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Buckley v. Valeo, Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing

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TABLE OF CONTENTS

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Mr. Justice Stewart: ". . . that's the First Amendment, what this case is all about, plus, perhaps, the Fifth Amendment; but we are talking about speech, money is speech, and speech is money, whether it be buying television or radio time or newspaper advertising, or even buying pencils and paper and microphones.

"That's the — that's certainly clear, isn't it?"

Mr. Justice Blackmun: ". . . following through on what Justice Stewart indicated, it seems to me, in a distinct sense, that one of [the appellees'] problems is to joust with this suggestion that money is speech. And I think part of the argument of your opponents is very forceful in that respect, that it does produce speech."

Comments from the bench during oral argument in Buckley v. Valeo, Nos. 75-436 and 75-437, on Monday, November 14, 1975; Record at 67,70.

The Supreme Court's decision in *Buckley* v. *Valeo*[1] undoubtedly will be the forerunner of many future decisions dealing with the complex area of political campaign finance and thus will exert a profound influence on the structure of American politics. From a broader perspective, the decision significantly applies fundamental constitutional law doctrines concerning the first amendment and separation of powers. Accordingly, a clear understanding of what the Court did and did not do in *Buckley* is essential to any further legislative or judicial initiatives in the regulation of political activity. This article will examine the Court's holdings in *Buckley*, describe the congressional response thereto, and attempt to analyze the potential constitutional effects of the decision and the legislation that followed it, with emphasis on issues left unresolved by the Court.

I. THE BUCKLEY DECISION

Senator James L. Buckley, former Senator Eugene J. McCarthy, and ten co-plaintiffs[2] challenged the constitutionality of major provisions of existing federal law[3] regulating the financing of politi-

v. Valeo. Also representing the plaintiffs were Ralph K. Winter, Jr., Professor, Yale Law School, and Melvin L. Wolf and Joel M. Gora of the American Civil Liberties Union.

1. 424 U.S. 1 (1976).

2. The original plaintiffs, who filed their complaint on January 2, 1975, the first business day after the effective date of the Federal Election Campaign Act Amendments of 1974, were Senators Buckley and McCarthy, Representative William A. Steiger, Stewart R. Mott, the Committee for a Constitutional Presidency (which later added "—McCarthy '76" to its name), the Conservative Party of the State of New York, the New York Civil Liberties Union, Inc., the American Conservative Union, and Human Events, Inc. They were joined on February 7 by the Mississippi Republican Party, the Libertarian Party, and the Conservative Victory Fund.

3. Those statutes were the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-54 (Supp. II, 1972) [hereinafter cited as FECA of 1971], the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified in several titles of U.S.C.) [hereinafter cited as FECA Amendments of 1974], and Subtitle H of the Internal Revenue

cal campaigns for federal office.[4] These provisions included limitations on campaign expenditures, campaign contributions, and so-called independent expenditures (*i.e.* election-related expenditures made by private citizens or groups independently of the candidates and their campaigns); required record-keeping and public disclosure of all the above; federal subsidies to some (but not all) presidential candidates; and the creation of a Federal Election Commission (FEC) to administer and enforce the substantive provisions.

Plaintiffs contended that these laws infringed free speech by candidates, citizens, and groups and violated equal protection principles by discriminating invidiously among candidates and political groups, generally (although not invariably) in favor of incumbents and major parties and against challengers and third-party and independent candidates and their contributors and supporters. The Commission was also challenged as an "arm of Congress" performing functions reserved to the Executive in violation of constitutional allocation of powers. The statutes were challenged *in toto* except for the disclosure provisions, which plaintiffs attacked only on limited overbreadth grounds.

A. *The Applicable Constitutional Rules*

In the court of appeals,[5] the plaintiffs' constitutional challenges

Code of 1954, INT. REV. CODE OF 1954, §§ 9001-42. "FECA" is used generally to describe the FECA of 1971 and all its amendments.

4. The principal provisions *not* challenged include the following: former 18 U.S.C. § 610 (1970) (contributions or expenditures by national banks, corporations, or labor organizations); 18 U.S.C. § 611 (1970) (contributions by government contractors; separate segregated funds of corporations and labor organizations); 18 U.S.C. § 613 (1970) (contributions by foreign nationals); 18 U.S.C. § 614 (1970) (prohibition on contributions in the name of another); and 18 U.S.C. § 615 (1970) (limitation on contributions of currency). These provisions, in some cases with amendments, are now 2 U.S.C.A. §§ 441b, 441c, 441e, 441f, 441g (Supp. 3, 1976).

5. 519 F.2d 821 (D.C. Cir. 1975). The *Buckley* case was in fact heard by two courts in session simultaneously. The Court of Appeals for the District of Columbia Circuit, sitting *en banc* pursuant to the statute's special judicial review provision, 2 U.S.C. § 437h (Supp. IV, 1974), heard argument on all of the challenged provisions. A 3-judge district court (composed of 2 members of the court of appeals and the district judge to whom the case was first assigned) also heard the argument and issued a separate decision dealing only with the challenge to Subtitle H. 401 F. Supp. 1235 (D.D.C. 1975). This curious arrangement was necessitated because § 437h did not clearly provide that Subtitle H was subject to the same judicial review procedures as the FECA. Since at least one and perhaps both courts plainly had jurisdiction over Subtitle H, the Supreme Court did not decide the jurisdiction question. *See* 424 U.S. at 9-10 n.6.

For purposes of simplicity — and since the 3-judge district court merely adopted the court of appeals' holding on Subtitle H *in toto*, 401 F. Supp. 1235 (D.D.C. 1975) — this article will refer to both courts below as "the court of appeals."

Aside from the 3-judge court's decision on Subtitle H, no district court ever ruled on the

were almost wholly rejected. Accepting almost every justification that had been advanced in Congress and by the original and intervening defendants[6] in support of the statutes, the per curiam opinion[7] relied on the familiar language of *United States v. O'Brien* to uphold the Federal Election Campaign Act (FECA):

> [A] government regulation [of speech] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[8]

This constitutional test was held satisfied largely on the theory that corruption and the appearance of corruption — as exemplified by the supposed example of Watergate[9] — required and justified massive congressional intervention in the political process. The court of appeals thus found a "compelling interest in safeguarding the integrity of elections and avoiding the undue influence of wealth."[10] As a subsidiary justification, the court of appeals accepted defendants' contentions that appropriate analogies could be drawn from the reapportionment cases, including *Reynolds v. Sims*[11] and *Wesberry v. Sanders*,[12] which enunciate the "one man, one vote" formula for legislative districting. This "equal protection" argument rested on the idea that the FECA's limitations on the contribution and expenditure of financial resources tended to equalize the power of the

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case. Section 437h provides for certification of all constitutional questions to the court of appeals without decision by the district court. The district court, however, at the direction of the court of appeals, was involved in formulating issues and making findings of fact on the basis of an extensive record compiled by the parties and elicited on discovery. 519 F.2d 817, 818 (D.C. Cir. 1975).

6. The original defendants were the Federal Election Commission, the Attorney General, the Comptroller General, the Clerk of the House, and Francis R. Valeo, Secretary of the Senate. The federal defendants were joined by 3 of the organizations principally responsible for having secured congressional passage of the challenged statutes — Common Cause, the League of Women Voters, and the Center for Public Financing of Elections — and several individuals associated with those groups.

7. Chief Judge Bazelon and Judges Wilkey, Tamm, and MacKinnon dissented from various portions of the court's opinion.

8. 391 U.S. 367, 377 (1968).

9. Plaintiffs argued that the statutes were not genuinely directed to the abuses of 1972 and that the statutes would make the recurrence of abuse more rather than less likely. Merely as one example, the incumbent administration, through the Secretary of the Treasury, is given considerable discretion in determining the amounts of federal subsidies available for presidential candidates. 26 U.S.C. §§ 9006(c), 9037 (Supp. IV, 1974).

10. 519 F.2d at 841.

11. 377 U.S. 533 (1964).

12. 376 U.S. 1 (1964).

wealthy and the non-wealthy, thus advancing the goal of political equality. Finally, the court also accepted defendants' argument that Congress had a valid interest in checking allegedly "skyrocketing" increases in campaign costs.

While conceding that "strict judicial scrutiny of the challenged provisions is appropriate,"[13] the court of appeals emphasized the primacy of the legislative decision, declaring that "[o]n questions of degree, of drawing the line, sound doctrine gives Congress latitude for reasonable judgments. . . ."[14] No attention was paid to precedents clearly holding that such deference is unwarranted and inappropriate when first amendment rights are at issue.[15]

By contrast, the Supreme Court, also in a per curiam opinion, declared that the FECA's "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities."[16] Noting that the "conflicting contentions" of the parties "could not more sharply define the basic issues before us,"[17] the Court rejected *O'Brien* as the applicable standard:

> We cannot share the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien*. The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. . . . [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.[18]

The Court also rejected other constitutional analogies that had been developed in defense of the challenged statutes. Professor Freund's alliterative and often-repeated slogan that if decibels could be regulated so could dollars[19] was quickly dismissed as based on "a fundamental misconception."[20]

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13. 519 F.2d at 843.

14. *Id.* at 842.

15. *See, e.g.*, Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

16. 424 U.S. at 14.

17. *Id.* at 15.

18. *Id.* at 16.

19. *See* Freund, *Commentary*, in ROSENTHAL, FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS 72-73 (1971). Professor Freund's reference was to the soundtruck cases. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949).

20. The *Buckley* Court stated:

> The decibel restriction upheld in *Kovacs* limited the *manner* of operating a soundtruck, but not the *extent* of its proper use. By contrast, the Act's dollar ceilings restrict the extent of the reasonable use of virtually every means of communicating information.

424 U.S. at 18-19 n.17.

Despite its concern with protecting first amendment rights, the Court distinguished between expenditure limits and limits on contributions to campaigns for the purpose of constitutional adjudication. Although holding that the FECA's expenditure limits "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech,"[21] the Court concluded that, "by contrast," a campaign contribution limitation "entails only a marginal restriction upon the contributor's ability to engage in free communication."[22] While recognizing that both expenditure and contribution limits impinge on protected associational freedoms, the Court found the infringement substantially less in the case of campaign contribution limits. In sum, the FECA's "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions."[23]

The Court's unfortunate and ultimately inadequate attempt to distinguish between contribution and expenditure limits lies at the heart of the continued uncertainty surrounding many of the constitutional issues left unresolved by *Buckley* and the new issues raised by the congressional response to the decision.[24] Indeed, considerable doubt exists whether, as experience under the FECA accumulates, the Court can continue to sustain the distinction it drew in *Buckley*. As the Chief Justice said in his separate opinion, "contributions and expenditures are two sides of the same First Amendment coin."[25] As will be suggested more fully, practical implementation of the Court's theoretical distinction seems unworkable, particularly with respect to "independent expenditures" — those made by individuals and groups not under the control of or in coordination with particular candidates.

B. Limitations on Expenditures

Pursuant to the theoretical framework described above, the Supreme Court declared unconstitutional limitations on candidate expenditures,[26] limitations on expenditures by candidates from their

21. *Id.* at 19.

22. *Id.* at 20-21.

23. *Id.* at 23.

24. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 [hereinafter cited as FECA Amendments of 1976].

25. 424 U.S. at 241 (Burger, C.J., concurring & dissenting).

26. Act of Oct. 15, 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263 (repealed 1976). Candidates for a party's nomination for President could not spend over $10,000,000 in pursuit of that nomination; the total spent in any one state could not exceed twice the expenditure

personal resources,[27] and limitations on independent expenditures.[28] The Court explicitly rejected the reasoning of the court of appeals that there was a compelling governmental interest in equalizing the financial resources of candidates.[29] The Court also emphatically rejected the rationale that election costs had grown too high and the costs of politics should be reduced:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people — individually as citizens and candidates and collectively as associations and political committees — who must retain control over the quantity and range of debate on public issues in a political campaign.[30]

Similar reasoning led to the holding that 18 U.S.C. § 608(e), the limit on independent expenditures, was unconstitutional. Because the plaintiffs had also challenged section 608(e) on vagueness grounds, however, the Court attempted to construe the language of section 608(e) in order to eliminate the vagueness it found before striking the section down as unconstitutional per se. It restricted the application of the provision "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.' "[31] Thus communications that omit these "buzz words" (what we call "independent non-expenditures") would not be restricted under section 608(e), and in fact *could not* be restrained constitutionally.[32]

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limit applicable in that state to a candidate for nomination for election to the Senate. General-election candidates for the presidency were limited to $20,000,000.

Candidates for nomination for election to the Senate were limited to spending 8 cents multiplied by the state's voting age population or $100,000, whichever was greater. No general-election Senate candidate was permitted to spend in excess of 12 cents multiplied by the state's voting age population or $150,000, whichever was greater.

In states with only one member in the House of Representatives, the Senate spending limits applied. In all other House elections, no candidate was allowed to spend in excess of $70,000 in pursuit of the nomination or in excess of $70,000 in the general election.

Candidates were permitted to spend an additional 20% of the applicable limit for fundraising purposes, 18 U.S.C. § 591(f)(4)(H) (Supp. IV, 1974), and the limits themselves were to be adjusted to changes in the Consumer Price Index, *id.* § 608(d).

27. Act of Feb. 7, 1972, Pub. L. No. 92-225, § 203, 86 Stat. 9 (repealed 1976). Candidates were limited to spending their personal funds or the funds of their immediate families as follows: $50,000 in the case of a candidate for President, $35,000 in the case of a candidate for the Senate, and $25,000 in the case of a candidate for the House.

28. Act of Oct. 15, 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263 (repealed 1976). No person (defined by 18 U.S.C. § 591(g) (Supp. IV, 1974) to include individuals, committees, and groups) could spend in excess of $1,000 during a calendar year "relative to a clearly identified candidate" and "advocating the election or defeat of such candidate."

29. 424 U.S. at 56-57.

30. *Id.* at 57.

31. *Id.* at 44 n.52.

32. Also of considerable importance is the Court's holding that independent expendi-

Other alleged interests justifying section 608(e) were also unsuccessful: the notion that a limit on independent expenditures was necessary to close the "loophole" that existed between contribution and expenditure limits,[33] the argument that restrictions such as those embodied in the Hatch Act also justified the FECA restrictions,[34] and the analogy to the "fairness doctrine" under *Red Lion Broadcasting Co. v. FCC*.[35]

Perhaps the most significant constitutional clash in *Buckley* was between the concepts of egalitarianism and the first amendment. The statute's defenders had argued that restraining large spenders and contributors made all citizens more equal politically, and that such equalization represented a compelling governmental interest sufficient to justify the FECA's limitations. In language that admits of only one interpretation — that the first amendment is paramount when measured against equal protection arguments — the Court stated:

> [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. . . .[36]

Finding no rational relationship between limits on expenditures by candidates from their own personal funds and the only legitimate governmental interest served by the FECA, the elimination of corruption,[37] the Court held such limits to be unconstitutional. Particu-

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tures do not appear "to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Id.* at 46.

33. *Id.* at 44.

34. *Id.* at 48 n.54.

35. 395 U.S. 367 (1969); *see* 424 U.S. at 49-50 n.55. The analogies listed in the text were often used, and indeed were argued in *Buckley*, in conjunction with Professor Freund's alliteration. *See* note 19 *supra*.

36. 424 U.S. at 48-49.

37. The Court apparently rejected the view of the court of appeals, 519 F.2d at 854, and the Federal Election Commission, Advisory Opinion 1975-65, 40 Fed. Reg. 58,393 (1975), that any member of the candidate's immediate family was permitted to contribute to the candidate's campaign amounts in excess of the $1,000 limitation on individual contributions, Act of Oct. 15, 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263 (repealed 1976) (up to the $25,000 aggregate candidate year contribution ceiling). 2 U.S.C.A. § 441(a)(3) (Supp. 3, 1976). Without explicitly holding to the contrary, the Supreme Court noted that the court of appeals and the FEC had overlooked pertinent Conference Committee report language:

> [M]embers of the immediate family of any candidate shall be suhject to the contribution limitations established by this legislation. If a candidate for the office of Senator, for example, already is in a position to exercise control over funds of a member of his immediate family before he becomes a candidate, then he could draw upon these funds up to the limit of $35,000. If, however, the candidate did not have access to or control over such funds at the time he became a candidate, the immediate family member would not be permitted to grant access or control to the candidate in amounts up to $35,000,

larly when personal wealth is directly related to effective candidacy, the Supreme Court's sharp dismissal of the equal protection arguments raised emphasizes the primacy of first amendment values in the campaign finance field.[38]

An argument plaintiffs decided against making in *Buckley*, in part on the ground that it sounded too political, is that restrictions on campaign financing generally favor Democrats over Republicans because the latter need to exploit their generally greater access to substantial contributors or larger total contributions to overcome the Democrats' much larger registered membership. Moreover, it can be argued persuasively that so long as our social system is based on the premise that inequalities of wealth serve valid and useful purposes, the wealthy need means to exercise their financial power to defend themselves politically against the greater numbers who may believe that their economic interests militate toward leveling.[39] As long as that financial power is exercised through speech or financing the speech of others, rather than through conduct such as

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if the immediate family member intends that such amounts are to be used in the campaign of the candidate. The immediate family member would be permitted merely to make contributions to the candidate in amounts not greater than $1,000 for each election involved.

424 U.S. at 52 n.57, quoting from S. REP. No. 1237, 93d Cong., 2d Sess. 58 (1974).

The Court did not define "access to" or "control over;" thus the reach of its decision in this area is still somewhat unclear. If, moreover, the donor family member did not possess the requisite intent, a gift to the relative-candidate would still not be subject to any limitations. The Commission adopted the Supreme Court's view in a Policy Statement, 41 Fed. Reg. 44131 (1976).

38. Justice Marshall dissented from the portion of the per curiam opinion declaring limits on a candidate's expenditures from his personal resources unconstitutional. 424 U.S. at 286-90 (Marshall, J., dissenting). He reasoned, correctly in our view, that wealthy candidates would begin their campaigns with a significant "head start" over their less affluent opponents, and that:

> [l]arge contributions are the less wealthy candidate's only hope of countering the wealthy candidate's immediate access to substantial sums of money. With that option removed, the less wealthy candidate is without the means to match the large initial expenditures of money of which the wealthy candidate is capable.

Id. at 289. Justice Marshall's pragmatic reasoning demonstrates the impossibility of maintaining a constitutional distinction between expenditures and contributions. Nevertheless, he would have upheld contribution limits even while concurring in voiding limits on the total amounts candidates and independent individuals and groups could spend. The more consistent course, and in particular the more consistent course for those concerned about the fate of non-affluent candidates, would have been to vote to invalidate the limits on contributions to candidates.

39. The same Congress which enacted the FECA Amendments of 1976 also enacted provisions of the Tax Reform Act of 1976, which imposes taxes totaling over 84% in the highest bracket on the "appreciated" value (usually due mostly to inflation) of inherited property which is sold (70% estate tax, then 47½% income tax on the 30% remaining. State taxes, of course, will make the totals even higher. Any distinction between such tax brackets and confiscation of property without compensation seems illusory.

bribery, it would appear entitled to first amendment protection. The Court again appeared implicitly to endorse such considerations when applied to expenditure limits, but not when applied to contribution limits.

Plaintiffs further argued that campaign regulation is bound to discriminate, and that the FECA did discriminate, generally in favor of incumbents and against challengers and third-party and independent candidates. The Court generally was receptive to these arguments but believed they would justify only more-than-facial challenges.

Having voided expenditure limits early in its opinion, the Court later and almost without explanation upheld such limits when accompanied by federal subsidies to candidates.[40] The Court made no attempt to reconcile that result with the unconstitutional-condition doctrine.[41] The spectacle of government's demanding that a candidate restrict, in return for federal payments, what the Court itself has squarely held to be his first amendment right to speech would seem to present one of the strongest cases imaginable for application of the unconstitutional-condition doctrine. Further, the case is strengthened by at least two considerations that as a practical matter will coerce the candidate into accepting subsidies whenever offered and thus into accepting "voluntary" limits on his speech. First, his subsidy-accepting opponent is relieved of some, or in general elections, all the burdens and uncertainties involved in political fund raising. Secondly, contribution limits intensify the competitive disadvantages by making private fundraising far more onerous than ever before.

In short, the candidate is presented with a particularly invidious form of the twentieth century "Catch 22" which threatens to reduce the private sector to adjuncts and servants of the state: government imposes restrictions upon, and by taxation or otherwise dries up funds formerly available to, a private activity; government then offers public funds to subsidize the activity it itself has

40. 424 U.S. at 107-08. The practical effect under present conditions is to void expenditure limits as applied to congressional elections but to preserve them for presidential elections. The aggregate limitation on presidential campaign expenditures is now codified as 2 U.S.C.A. § 441a(b) (Supp. 3, 1976). The FECA Amendments of 1976 also reimposed the $50,000 limit on expenditures from personal funds for presidential candidates accepting federal subsidies, for both candidates for nomination and general-election candidates. 26 U.S.C.A. §§ 9035(a), 9004(d), (Supp. 3, 1976).

41. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Marchetti v. United States, 390 U.S. 39 (1968). No party suggested to tbe Court the possibility of upholding expenditure limits only as to subsidized candidates. The unconstitutional condition problem was never discussed in briefs, oral argument, or opinion.

crippled; the courts then hold that by virtue of the regulation and the subsidies the formerly private activity has become "state action" and thus subject to even greater governmental control.[42] When this process involves a virtually coerced surrender of first amendment rights in an area going to the heart of the political process, it is difficult to see how the Court's unexplained result can be sustained if the issue is brought before it and fully analyzed.[43]

Another curious aspect of the decision is that the Court did not invalidate limitations on what political parties could spend on behalf of their nominees.[44] Although the plaintiffs made both a first and a fifth amendment challenge to these provisions, arguing that by allowing spending by parties in addition to what candidates could spend, the FECA discriminated against independent candidates not supported by party committees, the Court answered only the fifth amendment challenge by noting that since the candidate- and independent-expenditure limitations had been voided, the predicate for the discrimination argument had been eliminated.[45] While correct as far as it went, the Court's discussion simply ignored the first amendment arguments. The conclusion seems unavoidable that a political party challenging the limitation on first amendment grounds in a new lawsuit would succeed. Only the Democratic and Republican parties will have much incentive to make such a challenge (and their incentive may easily be counterbalanced by other

42. *See* note 60 *infra*. One of many obvious examples is the process by which federal control has taken over both the admissions and hiring policies of once-private colleges and universitites in the name of "affirmative action." The process has now been extended, without benefit of statute, to private secondary schools under threat of loss of their charitable status for income-tax purposes. *See* Rev. Proc. 75-50, 1975 INT. REV. BULL. No. 49, at 46-49.

43. It might be argued that only major-party presidential candidates would have standing to raise the issue. Voters, however, could reasonably argue that the unconstitutional condition adversely affects them by drastically reducing the level of campaigning and thus denying them information they need to cast their ballot intelligently. Press reports indicate that those effects are being felt with a vengeance in the 1976 presidential campaign. *See, e.g.*, Washington Post, Oct. 8, 1976, § A, at 4, col. 1. The Buckley Amendment, now 2 U.S.C.A. § 437h (Supp. 3, 1976), purports to give any voter standing to challenge the constitutionality of any provision of the FECA. While Article III constitutional limits on standing remain, the *Buckley* Court found that "at least some of the appellants [had] a sufficient 'personal stake'" as to each constitutional issue raised, which of course included the expenditure limits. 424 U.S. at 12.

44. Act of Oct. 15, 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263 (repealed 1976) (now 2 U.S.C.A. § 441a(d) (Supp. 3, 1976)). A political party's national committee is limited to spending 2 cents multiplied by the voting age population of the United States in the presidential general election. A national or state party committee may also spend up to 2 cents multiplied by the voting age population of the state or $20,000, whichever is greater, in an election to the office of Senator or at-large Representative. Such committees may also spend up to $10,000 in an election to the office of Representative.

45. 424 U.S. at 58 n.66, 59-60 n.67.

considerations) as long as only they are receiving federal subsidies for their presidential candidates. The limitation relating to other parties and non-presidential elections is fairly academic since unlimited expenditures may be made by the candidates themselves.

C. *Limitations on Contributions to Candidates*

As previously noted, the Supreme Court's constitutional distinction between campaign contributions and expenditures allowed the Court to uphold the FECA's limits on contributions to candidates for federal office: $1,000 per person per candidate per election,[46] $5,000 per candidate per election for certain specially defined political committees,[47] and an aggregate annual limit for individuals of $25,000.[48] The Court expressly declined to rest its validation of these limits on any ground other than the alleged need to eliminate corruption and the appearance of corruption.[49]

Moreover, the Court rejected only the plaintiffs' facial attack, thus permitting future challenges directly against the contribution limitations if they are proved to be discriminatory in practice.[50] Combined with the other difficulties created by the Court's decision, such as the existence of separate constitutional rules for expenditures and contributions, the discrimination in favor of personally wealthy candidates, and the murky line between truly independent expenditures and expenditures deemed subject to the control of the candidate, the possibility of subsequent *direct* challenges to the contribution limits may bode poorly for their ultimate chances of survival.

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46. Act of Oct. 15, 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263 (repealed 1976) (now 2 U.S.C.A. § 441a(a)(1)(A) (Supp. 3, 1976)). "Person" is defined broadly to include an "individual, partnership, committee, association, corporation, labor organization, and any other organization or group of persons." "Election" is defined to mean a general, special, primary, or runoff election. 2 U.S.C. § 431(a) (Supp. IV, 1974). The effect of the definition is to permit a person to contribute $1,000 to a candidate for a primary election and another $1,000 for his general election.

47. Act of Oct. 15, 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263 (repealed 1976) (now 2 U.S.C.A. § 441a(a)(2)(A) (Supp. 3, 1976)). These so-called "multi-candidate" committees must meet the following criteria before they are allowed to make contributions up to $5,000: they must be registered under 2 U.S.C. § 433 (Supp. IV, 1974) for not less than 6 months; they must have received contributions from more than 50 persons; and they must have made contributions to 5 or more candidates for federal office. *See* 2 U.S.C.A. § 441a(a)(4) (Supp. 3, 1976).

48. Act of Oct. 15, 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263 (repealed 1976) (now 2 U.S.C.A. § 441a(a)(3) (Supp. 3, 1976)).

49. 424 U.S. at 26.

50. *Id.* at 33-34.

D. Disclosure of Campaign Contributions

The *Buckley* plaintiffs argued that the FECA's disclosure provisions[51] discriminated against certain third parties and independent candidates, and that the dollar amounts contained in the "threshold" provisions triggering the reporting and disclosure requirements were too low. The plaintiffs did *not* challenge disclosure requirements in principle. Indeed, it was one of their main contentions that narrowly drafted disclosure statutes were the best remedy for virtually every evil Congress sought to cure in the FECA. Plaintiffs argued rather that the threshold amounts for disclosure are unnecessarily low and that application of the requirements to minor-party and independent candidates and their contributors, who may be subject to harassment if their contributions are publicly revealed, serve no compelling interest sufficient to override the associational rights at stake. Although only the Chief Justice agreed that the thresholds were too low,[52] the per curiam opinion agreed with the plaintiffs' other major argument that there might be cases "where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial" that the FECA's requirements could not be imposed constitutionally.[53] Although none of the *Buckley* plaintiffs was deemed to have made the requisite showing, the Court established specific rules on how to do so, including a direction that requirements as to the necessary proof not be overly strict.[54] This judicially created exemption from the disclosure requirements has not yet been applied by the federal courts, but the opportunity will soon arise.[55]

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51. 2 U.S.C. §§ 432-36 (Supp. III, 1973). Political committees, as defined by 2 U.S.C. § 431(d) are required to keep detailed records of the identities of all individuals who contribute more than $10 to them, subject to audit by the FEC. *Id.* §§ 432(b)-(d), 438(a)-(d). Political committees and candidates were further required to file periodic reports disclosing the names, occupations, and principal places of business of those contributing in excess of $100. *Id.* § 434(b)(1)-(8). Certain resources available to incumbent officeholders, enumerated in § 434(d), are not, however, required to be disclosed.

52. The Court expressly preserved the possibility that the thresholds might he successfully challenged at some later date after experience under the Act has heen accumulated. In fact, the Court agreed that "[t]hese strict requirements may well discourage participation by some citizens in the political process . . . ." 424 U.S. at 83.

Specifically concerning the requirement that records be kept of all contributions in excess of $10, subject to audit by the Federal Elections Commission, the Court reserved judgment whether those records could be made publicly available without violating the contributors' first amendment rights.

53. *Id.* at 71.

54. *Id.* at 74.

55. Socialist Workers Party v. Jennings, Civil No. 74-1338 (D.D.C., filed Sept. 10, 1974) may well be the first decision to apply the *Buckley* disclosure standards.

Also significant in the disclosure area was the Court's treatment of 2 U.S.C. § 434(e), the section providing for disclosure of independent expenditures.[56] As with independent expenditures themselves, the Court first construed section 434(e) to apply only to those communications containing express words of advocacy.[57] The Court then found that the disclosure requirement did not conflict with *Talley v. California*,[58] and upheld its constitutionality. This interpretation aligned section 434(e) with the decision of the court of appeals invalidating 2 U.S.C. § 437a, a section that would have required disclosure of contributions to and expenditures by such groups as the American Civil Liberties Union and the American Conservative Union if made "for the purpose of influencing the outcome of an election." Since there was general agreement that the section was unconstitutional, none of the defendants appealed the lower court's decision. Thus, following *Buckley*, not only are unlimited independent expenditures now permissible; if communications financed by such expenditures do not contain the "buzz words" of the Court's footnote 52, the expenditures need not even be reported.

E. Federal Subsidies

In upholding the challenged provisions of Subtitle H of the Internal Revenue Code of 1954 which provides federal subsidies to presidential candidates, the Supreme Court stressed the "positive" aspects of the legislation:

> Subtitle H is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.[59]

Only Chief Justice Burger accepted the plaintiffs' analogy between funding political parties and candidates and the governmental funding of religious organizations; the per curiam opinion held that concern over federal funding's leading to control over political parties was "wholly speculative."[60]

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56. As originally written, § 434(e) provided that every person who contributes or expends more than $100 per year other than by contribution to a political committee or candidate must file a report with the Federal Election Commission disclosing the same information required of political committees and candidates.

57. *See* notes 31-32 *supra* and accompanying text.

58. 362 U.S. 60 (1960).

59. 424 U.S. at 92-93. The Court made no attempt to reconcile this rationale with its holding that candidates accepting subsidies may be subjected to expenditure limits. *See* notes 40-43 *supra* and accompanying text.

60. *Id.* at 93 n.126. That this was an overstatement was demonstrated soon afterward in Advocates for Arts v. Thompson, 532 F.2d 792 (1st Cir. 1976). Quoting the passage from *Buckley* repeated in the text accompanying note 59 *supra*, the court of appeals upheld a

Moreover, the Court rejected the numerous specific claims of discrimination against independent and third-party presidential candidates raised by the plaintiffs.[61] Basing its decision largely on the logic of the ballot access cases,[62] the Court observed that it was rejecting only the facial challenge to Subtitle H. The Court expressed its willingness "upon an appropriate factual demonstration" to entertain future claims of invidious discrimination after the subsidy system had been observed in operation.[63]

Assisted by the *Buckley* Court's reliance on a theory that subsidy discrimination in favor of major-party candidates is at least to some extent offset by the "countervailing denial"[64] to candidates accepting subsidies of the right to spend in excess of expenditure ceilings, independent and third-party candidates presumably will soon challenge the subsidy system as discriminatory in its operation. The "countervailing denial" theory seems unlikely for two reasons to withstand litigation based on actual experience under the Act. First, especially given contribution limits, the expenditure ceilings are far higher than the amounts all but the rarest third-party or independent candidates can raise. Indeed, contrary to the Court's assumption,[65] experience seems likely to show that such candidates will be able to raise and spend less in proportion to major-party candidates than in the past. Secondly, if (as seems likely) expenditures made on behalf of candidates accepting subsidies rapidly come to include large amounts of independent expenditures in addition to their limited authorized spending, the spending limits may have relatively little effect on the total amount of activity on behalf of major-party candidates and correspondingly little effectiveness in somehow compensating other candidates for the denial of subsidies to them.

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decision by the Governor and Executive Council of New Hampshire to deny a grant from the National Foundation on the Arts and the Humanities to a literary journal because of an allegedly obscene poem that appeared therein. While noting the long-standing policy of governmental noninterference with expression in "public places," the court declared that "there is no similar tradition of absolute neutrality in public subsidization of activities involving speech." 532 F.2d at 796.

Even prior to the *Buckley* decision, the court of appeals for the District of Columbia Circuit, in Ripon Soc'y, Inc. v. National Republican Party, 525 F.2d 567, 575-76 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976), strongly intimated that receipt of federal subsidies by the major parties transformed their activities into "state action" subject to the fifth amendment.

61. 424 U.S. at 93-97.

62. *See, e.g.*, American Party v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Lubin v. Panish, 415 U.S. 709 (1974).

63. 424 U.S. at 97 n.131.

64. *Id.* at 95.

65. *Id.* at 99.

F. The Federal Election Commission

Although the appointment power of Article II, section 2 of the Constitution[66] is one of the most important prerogatives in the federal government, prior to *Buckley* the Supreme Court had not directly addressed the issue of the extent to which Congress could participate with the executive branch in the choice of officers of the United States.[67] After a scholarly review of the debates of the Constitutional Convention and case law interpreting the doctrine of separation of powers, the Court held that the Federal Election Commission as then constituted[68] could not exercise rule-making or enforcement powers.[69] Only duties related to the flow of information — "receipt, dissemination and investigation" — that could be carried out by a committee of the Congress were permitted.

The appointment issue, while generally treated by the Court as a discrete question involving only separation of powers, was in practical substance intimately linked, in plaintiffs' view, with the paramount dangers inherent in intensive governmental regulation of campaign finance generally. Congressmen are not only legislators but also politicians who usually plan to campaign for re-election. A principal spectre raised by legislative tampering with the political process is the danger that the law will be rigged to favor incumbents over challengers or the congressional majority over the minority. The problem is made much worse when incumbent congressmen arrogate to themselves the power to appoint the Commissioners who will do the detailed regulating. Appointment and confirmation by the constitutionally ordained process at least ensures the checks and balances involved when agreement between two separate branches

66. U.S. CONST. art II, § 2 states:

> [H]e [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

67. Springer v. Philippine Islands, 277 U.S. 189 (1928), had involved a construction of the Organic Act structuring the government of the Philippines. Although foreshadowing the result in *Buckley*, *Springer* alone could not have been dispositive.

68. The original mode of appointment of the 6 voting members of the Commission was as follows: 2 appointed by the President; 2 appointed by the President pro tempore of the Senate (to be recommended by the Senate majority and minority leaders); and 2 appointed by the Speaker of the House (to be recommended by the House majority and minority leaders). All 6 were to be confirmed by both the House and Senate. Act of Oct. 15, 1974, Pub. L. No. 93-443, § 208(a), 88 Stat. 1280, *as amended* 2 U.S.C.A. § 437c (Supp. 3, 1976). The Secretary of the Senate and the Clerk of the House serve *ex officio* as non-voting members.

69. 424 U.S. at 137-41.

of government is required. The Court implicitly gave some weight to these considerations by holding that plaintiffs had standing to raise the separation of powers issue.[70]

Although the effect of the Supreme Court's holding was to strip the FEC of most of its important powers until it was later reconstituted by the Congress, the appointment question was not the only constitutional issue raised by the plaintiffs. Also attacked were the chilling effect of the Commission's regulatory powers on speech and the legislative veto of Commission regulations as violative of the separation of powers principle and its potentiality for incumbent control of campaign-finance regulation. The Supreme Court found it unnecessary to reach these issues in view of its invalidation of the Commission's powers on the independent ground of congressional appointment. Although these and many other arguments are not yet resolved, they emphasize the highly uncertain future of the Commission and the entire regulatory scheme.[71]

The thrust of the Court's decision in *Buckley* indicates that Congress blundered badly when it passed the FECA Amendments of 1974. Coupled with the experience of the original FECA of 1971, key sections of which were held unconstitutional in *ACLU v. Jennings*,[72] Congress's record in enacting legislation governing the political process has not been encouraging. Although the *Buckley* decision presented Congress with an opportunity to learn from its past mistakes, the FECA Amendments of 1976 do nothing to resolve, and in several instances exacerbate, problems left undecided by the Court, which promise a rich harvest of litigation for years to come.

The 1976 amending process suggests that once campaign finance becomes a heavily regulated and subsidized industry, politicians will be unable to resist continual tinkering with the rules for partisan political advantage. The best example is perhaps the lengthy debate and maneuvering, which long delayed enactment of the 1976 amendments, on whether the financial activity of corporations or labor unions would be more severely restricted. The major-

70. *Id.* at 117-18.

71. As one commentator has noted, the overall result of the Court's analysis is that "although there is little likelihood that, in the near term, legislative provisions of the type that have been stricken in *Buckley* will on further consideration be held valid, it is quite probable that some of the clauses that have been upheld will later be declared unconstitutional at least in some of their applications."
Rosenthal, *The Constitution and Campaign Finance Regulations after Buckley v. Valeo*, 145 ANNALS 124, 133 (1976).

72. 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom.*, Staats v. ACLU, 422 U.S. 1030 (1975).

ity, of course, imposed its will and its interest in the end. The enacted provisions,[73] which impose far more severe restrictions on corporations than on unions, raise questions of discrimination[74] beyond the still-outstanding question of their basic constitutionality.[75]

At least since the Alien and Sedition Acts, political rivalry in this country generally has taken forms other than legislative attempts to stifle the speech of political opponents. Indications are that until the Supreme Court more narrowly restricts the sphere of political-spending regulation, the future will be profoundly different in that respect.

II. THE FEC RECONSTITUTED

The renascent Federal Election Commission presents two basic constitutional questions that will require future Supreme Court determination:[76] whether the Congress may retain a "legislative veto" over the actions of executive or independent agencies, and whether the FEC has been vested with an impermissible amount of power and discretion in its interpretation and enforcement of federal election law.[77] These questions were raised in *Buckley*, but the Court

73. Act of Feb. 7, 1972, Pub. L. No. 92-225, § 203, 86 Stat. 9 (repealed 1976) (now 2 U.S.C.A. §§ 441b, 441c (Supp. 3, 1976)).

74. The discrimination argument would be based on the fact that § 441b permits a labor union the unrestricted rights to propagandize its members and to solicit political contributions from them, but limits the corresponding rights of corporations, with one exception (§ 441b(4)(B)), to its stockholders and executive or administrative personnel and their families.

75. *See* text accompanying notes 178-98 *infra*.

76. The *Buckley* holding on the appointment issue was satisfied by a simple amendment to 2 U.S.C. § 437c(a), vesting the appointment of all 6 voting members of the Commission in the President. 2 U.S.C.A. § 437c(a) (Supp. 3, 1976).

77. Another issue raised in *Buckley*, but not resolved, was the power of the FEC to disqualify individuals from becoming candidates for federal office if it found that those individuals failed to file a required disclosure report while candidates. The period of disqualification extended from the date of the FEC finding until 1 year after the expiration of the term of the federal office for which the individual was a candidate. Act of Oct. 15, 1974, Pub. L. No. 92-225, § 407, 88 Stat. 1290 (repealed 1976).

No party to the *Buckley* litigation, not even the FEC, attempted to defend the provision. Although the court of appeals agreed that it raised "very serious constitutional questions," it did not decide the issue of § 456's constitutionality because of lack of ripeness. 519 F.2d at 892-93. The Supreme Court appears to have condemned § 456 tacitly when it wrote, citing Powell v. McCormack, 395 U.S. 486 (1969), that

> [t]he power of each House to judge whether one claiming election . . . has met the requisite qualifications . . . cannot reasonably be translated into a power granted to the Congress itself to impose substantive qualifications on the right to so hold such office.

424 U.S. at 133.

In one of the few improvements to the statute made by the FECA Amendments of 1976, Congress repealed § 456. Act of May 11, 1976, Pub. L. No. 94-283, § 111, 90 Stat. 486. *See* note 24 *supra*.

found decision unnecessary since it invalidated the Commission's powers on the congressional-appointment ground.

A. *The Legislative Veto*

Under the FECA Amendments of 1974, the FEC was given power to prescribe rules and regulations to carry out the FECA.[78] Rules or regulations relating to House candidates and political committees are transmitted to the House; rules and regulations relating to Senate candidates and their committees are transmitted to the Senate; and rules and regulations relating to elections for both Houses, to presidential candidates, and to their committees go to both Houses. If the appropriate body does not disapprove the proposed rule or regulation within thirty legislative days, then the Commission may prescribe it.[79] These provisions have been challenged in a subsequent suit[80] that should soon confront the Supreme Court with the same arguments it avoided deciding in *Buckley*.

The "legislative veto," as such provisions are known, comes in several different forms.[81] In the FECA's case, it is a "one-House negative" veto; that is, either House acting independently may veto the regulation by explicitly voting against the proposed FEC regulations.[82] Prior to the Supreme Court's decision in *Buckley*, the FEC

78. 2 U.S.C.A. § 438(a)(10) (Supp. 3, 1976). Prior to the FECA Amendments of 1976, it was possible to argue that the legislative-veto provision applied only to rules and regulations governing reporting and disclosure. The FEC had no rule-making power with respect to statutory provisions in Title 18 of the U.S. Code. *Compare* 2 U.S.C. § 438(a)(10) (Supp. IV, 1974), *with* Act of Oct. 15, 1974, Pub. L. No. 93-443, § 208(a), 88 Stat. 1280, *as amended* 2 U.S.C.A. § 437d(a) (Supp. 3, 1976). *See also* Buckley v. Valeo, 424 U.S. at 282-83 n.27 (White, J., concurring & dissenting). The 1976 Amendments eliminated this potential confusion by moving all provisions of Title 18 over which the Commission had jurisdiction into Title 2. Even so, the wording of 2 U.S.C. § 438(c), which imposes the legislative veto, still refers to rules and regulations "dealing with reports or statements required to be filed under this subchapter." 2 U.S.C. § 438(c)(3) (Supp. IV, 1974). Following the example of the FEC, which has submitted all its rules to Congress, we assume that that phrase in fact means all rules or regulations, whether they deal with limits provisions, disclosure provisions, or — as is usually the case — some combination of the two. Subtitle H contains its own provisions for the legislative veto. INT. REV. CODE OF 1954, §§ 9009(c), 9039(c).

79. 2 U.S.C. § 438(c)(2) (Supp. IV, 1974).

80. Clark v. Valeo, Civil No. 76-1227 (D.D.C., filed July 1, 1976). The original plaintiff, Ramsey Clark, candidate for the Democratic nomination for the U.S. Senate from New York, has been joined by the United States as intervening plaintiff. The case was certified to the Court of Appeals for the D.C. Circuit, which (sitting together with a 3-judge district court considering the Subtitle H aspects, as in *Buckley*) heard oral argument on September 10, 1976.

81. For an exhaustive description of the various types of legislative veto see Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

82. Representative Hays proposed that the legislative veto provision be rewritten after *Buckley* to give Congress a line-item veto, rather than the all-or-nothing veto it then pos-

had sent two sets of proposed regulations to Congress; both were vetoed in October 1975.[83]

The *Buckley* plaintiffs' attack on the congressional veto was twofold: first, they argued that the veto was an unconstitutional violation of the separation of powers, an argument similar to that which could be made against virtually all of the legislative vetoes now embodied in federal statutes; secondly, they argued that the veto in this case exemplified the particularly offensive nature of the incumbent-protection features that pervaded the entire FECA. The Supreme Court decided neither of these contentions, stating in a footnote that because it held that "the manner of appointment of members of the Commission precludes them from exercising . . . rule-making powers . . . ," it would not address this challenge.[84] Only Justice White reached the issue: he would have declared the veto constitutional.[85]

Although the legislative veto has been included in an increasing number of legislative enactments since the Reorganization Act of 1939,[86] it had apparently never been challenged in court prior to *Buckley*. Analysis of the legislative veto clearly indicates that it is in serious constitutional jeopardy. If Commission rules are regarded as legislative in nature, the veto constitutes what is in effect legisla-

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sessed. *See* H.R. 12406, 94th Cong., 2d Sess. § 110(b)(1) (1976). This suggestion would have given Congress a far more powerful veto power than that possessed by the President. The Senate, however, insisted on retaining the present provision, and the Hays suggestion was deleted by the Conference Committee. The committee's report, however, explains its action as follows:

> This provision is intended to permit disapproval of discrete self-contained sections or subdivisions of proposed regulations and is not intended to permit the rewriting of regulations by piecemeal changes.

H.R. REP. No. 1057, 94th Cong., 2d Sess. 52 (1976). Representative Hays may thus have won more than he lost on this point.

83. The Senate, on the advice of its Committee on Rules and Administration, S. REP. No. 409, 94th Cong., 1st Sess. (1975), vetoed a set of rules that would have included some "office account" spending by Members of Congress under the contribution and expenditure limitations then in Title 18. 121 CONG. REC. 17,888 (daily ed. Oct. 8, 1975). The House, on the advice of its Committee on House Administration, H.R. REP. No. 552, 94th Cong., 1st Sess. (1975), vetoed a set of regulations that would have required political candidates, including Members of Congress, to file their campaign financial reports with the FEC rather than with the Secretary of the Senate or the Clerk of the House as the case might be. 121 CONG. REC. 10,197 (daily ed. Oct. 22, 1975). For contemporaneous and enlightening accounts of the politics of the two vetoes see Weaver, *Senate Rejects Slush Fund Curb*, N.Y. Times, Oct. 9, 1975, at 15, col. 1; Weaver, *Election Agency Set Back in House*, N.Y. Times, Oct. 23, 1975, at 1, col. 4.

84. 424 U.S. at 140 n.176.

85. *Id.* at 282-86 (White, J., concurring & dissenting).

86. *See* Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 575-92 (1953).

tion by Congress without the constitutionally required presidential participation in the legislative process through the exercise of his veto power. If, as the *Buckley* Court strongly suggested in its discussion of the method of appointing the commissioners, the rule-making function is executive, then the veto is an impermissible intrusion upon executive-or-independent agency authority. The Act's provision for a veto by either House acting alone is even more questionable than the more usual device of a concurrent resolution.[87]

At the Constitutional Convention, the President's veto power was carefully considered and several alternative suggestions were debated.[88] The often-quoted language of James Madison emphasizes that Article I, section 7 of the Constitution[89] was drafted expressly to prevent the possibility that the President's veto could be made meaningless:

> [Since] if the negative of the President were confined to *bills*, it would be evaded by acts under the form and name of resolutions, votes, etc., [it is] proposed that 'or resolve' should be added after '*bill*', in the beginning of Section 13, with an exception as to votes of adjournment . . . .[90]

The primary purpose of the executive veto is to allow the President to resist encroachment upon his powers by the Congress. While Congress of course exercises considerable influence over executive actions by means of committee oversight and the like, the tensions between the two branches generally are worked out through a pattern of political accommodation. Nonetheless, the executive was deemed by the Constitutional Convention to require the defense of participation in the legislative process itself. As Hamilton wrote in *The Federalist*:

> The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments has been already suggested

87. *See* THE FEDERALIST No. 51, at 350 (Cooke ed. 1961) (J. Madison).

88. In many respects, the history of the veto parallels that of the appointment power. *See* 424 U.S. at 125-31. Only South Carolina vested its executive with a veto power at the time of the Constitutional Convention, Thach, *The Creation of the Presidency, 1775-1789*, 40 J. HOPKINS UNIV. STUDIES IN HIST. & POL. SCI. 415, 449-68 (1922), but the subject was widely debated. Many opponents of a proposed Massachusetts constitution (which was not ratified) stressed the absence of an executive veto as one basis for their position. *Id.* at 49-60.

89. That section provides that:

> [e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

U.S. CONST. art. I, § 7.

90. 5 ELLIOTT'S DEBATES 431 (1845), as quoted in Ginnane, *supra* note 86, at 573.

> and repeated; the insufficiency of a mere parchment delineation of the boundaries of each, has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defense, has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the Executive, upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands. If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us, that the one ought not be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defense.[91]

Even supporters of the legislative veto concede "that the veto conceivably could be used to deliver the executive completely or substantially into the hands of Congress."[92] Neither the presidential veto power nor the President's "great influence over decisions in the legislative process"[93] would be sufficient to preclude such a result. As the legislative veto becomes more commonplace, only the judiciary can prevent the usurpation of executive powers. In many respects, the encroachment on executive prerogatives caused by the veto would be similar to that caused by congressional interference with the appointment power, which was precluded by the Supreme Court in *Buckley*. There seems to be little difference between congressional control over an agency through appointment of its members and control through veto of its regulations. Indeed, since agency members serve for fixed terms of considerable length, the latter type of control is undoubtedly much more effective.

Justice White, in his separate opinion in *Buckley*, agreed that the main purpose of the executive veto was to "shore up the Executive Branch and to provide it with some bargaining and survival power against what the Framers feared would be the overweening power of legislators."[94] Nonetheless, he argued that

> for a regulation to become effective, neither House need approve it, pass it, or take any action at all with respect to it. The regulation becomes effective by nonaction. This no more invades the President's powers than does a regulation not required to be laid before Congress.[95]

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91. THE FEDERALIST No. 73, at 494-95 (Cooke ed. 1961) (J. Hamilton).

92. Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 505 (1962).

93. *Id.* at 505-06.

94. 424 U.S. at 285 (White, J., concurring & dissenting).

95. *Id.* at 284.

Justice White's approval of the legislative veto turns on the distinction between affirmative action by Congress to *adopt* a particular set of regulations and affirmative action to *reject* them: "[i]t would be considerably different if Congress itself purported to adopt and propound regulations by the action of both Houses."[96] It seems, however, that such a distinction is without constitutional significance.

By retaining a veto power over whatever regulations the FEC develops, Congress has simply added one more step to the lawmaking process. Resort to the disapproval method rather than some other device is simply a pragmatic method of avoiding further additions to Congress's already crowded schedule. Once the congressional intent is made clear — and the vetoes of the first two sets of regulations sent to Congress by the FEC speak with particular clarity — it is far more convenient for Congress to have to act only on occasions when the Commission resumes its "errant" ways. Even if such an arrangement is more convenient for Congress, no reason appears why such an accommodation should rise to the level of a constitutional distinction. The technique seems an example of what Madison described as the power of the legislature to "mask under complicated and indirect measures, the encroachments which it makes on the coordinate departments."[97] The constitutionality of the congressional veto ought not to turn on so immaterial a point.

Like many other supporters of the legislative veto, Justice White emphasized the President's approval of the enabling legislation creating the disapproval procedure or a congressional override of his veto.[98] Commentators have similarly argued:

> The fact that a different President may have approved the act, or that the act may have been passed over a presidential veto does not take the force from this reasoning since the veto power belongs to the office, not the man, and since the possibility of a presidential veto being overridden is clearly contemplated by the Constitution.[99]

This reasoning seems backwards. If the veto power belongs to the office and not to the holder, then the holder cannot delegate it to another body. If the congressional veto is contrary to Article I, section 7 of the Constitution, then whatever actions a particular President may take cannot alter that conclusion. Moreover, since *Buckley* the Court has indicated in dicta that it would reject the

96. *Id.* at 286.
97. THE FEDERALIST No. 42, at 334 (Cooke ed. 1961) (J. Madison).
98. 424 U.S. at 284 (White, J., concurring & dissenting).
99. Cooper & Cooper, *supra* note 92, at 478.

presidential-approval argument. In *National League of Cities v. Usery*,[100] the Court rejected the dissent's contention that the states were able to protect their own interests on the subject of federal minimum-wage laws applicable to state and local employees because of the states' representation in the Senate. Noting the results in the appointment-power aspect of *Buckley* and in *Myers v. United States*,[101] the Court declared:

> In each of these cases, an even stronger argument than that made in the dissent could be made to the effect that since each of these bills had been signed by the President, the very officer who challenged them had consented to their becoming law and it was therefore no concern of this Court that the law violated the Constitution. Just as the dissent contends that 'the States are fully able to protect their own interests . . .,' it could have been contended that the President, armed with the mandate of a national constituency and with the veto power, was able to protect *his* own interests. Nonetheless, in both cases the laws were held unconstitutional, because they trenched on the authority of the Executive Branch.[102]

Whether or not the President approves legislation is thus immaterial to the constitutionality of the legislative veto.[103]

There are other strong intimations that the FECA legislative-veto provision will be held unconstitutional when the question comes before the Court. The *Buckley* Court recognized that the Commission, viewed as a legislative agency because of the appointment method, could properly exercise any powers that Congress

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100. 96 S. Ct. 2465 (1976).

101. 272 U.S. 52 (1926) (Congress may not by law limit the President's authority to remove at will an officer of the executive branch appointed by him).

102. 96 S. Ct. at 2469 n.12.

103. This is not to say that over the years Presidents have simply acquiesced in the debilitation of executive power. To the contrary, the history of the legislative veto is a history of executive resistance on constitutional grounds overcome by the political necessity for particular pieces of legislation. A President without an "item" veto may find it politically impossible to disapprove a bill which is otherwise essential but which also contains a congressional veto. The most dramatic example is the Lend-Lease Act, which contained a provision permitting Congress to terminate it by a concurrent resolution not subject to the veto power of the President. After Lend-Lease was passed, President Roosevelt left with the Attorney General a memorandum embodying the President's view that the legislative veto was unconstitutional and that he had agreed to the Act only because of the existing world crisis. *See* Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353 (1953).

Watson, *supra* note 81, at 991-1029, contains a detailed history of the executive-legislative struggle over the legislative veto. Although Watson notes that the use of "extra-legislative control devices has increased markedly during the first months of the Ford administration," *id.* at 1029, President Ford has now committed his administration to opposing the legislative veto before the judiciary. In signing the FECA Amendments of 1976, he asserted that the legislative veto violated the Constitution, and he directed the Attorney General to challenge its constitutionality "at the earliest possible opportunity." 12 WEEKLY COMP. OF PRES. DOCUMENTS 857, 858 (May 17, 1976). The result was the intervention by the United States as a plaintiff in *Clark v. Valeo*. *See* note 80 *supra*.

could exercise directly or through one of its committees. Nevertheless, the Court squarely held that rule-making is not such a power. It is hard to see how the Court, having held that Congress cannot make campaign rules through the instrument of a legislative agency, could avoid holding that direct participation by Congress in the rule-making process through the legislative veto is also unconstitutional.

The *possibility* of a congressional veto is often as effective a deterrent to agency action as the *fact* of a veto. Justice White was apparently unimpressed with the impact on agency deliberations that the congressional veto might have:

> Congressional influence over the substantive content of agency regulations may be enhanced, but I would not view the power of either House to disapprove as equivalent to legislation or to an order, resolution or vote requiring the concurrence of both Houses.[104]

Such an approach seriously underestimates the *in terrorem* effect of the legislative veto. The possibility that vital regulations will be delayed from going into effect because a provision objectionable to a powerful Member of Congress comes to his attention must necessarily be near the forefront of any consideration of proposed rules by agency staff and commissioners. For a court to ignore the pervasive influence exerted by the threat of veto and to focus only on specific instances of its use, would be to concede to Congress the ability to use the congressional veto in a virtually unlimited fashion.

The FECA's legislative-veto provisions are even more vulnerable to constitutional attack than most.[105] Regulations dealing with campaign finance directly affect the profession and job security of every legislator and place them in a sharp conflict of interest. Experience indicates that legislators will enact or modify legislation and use the FEC to protect themselves to the detriment of challengers and minor-party and independent candidates. The form of the FECA veto explicitly recognizes Congress's self-interested purpose by making regulations dealing only with the elections of one House subject to veto only by that body.

Members of the Congress, of course, are candidates for office and thus are greatly affected by the Commission's regulations. If a primary purpose of campaign reform is to avoid even the appear-

104. 424 U.S. at 284-85 (White, J., concurring & dissenting).

105. This special vulnerability may in part explain the filing of *Clark v. Valeo*. Plaintiff Ramsey Clark is represented by attorneys from Ralph Nader's Public Citizen Litigation Group, an organization that consistently has opposed the inclusion of legislative vetoes in recent legislation.

ance of impropriety, that end is hardly served by the constant and detailed embroilment of the Congress in interpreting and fleshing out the campaign restrictions under which they and their challengers operate. Implementation of the campaign law contains a host of opportunities to favor incumbents, and repeated congressional involvement will increase public suspicion that the Act is an incumbents' protection law. Bias in favor of the majority party controlling the Congress is equally inevitable. It would be far better to place the rule-making process under proper safeguards in a genuinely independent and impartial agency rather than in one under incumbent and majority-party domination.[106]

The presumption of constitutionality that might otherwise inhere in a legislative-veto provision should be denied to the FECA and Subtitle H provisions for two reasons. First, in this instance the congressional veto operates within the ambit of the first amendment, an area in whichthe presumption of constitutionality is much weaker than in other areas.[107] In *Buckley*, the Court applied the strict standard of review normally employed in first amendment cases rather than the weaker standard that the court of appeals had

106. The Commission was intentionally designed to be "bipartisan," that is, representative of only the hitherto successful elements of the political process. *See, e.g.*, 120 CONG. REC. 10,328 (daily ed. Oct. 10, 1974) (remarks of Representative Brademas). A politically appointed and congressionally controlled agency, like the Commission, necessarily has a bias in favor of the two major parties when their interests coincide, and against minor parties and independents, that is automatic and virtually unconscious.

The classic example to date is the Commission's undated "Policy Statement — Presidential Debates," holding that the League of Women Voters may pay for the debates hetween the two major-party candidates for President, excluding all other candidates, without the payment's being a contribution to the campaigns of those two candidates. Yet the payments surely assist those candidates as against all others. The same logic would seem to require the result that a monetary gift to one major-party candidate is not a "contribution" so long as the donor made an equal gift to the other. But as the Chief Justice commented during oral argument in *Buckley*, "a man giving $10,000 to each of the two major party candidates perhaps just wants to make sure that one of two men that he regards as responsible will be elected and that the third-party candidate will not be elected." Record at 50. Regardless of the *motivation* of the League of Women Voters, on which the Commission's Policy Statement heavily relied, the *effect* seems exactly the same. We submit that, notwithstanding the arguments that can be made to the contrary, the League's payment must be regarded as a contribution if unfairness to other candidates is to be avoided.

107. Mr. Justice Frankfurter, one of the preeminent opponents of the theory that the first amendment occupied a "preferred position" among constitutional values, nonetheless believed that "those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring); *see* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

adopted. The same strict standard should be applied to FEC regulations, and especially so because they are subject to legislative veto. Secondly, the legislators' intense personal interest in the substance of Commission regulations should cause courts to pause and consider the possible harm such a veto might inflict on our relatively open political system. Understanding and taking into account legislative conflict of interest is nothing new to the Court. It has previously asserted that the presumption of constitutionality is based on the assumption that the legislative structure is fairly representative; when the issue is whether that underlying assumption is valid, the presumption of constitutionality is weakened.[108] An attack on that basic assumption is involved when the FECA's legislative veto is challenged.

The vulnerability of the legislative veto to constitutional criticism is thus considerable. Even if the veto is invalidated,[109] significant problems will remain with the FECA's enforcement scheme.

B. Astride the Political Process

The *Buckley* Court clearly recognized that any regulation of campaign expenditures and contributions operates in a critically sensitive area of constitutional concern. The Court left no doubt that such regulation inevitably encroaches on free speech and requires a balancing process between compelling governmental needs and first amendment freedoms. When activity by citizens in this most sensitive area is subjected to regulation, especially with criminal sanctions, the inhibiting effect on political expression is acute.

Moreover, the election law is both highly complex and in many respects vague, as was fully recognized in the Senate debate on the Commission's office-account regnlations.[110] In these circumstances, the power to interpret the law is largely the power to make new law. An agency with this kind of power has vast influence over the political process, including the power to determine the results of particu-

108. Kramer v. Union Free School Dist., 395 U.S. 621, 628 (1969).

109. It is likely that if *Buckley* had precluded retention of the legislative veto, Congress would have dispensed with the FEC altogether. In fact, the FECA Amendments strengthened the legislative veto by limiting the permissible scope of Commission advisory opinions and by expanding the areas in which the FEC must issue regulations (thus subjecting more FEC decisions to congressional approval). *See* 2 U.S.C.A. §§ 437f, 438(c) (Supp. 3, 1976). In view of the evidence that Congress considered the veto as of pivotal importance, the question of severability will arise if the veto is invalidated. The Supreme Court might conclude that the statutory provisions establishing and vesting powers in the Commission would have to be enjoined along with the legislative-veto provisions, on the ground that Congress would not have enacted the first without the second.

110. 121 CONG. REC. 17,873-89 (daily ed., Oct. 8, 1975).

lar elections. The Commission has used these powers with a vengeance. The Commission's pronouncements make new law — sometimes in areas in which the statute as enacted by the Congress was silent and sometimes in rather striking disregard of what the statute did say.[111]

Familiar and long-accepted principles of constitutional law hold that "standards of permissible vagueness are strict in the area of free expression . . . . Because first amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[112] Otherwise, citizens uncertain about what is forbidden and what is not will "steer far wider of the unlawful zone,"[113] thus forfeiting valuable rights of speech and association in the process. The *Buckley* decision reemphasized the importance of the vagueness doctrine in the first amendment area,[114] construing former 18 U.S.C. § 608(e) to eliminate its unconstitutional vagueness before invalidating the provision altogether. Since the decision in *Buckley*, the resurrected FEC has promulgated new sets of proposed regulations.[115] Whether they sufficiently cure the ambiguities that permeate the FECA is an open question. Those regulations, however, convincingly demonstrate the immense discretion with which the FEC is vested, and the complete system of prior restraints that the FECA has established.[116]

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111. Among the more conspicuous law-making pronouncements issued by the pre-*Buckley* Commission in only a few months of operation were: interim guidelines to govern special New Hampshire election, 40 Fed. Reg. 40668 (1975); eligibility of contributions for matching grants under Subtitle H, FEC Notice 1975-40, 40 Fed. Reg. 41933 (1975); interim guidelines to govern special Tennessee election, 40 Fed. Reg. 43660 (1975); spending limit applicable to a candidate running for 2 federal offices simultaneously, FEC Notice 1975-44, 40 Fed. Reg. 42839 (1975); disclosure regulations, 40 Fed. Reg. 44698 (1975); office-account regulations, 121 CONG. REC. 12,873-89 (daily ed. Oct. 8, 1975); attorneys' or accountants' fees as expenditures, Advisory Opinion 1975-27, 40 Fed. Reg. 51351 (1975); delegates to national nominating conventions: rules on contributions and expenditures, Advisory Opinion 1975-12, 40 Fed. Reg. 55596 (1975); contribution to a candidate from members of his immediate family, Advisory Opinion 1975-65, 40 Fed. Reg. 58393 (1975).

112. NAACP v. Button, 371 U.S. 415, 432-33 (1963).

113. Speiser v. Randall, 357 U.S. 513, 526 (1958). In *Speiser*, the Court held that tax-assessment procedures which shift the burden of proof to the taxpayer are inadequate when first amendment issues are at stake. *See* Grayned v. Rockford, 408 U.S. 104, 108-09 (1972); Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

114. 424 U.S. at 40-44.

115. 41 Fed. Reg. 21572 (1976). Since Congress adjourned on October 1, 1976, 2 legislative days before the Commission's rules would have been effective absent congressional disapproval, there were no regulations in effect for the 1976 elections.

116. Merely as one example, the *New York Times* reported that the Commission was "deadlocked, almost hopelessly," and deferred decision on the question whether Congressman Edward I. Koch (D. - N.Y.) could issue campaign buttons reading "Carter-Mondale-Koch" without making an illegal contribution to the other candidates mentioned. The *Times*

It is highly inappropriate, and arguably unconstitutional, for any agency to make law in an area so directly affecting freedom of speech and the electoral process. When either a candidate or an ordinary citizen is told by the Commission that certain political activity that he wishes to undertake would violate the law, in the overwhelming majority of cases he will refrain from engaging in that activity although he is convinced the Commission's interpretation is wrong. Even if he is otherwise disposed to litigate the issue, if he is well advised by counsel he will be aware that: first, a court probably will enforce a Commission rule as having the force of law unless it unquestionably is contrary to the words of the statute; secondly, a court may give great weight to any Commission pronouncement, because of alleged agency expertise, in deciding on the proper interpretation of the statute; thirdly, if the candidate or citizen is held to have violated the law, a Commission pronouncement can be used to strengthen the argument that the violation was knowing and willful.[117] Thus he will be chilled from exercising what a court ultimately might hold to be his rights under both the Constitution and the statute. He will be subjected to a prior restraint on the exercise

commented, "The process of regulating political campaigns has reached the point of ultimate absurdity . . . . [I]t might seem to the average layman that the free speech guarantee of the Constitution, let alone common sense and political tradition, gives Mr. Koch the inalienable right to link his candidacy with those of Mr. Carter and Senator Mondale if he chooses." N.Y. Times, Sept. 19, 1976, at 39, col. 1. We agree. The Commission eventually permitted Congressman Koch's buttons, although without giving any reasons. Letter from Chairman Thomson to Stanley Schlesinger, Sept. 21, 1976. Its delay chilled the Congressman's speech during a crucial part of the general-election campaign: from August 27, 1976, when Koch made his inquiry of the Commission, until September 21.

Only very recently has the Commission fully geared up its advisory-opinion mechanism after the period of confusion caused by *Buckley* and the delay in enactment of the 1976 Amendments. Now the Commission is issuing pronouncements almost daily that chill speech, the press, and the political process. As this article goes to press, *Campaign Practices Reports* announces the issuance of Advisory Opinion 1976-29, holding that when a candidate is a stockholder, director, and officer of a newspaper, commentaries or editorials favorable to his candidacy are presumptively illegal corporate contributions in kind. CAMPAIGN PRACTICES REPORTS, Sept. 20, 1976, at 4. If this opinion is sustained, a tradition dating back to the earliest days of the republic and beyond — ownership or control of news media by political candidates and parties will have been effectively outlawed. *See, e.g.*, F. MOTT, AMERICAN JOURNALISM 122-27 (1950). Nothing in first amendment history or theory provides any basis for tolerating such a rule, and we predict it will not survive a court test. In the meantime a newspaper will have been subjected to prior restraint for a lengthy period, which presumably began at least as early as February 26, 1976, when the opinion was requested.

117. The Commission plainly intends to exploit these chilling effects to the utmost. According to *Campaign Practices Reports* the position of "Commission lawyers" is that the proposed rules and policy statements (1) are "admissible in evidence" in enforcement proceedings, (2) can be used to show violations were "deliberate," and (3) should be "accorded 'substantial' weight in the courts because the agency is 'presumed to have administrative expertise in the area.'" CAMPAIGN PRACTICES REPORTS, Oct. 4, 1976, at 2.

of his first amendment rights. This chilling effect or prior restraint resulting from Commission pronouncements should be held to violate the Constitution.[118] The post-*Buckley* reconstitution of the Commission without any changes that address this problem leaves a constitutional cloud over the statute and the Commission, and the removal of the cloud necessarily will await further litigation.

One of the present authors suggested in the hearings on the 1976 Amendments that this problem could be mitigated by a provision that Commission rules, advisory opinions, and other pronouncements could not have the force of law, create a presumption, show criminal intent in the nature of *scienter*, or be used in any other fashion in any enforcement proceeding against any person.[119] It was suggested that only in this way could the Commission avoid the chilling effect of prior restraint. Such a provision would protect a citizen who disagrees with a Commission pronouncement, chooses to act in disregard of it, and finds himself the objectof proceedings. A person in this situation of course must take his chances that a court will decide independently that his actions violated the statute. Nevertheless, he should not be in effect forced to comply with whatever restrictions the Commission chooses to impose upon him because of the danger that a court will be precluded or influenced by the position the Commission has taken. This is a particularly aggravated form of prior restraint upon speech that could not be sustained if established first amendment principles are followed.

As with impermissible vagueness, the doctrine of prior restraint rests on familiar principles sufficiently clear to identify the FEC's rule-making power as a prior restraint. Such a restraint, which bears a heavy presumption *against* its constitutionality,[120] can be saved only by "procedural safeguards designed to obviate the dangers of a censorship system."[121] Required procedural devices include:

> *[F]irst*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor; *second*, any restraint prior

118. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975); Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967); Lamont v. Postmaster General, 381 U.S. 301 (1965); Freedman v. Maryland, 380 U.S. 51 (1965); Speiser v. Randall, 357 U.S. 513 (1958), in which the Court held that tax-assessment procedures that shift the burden of proof to the taxpayers are not adequate when first amendment issues are at stake; Saia v. New York, 334 U.S. 558 (1948).

119. *Hearings on S. 2911, S. 2912, S. 2918, S. 2953, S. 2980, and S. 2987 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 94th Cong., 2d Sess. 195 (1976). The suggested provision was introduced as an amendment on the Senate floor but was rejected by a vote of 65 to 23. 122 CONG. REC. 3681-87 (daily ed. March 17, 1976).

120. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

121. Freedman v. Maryland, 380 U.S. 51, 58 (1965).

to judicial review can be imposed only for the purpose of preserving the status quo; *third*, a prompt final judicial determination must be assured.[122]

All these safeguards are absent under the FECA. Indeed, like the postal statute in *Lamont v. Postmaster General*,[123] which "sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail,"[124] the FECA puts the Commission astride the flow of politics in America. One candidate may be audited, while another may go virtually unnoticed; one group may seek an advisory opinion from the Commission, waiting months for a decision, while another more daring group will engage in precisely the same activities hoping to prevail in any ensuing confrontation with the FEC. None of this contributes to "fairness" in the political process, nor does it have anything to do with the central statutory purpose of the FECA — the elimination of corruption and the appearance of corruption.

This "chilling" process is intensified by the fact that most issues and disputes will arise in the course of political campaigns, when a right of speech postponed for a few months, weeks, or even days may be the equivalent of a right denied altogether. Afterthoughts are of little comfort here. The result of a Commission mistake, constitutional or otherwise, may well be that the candidate who otherwise would have been chosen by the voters has been defeated because his speech has been stifled. That is a horrendous result, and not one susceptible to *post facto* rectification. A further *in terrorem* effect is created by the natural reluctance of a political candidate to do anything that might subject him to accusations that he is violating the election law or an FEC rule. All these are reasons, not only why a sensitive Congress might have chosen a far more cautious approach than the FECA, but why courts may view such an approach as constitutionally required.

The administrative apparatus of the FECA is justified by its proponents on essentially pragmatic grounds. They argne that the number of decisions faced by the Commission is so great that Congress could not possibly answer all such questions in advance. The only way to proceed, they assert, is on a case-by-case basis, attempting to eliminate confusion as time passes and experience under the FECA grows.[125] These practical arguments may be well founded.

122. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

123. 381 U.S. 301 (1965).

124. *Id.* at 306.

125. *See, e.g.*, 120 CONG. REC. 10,910 (daily ed. Nov. 20, 1974) (remarks of Representative Frenzel, a key advocate of the FEC). Any attempt to decipher the FECA and the

Indeed, given the creativity and ingenuity that were once thought to be the special genius of free political activity, there is every reason to believe that a priori formulations are almost certain to be inadequate. Assuming these pragmatic arguments to be correct, they do not lead to the conclusion that politics needs an FEC. On the contrary, they lead to the conclusion that governmental regulation of political speech should be limited to fair disclosure requirements. A system that allows flexibility but keeps the voters informed is far better than one that attempts to suppress "undesirable" political activity and either is always several steps behind or only confuses an already almost incomprehensible framework.

Supreme Court decisions that have developed the doctrine of "excessive discretion" over first amendment freedoms vested in regulatory officials demonstrate the constitutional weakness of the FEC's position. In *Saia v. New York*,[126] the Court ruled that a municipal ordinance that vested in the local chief of police discretion to permit the use of "sound-amplification devices" was "invalid on its face." In holding that the use of such devices could not be made to depend on the "whim or caprice" or "uncontrolled discretion" of the local official,[127] Mr. Justice Douglas, writing for the majority, observed:

> In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship inherent in this type of ordinance reveals its vice.[128]

In *Kunz v. New York*,[129] the Court reversed a state-court conviction based on a New York City ordinance forbidding worship meetings on city streets without a permit from the police commissioner. Discovering "no appropriate standards" in the ordinance to guide the commissioner's discretion, the Court found that it constituted an impermissible prior restraint. In addition to *Saia* and *Kunz*, earlier cases[130] and subsequent decisions[131] firmly establish that the discre-

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Commission's regulations brings immediately to mind the Supreme Court's description of the statute at issue in Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967): "[v]agueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules."

126. 334 U.S. 558 (1948).

127. *Id.* at 560-62.

128. *Id.* at 562.

129. 340 U.S. 290 (1951).

130. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

131. *See, e.g.*, Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Aptheker v. Secretary of State, 378 U.S. 500 (1964).

tion of government officials must be carefully circumscribed in the first amendment area.

The vitality of the excessive-discretion doctrine was recently demonstrated in *Hynes v. Mayor*.[132] A municipal ordinance of the Borough of Oradell, New Jersey, required door-to-door canvassers to obtain permits from the Borough Clerk and the Chief of Police. While observing that house-to-house canvassing as a way of spreading ideas "seems the least entitled to extensive protection," the Supreme Court nonetheless invalidated the ordinance on vagueness grounds, stating that any ordinance designed to protect householders must be "narrowly drawn," and must not "vest in municipal officials the undefined power to determine what messages residents will hear. . . ."[133] The strict scrutiny of government discretion over first amendment freedoms employed by the *Hynes* Court demonstrates the vulnerability of both the FEC and the FECA. The discretion of the municipal clerk so rigorously scrutinized in *Hynes* is insignificant compared to the FEC's vast discretionary powers. Further, the Oradell municipal ordinance was a model of legislative draftsmanship and clarity compared to numerous sections of the FECA.

The excessive-discretion doctrine has not been applied to an agency with the scope of the FEC's powers. In recent years, federal regulatory agencies generally have been accorded considerable deference by the courts. Nonetheless, it would be inconsistent with the spirit of the municipal-licensing cases not to extend their principles to the FEC. While such an extension may result in continuing difficulty for the Commission, that result is certainly more desirable than abandoning the judiciary's traditional solicitude for political speech.

The imprecision of the FECA, the system of prior restraints established by the statute's enforcement mechanism, and the discretionary power vested in the FEC all combine to create a "chilling" effect on the exercise of political activity unprecedented in American history. Even apart from the constitutional problems raised by many of the FECA's substantive provisions, the enforcement problem is itself virtually insuperable. There is much to be said for Chief Justice Burger's concluding remarks in *Buckley*:

132. 96 S. Ct. 1755 (1976).
133. *Id.* at 1759.

> There are many prices we pay for the freedom secured by the First Amendment; the risk of undue influence is one of them, confirming what we have long known: freedom is hazardous, but some restraints are worse.[134]

III. Outstanding Independent-Expenditure Issues

As previously noted, the Supreme Court in *Buckley* distinguished sharply between limitations on contributions to candidates and expenditures made independently by citizens in support of such candidates, holding the former constitutional but striking down the latter. As long as limitations on contributions remain in effect, an increasing portion of political activity by citizens may be conducted by means of independent expenditures. This expansion should be felt most sharply in presidential elections because all direct support for candidates has been prohibited, and many citizens accustomed to and desirous of such means of political expression are searching for substitutes. The majority in Congress, like the defendants in *Buckley*, regarded independent expenditures as an unfortunate and dangerous "loophole" to a well-ordered system of campaign finance regulation. Given this attitude, insensitive though it may seem in the light of the Supreme Court's holding that independent expenditures are protected by fundamental first amendment rights, constant vigilance must be exercised if continuing encroachments on those rights are to be prevented.

A. The "Coordination" Problem

In its proposed regulations[135] the Commission attempted, with one exception required by the 1976 Amendments,[136] to define independent expenditures in accordance with the *Buckley* decision. The basic definition reads:

> 'Independent expenditure' means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate which is not made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of such candidate.[137]

The Commission's definitions of the terms in this section also generally are reasonable and not clearly inconsistent with the Court's opinion.[138] Nevertheless, the Commission's approach fails to resolve

134. 424 U.S. at 256-57 (Burger, C.J., concurring & dissenting).

135. Proposed Fed. Election Reg. § 109, 41 Fed. Reg. 35,947 (1976).

136. *See* note 144 *infra* and accompanying text.

137. Proposed Fed. Election Reg. § 109.1(a), 41 Fed. Reg. 35,947 (1976).

138. For example, "agent" is defined in a relatively limited fashion properly focused on the existence *vel non* of actual or apparent authority to authorize the making of expendi-

the problem of expenditures by individuals based on information about the candidate's plans or needs provided by the candidate or his agents.[139] This "coordination" problem will remain as long as the constitutional distinction between contributions and independent expenditures stands. The possible nuances, distinctions, and differences in degree or in kind are almost limitless, and will presumably have to be resolved on a case-by-case basis.

The major problem with the distinction between contributions and expenditures is its inevitable chilling effect on political speech. Many citizens wishing to engage in independent political activity will be deterred by the uncertainty as to which side of the ultimately artificial line created by the Court their planned activities fall. Such inhibitions will be magnified by the requirement that independent expenditures over $100 must be reported to the Commission, and that the report must include, "under penalty of perjury, a certification of whether such independent expenditure is made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate."[140] It seems at least questionable whether government regnlation of independent political activity, an activity previously regarded as healthy and which was vindicated by the Supreme Court in *Buckley* as a constitutional right, is a price worth paying for campaign finance "reform" in the nature of restrictions on campaign contributions. As experience accumulates, guiding principles may evolve that will mitigate this dilemma. The Commission might advance this process by making its regulations more specific and thereby eliminating the vagueness and breadth of some of the language defining "coordination" which seems both unworkable and intimidating. The Commission ought to recognize, for example, that a candidate must be permitted to announce publicly what his campaign strategy is, what his strengths and weaknesses are, what media he intends to use most frequently, what issues he intends to stress, in which geographic localities he intends to campaign most heavily, and in which he does not without impairing the "independence" of those who use such information to target their

tures. *Id.* § 109.1(b)(5). "Expressly advocating" appears to be correctly defined as including only communications using the "buzz words" required by the Supreme Court. *Id.* § 109.1(b)(2). It bears remembering that communications clearly favorable to one candidate but falling short of such express advocacy are not independent expenditures at all, need not be reported, and cannot be limited through the guise of limiting "contributions" to them as the Commission has attempted to limit independent expenditures. *See* notes 146-59 *infra*.

139. *See* Proposed Fed. Election Reg. § 109.1(b)(4)(i)(A), 41 Fed. Reg. 35,947 (1976).

140. 2 U.S.C.A. § 434(e)(2) (Supp. 3, 1976).

expenditures. In effect, the candidate should have every right to state, without the risk of enforcement action based on speculations as to his motives, that "I have no plans to campaign in State X. I have no plans to buy media time there. The issues I would discuss if I were there would be A and B, which I favor, and C and D, which I oppose."

If such an announcement were made publicly and independent expenditures resulted, no presumption or inference of coordination or control should be permitted. Candidates, campaign officials, and workers routinely are interviewed by the press about their strategies, their plans, and their predictions. Buried beneath the typically optimistic expectations, significant information often is conveyed, information readily understandable by anyone with even a minimum knowledge of political realities. Any attempt to limit such communications would pose grave risks of discriminatory enforcement. Moreover, the candidate himself often will have legitimate reasons for wishing to make such announcements quite apart from any effects they might have on independent spenders: to rally his supporters or discourage his opponents; to show how limited his campaign against an incumbent must be because of the limitations on contributions; or to show that his affluent opponent is substantially outspending him. The candidate and his supporters have compelling first amendment interests at stake as well. Any attempt to restrict the ability of candidates to enunciate their political strategies also would restrict the freedom of the press by limiting the ability of reporters and commentators to discuss and report political events. The Commission should recognize that such announcements are proper even if partly motivated by a desire to encourage independent expenditures, and should not support, without more, a finding of forbidden "coordination." Instead, the Commission has erected a vague motive test[141] that threatens virtually every candidate and independent spender with accusations of unlawfulness and can only serve to inhibit perfectly proper political speech and activity.

One of the most needless effects of the Supreme Court's decision, and one not alleviated in the proposed regulations, has been the widely expressed fear that casual conversation among campaign leaders for a candidate and persons engaged in making independent expenditures are now precluded, or at least so highly suspect that witnesses ought to be present whenever any such contacts

141. *See* note 140 *supra* and accompanying text.

occur. Among groups which share the same basic philosophical views, some individuals will work for a particular candidate's campaign, while others may work for or with an organization supporting the candidate and which makes independent expenditures. To cause such people to fear to meet each other, or to threaten "coordination" findings if they talk about politics, has profound implications for the protected first amendment right of freedom of association. Accordingly, an explicit recognition by the Commission that people may meet and discuss politics without creating any presumption or inference of coordination or control would be highly desirable.[142] Even if the Commission were to move in the directions suggested,[143] unacceptable governmental intrusion into constitutionally protected areas of speech and association seems inherent in any attempt to regulate on the basis of the Court's distinction between expenditures and contributions for first amendment purposes.

Finally, in its attempt to restrict the independent-expenditure "loophole" as narrowly as possible, Congress in the 1976 Amendments added a provision that has no warrant in the Supreme Court's decision:

> [T]he financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees or their authorized agents shall be considered

as an expenditure made in cooperation, consultation, or concert with the candidate, and therefore a contribution to the candidate's

142. The chilling effect of vagueness and uncertainty in this area is quite real. In June 1976 the Conservative Party of the State of New York, one of the plaintiffs in *Buckley v. Valeo*, held its annual convention. In the course of the activities normally associated with such conventions, the Party hoped to sponsor a public, round-table discussion on what conservative citizens might do in the general-election campaign to support Governor Reagan should he win the Republican Party's presidential nomination. One panelist the Party hoped to invite was a distinguished young conservative political consultant, who, as it happens, had engaged in a limited amount of consulting work for the Citizens for Reagan, Governor Reagan's principal campaign committee. The consultant declined to participate in the round-table for fear of a Commission accusation of "coordination" or "control." Unfortunately, nothing in the statute or the proposed regulations would allay his fears. Such needless dampening of fundamental civil liberties finds no justification in any legitimate policy underlying the FECA.

143. The suggestions set forth above and others were made to the Commission, *see* Testimony of John R. Bolton, June 9, 1976, without notable success except with respect to the definition of "agent," *see* note 138 *supra*, and elimination of a draft provision that by "ratifying" an expenditure the candidate or his agent could transform subsequent similar expenditures into "coordinated" contributions. The regulations as adopted are silent on the latter point.

campaign.[144] The Commission has incorporated this language in its proposed regulations.[145] Since such "financing" obviously can occur without any "coordination" between spender and candidate, the provision seems plainly unconstitutional, and we predict it will fall when challenged in court.[146]

B. *Independent Expenditures by Groups or Committees*

Even more serious than the problems discussed above is the Commission's imposition of limits on independent expenditures made by groups of people cooperating with one another. The Commission has moved to restrict such activities by regarding the members' individual financial participation as "contributions" subject to the FECA's contribution limits, notwithstanding the fact that they are made not to the candidate but to a group wholly independent of the candidate which makes solely independent expenditures. If this approach is upheld, the *Buckley* Court's vindication of first amendment rights in the independent-expenditure area will have been emasculated. An early challenge to the Commission on this point is thus the most urgent single imperative in the entire campaign-regulation area.

The statute defines "political committee" as including any "group of persons" that either receives contributions or makes expenditures exceeding $1,000 per year for the purpose of influencing federal elections.[147] The Commission began its campaign to limit independent expenditures by taking the view that a group making only such expenditures is covered by the prohibition on contributions exceeding $5,000 "to any other political committee."[148] The Commission's regulations and other publications state that this $5,000 limit and the $25,000 ceiling applicable to all contributions by an individual in a single year are the only limits attaching to contributions to political committees other than a candidate's authorized committee.[149] As of September 1976, however, the Commission has informed those making inquiries that its present policy is

144. 2 U.S.C.A. § 441a(a)(7)(B)(ii) (Supp. 3, 1976).

145. Proposed Fed. Election Reg. § 109.1(d)(1), 41 Fed. Reg. 35,947 (1976).

146. The section is so appallingly drafted that its terms include not only the situations to which it was presumably directed, but also all media coverage of pronouncements by candidates.

147. 2 U.S.C.A. § 431(d) (Supp. 3, 1976).

148. *Id.* § 441a(a)(1)(C).

149. Proposed Fed. Election Reg. § 110.1(d), 41 Fed. Reg. 35,948 (1976); *see* FED. ELECTION COMM'N, CAMPAIGN GUIDE ON CONTRIBUTIONS AND EXPENDITURES 2.13 (August 1976); FED. ELECTION COMM'N, CAMPAIGN GUIDE FOR COMMITTEES 1.21 (June 1976).

contained in an unpublished draft memorandum that limits contributions to a committee making independent expenditures on behalf of a single candidate to $1,000 and that aggregates such contributions with contributions made to the candidate, his authorized committees, or to other independent committees on his behalf in order to determine whether the $1,000 ceiling has been exceeded.[150] The Commission reaches this result by regarding such contributions as made "on behalf of a particular candidate" within the meaning of Section 441a7(C), a result not required by the text of that subsection standing alone, and forbidden if read in light of the *Buckley* decision.[151]

Further, the Commission has ruled that a group of individuals that is not "organized" in any fashion, has no headquarters or bank account, but whose members are bound together only by a common political concern will be regarded as a political committee for contribution-limits purposes if any one person collects and delivers contributions of other individuals in the group.[152] This opinion dealt with contributions to a candidate or authorized committee. If, as seems probable, the Commission extends the same rationale to informal groups joining to make independent expenditures, it will have completed the process of restricting the constitutional right to make such expenditures to a single individual acting in complete isolation. For example, individuals contributing to a single advertisement which qualified as an independent expenditure would by that act become a political committee, subject to the Act's reporting requirements and contribution limits.

The Commission reasons that what it has done is not inconsistent with *Buckley*:

> The focus of the Court was on the constitutional right to 'vigorous advocacy' by an individual or organization; however, this right did not include donations to another person or organization to communicate for the original 'speaker.' Under *Buckley*, the 1976 Amendments to the Federal Election Campaign Act of 1971, and the Commission's proposed regulations, Part 109, a person or

150. Fed. Election Comm'n Memorandum No. 745 (Aug. 3, 1976). As this article goes to press the Commission has finally made its latest position public. Fed. Election Comm'n Policy Statement, 41 Fed. Reg. 44,130 (1976).

151. The Commission's interpretation is supported by the legislative history of the 1976 Amendments. H.R. REP. NO. 1057, 94th Cong., 2d Sess. 58-59 (1976). In that Report Congress explicitly invited the Commission to restrict independent-expenditure contributions notwithstanding the Supreme Court's decision.

152. Fed. Election Comm'n Advisory Opinion No. 1976-51 (Sept. 2, 1976) (unpublished). It has been reported that the Commission's General Counsel strongly objected to this opinion, regarding it as putting "a further crimp on the constitutional right of association." CAMPAIGN PRACTICES REPORTS, Sept. 6, 1976, at 2.

> organization is subject to no limitation on 'independent expenditures' made for or against Federal candidates. The right to 'speak one's mind' is thus unimpaired. However, when the speaker chooses to contribute to another person or organization, the Court's rationale for upholding contribution limits comes into play, and the Act's limits would apply to this activity.[153]

This rationale is wholly inconsistent with the *Buckley* decision, which clearly indicated that "contributions" may be constitutionally restricted only when made to candidates for federal office or their authorized campaign committees. Holding that the Act's purpose "to limit the actuality and appearance of corruption resulting from large individual financial contributions"[154] was the only basis on which to sustain the contribution limits, the Court recognized that the rationale applies only to contributions to candidates for federal office, to their authorized committees, and arguably to political parties. The Court rejected the notion that unlimited independent expenditures would have a corrupting effect:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.[155]

Further, the *Buckley* Court's rejection of the need to reduce the "skyrocketing" costs of election campaigns and the need to "equalize" the speech of affluent and non-affluent persons[156] as compelling governmental interests clearly demonstrates that in upholding contribution limits, the Court sustained such limits only with respect to contributions "to [c]andidates and [a]uthorized [c]ampaign [c]ommittees."[157] Nothing in the opinion furnishes a rationale for limitations on contributions to independent groups or committees. To the contrary, such contributions fall squarely within the type of activity that the Court held was protected by the first amendment from any regulation beyond disclosure requirements.

The Commission's theory that independent expenditures are constitutionally inviolate only when they represent "personal" speech or activity by the donor, and hence that contributions to independent-expenditure committees are unprotected, finds no support in *Buckley*.[158] In striking down limits on independent expendi-

153. Fed. Election Comm'n Memorandum No. 745, at 5-6 (Aug. 3, 1976).
154. 424 U.S. at 26.
155. *Id.* at 47.
156. *Id.* at 48-49.
157. *Id.* at 23; *see, e.g., id.* at 24, 28, 29, 34 n.40, 37.
158. This theory was urged by the *Buckley* intervening defendants in the court of

tures, the Court deemed that theory unworthy of comment. One might argue equally well that a political oration has no first amendment protection if it is ghost written, or that the Court's voiding of expenditure limits on candidates applies only to money spent to disseminate compositions that can be proved to have been written by the candidate personally.

What such theories ignore is the first amendment right to freedom of association.[159] Political power lies in cooperative activity; if that activity can be prohibited or limited, scrupulous preservation of freedom of speech to individuals acting in isolation would be meaningless. No case law or respectable theory supports limiting first amendment freedoms to instances in which one individual has composed, paid for, and published a text without any cooperation with others. Such a shriveled first amendment hardly could protect thoroughly cooperative, indeed corporate, activities such as publication of a newspaper.

In short, the Commission's attempt to stifle independent expenditures by limiting individual financial participation is squarely contrary to the *Buckley* decision and the first amendment. It seems highly probable that the Commission's restriction on independent expenditures will not survive its first court test. The Commission's ability to impose a patently unconstitutional restriction on an entire presidential campaign is eloquent testimony to the chilling effect of its powers and to the extreme perils involved in governmental intrusion into the political process under the banner of "reform."

IV. May Corporations and Labor Unions Make Contributions, Independent Expenditures, or Independent Non-Expenditures?

Constitutional principles governing campaign finance regulation arise in a special conceptual and historical context when the activities of corporations and labor unions are involved. While these issues were not presented in *Buckley*, they undoubtedly will be affected by that decision when they arise in future litigation.

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appeals. Brief for Intervening Defendants at 123, Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975); Oral Argument for Intervening Defendants (delivered by Mr. Cutler on June 13, 1975) at 63, Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975). The intervening defendants abandoned this argument in the Supreme Court, but amici curiae Senators advanced the theory there. Brief for Senators Scott and Kennedy as Amici Curiae at 59, 60, Buckley v. Valeo, 424 U.S. 1 (1975).

159. *See, e.g.*, Cousins v. Wigoda, 419 U.S. 477 (1975); American Party v. White, 415 U.S. 767 (1974); Kusper v. Pontikes, 414 U.S. 51 (1973); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

A. Introduction

In *United States v. CIO*,[160] defendant labor union was charged with violating the predecessor statute to 2 U.S.C. § 441b,[161] prohibiting any corporation or labor union from making contributions or expenditures in connection with federal elections. To test the statute's constitutionality, the CIO's president had written an editorial in the CIO newspaper (owned, published, and funded by the CIO) endorsing a candidate for Congress in a special election held in Maryland's Third Congressional District. The newspaper was circulated in the Third District, as were 1,000 reprints of the newspaper that the CIO president had ordered to be specially printed.

The district court dismissed the indictment, holding that the statute violated the first amendment. The Supreme Court affirmed the dismissal, but on the ground that the actions alleged were not proscribed by the statute. The Court did not read the indictment as charging that the CIO newspaper was circulated free to nonsubscribers or nonmembers, and therefore faced only the question of a union's communications with its own members.[162]

The prohibition against corporate contributions to political candidates had been first enacted in 1907[163] and was reenacted in the Corrupt Practices Act of 1925.[164] The same prohibition was extended to labor unions temporarily by the War Labor Disputes Act of 1943 and permanently by the Taft-Hartley Act of 1947. The Court explained that

> [w]hen Congress began to consider the Labor Management Relations Act of 1947 it had as a guide the 1944 presidential election, an election which had been conducted under the above amendment to the Act of 1925. In analyzing the experience of that election, a serious defect was found in the wording of the Act of 1925. The difficulty was that the word 'contribution' was read narrowly by various special congressional committees investigating the 1944 and 1946 campaigns. The concept of 'contribution' was thought to be confined to direct gifts or direct payments. Since it was obvious that the statute as construed could easily be circumvented through indirect contributions, § 304 [of the Taft-Hartley Act] extended the prohibition . . . to 'expenditures.'[165]

The majority concluded from the legislative history that Congress did not intend to include within the coverage of the section as an

160. 335 U.S. 106, *aff'g* 77 F.Supp. 355 (D.D.C. 1948).

161. Act of Feb. 28, 1925, ch. 368, § 313, 43 Stat. 1074 (repealed 1976) (18 U.S.C. § 610 (1920) prior to the FECA Amendments of 1976).

162. 335 U.S. at 111.

163. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864.

164. Act of Feb. 28, 1925, ch. 368 , § 313, 43 Stat. 1074.

165. 335 U.S. at 115.

expenditure the cost of a publication circulated to members only.[166] Neither the Court's opinion nor the legislative history cited indicates whether the "expenditures" prohibited by the statute included those of the type we now call "independent."

The decision in *United States v. UAW*,[167] however, did examine that issue. In *UAW*, the indictment charged that the union had paid funds from its treasury to an advertisement agency for certain television commercials endorsing various candidates in the 1954 congressional primary and general elections. No allegations were made regarding coordination with or control by the candidates endorsed by the advertisements. In granting the defendant's motion to dismiss the indictment, the district court held that the purchase of the television advertisements were not "expenditures" prohibited by the statute.[168] On appeal, the Supreme Court reversed and remanded the case for trial.

The Court again reviewed the legislative history, and concluded that

> it was to embrace precisely the kind of indirect contribution alleged in the indictment that Congress amended § 313 to proscribe 'expenditures.'[169]

During congressional investigation of their political activities, the labor unions had argued that many of the activities complained about were not "contributions." Specifically, in response to a charge from Senator Taft that the Ohio CIO had printed and distributed

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166. *Id.* at 116.

167. 352 U.S. 567 (1957), *rev'g* 138 F. Supp. 53 (E.D. Mich. 1956).

168. In support of its holding, the district court stressed that the case before it was "on all fours" with United States v. Painters Local 481, 172 F.2d 854 (2d Cir. 1949), in which a unanimous court of appeals panel reversed a conviction for violating what is now 2 U.S.C. § 441b (Supp. 3, 1976). The union had purchased, with funds from its general treasury, newspaper and radio advertisements advocating the rejection of Senator Taft as a candidate for the 1948 Republican presidential nomination. Judge Augustus N. Hand, while recognizing that the majority opinion in *United States v. CIO* dealt with a union newspaper distributed to members, whereas the present case concerned "ordinary" newspaper advertisements, nevertheless stated that:

> [T]he expenditure cannot be regarded as prohibited by the statute. Even if the contention that the financial or group power exercised over elections through labor unions may be curbed, either by limiting the amount of their expenditures or by prohibiting them altogether, be thought reasonable, an interpretation of the statute which would allow such expenditures in the case of a union publication and prohibit them when made by a union through the use of an independent newspaper or radio station seems without logical justification; nor is such a differentiation suggested by the apparent purposes or by the terms of the statute or by its legislative history.

172 F.2d at 856. In *UAW*, the district court noted that although the Second Circuit's decision gave the government "a case made to order for appeal . . . no petition for certiorari was filed . . . ." 138 F. Supp. at 57.

169. 352 U.S. at 585.

200,000 leaflets in Ohio criticizing him and endorsing his opponent, the CIO had replied that such activity was not a contribution, but

> merely an 'expenditure of its own funds to state its position to the world exercising its right of free speech . . . .'[170]

The Court interpreted the legislative response as follows:

> Because such conduct was claimed to be merely 'an expenditure[by the union] of its own funds to state its position to the world,' the Senate and House Committees recommended and Congress enacted, as we have seen, the prohibition of 'expenditures' as well as 'contributions' to 'plug the existing loophole.'[171]

In further support of its holding, the Court quoted extensively from the 1945 Report of the House Special Committee to Investigate Campaign Expenditures. The House Special Committee had recommended that the prohibition of contributions by unions and corporations

> be clarified so as to specifically provide that expenditures of money for salaries to organizers, purchase of radio time, and other expenditures by the prohibited organizations in connection with elections, constitute violations of the provisions of said section, *whether or not said expenditures are with or without the knowledge or consent of the candidates.*[172]

The Supreme Court noted the similarity between the activity about which Senator Taft complained and the activity described in the indictment against the Auto Workers, and held that the Government should have the opportunity to prove at trial that an indictable offense had been committed. As in the *CIO* case, the Court declined to pass on the constitutional arguments advanced. On remand, the union was acquitted by a jury.[173]

In 1971, Congress amended 18 U.S.C. § 610 as part of the Federal Election Campaign Act. The language in the fourth paragraph of section 610 beginning "As used in this section, the phrase 'contribution or expenditure' shall include . . . ." (now section 441b(b)(2)) was added through a floor amendment to the House bill offered by Representative Hansen. In presenting his amendment, he stated:

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170. *Id.* at 580, quoting S. REP. No. 101, 79th Cong., 1st Sess. 59 (1946).

171. 352 U.S. at 585.

172. *Id.* at 582, quoting H.R. REP. No. 2739, 79th Cong., 2d Sess. 46 (1945) (emphasis added).

173. Lane, *Analysis of the Federal Law Governing Political Expenditures by Labor Unions*, 9 LAB. L.J. 725, 732 (1958).

> the purpose of my amendment is to codify the court decisions interpreting [Section 610] . . . and to spell out in more detail what a labor union or corporation can or cannot do in connection with a Federal election.[174]

Representative Hansen then explained what the first part of his amendment would do:

> The effect of this language is to carry out the basic intent of section 610, which is to prohibit the use of union or corporate funds for active electioneering directed at the general public on behalf of a candidate in a Federal election. . . .
>
> Next, the amendment, in further defining the phrase 'contribution or expenditure,' draws a distinction between activities directed at the general public, which are prohibited, and communications by a corporation to its stockholders and their families, and by a labor organization to its members and their families on any subject, which the courts have held is permitted.[175]

Yet again, Representative Hansen commented that:

> section 610 as it stands, and under my proposal, represents a complete victory for those who believe that corporations and unions have no moral right to utilize their organizations' general funds for active public partisan politicking. It totally subordinates organizational interests to individual interests.[176]

It thus seems evident that former section 610, now 2 U.S.C. § 441b,[177] is intended to cover and does in fact cover "independent" expenditures by corporations and unions as well as contributions by them. Three questions, however, immediately are raised by this conclusion. Is section 441b itself constitutional? What is the effect of *Buckley v. Valeo* on section 441b? Are corporations and labor unions now or were they ever barred from making "independent non-expenditures," that is, expenditures that do not explicitly advocate the election or defeat of a clearly identified candidate for federal office?

B. The Constitutionality of Section 441b

After almost seventy years of its existence in one form or another, the constitutionality of section 441b is still unknown. The Supreme Court has avoided answering the issue just as assiduously in the more recent cases of *Pipefitters Local 562 v. United States*[178]

174. 117 CONG. REC. 43,379 (1971).

175. *Id.*

176. *Id.* at 43,380.

177. The scope and practical effect of the "segregated fund" and "communications to members" provisions of § 441b, as revised by the FECA Amendments of 1976, as well as the constitutionality of the distinctions made by those amendments between what corporations and labor unions may do are beyond the scope of this article.

178. 407 U.S. 385 (1972).

and *Cort v. Ash*[179] as it did in the earlier *CIO* and *UAW* cases.

Although *limitations* on contributions were upheld in *Buckley*, the Supreme Court was not faced with the issue of *prohibitions* on contributions. It noted that

> [w]hile the contribution limitation provisions might well have been structured to take account of the graduated expenditure limitations for House, Senate and Presidential campaigns, Congress's failure to engage in such fine tuning does not invalidate the legislation.[180]

The Court, however, stressed that while it would not decide whether a $2,000 ceiling was better than a $1,000 ceiling, it avoided such considerations because

> [s]uch distinctions in degree become significant only when they can be said to amount to differences in kind.[181]

Thus, when faced with a complete prohibition on contributions, the Court may well decide differently from the result in *Buckley*.

The issue lurking behind any discussion of section 441b's constitutionality is whether and to what extent corporations and labor unions have first amendment rights.[182] The extent to which first amendment protection is available seems to be the more important aspect of the issue: even if corporations and unions have some first amendment rights, that alone is insufficient to determine whether the protections afforded are sufficient to invalidate section 441b. Whether or not section 441b is found invalid, resolution of the extent to which corporations and unions fall within the protections of freedom of speech and association will be significant in determining the impact of *Buckley v. Valeo* and answering the question whether corporations and unions may make independent non-expenditures.

It seems clear that communications by unions and corporations "internally" (to members and stockholders) and to at least some "outsiders" are protected. The majority opinion in *CIO* warned that:

> [i]f § 313 [now section 441b] were construed to prohibit the publication by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders *or customers* of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.[183]

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179. 422 U.S. 66 (1975).

180. 424 U.S. at 30.

181. *Id.*

182. *See* Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U. CHI. L. REV. 148 (1974).

183. 335 U.S. at 121 (emphasis added).

Although the Court spoke of "periodicals" advising customers on issues important to them, it is difficult to imagine how many large corporations could even identify their customers, let alone maintain a periodical distribution list. Moreover, no principled constitutional requirement appears to mandate communication on a "periodic" rather than an *ad hoc* basis. In *United States v. Painters Local 481*,[184] the union that had bought the television and newspaper advertisements was small and had no union newspaper of its own. Although differences in magnitude obviously exist between the small union and the large corporation, the Second Circuit's logic in analogizing the *CIO* case to the facts before it in *Painters Local 481* applies in both instances:

> In a practical sense the situations are very similar, for in the case at bar this small union owned no newspaper and *a publication in the daily press or by radio was as natural a way of communicating its views to its members as by a newspaper of its own.*[185]

The concurring opinion in *CIO* was much more assertive on behalf of corporations' and unions' first amendment rights. Justice Rutledge wrote that "[t]he expression of bloc sentiment is and always has been an integral part of our democratic electoral and legislative processes."[186] Further,

> [t]o say that labor unions as such have nothing of value to contribute to that process and no vital or legitimate interest in it is to ignore the obvious facts of political and economic life and of their increasing interrelationship in modern society . . . . This ostrichlike conception, if enforced by law, would deny those values both to unions and thus to that extent to their members, as also to the voting public in general.[187]

Moreover, citing *Grosjean v. American Press Co.*,[188] Justice Rutledge argued that

> [c]orporations have been held within the First Amendment's protection against restrictions upon the circulation of their media of expression . . . . It

184. 172 F.2d 854 (2d Cir. 1949).

185. 172 F.2d at 856 (emphasis added).

186. 335 U.S. at 143 (Rutledge, J., concurring).

187. *Id.* at 144.

188. 297 U.S. 233 (1936). In *Grosjean* the plaintiffs challenged a Louisiana statute that imposed a tax on all newspapers within the state having a circulation greater than 20,000 copies per week. First amendment safeguards were held to be incorporated into the fourteenth amendment and made applicable to the states, and the Court reaffirmed its cases holding a corporation to be a "person" within the meaning of the due process and equal protection clauses. *Id.* at 244. Although the statute was deemed by the Court to be an infringement of freedom of the press, it did state more broadly that the issues raised by the tax go

> to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests.

Id. at 243.

> cannot therefore be taken, merely upon legislative assumption, practice or judgment, that restrictions upon freedoms of expression by corporations are valid. Again, those matters cannot be settled finally until this Court has spoken.[189]

Moreover, the concurring opinion in *CIO* was emphatic in rejecting the majority's attempt to distinguish between "periodic" newsletters and all other frequencies and types of distribution:

> I know of nothing in the [First] Amendment's policy or history which turns or permits turning the application of its protections upon the difference between regular and merely casual or occasional distributions. Indeed pamphleteering was a common mode of exercising freedom of the press before and at the time of the Amendment's adoption. It cannot have been intended to tolerate exclusion of this form of exercising that freedom.[190]

This contention is consistent with the line of cases which has held that "every sort of publication which affords a vehicle of information and opinion" is part of the press itself.[191]

Finally,

> the difference between distribution to dues-paying members only and distribution to outsiders or the public, whether with or without price, [does not] make a constitutional difference. The Amendment did not make its protections turn on whether the hearer or reader pays or can pay, for the publication or the privilege of hearing the oral or written pronouncement. Neither freedom of speech and the press nor the right of peaceable assembly is restricted to persons who can and do pay.[192]

The issues that divided the two opinions in *CIO*, on the basis of which the concurring opinion would have invalidated the predecessor to section 441b as violative of the first amendment, still have not been resolved.[193]

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189. 335 U.S. at 154-55.

190. *Id.* at 155.

191. Bigelow v. Virginia, 421 U.S. 809 (1975). Branzburg v. Hayes, 408 U.S. 665, 704 (1972); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Martin v. Struthers, 319 U.S. 141 (1943); Lovell v. Griffin, 303 U.S. 444, 452 (1938). Paid "editorial" advertisements (typified recently by the Mobil Oil Company series appearing on "op-ed" pages of newspapers) that "communicated information, expressed opinion, recited grievances, and protested claimed abuses," *see* New York Times Co. v. Sullivan, 376 U.S. at 266, clearly were entitled to first amendment protection. A contrary rule

> would discourage newspapers from carrying editorial advertisements of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities — who wish to exercise their freedom of speech even though they are not members of the press.

Id.

192. 335 U.S. at 155.

193. In his dissenting opinion in *UAW* Mr. Justice Douglas answered these questions in characteristic fashion:

> Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a

Numerous cases dealing explicitly with the rights afforded labor unions by the first amendment have protected union and organizational activity, discussion of labor disputes,[194] and the associational rights of union members.[195] Such issues have arisen far less frequently with respect to corporations. Unless there is something inherent in the corporate form that disqualifies it from first amendment protection, there is no reason why corporations should not receive the same protection as other voluntary associations. The four attributes most often mentioned as key to the corporate form — continuity of life, limited liability, free transferability of interests, and centralization of management — have nothing to do with the coverage of constitutional safeguards. Since most newspapers and other communications media whose first amendment rights have been upheld[196] are corporations, the corporate form alone cannot be disqualifying for first amendment purposes. It seems difficult, if not impossible, to draw any principled distinction between "media" corporations and others whose principal business is not communication but which surely have political interests to protect by communication and persuasion. Pending a dispositive opinion by the Supreme Court, corporations can and should take the position that their first amendment rights are coextensive with the outer limits of protection afforded by that provision.

In addition, corporations have fifth amendment rights that may be infringed by section 441b. That section's prohibition of union and corporate activity seems similar to the ordinance prohibiting all picketing near schools *except* labor picketing in *Police Department v. Mosley*,[197] which was invalidated as an illegitimate categorization by subject matter. An analogous argument might be made against section 441b. Moreover, section 441b arguably violates the due process clause by regulating only unions and corporations among all forms of economic organization.[198]

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record of lawless action. But these are not justifications for withholding First Amendment rights from any group — labor or corporate . . . . First Amendment rights are part of the heritage of all persons and groups in this country. They are not to be dispensed or withheld merely because we or the Congress thinks the person or group is worthy or unworthy.

352 U.S. at 597 (Douglas, J., dissenting).

194. Thomas v. Collins, 323 U.S. 516, 531-32 (1945); Thornhill v. Alabama, 310 U.S. 88, 102-03 (1940).

195. Transportation Union v. State Bar, 401 U.S. 576 (1971); UMW v. Illinois State Bar, 389 U.S. 217 (1967); Brotherhood of Trainmen v. Virginia, 377 U.S. 1 (1964).

196. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

197. 408 U.S. 92 (1972).

198. *See* Comment, *supra* note 182, at 163-65.

C. *The Impact of Buckley v. Valeo on Section 441b*

Assuming that section 441b prohibits "independent expenditures," does the *Buckley* decision, in invalidating 18 U.S.C. § 608(e), presage a similar invalidation of section 441b? The legislative history of section 441b and predecessor statutes reveals that the term "contribution" was deemed insufficient to prevent the flow of union and corporate money into the political process, and that the broader term "expenditure" was added to the statutory prohibition as a "loophole-closing" device.[199] Under the rationale of *Buckley*, even if it is permissible to prohibit corporate and union contributions, this alone does not justify the broader proscription entailed by the word "expenditure." As the Court said with respect to section 608(e):

> The markedly greater burden on basic freedoms caused by § 608(e)(1) thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations. Rather, the constitutionality of § 608(e)(1) turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.[200]

The prevention of corruption or the appearance of corruption was found insufficient as a rationale to justify section 608(e). Moreover, one attempted justification of section 441b—the prevention of large aggregations of wealth from distorting the political process —was also found insufficient to validate section 608(e):

> But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . . The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion. Cf. *Eastern R. Conf.* v. *Noerr Motors* [sic], 365 U.S. 127, 139 (1961).[201]

To make the point even more flatly, the Court stated:

> [L]egislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment.[202]

One final justification for section 441b — the protection of the interests of minority shareholders and union members — was not involved in *Buckley*. Nonetheless, the protection of minority interests in many instances may be an insufficient governmental interest

199. *See* notes 174-76 and accompanying text.
200. 424 U.S. at 44-45.
201. *Id.* at 48-49.
202. *Id.* at 50.

to support an interpretation of section 441b that would bar independent expenditures. The Court itself has intimated that, absent any identifiable dissenting interest, section 441b might be a nullity. Thus, in *Pipefitters*, the Court agreed that

> an indictment that alleges a contribution or expenditure from the general treasury of a union or a corporation in connection with a federal election states an offense.[203]

The Court then noted (without any prior statutory, legislative, or judicial support) that "[t]he unanimous vote of the union members or stockholders may at most (but we need not now decide) be a defense."[204]

More recently, in *Cort v. Ash*,[205] the Court found that "the legislative history of the 1907 Act, recited at length in . . . *UAW* . . ., demonstrates that the protection of ordinary stockholders was at best a secondary concern."[206] The Court also noted that "while a stockholder acquires his stock voluntarily and is free to dispose of it, union membership and the payment of union dues is often involuntary because of union security and check-off provisions,"[207] and admitted that it was "arguable that the federal interest in the relationship between members and their unions is much greater than the parallel interest in the relationship between stockholders and state-created corporations."[208] The Court's recognition of the voluntary nature of stock ownership would appear to be a complete answer to any "minority interest" defense of section 441b insofar as its prohibition on corporations is concerned.

While the coerced-membership problem often does exist with unions, strong arguments can be made that minority interests can be protected by measures less drastic than the complete prohibition of union independent expenditures. The early *CIO* and *UAW* cases were decided before the "least drastic means" line of cases developed.

In *International Association of Machinists v. Street*,[209] the Court held that members forced to join unions by federally authorized union-shop contracts had a first amendment right to prevent money extracted from them from being expended to support politi-

203. 407 U.S. at 416 n.28.
204. *Id.*
205. 422 U.S. 66 (1975).
206. *Id.* at 81.
207. *Id.* at n.13.
208. *Id.*
209. 367 U.S. 740 (1961).

cal causes with which they disagreed. Their remedy, as limited by the Court, would be refunds or a reduction in the expenditure proportionate to the number of dissenting members.[210] In view of *Street*, it seems likely that the Court would agree that section 441b is not the least drastic means available to protect minority interests. *Cort* and *Street*, however, make it clear that some protection of minority rights constitutionally is required when coerced membership has been authorized by the government. Since mandatory membership is the case with many labor unions but not with shareholders in corporations, it follows that greater restraints on labor union political activity than on similar activity by corporations are not only justifiable but may be constitutionally required.[211]

D. Corporate and Union Independent Non-expenditures

It would appear that corporations and labor unions have a constitutionally protected right to make "independent non-expenditures," subject to the requirement that minority rights be protected in coercive situations, such as involuntary union membership.[212] The legislative history of section 441b is filled with statements by Representatives and Senators that particular language does or does not regulate or control "non-partisan" expenditures, "political" expenditures, "politicking," and the like.[213] These statements arguably express a congressional intent that section 441b cover expenditures that clearly are designed and intended to affect the outcome of an election, but that do not use the specific words set forth in *Buckley*.[214] Nonetheless, congressional intent is insufficient to bring communications that are constitutionally protected within section 441b's coverage.

The right of corporations to engage in activities designed to affect the course of legislation has long been recognized, even in the face of statutes such as the antitrust laws. In *Eastern Railroad*

210. *Id.* at 774-75. In so limiting the remedies, the Court used language strongly supporting the basic proposition that unions (and corporations) have a first amendment right to "the expression of political ideas." *Id.* at 773.

211. Section 441b discriminates in the *opposite* direction. *See* note 74 *supra*.

212. "Independent non-expenditures" are defined at text accompanying note 32 *supra*. *Street* makes it clear that protection of minority rights is required whenever "political causes" are involved, whether or not in relation to specific election candidacies. 367 U.S. at 750, 769.

213. *See, e.g.*, 122 CONG. REC. 3781 (daily ed. May 3, 1976) (remarks of Representative Frenzel).

214. The Court noted that its construction of § 609(e)(1) restricts its application "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" 424 U.S. 44 n.52.

Presidents Conference v. Noerr Motor Freight, Inc.,[215] an association of railroads was charged with a violation of sections 1 and 2 of the Sherman Act. The railroads had conducted a publicity campaign described by the plaintiffs as "vicious, corrupt, and fraudulent," and "designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business . . . ."[216] Rejecting the claim that such activities violated the Sherman Act, the Court stated:

> It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors . . . . [To] disqualify people from taking a public position in matters in which they are financially interested would thus deprive the government of a valuable source of information and . . . deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.[217]

Any other holding or construction of the Sherman Act

> would raise important constitutional questions. . . . [W]e think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitations of governmental action with respect to the passage and enforcement of laws.[218]

Admittedly, *Noerr* is not directly on point, but it does indicate a certain solicitude for corporate expenditures that are at least arguably "political" or that might have partisan connotations.

Whatever the effect of *Noerr*, the issue of corporate independent non-expenditures seems to have been settled by *Buckley*. Only if the Court is willing to state flatly that a different rule applies to corporations and unions can *Buckley* not be read to allow unlimited non-expenditures subject always in the case of unions to the requirement that minority rights be protected in coercive situations.

The *Buckley* opinion was frank in recognizing that

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions.[219]

Nonetheless, the constitutional deficiencies in section 608(e) could only be avoided

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215. 365 U.S. 127 (1961).
216. *Id.* at 129.
217. *Id.* at 139.
218. *Id.* at 138.
219. 424 U.S. at 42.

> by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate . . . .[220]

Any other construction would render the section unconstitutional. Given this highly restrictive interpretation of the reach of section 608(e), it must be inferred that similar statutory wording (*e.g.*, the "in connection with" formula used in section 441b) would also be subject to the same restrictive definition in order to avoid vagueness problems.

Support for the idea that the Court will interpret broad phrases narrowly to save them from invalidation is also found in the approval with which the Court cited two lower court decisions construing the phrase "for the purpose of influencing an election."[221] In those cases,[222] to conform with first amendment requirements, the courts had construed the phrase "made for the purpose of influencing" to include "only those expenditures 'made with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate or his agents.' "[223] Since the corporate expenditures under discussion are independent of the candidates, they should not be deemed to be "made for the purpose of influencing" a federal election.[224] The section 441b formula—"in connection with any election"—is no more specific and must be similarly construed to avoid constitutional infirmity.[225]

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220. *Id.* at 43.

221. *Id.* at 23 n.24.

222. United States v. National Comm. for Impeachment, 469 F.2d 1135 (2d Cir. 1972); ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom.* Staats v. ACLU, 422 U.S. 1030 (1975).

223. 366 F. Supp. at 1057, quoting National Committee for Impeachment, 469 F.2d 1135, 1141 (2d Cir. 1972).

224. It may not be necessary to define the extent of corporate first amendment rights for vagueness-argument purposes. A statute trenching on first amendment interests can be invalidated for vagueness without defining the parameters of those interests or reaching more traditional questions (*e.g.*, whether a statute is overbroad or not rationally related to its declared intentions). *See* Hynes v. Mayor, 96 S. Ct. 1755 (1976). Since corporations unquestionably have some rights under the first amendment, the *Buckley* vagueness argument is fully applicable to corporate independent non-expenditures.

225. Incredibly, in our view, a Commission staff member has recently given an opinion that a corporate federation of trade associations may not disseminate to members of the public compilations of voting records of Congressmen on issues of interest to the business community, also indicating its opinion of each vote as "right" or "wrong," without violating § 441b. Letter of N. Bradley Litchfield, Assistant General Counsel, FEC, to Stanley T. Kaleczyc, Jr., U.S. Chamber of Commerce, O/R # 740, Oct. 12, 1976. The opinion is of course flatly incompatible with ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom.* Staats v. ACLU, 422 U.S. 1030 (1975), which similarly involved dissemination of voting records and opinions thereon by a corporation, and with *Buckley* unless corporations have no First Amendment rights whatever. We predict with confidence approaching certainty that the opinion, if adhered to by the Commission, will not survive its first court test. Yet

V. CONCLUSION

By the time this article appears in print the first election campaign subject to a full legislative scheme of campaign finance regulation will be over. Statistics will be compiled and analyzed by the commentators, with particular attention to the practical impact of the FECA on the political process. Those statistics and analyses, as well as the FEC's performance during the campaign, doubtless will be used to support many further challenges to aspects of the law not held facially invalid in *Buckley*. As has been indicated, we expect a plethora of litigation along these and other lines.

The most striking impact of the law in 1976 doubtless will be found in a sharp decrease in presidential-campaign spending activity by the major-party candidates, attributable to the expenditure limits to which those candidates "voluntarily" acquiesced when they accepted federal subsidies. Constitutional questions aside, we see no advantage to the American people or political system in such a decline of campaign speech, and we perceive very real disadvantages. Surely a successful democracy needs an informed electorate and a thorough canvassing of election issues. While such ideals hardly have been met to perfection in the past, their effectuation can only be made even more improbable by the imposition of limits on campaign speech. If, as is expected, voter participation in the election reaches a record low in 1976, we think the decline in campaign activity compelled by the expenditure limits will have been a significant, though certainly not the only, cause of that dubious achievement.

Thus in our view Congress would act constructively if it eliminated expenditure limits for subsidy-taking candidates if that result is not obtained by further litigation. If subsidies are to remain with us, they should be used, as they are in Europe, as a floor to ensure minimally adequate campaign funding,[226] not as a device for imposing limits that restrict political speech. Moreover, ample opportunities exist for a subsidy system much fairer than the present version, which gives pre-election subsidies only to parties obtaining five per cent of the vote in the preceding election. The law readily could be revised to allow new and smaller parties to qualify for subsidies by a petition method in line with what the Court has required in the

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meanwhile its chilling effect is devastating: the recipient of the opinion has felt itself compelled to decline dissemination of the voting rating to more than 1,000 persons who requested copies.

226. *See* Agree, *Public Finance After the Supreme Court Decision*, 425 ANNALS 134, 135-36 (1976).

ballot-access cases. Given the natural preference for "bipartisanship" on the part of incumbent officials, such a reform seems unlikely unless the Court requires it.

Notwithstanding contribution limits, total contributions and expenditures in the 1976 congressional elections will probably be higher than ever before, largely because the prohibition of all contributions to major-party presidential general-election candidates artificially has channeled many resources into congressional campaigns. Experience should demonstrate that contribution limits have the effect of excluding certain candidates and types of candidates by denying them the "seed money" necessary to mount a viable political challenge. We remain unconvinced that any compelling governmental need warrants such consequences or the concomitant interference with private choice and free expression. Disclosure is the correct and adequate remedy in a democratic society for alleged corruption by means of campaign contributions. If a candidate wishes to accept a million dollars from the Mafia, the most basic libertarian principles suggest that no impediment should or need be placed on him from doing so, so long as the voters fully and timely are informed. The Court has rejected that view, however, and the Congress seems unlikely to embrace it in the foreseeable future. On the other hand, Congress may come under a good deal of pressure, not least from among its own Members, to increase the present draconian contribution limits. A consensus seems to be developing among informed people that they are unnecessarily low for any legitimate corruption-avoidance purpose, and so low that they seriously handicap political fund raising as well as inhibiting desirable citizen participation in politics.

Finally, we expect that this year's elections will be seen as providing a multitude of intolerable examples of the chilling effect and prior restraint on political speech that necessarily result from the broad discretionary powers vested in the Federal Election Commission and from the *in terrorem* impact of its pronouncements, including those later (but too late) demonstrated to have been wrong. The Commission's most notorious contribution to the 1976 election has been the crippling of independent expenditures by its wholly unconstitutional restrictions. Its inhibiting role has extended into every other phase of campaign activity as well, leaving candidates and citizens alike in a state of catatonic caution completely inconsistent with a free climate of political communication. Unless steps are taken by Congress or the courts to relieve these horrendous effects of the present legislation, activity both by candidates and by

ordinary citizens and groups will remain subject to a nightmarish straitjacket incompatible with the vigorous political life the country has known.