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The Confrontation in the Electoral Forum Between Compelled Disclosure and Freedom of Association: Recent Developments Concerning Vital Rights

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THE CONFRONTATION IN THE ELECTORAL FORUM BETWEEN COMPELLED DISCLOSURE AND FREEDOM OF ASSOCIATION: RECENT DEVELOPMENTS CONCERNING VITAL RIGHTS

I. Introduction

"There are many prices we pay for the freedoms 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."[1] So ended Chief Justice Burger's separate opinion in *Buckley v. Valeo*,[2] which highlighted the tension between issues fundamental in our Constitution and to our society.

In the post-Watergate period, there has been an increase in public interest and legislative activity concerning the regulation of the political forum. However, this forum is particularly sensitive to governmental regulations; present within this milieu are some of the citizen's most basic rights. Also, it is from this forum that the fabric of government and society eventually emerge. Thus, regulatory activity in this area ought to be carefully examined to insure that rights are not infringed upon and that any restrictions are carefully examined so only the most necessary, if any, encroachments on a citizen's rights are permitted. This Comment will discuss the right of an individual to maintain the privacy of his beliefs and associations as it conflicts with the right of the government to compel disclosure of a citizen's political activities.

A. The Congressional Regulatory Authority and Enactments

The power of Congress to enact political disclosure legislation in the field of elections was upheld in *Burroughs and Cannon v. United States*.[3] In that case, the Supreme Court upheld the constitutionality of the disclosure requirements for political committees in the

1. Buckley v. Valeo, 424 U.S. 1, 256 (1976) (Burger, C.J., dissenting in part).

2. *Id.* The *Buckley* case presented a landmark decision in the field of federal election law. As this Comment will discuss many issues which have been addressed in *Buckley*, it will often return to that case. The present state of the law may only be properly discussed with an understanding of the pre-*Buckley* statutory schemes, the impact of *Buckley*, and the resulting gaps and inconsistent applications of the law in the post-*Buckley* era.

3. 290 U.S. 534 (1934).

Federal Corrupt Practices Act of 1925.[4] However, the *Burroughs* Court did not consider the impact that such disclosure requirements might have on first amendment freedom of association and privacy rights.[5]

In *United States v. Harriss*,[6] the Supreme Court upheld the power of Congress to enact political disclosure legislation in the related area of the legislative process through the Federal Regulation of Lobbying Act.[7] Again, although the power of Congress was sustained over the arguments that the statute was vague and in violation of first amendment freedom of speech, publication, and petition protection, the Court did not consider associational and privacy guaranties.

Both these acts were forerunners of the most comprehensive of electoral regulatory schemes, the Federal Election Campaign Act of 1971[8] (FECA 1971), as amended in 1974[9] (FECA 1974), and 1976[10] (FECA 1976).[10.1] This Comment shall focus only on those provisions

4. Federal Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1070. (Although the Act is codified mostly in various sections of 18 U.S.C., the disclosure requirements can be found at 2 U.S.C. §§ 432-36 (1976)).

5. 290 U.S. 534 (1934).

6. 347 U.S. 612 (1954).

7. Federal Regulation of Lobbying Act of 1946, 2 U.S.C. §§ 261-70 (1976). The relevant disclosure provisions can be found at 2 U.S.C. §§ 264, 267.

8. Federal Election Campaign Act of 1971, Pub. L. No. 92-255, 86 Stat. 3 (codified in various sections of 2, 18, 47 U.S.C. (1976)).

9. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-433, 88 Stat. 1291.

10. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475.

10.1. FECA 1971 and FECA 1974 (1) placed limits on contributions to candidates for federal office, FECA 1974 § 101(a) (codified at 18 U.S.C. § 608(c) (Supp. V 1975)); (2) limited the allowable expenditures by individuals or groups relative to a candidacy, *id.* § 101(a) (codified at 18 U.S.C. § 608(e) (Supp. V 1975)); (3) limited the allowable expenditures by a candidate for federal office from his personal or family funds, *id.* § 101(b)(1) (codified at 18 U.S.C. § 608(a)(1) (Supp. V 1975)); (4) restricted primary and general election expenditures by candidates, *id.* § 101(a) (codified at 18 U.S.C. § 608(c)(1) (Supp. V 1975)); (5) created the Federal Election Commission (the Commission) and bestowed extensive rulemaking, adjudicatory, and enforcement powers upon this administrative agency, as well as investigative, record-keeping and disclosure functions, *id.* § 208(a) (codified at 2 U.S.C. § 437c(a)(1) (Supp. V 1975)); (6) provided for public financing of Presidential nominating conventions and general election and primary campaigns through a related amendment to Subtitle H of the Internal Revenue Code of 1954, The Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 562, as amended FECA 1974, as amended Pub. L. No. 93-53, 87 Stat. 138 (codified at Int. Rev. Code of 1954, chs. 95, 96); and lastly (7) instituted extensive reporting and disclosure requirements as to political contributions, FECA 1971 §§ 301-11 (codified at 2 U.S.C. § 434 (Supp. V 1975)).

which instituted extensive reporting and disclosure requirements as to political contributions.

The reporting and disclosure regulations of these recent acts basically required political committees to record the name and address of each individual whose contribution exceeded $10, and additionally record the occupation and principal place of business of each individual whose contribution exceeded $100.[11] Also, political committees were required to file periodic reports with the Commission disclosing the source of every contribution which exceeded $100,[12] as well as the recipient and purpose of every expenditure over $100.[13] Lastly, all individuals or groups other than the candidate or political committee, which expected to receive contributions or make expenditures totaling more than $100 in any calendar year, were required to file a statement with the Commission.[14] Any committee which had not been designated by the candidate it supported as the principal campaign committee were required to file reports including the aforementioned information with the principal campaign committee. The designated principle campaign committee became solely responsible for filing periodic reports with the Commission.[15]

II. Summary and Analysis of *Buckley v. Valeo*

A. The Impact on FECA 1971 and FECA 1974

The first major test of this electoral regulatory scheme in the United States Supreme Court was presented in *Buckley v. Valeo*.[16]

11. FECA 1974 § 204 (codified at 2 U.S.C. § 432 (Supp. V 1975)).

12. *Id.* §§ 202(a), 204(b)(3) (codified at 2 U.S.C. §§ 434(b)(5), (6), (7), (Supp. V 1975)).

13. *Id.* § 204(b) (codified at 2 U.S.C. § 434(b)(9), (10) (Supp. V 1975)).

14. *Id.* § 204(b)(5) (codified at 2 U.S.C. § 434(e) (Supp. V 1975)).

15. *Id.* § 204(b) (codified at 2 U.S.C. §§ 432(f)(2), (3) (Supp. 1975)).

16. 424 U.S. 1 (1976). The suit was filed originally in the United States District Court for the District of Columbia. The original plaintiffs included United States Senator James L. Buckley, former U.S. Senator Eugene McCarthy, the Committee for a Constitutional Presidency — McCarthy '76, the Libertarian Party, the Conservative Party of the State of New York, the Mississippi Republican Party, the New York Civil Liberties Union, Inc., the American Conservative Union, the Conservative Victory Fund, Human Events, Inc., and a potential political contributor. The original defendants included the Secretary of the United States Senate, the Clerk of the United States House of Representatives, the Attorney General of the United States, the Comptroller General of the United States, and the Federal Election Commission. *Id.* at 7.

The complaint sought both an injunction against enforcement of the FECA of 1971 as amended by FECA 1974 and a declaratory judgment that the major provisions of those acts were unconstitutional. The plaintiffs sought a convocation of a three-judge district court and

The *Buckley* Court struck down the limitations on campaign expenditures, the limitations on expenditures from a candidate's personal funds, and the limitations on independent expenditures by individuals or groups as violative of first amendment rights. The composition of the Federal Election Commission was also rejected by the *Buckley* Court which found that the functions could only be filled by "Officers of the United States" appointed in conformity with article II, section 2, clause 2 of the Constitution.[17] This forced Congress to reconstruct the Commission to meet the constitutional requirements.[18]

The Supreme Court, however, also upheld many of the challenged provisions. The Court rejected attacks on the constitutionality of the limitations on contributions, the provision of public financing of Presidential elections, and the disclosure and reporting requirements of the acts.

B. The Plaintiffs' Case

The principles underlying the broad disclosure and reporting requirements were not attacked in this case. The plaintiffs instead argued that in principle, narrowly-drafted disclosure and reporting requirements would in themselves be sufficient to realize the electoral reform sought by Congress. However, the plaintiffs did unsuccessfully attack the form of the enacted reporting and disclosure regulations on two grounds.

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requested certification of the constitutional questions to the court of appeals. The district judge denied the application for the three-judge district court and transmitted the case directly to the court of appeals. The court of appeals remanded the case to the district court with leave for other individuals and groups to intervene and with instructions to make findings of fact, to identify the constitutional issues, and to certify the constitutional questions to the court of appeals. *Id.* at 9. This, the district court did, and thus remanded the case back to the court of appeals with an extensive memorandum. The court of appeals upheld the constitutionality of the acts with only one exception (a fatally vague requirement that all individuals or groups seeking to influence the outcome of an election file reports with the Commission). *Id.* at 10. The plaintiffs then appealed to the United States Supreme Court, which found that at least some of the plaintiff-appellants had a sufficient personal stake in the outcome of the matter to present a real and substantial controversy. *Id.* at 12. The decision of the court of appeals was affirmed in part and reversed in part in a *per curiam* opinion. *Id.* at 144. The case produced six opinions from the eight justices hearing and deciding the case, with Chief Justice Burger, and Justices White, Marshall, Rehnquist, and Blackmun each filing opinions which concurred in part and dissented in part with the *per curiam* opinion. Justice Stevens took no part in the decision of the case. *Id.* at 6.

17. *Id.* at 143.

18. FECA 1976 § 101(a) (codified at 2 U.S.C. § 437c (1976)).

First, the plaintiffs argued that the threshold amounts for disclosure were unnecessarily low. Second, they questioned the applicability of the requirements to minor party and independent candidacies. In these particular situations first amendment freedom of association rights are at stake, the plaintiffs argued, with no state interest of compelling importance to justify the overriding of basic rights. The Court allowed the requirements to stand.[19]

C. The Court's Rationale

First, the Court stated the principle that the people, not the government, must as individuals and associations maintain control of the political sphere.[20] Many of the regulations, the Court found, were in conflict with first amendment guaranties of freedom of expression and of association,[21] and as they interfered with fundamental rights, such legislation was subject to the closest scrutiny.[22] Most of the *Buckley* Court's rationale for the invalidation of many of the regulations set forth by Congress was based on the principle of the first amendment freedom of speech. The reporting and disclosure requirements, however, were found to be more closely related to fundamental rights concerning freedom of association.[23]

The freedom to associate, the Court posited, is not absolute and sufficient governmental interests may allow infringement of this basic right. Thus, although compelled disclosure may seriously infringe upon first amendment freedom of association and related privacy guaranties, such disclosure requirements are to be upheld when the government puts forward sufficient interests.[24]

The Court found that three governmental interests were of sufficient magnitude to justify the infringement of first amendment rights. The first was a public informational interest. Disclosure, the Court stated, would serve this goal by allowing the public to more precisely place a candidate in the political spectrum. Also, disclo-

19. 424 U.S. at 143.
20. *Id.* at 14.
21. *Id.* at 15.
22. *Id.* at 64-66.
23. *Id.* at 64.
24. *Id.* at 68. The Court here took notice of the wide-spread use of campaign disclosure regulations as a tool of electoral reform. The District of Columbia and some thirty-one states maintain pre-election periodic disclosure statutes, and many other states have post-election disclosure laws.

sure would facilitate public awareness of assistance being given a candidate by special interest groups which may seek certain favors in return.[25] Another major governmental interest enhanced by disclosure was that of preventing actual or perceived corruption in the electoral system by "exposing large contributions and expenditures to the light of publicity."[26] Third, prosecutorial interests in acquiring data through the recording and disclosure requirements posed another major governmental interest in maintaining such laws.[27] Thus, the Court found that the governmental interest outweighed the possible infringement of first amendment rights.[28]

III. Freedom of Association and the Freedom from Disclosure: The Decisional Development

The tension between freedom of association and disclosure requirements was not a new conflict to the Court. Indeed, the unfoldment of freedom of association occurred in a line of cases where compelled disclosure was sought by the governmental bodies and denied by the Court. In *NAACP v. Alabama ex. rel. Patterson*,[29] a unanimous Court upheld the right of the NAACP to refuse to disclose the names and addresses of the organization's Alabama members and agents to the state attorney general's office. In a forceful opinion, Mr. Justice Harlan clearly found that group association involved issues of great constitutional importance: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[30]

Justice Harlan went on to say that this basic right might be irreparably impaired when certain groups are forced to make disclosure where there is a potential for harrassment:

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25. *Id.* at 67.
26. *Id.*
27. *Id.* at 68.
28. *Id.*
29. 357 U.S. 449 (1957). The Court in this case reversed a judgment for contempt issued by a state court. Contempt had been found at the state level due to the organization's refusal to disclose the identities and addresses of the Alabama members and agents in defiance of a state court order.
30. *Id.* at 460.

> This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association. . . compelled disclosure of the petitioner's Alabama membership is likely to affect adversely the ability of petitioners and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure.[31]

Although many of the initial decisions which rejected disclosure requirements as constitutionally infirm were related to activity by the NAACP in the South,[32] holdings by the Court have expanded this protection to include other areas and circumstances.

A. Protection in the Political Forum

In a long line of cases, the Court developed a right to privacy in the political forum concerning the secrecy of the ballot.[33] The Court later expanded this protection to include the privacy of a citizen's political loyalties. In *Sweezy v. New Hampshire*,[34] the Court rejected the statutory political disclosure requirements in New Hampshire concerning a member of the Progressive Party. In a concurring opinion, Mr. Justice Frankfurter stated that privacy of an individual's political loyalties was a right of the most fundamental nature:

> [t]he inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the well-being of our kind of society that it cannot be constitutionally encroached upon on the basis of so meagre a countervailing interest. . . . In the political realm, as in the academic,

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31. *Id.* at 462-63.

32. Bates v. City of Little Rock, 361 U.S. 516, 523 (1960). Justice Stewart, writing for a unanimous Court, sustained the refusal of two local chapters of the NAACP to file a statement with the city clerk, in compliance with a local tax ordinance, listing contributors and members as "compulsory disclosure . . . would work a significant interference with the freedom of association . . . ." *Id.* at 523. Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961) (sustaining the refusal of the NAACP to comply with the membership disclosure requirements imposed on certain types of organizations doing business in Louisiana); NAACP v. Button, 371 U.S. 415 (1963).

33. People v. Cicott, 16 Mich. 283, 311 (1868); Williams v. Stein, 38 Ind. 89, 95 (1871). For the later cases reaffirming this same right, see 90 A.L.R. 1362 (1934). Also, for a full discussion on the issues and developments in this area, see Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusion in Political Affairs*, 47 Mich. L. Rev. 181 (1948) [hereinafter Nutting].

34. 354 U.S. 234 (1957).

> thought and action are presumptively immune from inquisition by political authority.[35]

This protection of a citizen's privacy in his political activities is not limited to active members of an organization. The Court extended this protection to supporters in *Bates*[36] and in *United States v. Rumely*.[37] In fact, *NAACP v. Alabama*,[38] discussed above, originally enunciated the principle that freedom of association protected the members' *and* supporters' rights to express themselves through an association, not the rights of the organization itself.[39]

Political beliefs were among those citizen's beliefs protected by the Court in *Shelton v. Tucker*.[40] In *Shelton*, the Court struck down certain disclosure requirements in the academic forum. The Court stated that a law requiring teachers to disclose all of the organizations to which they contributed or of which they were members during a five year period was violative of the teachers' rights to free speech, privacy, and freedom of association.[41] And again, in *Talley v. California*,[42] the Court struck down a disclosure requirement as violative of first amendment rights to privacy in association as well as freedom of expression. In *Talley*, a Los Angeles city ordinance which prohibited distribution of handbills which did not have printed on them the names and addresses of the persons who prepared, distributed, or sponsored the handbills was rejected by the Court which again found that such requirements violate fundamental constitutional rights.[43]

In all of these cases, the government's interest was weighed against the infringement of first amendment rights and the state interest was rejected. Compelled disclosure, the Court found, violated freedom of expression and association by creating in the members or contributors fear of reprisals for their involvements. The

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35. *Id.* at 265-66.
36. 361 U.S. 516 (1961).
37. 345 U.S. 41 (1953).
38. 357 U.S. 449 (1958).
39. *Id.* at 459. *See* Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. 1, 4-5 (1964). *See also* Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C. L. Rev. 389, 419 (1973) [hereinafter Fleishman].
40. 364 U.S. 479 (1960).
41. *Id.* at 487.
42. 362 U.S. 60 (1960).
43. *Id.* at 65.

Court has not only considered an individual's rights to be free from reprisals due to his association with an organization or expression of beliefs, but also the right to be free from the deterrent influence which may prevent an individual from participating in an organization or expressing a belief.[44] All of these cases present a conflict between important values and goals. Interests supporting the disclosure requirements of the government include the public's right to know, and also the deterrence, as well as the substantiation, of political corruption. In conflict with these interests is the freedom of individuals to exercise their first amendment freedoms of speech, association, and privacy.

Certain members of the Court have long felt that countervailing governmental interests in disclosure fail when weighed against the infringement of first amendment rights. These justices set forth their position in a concurring opinion in *Bates*: "First Amendment rights are beyond infringement either by legislation that directly restrain their exercise or by suppression or by impairment through harrassment, humiliation, or exposure by the government."[45] However, the advocates of this position have never constituted a majority of the Court, which has consistently ruled that at a certain point, governmental interests in disclosure may be so important as to outweigh the infringement of first amendment rights. The Court has held that the right to privacy, without more, may be outweighed by other interests.[46] In this conflict, the absence of a threat of reprisal and the related deterrent effect may tip the balance in favor of the interests of the government in compelling disclosure.[47]

IV. The Balancing of Conflicting Interests

A. The Requisite Governmental Interest in Compelling Disclosure

A central question is how powerful the governmental interest in the regulation must be before it can justify the related infringement

44. Griswold v. Connecticut, 381 U.S. 479 (1965); Gibson v. Florida Legislative Investigative Committee, 357 U.S. 449 (1958). *See* note 32 *supra*.

45. 361 U.S. 516, 528 (1960) (Black & Douglas, J.J., concurring).

46. Times, Inc. v. Hill, 385 U.S. 374 (1967).

47. 424 U.S. at 143. Many commentators are in accord with this view. *See* Rosenthal, *Campaign Financing and the Constitution*, 9 Harv. J. Legis. 359, 405 (1972); Lobel, *Federal Control of Campaign Contributions*, 51 Minn. L. Rev. 1, 42-43 (1966); Nutting, *supra* note 33.

of rights guaranteed by the first amendment. A major problem in answering this question stems from the Court's description of the requisite showing in different and imprecise terms.[48] In various opinions the Court has required that the governmental interest be "important,"[49] "compelling,"[50] "substantial,"[51] "subordinating,"[52] "paramount,"[53] "cogent,"[54] "strong,"[55] and most recently, "not wholly without rationality."[56]

The Court in *United States v. O'Brien*,[57] however, did attempt to create a framework for examining the governmental interest in the regulation. The *O'Brien* Court stated that the regulation would be "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."[58]

1. The Test Applied

The government's primary interest in political disclosure regulations is that of fostering public knowledge and awareness. Its intention is that the voters and the press be given the information concerning who gave what to whom in the political forum. The propo-

48. The Court has admitted that it has failed to deliver a consistent precise rule of law which may be applied in this area. However, it has set forth a set of factors to facilitate determinations, as is discussed in the text. United States v. O'Brien, 391 U.S. 367, 376-77 (1967).

49. *Id.* at 377.

50. 471 U.S. at 438.

51. 357 U.S. at 464.

52. 361 U.S. at 524.

53. Thomas v. Collins, 323 U.S. 516, 530 (1945).

54. 361 U.S. at 524.

55. Sherbert v. Verner, 374 U.S. 398, 408 (1963).

56. 424 U.S. at 83.

57. 391 U.S. 367 (1967). The court of appeals below in *Buckley* considered *United States v. O'Brien* as dispositive of many of the issues presented in *Buckley*. Specifically, the Court found that *O'Brien* would allow the regulations to stand without violating first amendment rights as the regulations dealt with conduct, not speech. 519 F.2d 821, 840 (D.C. Cir. 1975). The Supreme Court in *Buckley* rejected this approach as applied to the expenditure issue. The *per curiam* opinion stated that "[t]his Court has never suggested that the dependence of communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment." 424 U.S. at 16.

58. *Id.* at 377.

nents of the position favoring the public's right to know state that such disclosure enhances the ability of the electorate to choose between candidates in a political contest, fosters confidence in public officials, and has a deterrent effect on potential poltical corruption.[59] This last result is itself an interest held by the government to be a significant product of political disclosure regulations. That disclosure of financial entanglements will deter those in the public's eye from offering even an appearance of political corruption or favoritism is the second major interest served by such regulation. Lastly, the disclosure regulations make possible less cumbersome detections of violations of campaign regulations.[60] Thus, the government may put forward several weighty interests in favor of disclosure regulations which, the Court has held, in certain circumstances serve to outweigh the damage done in tramelling on the individual's first amendment rights and guaranties.

B. The Interests Supporting Freedom from Disclosure

The Supreme Court has made it clear that when balancing governmental interests against citizen's rights, the scale will not always fall in favor of the government. The freedom of association guarantee was first enunciated in a line of cases where the Court rejected the government's interest in disclosure.[61] Although some commentators have attempted to distinguish this line of cases offering protection from disclosure from those enforcing the regulations as a difference between the right to privacy and freedom of association for socio-economic change versus the right to privacy and freedom of association for political activity,[62] such distinctions seem tenuous.

The *Buckley* Court stated that in cases where the state interest sought to be advanced is not substantial and if the threat to the exercise of first amendment rights is exacerbated, the disclosure regulations could not be constitutionally imposed.[63] None of the plaintiffs in *Buckley* were able to persuade the Court that such was their plight. Although the Court attempted to elaborate on the requisite showing which must be made before an organization could

59. *Id.* at 66.
60. *Id.* at 68.
61. *See* notes 29-32 *supra*.
62. *See* Fleishman, *supra* note 39, at 411.
63. 424 U.S. at 71.

meet this judicially created exemption from the disclosure requirements, the efforts apparently failed. The *Buckley* Court established the requirements that the necessary showing ought not be overly strict;[64] that the organization must be allowed sufficient flexibility;[65] and that evidence need only show a reasonable probability that disclosure will result in official or unofficial reprisals.[66] However, the Court went on to state that evidence in such cases would include specific evidence of past or present harassment directed at the organization or at the members thereof due to their associational ties with the organization.[67]

C. The Inconsistent Application by the Federal Courts of the Requisite Evidentiary Showing

There has been considerable confusion in the courts applying the law in this area. The center of the judicial inconsistency seems to be in the application of this balancing test and the requisite showing that must be made to qualify for the exemption. Several courts have interpreted the tests differently and have demanded, with varying degrees of severity, proof of damage to first amendment rights.

1. A Pre-Buckley Standard

Prior to the *Buckley* decision, the Conservative Party of the State of New York in *Pichler v. Jennings*[68] questioned the constitutionality of the disclosure requirements of FECA 1971. The Conservative Party asserted that the regulations unconstitutionally infringed upon its members' freedom of association and of privacy. However, the *Pichler* court dismissed the complaint on the grounds that the Conservative Party failed to allege specific instances of harrassment or reprisals suffered by members of the organization, and that the court thus lacked clear factual controversy upon which the balancing may be determined.[69] Thus, the court set out a strict standard which the organization had to meet even to state a cause of action.

The court presented the Conservative Party with a dilemma, whether to seek exemption from disclosure regulations to protect the

64. *Id.* at 74.
65. *Id.*
66. *Id.*
67. *Id.*
68. 347 F. Supp. 1061 (S.D.N.Y. 1972).
69. *Id.* at 1069.

rights of its present and potential members and contributors by declaring that undesirable effects might accompany being associated with the political organization, or to allow the infringement of its members' constitutional rights. The very proof required by this court to state a cause of action would have a severe chilling effect upon the present involvement of its members. Also, potential members and contributors would not seem likely to rush to the organizational ranks of those being abused.

Lastly, the court stated that to successfully challenge the constitutionality of the provisions, the Conservative Party would have to demonstrate that as a direct result of the disclosure requirements, individuals who would have become involved in the political process were deterred from doing so due to fear of community censure.[70] By this requirement, the court demanded that the Conservative Party give additional specific evidence that potential supporters were deterred due to fear of disclosure. It seems that if the potential supporters came forward and identified themselves in court as such, by doing so they would run the risk of subjecting themselves to the exposure and possible subsequent harrassment they fear. Such a requirement renders the very issues of disclosure and of constitutional rights to privacy in association moot for at least the individual going forward.[71]

2. *The Post-Buckley Applications*

In the period since the *Buckley* decision the confusion has continued. In *Oregon Socialist Workers Party 1974 Campaign Committee v. Paulus*,[72] the Oregon Campaign Disclosure Act[73] was challenged on the grounds that disclosure regulations infringed upon the first amendment rights of the supporters of the Socialist Workers Party. The United States District Court for the District of Oregon decided against the Socialist Workers Party on the grounds that the Party failed to establish a reasonable probability that disclosure would result in infringement of the supporters' rights. The court so held despite the evidentiary showing by the Socialist Workers Party of

70. *Id.*

71. Oregon Socialist Workers 1974 Campaign Committee v. Paulus, 432 F. Supp. 1255, 1259 (D. Ore. 1977).

72. 432 F. Supp. 1255.

73. Oregon Campaign Disclosure Act, OR. REV. STAT. §§ 260.005-260.255 (1975).

many specific acts of harassment which had occurred when the identities of supporters had been revealed. "Each instance of alleged harassment set out in the plaintiffs affidavits is insufficient by itself to justify the conclusion that the valid governmental interests in disclosure are outweighed by the First Amendment rights of potential SWP supporters."[74] Thus, under the strict standard used by the court, even specific instances of harassment of present supporters were insufficient to favor the first amendment rights of the organization's supporters or potential supporters.

However, the United States District Court for the Eastern District of Wisconsin viewed the balancing test differently. In *Wisconsin Socialist Workers 1976 Campaign Committee v. McCann*,[75] the court granted injunctive relief preventing the disclosure requirements of Wisconsin[76] from being implemented against the Socialist Workers Party. Here, the court rejected the contention that specific evidence of harrassment against supporters was required to prove the plaintiffs case. "To require evidence of specific acts of harassment of contributors would impose an unduly strict burden on the plaintiffs."[77] Therefore, the plaintiffs were deemed to have carried forward their burden and an injunction was issued to prevent enforcement of the disclosure regulations.[78]

In still another recent decision, the requirement of specific evidence of harassment, concerning past, present, or potential supporters was not even mentioned when enjoining the enforcement of a disclosure regulation. In *Partido Nuevo Progresista v. Hernandez Colon*,[79] the United States District Court for the District of Puerto Rico examined a political contribution and disclosure statute which provided for attendance of observers at large political fund raising activities to insure that the disclosure regulations were not circumvented. The court held that the statute was unconstitutional and issued an injunction preventing enforcement. Here, the court required no evidence of harassment to find that the balancing test of *Buckley* tipped in favor of enjoining enforcement, as enforcement of this disclosure regulation would bring about a "chilling effect" on

74. 432 F. Supp. at 1255.
75. 433 F. Supp. 540 (E.D. Wis. 1977).
76. Wisconsin Campaign Financing Act, WIS. STAT. ANN. § 11.06(1)(a), (b), (g), (h) (West Supp. 1978).
77. 433 F. Supp. at 548.
78. *Id.* at 549.
79. 415 F. Supp. 475 (D.P.R. 1976).

the exercise of first amendment rights of freedom of association.[80] Describing the substantial impact the *Colon* court deemed this disclosure regulation to have on associational rights, the court stated that "[a] cannon has been used to kill a mockingbird."[81]

Even without concerning itself with specific requirements of evidence of harassment and the extent of physical interference with political association, the *Colon* court found it evident that the statutory provision's enforcement ought to be enjoined as unconstitutional. One might find a distinction between a provision requiring attendance by an observer at a mass rally and another provision mandating the filing of an extensive report with the government detailing the supporter's name, address, occupation, place of business, and extent of financial political involvement. However, it would seem fallacious to rest the protection of an individual's first amendment rights on whether the disclosure statute is carried out by the presence of a government observer or rather through the scrutiny of detailed reports by the same government agent out of the physical presence of the individual.

3. The Need for Exact and Consistent Standards

Thus, under the guidelines of the *Buckley* decision, various federal courts used different standards in applying the balancing test by requiring different specific evidence of infringement on first amendment freedom of association rights. A definitive pronouncement as to what requisite showing must be made to enjoin the enforcement of the disclosure regulations does not seem to be immediately forthcoming.

V. Factors Enhancing the Freedom from Disclosure

A. Governmental Interests Are Not Absolute

As the first amendment freedoms must be balanced against other interests in the test enunciated by the Court in *Buckley v. Valeo*, and at least some members of the Court believe that these rights are not absolute, but may be subject to even substantial encroachment when balanced against certain governmental interests, so too the chief governmental interest in disclosure, public information, is not absolute. The Court has a long history of upholding the interests of

80. *Id.* at 482.
81. *Id.* at 483.

freedom of expression, privacy, and the press when these rights conflicted with the interest in public information. Mr. Justice Frankfurter in his concurring opinion in *Sweezy* spoke of the "inviolability of privacy belonging to a citizens loyalties"[82] while deciding that the public right to know did not encompass certain areas, protecting, for example, the privacy of the ballot.[83]

Another aforementioned case, *Talley v. California*,[84] also involved a conflict between first amendment rights and the public right to know. There, the Court stressed that the importance of anonymity in expression may outweigh the value of public knowledge.[85] Hence, the United States Supreme Court has held that the interests on both sides of the balancing test are not absolute and may be compromised in certain circumstances.

B. The Risk of Harassment

As the interests in preventing disclosure may be outweighed in certain circumstances, the Court has found that conversely, these interests may become more weighty in the presence of particular factors. In the balancing test of *Buckley*, rights of freedom of association were to be protected to a greater degree when the factors indicated that there was an element of danger inherent in the infringement of these rights. The possible requirement of evidence of harassment, although subsequently ambiguously applied, is one such factor. At least it is clear in *Buckley* that the test of specific evidence of harassment of supporters will force the balance against disclosure as an overly severe infringement on the first amendment freedoms of the supporters.

In the NAACP line of cases, the factor compelling the enjoining of disclosure was that of harassment. In *Louisiana v. NAACP*,[86] the Court stated that disclosure would not be required if it would result in "reprisals against and hostility to the members."[87] One of the great dangers is that harassment will not only infringe upon the rights of an organization's members or supporters, but that it will also deter involvement in the political process. The harassment

82. 354 U.S. at 265-66.
83. *Id.*
84. 362 U.S. 60 (1960).
85. *Id.* at 65.
86. 366 U.S. 293 (1961).
87. *Id.* at 296.

resulting from disclosure has undesirable effects which hurt society, not only through the deprivation of free exercise of an individual's fundamental rights, but also by dissuading people from taking an active role in a crucial part of society.

This was the position of the United States District Court for the Eastern District of Arkansas in *Pollard v. Roberts*.[88] In enjoining the enforcement of a subpoena issued by a district attorney for production of the bank records of the Arkansas Republican Party and thus preventing disclosure of the Party's supporters, the Court based its decision on this dual harm which would have resulted from disclosure.

> For various reasons, including fear of reprisal or harrassment, the possibility of disclosure of their party affiliations and contributions, if any, tends to inhibit citizens from exercising their right to participate meaningfully in American political life. . . . To the extent that a public agency or officer unreasonably inhibits or discourages the exercise by individuals of their right to associate with others of the same political persuasion in the advocacy of principles and candidates of which and of whom they approve, and to support those principles and candidates with their money if they choose to do so, that agency or officer violates private rights protected by the First Amendment.[89]

Thus, the public interest may be harmed rather than enhanced by compelled disclosure due to both its effect in the infringement of an individual's rights and as a deterrent to political involvement. In evaluating the importance of these deleterious effects, some commentators have noted[90] that although public officials or public figures may be expected to have "thick skins"[91] in the face of publicity, the courts have not handed down any similar requirement of voters or political supporters.

1. The Chameleonic Nature of Harassment

The harassment which may result in serious injury to the rights of an individual and the interests of society need not spring only from official governmental malfeasance, but may flow from private sources in no way connected with the government. Either may precipitate an injunction against disclosure. The *NAACP v. Alabama* decision stated that:

88. 283 F. Supp. 248 (E.D. Ark.), *aff'd per curiam*, 393 U.S. 14 (1968).
89. *Id.* at 258.
90. *See* Rosenthal, *supra* note 47.
91. New York Times Co. v. Sullivan, 159 U.S. 254 (1964).

> [i]t is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have . . . follows not from state action, but from private community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power . . . that private action takes hold.[92]

Therefore, harassment or reprisals due to disclosure should not be discounted merely because the reprisals were based on unofficial rather than official action.

The Court has also taken cognizance of the various forms in which harrassment and reprisals may materialize. In his opinion in *Buckley*, Chief Justice Burger stated that fear of reprisal may deter many different individuals from becoming involved in the political forum for many different reasons. He cited the fact that those seeking advancement in the fields of labor or management may believe that they should best stay clear of political involvement with candidates or causes disfavored by those in a position to affect their future. The Chief Justice went on to point out that contributors may be taking a risk when giving reportable contributions to the opponent of a well-entrenched incumbent officeholder.[93] By doing so, the Chief Justice may have intimated one possible and not entirely noble reason for Congressional passage of this statute.

Many commentators have shown that potential for misuse of the disclosed information is boundless.[94] Should a potential contributor engage in the same mental exercise, the chance that he may be deterred from supporting a particular political cause becomes substantial. Unfortunately, in these days of "enemy lists," one need not have been an astute student of politics to have seen the manner in which such disclosed information may be used for the purpose of reprisal.[95]

Also, it is not a unique concept that those supporting unpopular causes would run the greatest risk of reprisal or harassment and thus have the greatest need for privacy. Those organizations composed of only an acute minority of the members of the community or those which advocate positions at the extremes of the political

92. 357 U.S. at 463.
93. 424 U.S. at 237.
94. *See* Rosenthal, *supra* note 47, at 405; Fleishman, *supra* note 39, at 425.
95. N.Y. Times, June 28, 1973, at 1, col. 5, 6.

spectrum are likely targets of harassment or reprisals. It is not surprising that individuals in such circumstances seek the protection of anonymity in their activity. Indeed, providing such anonymity has through the atmosphere of unfettered debate and association aided this nation in its development.[96]

VI. Blanket Exemptions from Disclosure

A. The Failure to Decide in *Buckley*

A challenge of the disclosure provisions seeking a blanket exemption for non-major parties was heard in the *Buckley* case. The Court concluded that a blanket exemption was not required.[97] However, the decision stated that the governmental interests in disclosure of the supporters of these organizations was inherently less important. The Court noted that the public information goal is furthered little in circumstances where the views of the minor party are clearly framed in the political spectrum and the chances of a campaign victory are slight.[98] However, despite recognition of the sensitivity of non-major parties through disclosure to the potentialities of harassment, of the public importance of such organizations in furthering the free circulation of beliefs, and the mitigated importance of the governmental interests in such disclosure, the Court found that the infringements of first amendment rights were too speculative.[99]

B. Inherently Disqualifying Factors

When considering the application for blanket exemptions for the non-major parties, the Court examined the circumstances surrounding organizations not inherently disqualified from exemption from disclosure on other grounds. Of these inherently disqualifying

96. At the time of the very origin of this nation, many of the founding fathers used anonymous political authorship to advocate their positions. Even the Federalist Papers of Madison, Jay, and Hamilton were first published under the name "Publius." Within the first twenty years of the existence of our Republic, some six presidents, twenty senators, thirty-four congressmen, and fifteen cabinet members advocated various political positions anonymously. Even members of the United States Supreme Court have used this tool as demonstrated by Chief Justice Marshall in his defense of certain Supreme Court decisions, writing under the name of "a friend of the Republic." *See* Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 Yale L.J. 1084, 1084-85 (1961).

97. 424 U.S. at 72-74.

98. *Id.* at 70.

99. *Id.*

grounds, two organizational characteristics have stood out as factors overriding the organization's rights to privacy in association. First, the Court has distinguished between legitimate and illegitimate political parties. Illegitimate political parties are those organizations dominated by a particular foreign country. One such organization questioned the constitutionality of disclosure and was rebuffed by the Court in *Communist Party v. Subversive Activities Control Board.*[100] This first distinction was further enforced when the Court protected members of the Progressive Party from compelled disclosure in *Sweezy,*[101] and two years later denied such protection to those associated with the Communist Party in *Uphaus v. Wyman.*[102] The second inherently disqualifying organizational characteristic was violence. It was this distinction which allowed the Court to uphold the registration of Ku Klux Klan in *Bryant v. Zimmerman.*[103]

In *Buckley,* the Court was not faced with organizations infirm due to the above-mentioned deficiencies. These non-major legitimate peaceful parties asserted the claim that as the infringements of their supporters' constitutional rights were substantial, and as the government's interest was mitigated when applied in the context of small third parties, the Court should have granted a blanket exemption from disclosure. As stated above, the Court did not decide whether the government's interest in disclosure as applied to non-major parties outweighed the aggravated potential infringement of these parties' supporters' rights, because the Court found that the potential for harassment was simply too speculative.[104] In doing so, the Court may have disregarded the possibility that the statute was infirm for another reason: that of statutory overbreadth.

VII. The Infirmity of Statutory Overbreadth

The Court has long held that legislative measures must be tailored to precisely fit the governmental interests.[105] Should broader

100. 367 U.S. 1 (1961).
101. 354 U.S. 234 (1957).
102. 360 U.S. 72 (1959).
103. 278 U.S. 63 (1929). *See* Fleishman, *supra* note 39, at 420-422.
104. 424 U.S. at 70.
105. *See* NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964); Bates v. City of Little Rock, 361 U.S. 516 (1960); United States v. Robel, 389 U.S. 258 (1967); Aptheker v. Secretary of State, 378 U.S. 50 (1964); Shelton v. Tucker, 364 U.S. 479 (1960).

means than are justified be enacted with a resulting impact on those within the grasp but not within the purpose of the legislation, the Court has consistently held that the statute should be struck down as overbroad.[106] This is especially true when the potential harm affects first amendment rights. "In the area of First Amendment freedoms government has a duty to confine itself to the least intrusive regulations which are adequate for the purposes," stated Mr. Justice Brennan in his concurring opinion in *Lamont v. Postmaster General*.[107] As the governmental interests futhered by the regulations' application to minor parties were quite questionable and the consequences quite severe, it seems evident that broader means than were justified were enacted in the disclosure requirements. However, the *per curiam* opinion in *Buckley*, rather than discussing the overbreadth issue, simply dismissed the claim of the non-major parties. Even though the overbreadth argument was raised in the opinion of Chief Justice Burger,[108] and was articulated by commentators[109] prior to the Court's decision in *Buckley*, the Court failed to address the issue in its decision.

The Court also failed to maintain its resistance to overbroad legislation with regard to the statute's monetary thresholds, the dollar amount contributed beyond which the disclosure regulations are applied. The *Buckley* plaintiffs argued that the $10 threshold which triggered the recording requirements and the $100 threshold which triggered the disclosure requirements were far too low to serve any legitimate governmental interest. Again, the plaintiffs claimed an infringement of first amendment rights due to sloppy draftsmanship of the statute rather than compelling governmental interests.[110]

106. *See* cases cited in note 105 *supra*.

107. 381 U.S. 301, 310 (1965).

108. 424 U.S. at 240.

109. *See* Fleishman, *supra* note 39, at 430-432.

110. These original $10 and $100 thresholds seem to have been drawn without modifications from election legislation dealt with in 1910 by Congress. Chief Justice Burger pointed out the effect of the lack of consideration that Congress applied in the drafting of this particular section of the statute. The Chief Justice observed that inflationary pressures over a sixty-five year period of time would reduce the value of $10 in 1910 to $1.68 in 1976. 424 U.S. at 239.

The reporting thresholds were later raised by Congress from $10 to $50. The $100 disclosure statute was left intact. This change has already been attacked by commentators as doing little to cure the problem of overbreadth. *See* Comment, *Buckley v. Valeo: The Supreme Court and Federal Campaign Reform*, 76 Colum. L. Rev. 851, 880-881 (1976).

The Court again side-stepped the thrust of the plaintiffs' claims, this time basing its approval of the statute on the public information interest advanced by the government, and thus avoiding the issue that the goal of preventing corruption was not advanced.[111] The Court upheld the thresholds as "not wholly without rationality"[112] in their relation to the interests advanced by the government.

VIII. The "Not Wholly Without Rationality" Standard — A Departure from Tradition

As discussed above, the Court's decisions have included various imprecise terms to define the requisite governmental interest which would justify infringement on first amendment rights. As imprecise as the terms are, however, it appears that the "not wholly without rationality" standard is a deviation from the strict standards of the past. Two problems immediately arise from this test. First, this standard seems to show an absence of the traditional concern with potential "chilling" effects on the exercise of first amendment rights. Second, this test seems again to fail to satisfy the established requirement that governmental regulations affecting the exercise of first amendment rights must be drafted with care and precision in order to survive the once traditional constitutional scrutiny.[113]

Even when one accepts the new standard, there are still questions relating to how the "rationality" test could have been met as Congress did not consider the constitutional implications of its actions. The legislative history shows that Congress failed to focus on the potential first amendment difficulties of the threshold amounts but rather uninquisitively drew the figures from a sixty-five year-old piece of legislation.[114] The combination of these factors points to a conclusion that the Court may have failed to display the traditional sensitivity exercised in examining the potential infringement of first amendment rights, especially with regard to those members and supporters of non-major parties. The Court also seemed to display an unusual degree of tolerance of Congressional action *sin* Congressional judgment in an area touching the exercise of first amendment rights. However, the Court left open the possibility of

111. 424 U.S. at 83.
112. *Id.*
113. *See* note 105 *supra.*
114. 424 U.S. at 239.

future successful challenges of the threshold amounts by implying that at a later date, the Court may hold that experience reveals a tendency of the statutes to deter some individuals from political involvement.[115]

IX. Conclusion

The central problems in federal disclosure legislation arise from the deep-rooted conflicts which occur when the exercise of first amendment freedom of association and privacy directly clash with the government's interest in compelling disclosure of an individual's political involvement. The balancing of many factors, which include the threat of harassment of the free exercise of fundamental rights as against the gravity of the government's interests achieved through compelled disclosure, is not a light task. The task is especially difficult as the stakes involved on either side are of great importance. Judicial conflicts with regard to requisite evidentiary demonstrations, the use of imprecise and vacillating criteria in matters central to conflict determination, the inconsistencies between courts concerning the granting of exemptions from disclosure, and the toleration of poor legislative draftsmanship with regard to statutory overbreadth as well as Congressional apathy toward fundamental rights, do not make the application of this important balancing test an easier task.

An individual's monetary contribution to a political organization, like the placard or the handbill, allows the individual to unambiguously express and ally himself with a particular set of views or beliefs. In a free society, this activity is perfectly consonant with, indeed is the very exercise of, the freedoms of speech and of association. We must recognize regardless of whether it is to our liking that we have entered an era of highly expert, technical, and complex campaign production. In such an atmosphere, contributing money to candidates or political organizations may be the only meaningful way, besides voting, that a citizen can become involved in the political process.[116] Interference with such an important activity certainly deserves the most serious judicial consideration. Due to the weighty interests involved, the Court is obliged to promulgate demandingly exact standards in consistent determinations.

115. *Id.* at 83.
116. 283 F. Supp. at 258.

Especially in an era of declining participation in the democratic franchise, even incidental deterrence of political involvement and infringement of freedoms in this area cannot be undertaken without recognition of the grievous harm to one of the most fundamental components of our society. Failure on the part of the legislatures or the courts to properly safeguard from infringement the fundamental rights of individuals in the creationary political arena may not chill the many freedoms we find so dear, it may freeze them half to death.

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