21-22. The Court in *Beaumont* explained that contribution limits are subject to a relaxed standard of review because "[w]hile contributions may result in political expression if spent by a candidate or an association . . . the transformation of contributions into political debate involves speech by someone other than the contributor." 539 U.S. at 161-62.

The Court in *McConnell* also maintained that the less rigorous standard of review shows proper deference to Congress' ability to "weigh competing constitutional interests in an area in which it enjoys particular expertise"[63] and provides Congress with "sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process."[64] The dissenters in *McConnell*, on the other hand, urged a return to strict scrutiny for all restrictions on political speech and association, including those on campaign contributions, express advocacy, and corporate or union speech.[65]

VI. FALSE PREMISES OF CONTRIBUTION LIMITS

The basic justification for campaign-finance reform is the reduction in corruption that money allegedly engenders, and the resulting restrictions seem to rest ultimately on the premise that legislators should be responsible to a higher (and curiously undefined) notion of the "public good" that somehow exists apart from the views of any particular group of voters. But this is an untenable position, for elections are an exchange between candidates and the citizens who elect them, and every candidate necessarily offers something to the voter in exchange for being elected. This exchange is part of the fabric of a representative democracy, as is the influence that it necessarily creates. Falsely egalitarian notions that the speech of persons and groups should have equal influence indicate fundamental misunderstandings of the First Amendment. Each person may have only one vote, but it has never been seriously suggested that the speech of each person should be equally influential; otherwise, the views of politicians would have to be based solely on opinion polls. As one justice has observed:

> [It is considered corruptive behavior by some campaign reformers] that corporations, on behalf of their shareholders, will be able to convince voters of the correctness of their ideas. Apparently, winning in the marketplace of ideas is no longer a sign that "the ultimate good" has been "reached by free trade in ideas," or that the speaker has survived "the best test of truth" by having "the thought . . . get itself accepted in the competition of the market."[66]

Opponents of soft money believe that it invites wholesale evasion of contribution limits. But that is exactly what one would expect when citizens are prohibited from contributing directly to candidates of their choice. Because soft money goes to parties, not candidates, the likelihood of the kind of *quid pro quo* corruption

63. 540 U.S. at 137.
64. *Id.*
65. *Id.* at 265 (Thomas, J., concurring in part and dissenting in part).
66. *Id.* at 274 (Thomas, J., concurring in part and dissenting in part).

that is said to justify contribution limits does not occur. After all, citizens contribute to political parties to advance the ideas for which these parties stand, and these contributions in turn encourage lively and productive political debates.

It is commonly presumed that contributions unfairly influence how a politician will vote, but it is just as logical to assume that contributors favor candidates who agree with them in the first place. Besides, adopting an unpopular position in exchange for a donation is generally unwise for a politician, for it is votes—not money—which ultimately win elections. It therefore makes little sense for a candidate to betray his personal convictions, lose the support of his party, and offend public opinion in order to obtain a contribution. Additionally, it is hardly inappropriate for a legislator to vote in ways that please his constituents, who in turn raise future campaign donations.[67] Furthermore, it has been repeatedly shown that outspending one's opponent does not guarantee success on election night. Finally, disgruntled voters can always register their disapproval at the next election.

Naturally, the lower the contribution limit, the more difficult it is for a candidate to raise money quickly. Raising campaign funds from a large number of small contributors clearly benefits incumbents who have in place a list of past contributors. But in an unrestricted system, a challenger might be able to propose bolder solutions and rely on a handful of donors who provide "start-up capital" for the campaign, thus adding competition to the race.

Implicit in the justification for reform is the notion that only *expenditures of money* are regulated, *not speech itself*.[68] But the right to speak is hardly ineffective if it does not include the financial ability to make it possible.[69] Representative democracies

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67. As Justice Scalia concluded in *McConnell*:

> It cannot be denied, however, that corporate (like noncorporate) allies will have greater access to the officeholder, and that he will tend to favor the same causes as those who support him (which is usually *why* they supported him). That is the nature of politics—if not indeed human nature—and how this can properly be considered "corruption" (or "the appearance of corruption") with regard to corporate allies and not with regard to other allies is beyond me.

Id. at 259 (Scalia, J., concurring in part and dissenting in part).

68. "These property rights, [to fund speech by proxy] however, are not entitled to the same protection as the right to say what one pleases." *Nixon*, 528 U.S. at 399. But *Buckley* stated: "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Buckley*, 424 U.S. at 16.

69. Justice Scalia noted in *McConnell* that: "[W]here the government singles out money used to fund speech as its legislative object, it is acting against speech as such, no less than if it had targeted the paper on which a

are based on political parties, and these parties need resources.[70] The freedom to associate with others for the dissemination of ideas—by pooling financial resources for political expression—is an important aspect of free speech.[71] The *Buckley* Court acknowledged that contributions enable "like-minded persons to pool their resources in furtherance of common political goals."[72] Justice Scalia likewise remarked in *McConnell*:

> In the modern world, giving the government power to exclude corporations from the political debate enables it effectively to muffle the voices that best represent the most significant segments of the economy and the most passionately held social and political views. People who associate—who pool their financial resources—for purposes of economic enterprise overwhelmingly do so in the corporate form; and with increasing frequency, incorporation is chosen by those who associate to defend and promote particular ideas—such as the American Civil Liberties Union and the National Rifle Association. [73]

VII. UNINTENDED CONSEQUENCES OF REFORM

Justice Kennedy noted the dramatic and far-reaching impact of campaign-finance legislation on the ability of political parties to engage in public discourse:

> The many and varied aspects of [campaign-finance] regulations impose far greater burdens on the associational rights of the parties, their officials, candidates, and citizens than do regulations that do no more than cap the amount of money persons can contribute to a political candidate or committee. The evidence shows that national parties have a long tradition of engaging in essential associational activities, such as planning and coordinating fundraising with state and local parties, often with respect to elections that are not federal

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book was printed or the trucks that deliver it to the bookstore." 540 U.S. at 252 (Scalia, J., concurring in part and dissenting in part).

70. The Court in *Buckley* recognized that money is necessary for political discourse:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

424 U.S. at 19.

71. The Supreme Court has held that the First and Fourteenth Amendments guarantee the "freedom to associate with others for the common advancement of political beliefs and ideas" and that this freedom encompasses the right to "associate with the political party of one's choice." Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973).

72. 424 U.S. at 22.

73. 540 U.S. at 257-58 (Scalia, J., concurring in part and dissenting in part).

> in nature. This strengthens the conclusion that the regulations now before us have unprecedented impact.[74]

While it is true that on its face all candidates—incumbents and challengers—are treated equally in such reform, incumbents are inherently favored. It has been shown that incumbents raise about three times as much unrestricted "hard money" as do their challengers. Further, national-party funding, which is severely limited by the Act, is more likely to assist cash-strapped challengers than incumbents with hard money.[75] Justice Scalia also comments:

> To be sure, the legislation is evenhanded: It similarly prohibits criticism of the candidates who oppose Members of Congress in their reelection bids. But as everyone knows, this is an area in which evenhandedness is not fairness. If *all* electioneering were evenhandedly prohibited, incumbents would have an enormous advantage. Likewise, if incumbents and challengers are limited to the same quality of electioneering incumbents are favored. In other words, *any* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.[76]

Without the ability to raise sufficient sums of money, the fate of candidates then rests at the mercy of a select group of professional journalists, who then have the power to interpret the candidate's message. Less campaign spending simply reduces the amount of communication; it does not necessarily eliminate its negative aspects. In fact, candidates who have reached their spending limits are unable to respond when their opponents make a last-minute barrage of unfair assaults. Attempts to exclude money from politics only strengthen the position of those with non-monetary resources, such as media access or campaign volunteers. Although the access to such contributions is nominally the same for all candidates, certain types of interest groups—and in turn their choice of candidates—are thus favored.

Additionally, the complicated nature of campaign-finance legislation has been used as political strategy. Sophisticated political strategists now routinely file complaints with the FEC, which are often the quickest and least expensive way to tarnish an opponent's reputation or have him divert valuable resources defending himself.

As for the future of such reform, Justice Thomas grimly predicts that the news media, which also seek to influence elections through editorials, may be the next target: "The chilling endpoint of the Court's reasoning is not difficult to foresee:

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74. *Id.* at 313 (Kennedy, J., concurring in part and dissenting in part).
75. *Id.* at 249-50 (Scalia, J., concurring in part and dissenting in part).
76. *Id.* at 249 (Scalia, J., concurring in part and dissenting in part).

outright regulation of the press."[77] Furthermore, Justice Scalia observes that restrictions upon the right of the electorate to pool financial resources "threatens the existence of all political parties."[78] Restrictions such as these would be serious consequences indeed.

But the underlying question persists: is too much money spent on political campaigns?[79] Even assuming the most liberal estimates, it has been pointed out that total campaign spending for all local, state, and federal elections combined amounts to no more than fifteen dollars per eligible voter (and this is often spread over a two-year election cycle).[80] Total expenditures therefore constitute about 0.05% of gross domestic product—an amount considerably less on a per-voter basis than many other less affluent democracies in the world.[81] In spite of these modest amounts, the public perception remains that vast sums are spent on political campaigns, and that something must be done to rein in the excessive money.[82]

VIII. A PROPOSAL FOR DEREGULATION AND DISCLOSURE

It has become increasingly apparent that the regulatory model of campaign reform which currently exists has failed to achieve even its modest objectives. Present law restricts the supply of funds (through contribution limits), but not demand (because mandatory spending limits were declared unconstitutional in *Buckley*). Due to this paradoxical state of the law, it is no wonder that the current system intensified the race for raising and spending money designed to persuade voters and politicians.[83]

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77. *Id.* at 283. Justice Thomas also noted that under the reasoning of the majority opinion, he could envision laws being passed and upheld that would require print media to give equal time to opposing viewpoints. *Id.* at 284-85 (Thomas, J., concurring in part and dissenting in part).

78. *Id.* at 256 (Scalia, J., concurring in part and dissenting in part).

79. The Court in *Buckley* saw increasing expenditures to be of no consequence: "[T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns." 424 U.S. at 57.

80. BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 41-42 (2001).

81. *Id.* at 42.

82. Justice Scalia noted in *McConnell* that even if the larger estimates of campaign spending are considered, Americans have spent half as much as they spend on movie tickets, and a fifth as much as they spend on cosmetics and perfume. 124 S. Ct. at 262 (Scalia, J., concurring in part and dissenting in part).

83. A perfect example of this phenomenon is the recent proliferation of so-called "Section 527" groups, named for the section of the tax code which exempts them from campaign-finance regulation. *See* 26 C.F.R. § 1.527.1

A simpler and more reasonable approach to campaign-finance regulation is to remove the limits on campaign contributions and instead mandate complete and readily accessible disclosure on all contributions to candidates, their parties, and political advertising. In this way, the political marketplace would be disciplined by citizens exercising their franchise to vote, not a legal thicket of arcane rules and zealous regulations.[84] The country experienced eminent success in deregulating transportation, energy, and financial services. Thus, there is no reason to believe that an unwieldy and ineffectual campaign-finance scheme protects voters any better than past economic regulations protected consumers.

As long as the law mandates full disclosure of all substantial contributions to candidates and political parties and of all significant political advertising,[85] the voters themselves can decide whether the fact that a candidate has been heavily supported by a particular individual or group should weigh against his candidacy.[86] Justice Scalia has remarked in this regard:

> Evil corporate (and private affluent) influences are well enough checked (so long as adequate campaign-expenditure disclosure rules exist) by the politician's fear of being portrayed as "in the pocket" of so-called moneyed interests. The incremental benefit obtained by muzzling corporate speech is more than offset by loss of the information and persuasion that corporate speech can contain. That, at least, is the assumption of a constitutional guarantee which prescribes that Congress shall make no law abridging the freedom of speech.[87]

Under this simplified proposal, all political contributions and communications would be clearly revealed to the public through the Internet and major metropolitan newspapers.[88] The intent here is not to create another bureaucracy, and it should be noted that most of this easily compiled data is currently required by the

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(2004).

84. A similar recommendation was introduced by Representative John Doolittle. Citizen Legislature and Political Freedom Act, H.R. 3525, 108th Cong. (2003).

85. The Court in *Buckley* observed: "A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." 424 U.S. at 67.

86. As Justice Scalia stated in *McConnell*: "The use of corporate wealth (like individual wealth) to speak to the electorate is unlikely to 'distort' elections—*especially* if disclosure requirements *tell* the people where the speech is coming from." 124 S. Ct. at 258 (Scalia, J., concurring in part and dissenting in part).

87. *Id.* at 259 (Scalia, J., concurring in part and dissenting in part).

88. For example, the disclosure of contributors might be required on the first day of each month in, say, the classified ads section of such national newspapers as *The New York Times*, *The Washington Post*, and *The Wall Street Journal*.

FEC. However, public knowledge of this information could be significantly increased by making it even more conspicuous to even the casual observer. In the process, the public would be well-informed of those individuals and advocacy groups who are contributing to particular politicians, political parties, and issue advertising. Furthermore, the failed system of contribution limits—with its stifling effects on free speech—could be eliminated.

IX. CONCLUSION

The explicit wording of the First Amendment ensures that individuals and organizations have a right to voice their opinions. The government has no business attempting to equalize political strength among society by restricting speech, even if disparities in political influence appear. Despite claims of campaign-finance reformers that regulation can rid the political system of corruption, the suggestion that it is somehow corrupt to persuade elected representatives to vote in a certain way is inane. Complete disclosure of contributions and political activity allows the electorate to be informed of any attempts at political maneuvering, with any *quid pro quo* corruption by politicians to be prosecuted to the fullest extent of the law.

The quantity and substance of campaign speech ought to be determined by private choices. It has been the experience of our democracy that free speech is in fact eventually judged on its substance, rather than its sheer volume or immediate allure. Through vibrant political debate—*not* a federal campaign bureaucracy—the Constitution in the end wisely places its trust in the public to select its representatives.