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## Political Campaign Spending Caps and the First Amendment: Buckley v. Valeo Revisited

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## Panel II: Political Campaign Spending Caps and the First Amendment: *Buckley v. Valeo* Revisited

Moderator: Wayne Barrett\*

Participants: Edward W. Hayes, Esq.\*\*

Erik Joerss\*\*\*

William G. Kastin, Esq.\*\*\*\*

Leo Kayser, III, Esq.\*\*\*\*\*

Mark Lopez, Esq.\*\*\*\*\*

MR. BARRETT: This panel addresses political campaign spending and the First Amendment. We will examine *Buckley v. Valeo*<sup>1</sup> and discuss the impact of that case on congressional power to limit campaign spending. The issue is at what point do campaign spending limits become limits on free speech.

I am Wayne Barrett. I am an investigative reporter and I cover a lot of campaigns. Campaign finance stories have taken on a kind of disappointing air in recent years because you cannot shock

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

anymore.<sup>2</sup> It has reached the stage where the quid pro quos of campaign finance are so routine that they are hardly news, and when they become news they seem to have little effect on the electorate.<sup>3</sup>

The Supreme Court case that we will analyze today considered whether or not campaign contributions are protected speech.<sup>4</sup> The image that came to my mind was a contributor shouting “gimme” at a crowded fund-raiser. But the Court did rule that expenditure caps are a restriction on free speech.<sup>5</sup>

Here in New York City, we do have a campaign finance system that does have an expenditure cap.<sup>6</sup> It is a voluntary program, so candidates choose whether or not to participate.<sup>7</sup> We just had a mayoral election in which all of the major candidates chose to participate in the program.<sup>8</sup> It certainly did not seem to restrict anyone’s speech. In fact, Mayor Rudolph Giuliani was able to say so much that one *New York Magazine* ran an advertisement stating that it was the only thing for which he had not claimed credit.<sup>9</sup>

So we are going to examine the question of expenditure caps as a restriction on speech. We have four excellent panelists. Our first speaker is Edward Hayes, a private attorney and former Assistant District Attorney with the Bronx County District Attorney’s Office. He has been active in New York politics for much of his ca-

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2. See Jack W. Germond & Jules Witcover, *Another Sham Exercise*, 30 NAT’L J. 775 (1998).

3. See Helen Dewar, *Petition Drive May Be Last Hope for Campaign Reform*, WASH. POST, Apr. 1, 1998, at A1. *But see* Bradley A. Smith, *Real And Imagined Reform Of Campaign Corruption: A Review Of Dirty Little Secrets: The Persistence Of Corruption In American Politics*, 6 CORNELL J.L. & PUB. POL’Y 141, 141-142 (1996).

4. See *Buckley*, 424 U.S. at 23-28.

5. See *id.* at 39.

6. New York City Campaign Finance Act (1988) (codified as NEW YORK CITY ADMIN. CODE tit. 3, ch. 7, §§ 3-701 to 3-715).

7. See *id.*

8. See William Murphy, *City Briefing: A Report on People and Issues in City Government*, NEWSDAY, Sept. 29, 1997, at A37 (reporting allegations that both of New York City’s major mayoral candidates used their political offices to sidestep spending limits while participating in a Campaign Finance Board program that limited fund raising and spending in return for matching funds); Adam Nagourney, *Giuliani Leads His Opponents In Money Raised and Spent*, N.Y. TIMES, July 16, 1997, at B5.

9. See Felix H. Kent, *Mayor Giuliani’s Right of Privacy*, N.Y. L.J., Feb. 20, 1998, at 3.

reer and was appointed to the Civilian Complaint Review Board by Mayor David Dinkins. I should also point out that he represents many journalists, including Mike McAlary of the *Daily News*, so he does have some interest in the First Amendment. After Mr. Hayes, we will hear from Erik Joerss, a political organizer with Common Cause. Mr. Joerss is actively lobbying for federal finance campaign reform. Following Mr. Joerss, we will hear from Bill Kastin, an attorney with the New York City Campaign Finance Board. Mr. Kastin is a former motions law clerk for the United States Court of Appeals for the Second Circuit. Following Mr. Kastin, we will hear from Leo Kayser, a partner in the law firm of Kayser & Redfern. Mr. Kayser specializes in constitutional law, literary property law, and commercial litigation, and was a member of the transition team that helped New York Governor George Pataki move into office after his election. The last speaker we will hear from is Mark Lopez, a senior staff attorney with the American Civil Liberties Union (“ACLU”) in New York. Prior to joining the New York office of the ACLU, Mr. Lopez served as a senior staff attorney with the ACLU’s National Prison Project. After each panelist speaks, we will have a roundtable discussion and open the floor to questions.

Mr. Hayes is first.

MR. HAYES: I am a mouthpiece. Through out my career, my job has been to stand next to somebody who obviously did something atrocious and argue that he did not. That role has made me extremely well suited to discuss campaign finance reform. First, almost since the beginning of time, people have tried to find a way to manipulate people in authority. Campaign finance reform is essentially another way to control people’s natural impulse to corrupt those in power.<sup>10</sup> The second thing is, by and large, people that give money to people who run for office want something in return.<sup>11</sup>

Now, let me discuss something that has raised very serious issues. Do you remember the news reports about the individual that

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10. See *Buckley v. Valeo*, 424 U.S. 1, 25-28, 45 (1976).

11. See Jill Abramson, *The Nation: Money Buys a Lot More Than Access*, N.Y. TIMES, Nov. 9, 1997, at C4.

apparently collected money from Chinese landscapers and Buddhist nuns, and gave the Clinton campaign very large sums of money?<sup>12</sup> There were reports of a man who visited the White House on many occasions, an individual of Chinese descent who raised money from a lot of overseas sources.<sup>13</sup> It raises issues in your mind that must be examined when considering campaign finance. The first thing I thought was that he went to the White House to bring cash because people sometimes give cash to politicians instead of checks.<sup>14</sup>

The second reason why somebody might make a trip to a politician's office is to check, for instance, if it would affect trade relations if three sixteen-year-old kids were shot in the middle of a square in Beijing last night. And the politician might reply, you could shoot one, you could shoot two, but three is too many.

That is a lot of what campaign finance is about. I am not saying that happened. What I am saying is that you want to avoid the appearance of impropriety. You do not want anybody to worry about improper behavior.

There are lots of ways to pay somebody to gain advantage. For example, when Rupert Murdoch bought the *New York Post* he also bought a disguised way of making campaign contributions. Every time he can control an editorial page or what a story says, then in a way, he is helping himself get a lucrative television license; he is winning the love and affection of some United States Senators.<sup>15</sup>

Those in the audience who are students at Fordham Law School, by and large, when you finish school you are going to practice in New York City. New York City is the absolute heartland of wide judicial discretion.<sup>16</sup> There are no judges in Manhat-

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12. See Don Terry, *Democratic Fund-Raiser Pleads Guilty to Fraud and Conspiracy*, N.Y. TIMES, Mar. 17, 1998, at A18.

13. See Amy Keller, *Burton to Grill FEC for Going Soft on Gore Friend*, ROLL CALL, Mar. 26, 1998; Terry, *supra* note 12, at A18.

14. See Scott Turow, *Reforming Campaign Finance*, SACRAMENTO BEE, Oct. 19, 1997, at F1.

15. See Frank Rich, *Who's Biased Now?*, N.Y. TIMES, Mar. 4, 1998, at A21; see also Clifford J. Levy, *Mayor Can't Force Cable Firm to Add Channel, Judge Rules*, N.Y. TIMES, Nov. 7, 1996, at B21.

16. See *Letter to the Editor from George Pataki, Governor, New York*, N.Y. L.J., Mar. 18, 1996, at 2.

tan<sup>17</sup> or the Bronx<sup>18</sup> who are not picked by the Democratic organization: none. There are no Republican judges elected to the New York Supreme Court<sup>19</sup> in Manhattan or the Bronx. The key to becoming a New York Supreme Court justice in Manhattan is your relationship with Mr. Farell,<sup>20</sup> the Democratic leader for Manhattan. All of these things relate to the life that you will lead when you leave law school. The First Amendment issue concerns how you live in a free society. Campaign finance is just one of the checks and balances affected by that.

The essence of the *Buckley* decision was the idea of the judge applying a balancing test. If you read Robert Bork's book,<sup>21</sup> he will say judges should not have balancing tests. As much as possible, judges should not exercise their discretion; judges should give only an interpretation of the existing law and not make policy.<sup>22</sup> The reason is that, in an indirect way, campaign finance will affect those decisions. If you can collect enough money and your candidate is elected, that will have an effect on which judges are appointed. Every study has shown that judges tend to reflect the politics that they bring with them to the bench in their decisions.

So my first point is, when you think of campaign finance, first think of what kind of life you will lead and where you will play on the exercise of the power, which is what lawyers do. Lawyers are basically brokers in the exercise of power. The opportunity to influence judges, politicians, and government is at the essence of what we do as lawyers. That is the first issue.

The second issue is allowing the press to be the watchdogs of campaign finance. People like Wayne Barrett, along with another reporter named Andrea Bernstein, who writes for the *New York*

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17. Manhattan—comprising the whole of New York County—is one of the five boroughs of New York City. Each is a separate county.

18. The Borough of the Bronx comprises the whole of Bronx County, New York.

19. The New York Supreme Court is the state's trial-level court of unlimited original jurisdiction. The state's highest court is the New York Court of Appeals.

20. New York Assemblyman Herman D. Farell, Jr., chairman of the Ways and Means Committee.

21. ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990).

22. *See id.* at 143 (“It is a necessary implication of the prescribed procedures [set out in Article V] that neither statute nor Constitution should be changed by judges.”).

*Observer*,<sup>23</sup> are two people that I probably would have to deny ever meeting in my entire life. That is because I am relatively conservative and they have skewered virtually every politician with whom I have had a good relationship over the last five years.<sup>24</sup> Nonetheless, society would fall in about seven seconds if Wayne Barrett and Andrea Bernstein could not write because, no matter what reforms you introduce for campaign finance, the people who are voting on those laws are living off that money. Politicians use campaign finance to pay for their girlfriends, clothes, restaurant bills, and the hotel rooms where they meet their girlfriends.

There are a million other ways that people get paid back for making campaign contributions.<sup>25</sup> You give them free legal ad-

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23. Andrea Bernstein covers New York State politics for the *New York Observer* and also writes for other popular publications, such as the *New York Times* and the *Washington Post*. See Andrea Bernstein, *A Look at Roadblocks to Campaign Reform; The Lord of the Loopholes; Any Law You Can Draw; The Likes of Wily Al D'Amato Can Evade*, WASH. POST, Jan. 12, 1997, at C3; Andrea Bernstein, *Pataki's Secrets*, N.Y. TIMES, Mar. 23, 1996, at A21.

24. See, e.g., Wayne Barrett, *Giuliani For Sale*, VILLAGE VOICE, Apr. 7, 1998, at 25 (discussing New York City Mayor Rudolph W. Giuliani ("Mayor Giuliani")); Wayne Barrett, *Fifty Reasons to Loathe Your Mayor*, VILLAGE VOICE, Nov. 4, 1997 (same); Wayne Barrett, *State For Sale: How Pataki's Secret Auction Attracted Conflict Contributions*, VILLAGE VOICE, May 7, 1996, at 12 (discussing New York Governor George Pataki); Wayne Barrett, *Taking a Pass on Peace: The Rabin Rant of Rudy's Rabbis*, VILLAGE VOICE, Dec. 12, 1995 (discussing Mayor Giuliani); Wayne Barrett, *Grand Old Pals: The Political Rapsheet of Rudy's Brooklyn Party Animal*, VILLAGE VOICE, Sept. 26, 1995, at 13 (same); Wayne Barrett & Jon Bowles, *A D.A. Gone Bad: How Albany Ambitions Corrupted Joe Hynes*, VILLAGE VOICE, Aug. 30, 1994 (discussing Joe Hynes); Andrea Bernstein, *Why Albany Can't Shun Controversy*, NEWSDAY, Jan. 4, 1998, at B5 (discussing New York State politicians working in Albany, New York's capital); Andrea Bernstein, *A State Budget of Smoke and Mirrors*, NEWSDAY, Aug. 10, 1997, at G5 (same); Andrea Bernstein, *A Cold, Cold Feeling Inside Albany*, NEWSDAY, Feb. 2, 1997, at G5 (same); Andrea Bernstein, *A Look at Roadblocks to Campaign Reform; The Lord of the Loopholes; Any Law You Can Draw; The Likes of Wily Al D'Amato Can Evade*, WASH. POST, Jan. 12, 1997, at C3 (same); Andrea Bernstein, *Once Again, A State Budget Mess*, NEWSDAY, Mar. 31, 1996, at A45 (same); Andrea Bernstein, *Pataki's Secrets*, N.Y. TIMES, Mar. 23, 1996, at A21 (discussing New York Governor George Pataki).

25. See *Council of Favors; Lords of Their Wards, Aldermen are Generous to a Fault-With Taxpayer's Money. The Gift-Giving Translates into Votes and Campaigns Contributions*, CHI. TRIB., Nov. 3, 1997, at N1; George E. Jordan & Michael Powell, *The Buddy System is Rudy's Too; Mayor's Hiring Freeze Thawed to Accommodate Pals and Kin*, NEWSDAY, Apr. 18, 1994, at A6; Liam Plevin & Robert E. Kessler, *Feds Probe Pataki's 1994 Fundraising/Sources: Focus on Possible Promised Favors*, NEWSDAY, Jan. 22, 1998, at A26; David E. Rosenbaum, *In Political Money Game, the Year of Big*

vice. When some judge gets in trouble, you get appointed to investigate him and throw the investigation into the toilet. There are a million ways to benefit from making campaign contributions.

So if you are asking me for my opinion about the most important issue regarding campaign finance reform, it is allowing the views of Wayne Barrett on the left, the *American Spectator* on the right, and the *New York Times* for *noblesse oblige* in the middle to be heard.

The biggest problem that we have now, is the business with soft money and hard money.<sup>26</sup> Politicians find ways to collect large sums of money for which they do not have to disclose the source and there is not a campaign cap.<sup>27</sup> The absolute champion of that, God bless him, is Senator Alfonse D'Amato (R-New York).<sup>28</sup> He collects very large sums of money and then transfers it back to the local republican parties.<sup>29</sup>

Look at President Clinton. The Democratic Party in New York is dying; it is hard to believe, but it is really in trouble.<sup>30</sup> President

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*Loopholes*, N.Y. TIMES, Dec. 26, 1996, at A1; Bob Sablatura, *The Other Government; Contractual Friendships; Thin Line Separates Political Giving and Quid Pro Quo*, HOUS. CHRON., Mar. 24, 1998, at A1.

26. See 144 CONG. REC. H1726 (1998); see also *Hearings on Campaign Finance Revision: Soft Money Before the Senate Comm. on Rules and Administration*, 104th Cong. 1 (1997) (testimony of Bradley A. Smith, Adjunct Scholar, Cato Institute; Anthony Corrado, *Giving, Spending and "Soft Money"*, 6 J.L. & POL'Y 45 (1997).

27. See Art Buchwald, *Hard Facts About Soft Money*, WASH. POST, July 4, 1996, at C1; James Dao, *Pataki Will Not Open Books on Inaugural Fund*, N.Y. TIMES, Nov. 17, 1995, at A1; Ernie Freda, *On Washington; Disaster-Relief Bill Heading For Certain Veto*, ATLANTA J. & CONST., June 6, 1997, at A8; *Disclosure Best Reform of Soft-Money Financing*, SEATTLE TIMES, June 25, 1997, at B4; David E. Rosenbaum, *In Political Money Game, the Year of Big Loopholes*, N.Y. TIMES, Dec. 26, 1996, at A1.

28. See Andrea Bernstein, *A Look at Roadblocks to Campaign Reform; The Lord of the Loopholes; Any Law You Can Draw, The Likes of Wily Al D'Amato Can Evade*, WASH. POST, Jan. 12, 1997, at C3; Howard Kurtz, *Raging Al*, WASH. POST, May 22, 1994, at W10.

29. See Andrea Bernstein, *A Look at Roadblocks to Campaign Reform; The Lord of the Loopholes; Any Law You Can Draw, the Likes of Wily Al D'Amato Can Evade*, WASH. POST, Jan. 12, 1997, at C3; Kurtz, *supra* note 28, at W10; Leslie Wayne, *Republican Rainmaker—A Special Report; D'Amato Converted Donations to Help New York Candidates*, N.Y. TIMES, Feb. 18, 1997, at A1.

30. See Richard L. Berke, *Democratic Party Unable to Pay Debts from Last Year's Elections*, N.Y. TIMES, Mar. 27, 1997, at A1; Richard L. Berke, *Democrats' Big Debt Hurts Effort in Three Races*, N.Y. TIMES, Oct. 30, 1997, at A28; Tom Precious, *State*



Clinton has taken all the money out of the state of New York.<sup>31</sup> The Democratic Party of New York is screaming on the front page of the *New York Times* that the Democratic National Party is collecting their share.<sup>32</sup> Well, the reason for that is the Democrats are not in power in New York State,<sup>33</sup> so they no longer have access to the goodies to give to contributors. A large Democratic contributor cannot go to the Governor and get a road contract or have advantageous judges appointed. So President Clinton comes in and collects all of the money.

The difference between soft and hard money is wrong. It enables people who can accumulate a lot of money to make essentially surreptitious contributions.<sup>34</sup> So the absolute essence of all of this is disclosure. I think that if you are rich and you want to give a lot of money to a politician, so long as everybody knows about it, go ahead and do it. The election is still based on the majority of votes. Unions and other special interest groups in this country will find a way to offset those large contributions of money.

You cannot have secret contributions, and you also cannot have disguised contributions. A disguised contribution would be where some people in Indonesia decide to give money to advance the in-

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*Democrats are Hard at Work Rebuilding Party*, TIMES UNION, Aug. 25, 1996, at A1; Adam Nagourney, *New York State's Democrats See Party Adrift and Divided*, N.Y. TIMES, July 9, 1997, at A1; Adam Nagourney, *Consensus Proves Elusive For Democratic Leaders*, N.Y. TIMES, Dec. 14, 1997, at A51.

31. See Adam Nagourney, *Democratic National Party to Share Wealth with States*, N.Y. TIMES, Mar. 6, 1998, at B4; Adam Nagourney, *Fight Widens Over Keeping Party Funds*, N.Y. TIMES, Jan. 17, 1998, at B1.

32. See Adam Nagourney & James Dao, *As Clinton Eats Up Contributions, New York Party Says It's Starving*, N.Y. TIMES, Jan. 9, 1998, at A1; Adam Nagourney, *Democratic National Party to Share Wealth with States*, N.Y. TIMES, Mar. 6, 1998, at B4; Adam Nagourney, *Fight Widens Over Keeping Party Funds*, N.Y. TIMES, Jan. 17, 1998, at B1.

33. See Precious, *supra* note 30, at A1; see also Robert J. McCarthy, *State Democrats Meet to Discuss Plan on How to Regain Power in New York*, BUFFALO NEWS, Sept. 30, 1997, at B6; Adam Nagourney, *New York State's Democrats See Party Adrift and Divided*, N.Y. TIMES, July 9, 1997, at A2.

34. See *Color of Money; End the Abuse; McCain-Feingold is Dead, and With It, Hopes For Campaign-Finance Reform*, VIRGINIAN-PILOT, Mar. 3, 1998, at B8; Sandra Smokes, *End the Scam of Soft Money Campaign Contributions*, SYRACUSE HERALD AM., Feb. 23, 1997, at G3.

terests of people in China. I still do a lot of criminal defense work, so I can tell you, if you represent any Chinese gangsters, they will tell you that they can go home to China and nobody will be able to get them. The Chinese gangsters, in some areas, run the banks, the government, and the police.<sup>35</sup> So, with a disguised contribution you do not know whose interests are being served; that is why it is a problem.

Those foreign contributors to President Clinton are on the run and cannot be located<sup>36</sup> because they are in China. They will not turn up, and China will not give them back unless they want to. In return for hiding out the main witnesses against President Clinton in China, someone, somewhere paid a price. Actually, you paid for that indirectly. I am not saying President Clinton is any different than the Republicans—there are lots of bad things you could say about them too. But here, somebody made a power tradeoff.

In short, the essence of what I am saying is two things. First, everything they tell you in law school about the law and the impartiality of the judiciary is lovely, but it is not true. As a lawyer, you should look for things that go wrong, for partiality, and for unfair influence.

Second, campaign contributions are a double-edged sword because contributions enable people to express their opinions and influence government—hopefully for the better, but possibly for the worse.

The most important thing is disclosure. Interestingly enough, in the practice of law, it is what people do not tell you which is the most upsetting and often causes the most injustice.

MR. BARRET: Thank you very much. Our next panelist to speak is Erik Joerss of Common Cause.

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35. See Daniel Kwan, *Warning as Crime Gangs Take Control*, SOUTH CHINA MORNING POST, Sept. 17, 1996; Jane H. Lii, *Chinese Immigrant Flees an Asian Smuggling Gang a Second Time*, N.Y. TIMES, Feb. 23, 1995, at B1; Sam Meddis, *Chinese Gangs: USA's 'New Mafia?'*, USA TODAY, July 11, 1990, at A1.

36. See, e.g., *Indictments Bolster Contentions of Foreign Influence Peddling*, OMAHA-WORLD HERALD, Feb. 21, 1998, at 34 (stating that Charlie Trie, who was indicted by a federal grand jury on fifteen counts of campaign finance violations in connection with the Clinton-Gore campaign, disappeared from the United States and was thought to be hiding in China).

MR. JOERSS: I would like to start by saying that what Mr. Hayes just said about Andrea Bernstein is completely true. As a matter of fact, Common Cause is honoring her on Friday for the work she has done over the past year.<sup>37</sup>

It is really an honor to be here. Looking at the other panelists, it is even more of an honor. I feel a bit overwhelmed.

I want to talk a little bit about *Buckley v. Valeo*,<sup>38</sup> in that the key to *Buckley*, according to the justices, was that you can limit contributions only if Congress can show a compelling interest, such as corruption or the appearance of corruption.<sup>39</sup> In *Buckley*, the Court decided that Congress could limit contributions in order to eliminate corruption.<sup>40</sup> The Court held, however, that Congress could not limit spending, because the Court did not see the same link between spending and corruption.<sup>41</sup>

We see now, twenty-two years later, that the system has created a hybrid<sup>42</sup> where it has ignored basic supply-and-demand rules. Although the decision has led to an unquenchable thirst for campaign dollars because campaign spending is not restricted, there are limited ways to raise this money.<sup>43</sup> This has fostered much of the illegality and the underground contributions that we presently see.<sup>44</sup>

If the Court looked at *Buckley* now, twenty-two years later, it would see that the current system is unworkable, partly because we

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37. See *Judge Sets Sights on Old Seat*, TIMES UNION (Albany, N.Y.), Jan. 19, 1998, at B2.

38. 424 U.S. 1 (1976).

39. *Id.* at 26-29, 58.

40. See *id.*

41. See *id.* at 45-47, 53.

42. See Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 665-66 (1997).

43. See generally, *No More Loophole to Avoid Special Counsel*, TAMPA TRIB., Sept. 7, 1997, at 2 (discussing restrictions on raising "hard money" contributions).

44. See William Booth, *California Rep. Kim, Wife Charged in Campaign Donation Scheme*, WASH. POST, Aug. 1, 1997, at A16; Art Buchwald, *Hard Facts About Soft Money*, WASH. POST, July 4, 1996, at C1; James Dao, *Pataki Will Not Open Books on Inaugural Fund*, N.Y. TIMES, Nov. 17, 1995, at A1; *Firm Faces Charges of Illegal Donations*, TIMES UNION (Albany, N.Y.), May 16, 1997, at E1; Freda, *supra* note 27; Jerry Seper, *Lobbyist Gets Fine, Probation in Illegal Espy-Case Donation*, WASH. TIMES, Jan. 31, 1998, at A2.

do need spending caps in order to limit the role that money plays in our political system.

The *Buckley* Court equated money with free speech.<sup>45</sup> It pointed out that advertising is the key instrument used by candidates to get their messages out.<sup>46</sup> The Court ignored such things as debates, candidate forums, and panel discussions.<sup>47</sup> All of which are generally more substantive than a thirty-second sound bite in a television advertisement that attacks competitors and does not advance any views.

So we are left with a system where money, as Mr. Hayes just said, is the measure of a candidacy and how seriously a candidate is taken. Right now, the race that we will see with Alfonse D'Amato against Geraldine Ferraro<sup>48</sup> or Mark Green<sup>49</sup> or Charles Schumer<sup>50</sup> is expected to cost somewhere around \$40 to \$45 million.<sup>51</sup> Senator D'Amato is expected to spend well over \$20 million;<sup>52</sup> he already has well over \$12 million in his campaign chest.<sup>53</sup> There is talk that Geraldine Ferraro might not be the right

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45. In *Buckley*, the Court stated that:

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

*Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

46. *See id.* at 26.

47. *See id.* Although the Court ignored debates, forums, and panel discussions, it did recognize speeches and rallies as expensive approaches for political candidates to convey their messages. *See id.*

48. Former U.S. Representative (D-New York); 1984 Democratic vice presidential candidate.

49. Public Advocate for the City of New York.

50. U.S. Representative (D-New York)

51. *See* Marie Cocco, *Get It While It's Hot—the \$50-Million Senate Seat*, *NEWSDAY*, July 17, 1997, at A49; Joel Siegel, *Campaigns Adopt Art of the Deal*, *DAILY NEWS*, Feb. 15, 1998, at 51; James Toedtman, *First Bucks, Then Ballots*, *NEWSDAY*, Jan. 11, 1998, at A24.

52. *See* Robert Gavin, *D'Amato Polishing Image For Election*, *POST-STANDARD* (Syracuse, N.Y.), Mar. 24, 1998, at A4 (estimating cost of New York campaign to exceed \$30 million).

53. *Compare* Marc Humbert, *D'Amato Keeps Lead in Raising Donations*, *TIMES UNION* (Albany, N.Y.), Jan. 31, 1998, at B2 (estimating that D'Amato has raised \$12.2

person to run against him simply because she has not raised enough money yet and she may not have the ability to do so.<sup>54</sup> Mark Green, who has arguably a very, very strong record, has only raised \$1 million.<sup>55</sup> Now, although \$1 million may seem like a lot of money, in state politics it is a pittance. It is enough to ensure that Mark Green will probably be the first one out of the race. Charles Schumer, who has raised \$8 to \$9 million at this point, is most likely to be a successful candidate—and it is not based on his record; it is based on the fact that he was able to raise this money.<sup>56</sup>

So we have candidates whose expertise is not necessarily on issues. We have candidates whose expertise is not necessarily in representing the people. Fund-raising prowess is the major skill that a candidate needs right now to run for office.<sup>57</sup> I do not think it is terribly difficult to see how destructive that is.

In the last election cycle, it was estimated that the average Senate seat went for \$4.5 million.<sup>58</sup> So, from their first week in office until they are out, Senators have to raise \$15,000 every single week. This also takes away from the job that politicians are supposed to do for the public.

I got involved with this issue working on Project Independence with Common Cause. Project Independence started largely because two former Senators, Bill Bradley<sup>59</sup> and Alan Simpson,<sup>60</sup> both walked away from the Senate citing the fact that fund-raising has obscured the reason why they actually wanted to serve the pub-

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million), *with* Toedtman, *supra* note 51, at A24 (estimating that D'Amato raised \$12.7 million and has already spent \$4.2 million).

54. See Clifford J. Levy, *Ferraro Says Fund-Raising Shows Her Strength*, N.Y. TIMES, Apr. 7, 1998, at B5.

55. See Humbert, *supra* note 53, at B2.

56. See Gavin, *supra* note 52, at A4.

57. See Toedtman, *supra* note 51, at A24; *Can Ferraro Raise Enough To Win Democratic Nomination, Run Against D'Amato?*, GANNETT NEWS SERV., Jan. 29, 1998, available in West, WESTLAW, 1998 WL 5620770.

58. See Toedtman, *supra* note 51, at A24; see also David S. Broder, *Campaigns Without Shame*, WASH. POST, Sept. 24, 1997, at A21.

59. See Clifford J. Levy, *Bradley Says He Won't Seek 4th Term*, N.Y. TIMES, Aug. 16, 1995, at A1.

60. See Joel Achenbach, *Hi Ho, Simpson, Away! Roasts and Toasts for the Cowboy Senator*, WASH. POST, May 22, 1996, at C1.

lic.<sup>61</sup> So they started Project Independence.<sup>62</sup>

Part of it was based on a poll in the *New York Times*, stating that nine out of ten people polled said that the campaign finance system is broken and in desperate need of repair—two out of ten thought that legislators might actually act on it.<sup>63</sup> So again, because of our campaign fund raising system, our candidates are not as strong, we have low voter turnouts,<sup>64</sup> and people feel less connected with the system.<sup>65</sup>

In Project Independence, which was largely a petition drive, there were 1 million signatures gathered around the country—100,000 in New York State.<sup>66</sup> A carload of them was dumped at Senator D'Amato's office. His campaign staff said they had never, ever gotten that many calls or letters on an issue before. Yet he ignored it. He is basically still against the McCain-Feingold bill.

The question is, if his constituents are clearly for it, what is his motivation for going against it? He already has his war chest. One could argue the motivation for going against it is that the party leadership, due to things like soft money and the way that the national parties are able to raise unlimited money, has a disproportionate amount of power. If Sen. D'Amato decides to buck people like Senator McConnell<sup>67</sup> or Senator Lott,<sup>68</sup> he can be punished in the next election cycle. A lot of the Republican soft money maybe will go to him, as it certainly will not go to people like John

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61. See Richard L. Berke, *Bradley, in Retirement, Remains Coy on Presidency*, N.Y. TIMES, Oct. 26, 1997, at A24.

62. See Jonathan Riskind, *Campaign Gift Reform Backed at Gathering*, COLUMBUS DISPATCH, June 5, 1997, at A7; *Former U.S. Senator Alan K. Simpson Elected To The Board Of Directors Of U.S. Energy Corp.*, PR NEWswire, Apr. 17, 1997.

63. See Michael Lewis, *A Question of Honor*, N.Y. TIMES, May 25, 1997, at F32 (stating that the poll showed that "while 90% of the electorate say that money is corrupting politics, only 23% expect Congress to do anything about it").

64. See Darrel Rowland, *Advocate of Campaign Reform Raises Big Bucks*, COLUMBUS DISPATCH, Nov. 12, 1997, at D2.

65. See Jonathan Riskind, *High-Dollar Campaigning*, COLUMBUS DISPATCH, Mar. 9, 1997, at D4.

66. See Edwin Chen, *A Hard March Through Campaign-Cash Jungle*, L.A. TIMES, Oct. 13, 1997, at A14 (stating that one million signatures were obtained).

67. Senator Mitch McConnell (R-Kentucky).

68. Senator Trent Lott (R-Mississippi).

McCain<sup>69</sup> or Olympia Snowe,<sup>70</sup> who right now support the McCain-Feingold bill.<sup>71</sup>

Every presidential election cycle we hear that we are getting the lesser of two evils.<sup>72</sup> It is not an empty refrain. We are not the ones who really decide who is among the available choices for election. This again relates to the fact that getting elected is about money, rather than skill and caring about issues.

This is partly why we are here talking about *Buckley*. In *Buckley*, the Court acknowledged that there were fundamental problems with our campaign finance system.<sup>73</sup> The Court, however, created this hybrid which actually exacerbated the problems. I think the decision would be different if they looked at *Buckley* now. If the Court did the fact finding today, they would find many corruptive influences. For example, Amway, which is a direct marketing group, gave \$1 million cash to the Republican Party in April of last year.<sup>74</sup> In July of last year, a federal tax bill went through in which Amway received a \$270 million tax break.<sup>75</sup> This is, in my opinion, the straight quid pro quo corruption that Congress and the Court sought to prevent.<sup>76</sup> Yet, we see more and more illustrations of corruption—this is why reform is so necessary.

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69. Senator John McCain (R-Arizona).

70. Senator Olympia Snowe (R-Maine).

71. See Lewis, *supra* note 63, at F32.

72. See *Campaign Notebook: Clinton Aides Begin Work Early on Second-Term Staff*, DETROIT NEWS, Nov. 6, 1996, at A12; David Goldberg, *Skeptical Georgians Opt for Status Quo*, ATLANTA J. & CONST., Nov. 6, 1996, at B7; *How our Panelists Voted in Presidential Election*, PITTSBURGH POST-GAZETTE, Nov. 6, 1996, at A13.

73. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (finding that the problem of campaign finance is not illusory).

74. See Ruth Marcus, *Common Cause Lists "Soft" Donors*, WASH. POST, Mar. 13, 1998, at A23; John R. Wilke, *Big GOP Donor Gets His Way in Bill Affecting Merger of Michigan Hospitals*, WALL ST. J., Aug. 7, 1997, at A16; see also Greg Hitt, *Favored Companies Get 11th-Hour Breaks*, WALL ST. J., July 30, 1997, at A2.

75. See Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (Aug. 5, 1997) (codified at scattered sections of 26 U.S.C.A. (West, WESTLAW through Pub.L. No. 105-165)); see also *Clinton Prepares to Fire a Popgun at Giveaways*, USA TODAY, Aug. 11, 1997, at A11; Michelle Malkin, *We Have Ourselves to Blame for Beggars in 3-Piece Suits*, SEATTLE TIMES, Aug. 26, 1997, at B4.

76. See *Federal Election Campaign Finance Reform: Hearings on Campaign Finance before the Senate Governmental Affairs Committee*, 105th Cong. (1997); see also *Buckley*, 424 U.S. at 27.

MR. BARRET: Thank you Mr. Joerss. Our next presentation is from William Kastin, an attorney with the New York City Campaign Finance Board.

MR. KASTIN: Thank you.

I want to start today by reading a quote of Charles Keating, the former operator of the failed Lincoln Savings & Loan.<sup>77</sup> During the time period in which the Lincoln Savings & Loan was being investigated, Charles Keating raised more than \$1.3 million for five United States Senators and their causes.<sup>78</sup> This is what he had to say:

“One question had to do with whether my financial support in any way influenced several political figures to take up my cause. I want to say, in the most forceful way I can, I certainly hope so.”<sup>79</sup>

Although this quote deals with campaign contributions and this panel is discussing spending limits, I think the quote is significant because it illustrates an important point in today’s political arena: money talks.

As a result of the Supreme Court’s holding in *Buckley* that government-mandated expenditure limits violate the First Amendment,<sup>80</sup> wealthy citizens like Charles Keating are able to inject large amounts of money into political campaigns and causes. Incumbents and challengers alike welcome such money, as there is no limit whatsoever on the amount of money politicians can spend.

The *Buckley* Court’s holding does not completely prohibit spending limits.<sup>81</sup> There is a footnote in the decision, footnote 65, which states that “Congress may engage in public financing of election campaigns and may condition the acceptance of public funds on an agreement by the candidate to abide by specified ex-

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77. See *Lincoln S & L Lacks Sufficient Capital, Bank Board Says*, WALL ST. J., Dec. 23, 1988, § 1, at 7..

78. See Jill Abramson & Paul Duke, Jr., *The Keating Five: Senators Who Helped Lincoln S&L Now Face Threat to Their Careers*, WALL ST. J., Dec. 13, 1989, at A1; *Gramm’s Campaign Manager Counts GOP Support in Lake*, ORLANDO SENTINEL, Oct. 31, 1995, at 4.

79. David J. Jefferson, *Keating of American Continental Corp. Comes Out Fighting*, WALL ST. J., Apr. 18, 1989, § 2, at 2.

80. See *Buckley*, 424 U.S. at 51.

81. See *id.* at 57 n.65.



penditure limits.”<sup>82</sup> In other words, if a candidate chooses to accept public funds, the government may establish a spending limit upon that candidate without violating the First Amendment.<sup>83</sup>

New York City has one such program. The Campaign Finance Board (“Board”) administers the Campaign Finance Program (“program”), which was established in 1988 following a series of scandals in New York City government.<sup>84</sup> Those scandals focused public attention on the issue of influence over elected officials and whether such influence leads officials to act for private gain rather than for the public welfare.<sup>85</sup>

The purpose of the Campaign Finance Act<sup>86</sup> is to decrease the influence of private campaign contributions on candidates for New York City office.<sup>87</sup> The Campaign Finance Act seeks to promote community-level fund-raising, enable serious candidates to run effective campaigns regardless of access to money, increase public understanding of local issues, and increase participation in local elections.

The program is voluntary and is available to candidates who are running for the offices of mayor, public advocate, comptroller, borough president, or city council.<sup>88</sup> Candidates who join the program—called participating candidates—must abide by contribution and expenditure limits and provide disclosure of campaign activ-

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82. *Id.*

83. *See id.*

84. New York City Campaign Finance Act, NEW YORK CITY ADMIN. CODE tit. 3, ch. 7, §§ 3-701 to 3-715. *See generally* Jeffrey D. Friedlander, et al., *The New York City Campaign Finance Act*, 16 HOFSTRA L. REV. 345 (1988) (describing New York City’s campaign finance system); *Is This the Best We Can Do? Regarding Tomorrow’s City Council Vote on an Historic Campaign Finance Reform*, NEWSDAY, Feb. 8, 1988, at 48 (discussing New York City’s campaign finance system).

85. *See* Nicole A. Gordon, *Campaign Finance Reform: Life in the Trenches; The New York City Model: Essentials for Effective Campaign Finance Regulation*, 6 J.L. POL’Y 79 (1997) (citing political scandals in New York City during the 1980s as the impetus for various reforms including the Campaign Finance Act) [hereinafter Gordon I]; Michael C. Miller & Maranda E. Fritz, *New York City’s Campaign Finance Laws*, N.Y. L.J., June 17, 1993, at 1.

86. NEW YORK CITY ADMIN. CODE tit. 3, ch. 7, §§ 3-701 to 3-715.

87. *See* Nicole A. Gordon & Hyla P. Wagner, *The New York City Campaign Finance Program: A Reform that is Working*, 19 FORDHAM URB. L.J. 605, 607-08 (1992).

88. *See* NEW YORK CITY ADMIN. CODE, tit. 3, ch. 7 § 3-703 (outlining eligibility and other requirements).

ity.<sup>89</sup>

Participating candidates running for city-wide office must also participate in a series of debates.<sup>90</sup> In return, candidates who demonstrate sufficient public support and are opposed on the ballot can receive public matching funds.<sup>91</sup> In addition, the Board monitors candidates' compliance with the program<sup>92</sup> and publishes the *Voter Guide*<sup>93</sup> before each election, which gives the candidates an opportunity to present their views to the public.<sup>94</sup>

The program's expenditure limits are intended to curtail excessive campaign spending and enhance public confidence in elected officials. History indicates that, in certain instances, the public disapproves of candidates who fail to join the program. For example, in the 1989 mayoral election, candidate Ronald Lauder, who chose not to participate in the program, spent \$13 million on his failed 1989 mayoral bid,<sup>95</sup> but five major mayoral candidates who did join the program agreed to spend no more than \$3.6 million.<sup>96</sup>

Realistic spending limits reduce the public perception that elective offices are for sale and create a more level financial playing field on which all candidates, including challengers, can compete more meaningfully.<sup>97</sup>

The program does recognize, however, that the spending limit could handicap a participant if the participant is facing a candidate who has not joined the program. In those situations, the program

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89. See *id.* § 3-703(d), (f), (h).

90. See *id.* § 3-709.5(1).

91. See *id.* § 3-705(2) (discussing public financing).

92. See *id.* § 3-710 (Board's auditing powers).

93. The *Voter Guide*, published by New York City's Campaign Finance Board, helps inform voters about candidate positions. See generally Laurence Laufer, *Campaign Finance: New York's Campaign Finance Program for the 1997 City Elections: A Look Ahead*, 2 CITY LAW 101 (1996). The guide is published in five languages and distributed to all registered voters. See *id.*

94. The *Voter Guide* provides each candidate with one page to present his or her views and qualifications. See *id.*

95. See Michael Weber, *Primary '89 Now, The Real Fund Raising Stars*, NEWSDAY, Sept. 13, 1989, at 36; see also Gordon & Wagner, *supra* note 87, at 607-08.

96. See Weber, *supra* note 95, at 36; see also Gordon & Wagner, *supra* note 87, at 611.

97. See Gordon I, *supra*, note 85, at 83-84; George N. Spitz, *New York Forum About Politics—Reform Money Still Talks*, NEWSDAY, Jan. 26, 1990, at 62.

spending limit is removed when the non-participating candidate has raised or spent more than one half the expenditure limit,<sup>98</sup> of \$30,000 in the case of the city council.

In addition, the Board realizes that during a political campaign there may be expenditures made on behalf of a candidate by an individual entity not connected with the campaign.<sup>99</sup> In those situations, the expenditures, which are referred to as independent expenditures, are not subject to the spending limit, as long as the participant did not in fact authorize, request, or cooperate with the expenditures in any way.<sup>100</sup>

Based on the ten years of the program and the three election cycles in which the Board has administered the program, there are nine observations I would like to make about spending limits and the First Amendment. Naturally, the numbers that I reference will continue to change as candidates continue to file.

First, despite First Amendment concerns, history indicates that a majority of candidates choose to join the voluntary program and are willing to abide by spending limits.<sup>101</sup> For example, in the 1997 primary election, 81% of the candidates on the ballot chose to join the program. In the general election, 55% of the candidates on the ballot joined the program. In 1997, 71% of all incumbents joined the program.<sup>102</sup> Those numbers are even higher when looking at candidates who are considered competitive candidates. Consider also the 1996 Senate race in Massachusetts, where Republican Governor William Weld and Democratic Senator John Kerry agreed to limit their expenditures to \$6.9 million.<sup>103</sup>

What those numbers indicate is that, while not every candidate chooses to agree to abide by spending limits, the claim that a candidate's freedom of speech is actually impeded by the imposition

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98. See NEW YORK CITY ADMIN. CODE tit. 3, ch. 7, § 3-706(3).

99. See *id.* § 3-702(8) (defining the term "contribution").

100. See *id.*; Miller & Fritz, *supra* note 85, at 1 n.18-20.

101. See Gordon & Wagner, *supra* note 87, at 623-25.

102. Program participation rates and participants' campaign finance data are available at the offices of the campaign finance board.

103. See Frank Phillips, *Deal to Limit Spending Breaks Down*, BOSTON GLOBE, Oct. 24, 1996, at A1. *But see* Max Frankel, *Words & Image: Target the Tube*, N.Y. TIMES, Dec. 1, 1996, § 6, at 42 (stating that, ultimately, even they went over the limit).

of spending limits may be mere speculation. Rather, candidates are willing to abide by spending limits in competitive political races without experiencing a threat to their freedom of speech.<sup>104</sup>

The second point is that spending limits must be set at an amount high enough for all candidates running for a particular office to maintain effective campaigns.<sup>105</sup> For example, spending limits set for the city council elections must account for the highest-spending race in all city council districts. After each election, the spending limits must be fine-tuned to reflect the most recent spending patterns.<sup>106</sup>

One point to keep in mind is that, because reform is an ongoing process, it is important for the spending limits to be re-examined after each election to make sure that candidates are subject to a fair limit that will not violate their rights.<sup>107</sup>

Third, there is ample evidence that a public financing system with spending limits, as referred to in the footnote in *Buckley*,<sup>108</sup> does work. An analysis of spending by candidates who participated in the program in 1997 clearly indicates that few candidates approached the spending limit for their particular offices. For example, the spending limit in 1997 for a New York City borough president candidate was \$2.3 million. Twelve borough president candidates participated in the program. Only two candidates out of the twelve spent more than \$1 million, and no candidate spent more than approximately \$1.8 million.

Similar results were found in the city council elections, in which 138 candidates participated in the program and the spending limit was \$288,000. Of the 138 candidates, only a few candidates

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104. See generally Vincent Blasi, *Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994) (analyzing campaign spending limits in light of the First Amendment).

105. See Gordon & Wagner, *supra* note 87, at 618-21.

106. In New York City, the spending limits are adjusted each election cycle to reflect changes in the Consumer Price Index. See NEW YORK CITY ADMIN CODE § 3-706(1)(e).

107. See Gordon & Wagner, *supra* note 87, at 617; Nicole A. Gordon, *The New York City Model: Essentials for Effective Campaign Finance Regulation*, 6 J.L. & POL'Y 79, 89 (1997).

108. See *Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976).

spent more than \$200,000 and no candidate came within \$10,000 of the combined spending limit. One notable candidate who did approach the spending limit in the 1997 elections was New York City Mayor Rudolph W. Giuliani.<sup>109</sup>

The Campaign Finance Board has never received a complaint from a participating candidate that he or she was unable to run an effective campaign due to the amount of the spending limit. The claim that the program spending limits have the effect of hampering a candidate's ability to communicate his or her ideas is simply without merit.

Fourth, some commentators have claimed that spending limits hinder a challenger from mounting an effective campaign against an incumbent.<sup>110</sup> But the last three city elections for mayor do not support this proposition, as a challenger defeated the incumbent in two of the last three elections.<sup>111</sup> Moreover, there is no evidence that the sole exception—the 1997 election—was due to the spending limit hindering the challenger. Rather, it was more likely the result of the general competitiveness between the two major candidates.<sup>112</sup>

Fifth, numerous candidates have indicated that spending limits actually enhance speech, as they prohibit wealthy candidates from

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109. See Robert Polner, *Mayor Admits Illegal Donations*, NEWSDAY, Sept. 13, 1997, at A3 (reporting that the Giuliani campaign had raised \$8.6 million by mid-September 1997); cf. Clifford J. Levy, *Rules Stiffened for Spending on Candidates*, N.Y. TIMES, July 7, 1997, at B1 (reporting that 27 donors who had contributed the maximum allowable to the Giuliani campaign were able to funnel more funds into the Giuliani campaign through "soft money" contributions to the New York state Republican Party).

110. See, e.g., FRANK SORAUF, JR., *MONEY IN AMERICAN ELECTIONS* 179 (1988) (concluding that caps harm rather than enhance competition); Joel M. Gora, *Campaign Finance Reform: Still Searching for a Better Way*, 6 J.L. & POL'Y 137, 151 (1997) (stating that severe limits make it harder for challengers to raise money and that the disparity is greater because incumbents have free means of communications).

111. See William Bunch, et al., *Election '93 a Rudy Makeover*, NEWSDAY, Nov. 4, 1993 (reporting Giuliani's victory over Dinkins in the 1993 mayoral race); Rick Hampson, *Now Comes the Hard Part for New York's New Mayor*, ASSOCIATED PRESS, Nov. 4, 1993, available in West, WESTLAW 1993 WL 5597131; Frank Lynn, *The New York Primary: Dinkins Sweeps Past Koch for Nomination*, N.Y. TIMES, Sept. 13, 1989 at A1.

112. Cf. *CNN Special Event: Elections* (CNN television broadcast, Nov. 4, 1997) (discussing the two major candidates).

drowning out candidates with less financial resources.<sup>113</sup> Thus, spending limits can provide more candidates with an opportunity to participate in competitive races, thereby widening the field of participants to those who otherwise could not viably run due to a lack of resources.

Sixth, a spending cap also influences contributions.<sup>114</sup> If a candidate is limited in the amount of money he or she can spend, the candidate will not need to amass contributions from as large a pool of donors. Therefore, by imposing reasonable spending limits, the amount of contributions a candidate collects, and the prospect of undue influence and corruption as a result thereof, are minimized.

Seventh, one should also consider the role government can play in expanding political speech.<sup>115</sup> New York City, for example, recently adopted a local law providing that, candidates running for citywide office who join the program and appear on the ballot must participate in a series of debates.<sup>116</sup> Thus, in addition to receiving the benefit of public funds, candidates have an opportunity to appear before the voters and present their opinions at no cost to their campaigns.

Similarly, the *Voter Guide*,<sup>117</sup> which is published by the Board before each election, gives candidates the opportunity to present their views to the public.<sup>118</sup> Those are examples of campaign fi-

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113. Cf. Tim Curran, *Campaign Reform Becomes Hottest Game on Hill; Boren Moves to Restrict Lobbying*, ROLL CALL, Jan. 25, 1993 (discussing Senator Ernest Hollings statements about campaign spending).

114. See Gora, *supra* note 110, at 162. But see Buckley v. Valeo, 424 U.S. 1, 45-46 (1976) (rejecting the argument that spending caps are necessary because they prevent contributors from sidestepping the contribution limits by paying directly for advertisements or other campaign activities); cf. Federal Election Comm'n v. National Conservative Political Action Comm'n, 470 U.S. 480, 496-97 (1958) (stating that "elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns").

115. See, e.g., Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 FORDHAM L. REV. 53, 59 (1987) (discussing the government's role in regulating campaign finance and the effects on speech).

116. See NEW YORK CITY ADMIN. CODE tit. 3, ch. 7, § 3-709.5. The program is voluntary in that candidates who elect not to join forgo public money.

117. See *supra*, notes 93-94 (describing the *Voter Guide*).

118. See *supra* notes 93-94 (explaining how candidates use the *Voter Guide* to pre-

nance reform in which action by the government augments speech rather than hampers it.

Eighth, the program's history indicates that a large percentage of campaigns in New York City are driven by the cost of media and mailings.<sup>119</sup> In 1997, for example, seven of the top ten vendors used by participants were related to political mailings or the media.<sup>120</sup> In 1993, approximately forty percent of all expenditures, or \$14.2 million, was spent on advertising and campaign mailings.<sup>121</sup> By providing free television time for candidates or subsidizing mailings, the overall cost of campaigns could be diminished and spending limits would not have the same negative connotation they may have to some candidates.<sup>122</sup>

Lastly, at the federal level, spending on political campaigns has reached monumental heights.<sup>123</sup> In fact, the *New York Times* recently estimated that it takes at least \$5 million to run a successful Senate campaign, and in some states as much as \$30 million, and that a House seat can cost \$2 million.<sup>124</sup>

One needs to question the quality of candidates running for a political office when only those with immense fortunes or access thereto are able to run effective campaigns. Look at the recent ex-

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sent their views to the public).

119. See Philip Lentz, *Robust Spending in '97 Elections Bolsters Vendors: Consultants, Hotels Among Big Winners as NYC Politicians Pay Out \$36 Million*, CRAIN'S N.Y. BUS., Mar. 16, 1998.

120. See generally *id.* (discussing budget allocations).

121. See 1 NEW YORK CITY CAMPAIGN FINANCE BOARD, ON THE ROAD TO REFORM: CAMPAIGN FINANCE IN THE 1993 NEW YORK CITY ELECTIONS 40 (1994) [hereinafter ROAD TO REFORM] (reporting that "[c]itywide candidates put more money into advertising than anything else, and the biggest chunk of advertising dollars was spent on television").

122. Cf. Janet E. Williams & Suzanne McBride, *Funding From Special Interest Group Pays for a Lot More Than Just Getting Elected*, INDIANAPOLIS STAR, Aug. 10, 1997, at A1 (quoting Representative David Frizzel); see also McCain-Feingold Bill, S. 25, 105th Cong. (1997).

123. See Allison Mitchell, *Senate Resumes Debate on Campaign Financing*, N.Y. TIMES, Feb. 24, 1998, at A17; see also Lawrence M. O'Rourke, *Impact of "Soft Money" Brings Call for Reform*, SACRAMENTO BEE, May 26, 1997, at A1; Michael Posner, *Congressional Campaign Spending Smashes Record*, REUTERS NA WIRE, Dec. 21, 1994, available in LEXIS, Nexis Library, ACRNWS File.

124. See Max Frankel, *Word & Image: TV Remedy for a TV Malady*, N.Y. TIMES, Sept. 8, 1996, at 36.

amples of Ross Perot,<sup>125</sup> Steve Forbes,<sup>126</sup> and, in California, Michael Huffington.<sup>127</sup> In 1994, Huffington spent \$28 million of his own money in a narrow loss to Senator Diane Feinstein.<sup>128</sup> In the 1996 presidential primary race, Steve Forbes spent \$4 million in Arizona alone, approximately four times as much as Senator Bob Dole, and prevailed.<sup>129</sup>

This pattern of high spending has emerged on the local level as well.<sup>130</sup> In the 1993 race for City Council in Council District 4 on the Upper East Side of Manhattan, the incumbent Andrew Eristoff did not participate in the program, but he spent almost \$624,000 in the general election, or about \$26.54 per vote received. His opponent spent \$228,000, or about \$9.77 per vote.<sup>131</sup> In 1997, Andrew Eristoff ran a similar campaign.

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”<sup>132</sup> Those words do not mean that any restriction on speech is unconstitutional, as such an interpretation would prevent laws against fraud and blackmail.<sup>133</sup> Admittedly, expenditure caps limit the quantity of political speech, as when a wealthy politician is prevented from broadcasting as

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125. See, e.g., David Lauter, *Perot Spent Nearly \$400,000 in March Funding: Most of it Was His Own Money*, L.A. TIMES, Apr. 21, 1992, at 12; see also David Morgan, *Gingrich Calls Wealthy Campaigners America's No. 1 Problem*, REUTERS NA WIRE, Jan. 27, 1996, available in LEXIS, Nexis Library, CURNWS File.

126. See *id.*; see also David C. Johnston, *Mr. Forbes's Modest Plan*, N.Y. TIMES, Mar. 10, 1996, at D5.

127. See Todd S. Purdum, *California Governor's Race: A New Height in Spending*, N.Y. TIMES, Feb. 13, 1998, at A1; see also Posner, *supra* note 123.

128. See Purdum, *supra* note 127, at A1; Posner, *supra* note 123.

129. See B. Drummond Ayres, *Arizona: Rare Chance in a Contest Too Close to Predict*, N.Y. TIMES, Feb. 25, 1998, at A18; Jodi Enda & Steven Thomma, *Forbes Wins in Arizona; Dole Takes Dakotas; GOP Race Thrown Into Further Turmoil; Doubts Mounting About Senate Leader's Viability*, AUSTIN AM.-STATESMAN, Feb. 28, 1996, at A1.

130. Cf. Ken Fireman, *Long Island Politics High Prices: Campaign Spending on the Rise*, NEWSDAY, Dec. 13, 1996, at A1 (discussing the rise in campaign spending for local positions on Long Island); see Sam H. Verhovek, *Perot as a Political Presence: 1992 All Over Again?*, N.Y. TIMES, Jan. 23, 1996, at A10.

131. See ROAD TO REFORM, *supra* note 121, at 87; *Newest Council Member Unsure If He Will Recoup \$250,000 Campaign Loan*, UPI, Mar. 26, 1993, available in LEXIS, Nexis Library, ACRNWS File.

132. U.S. CONST. amend. I.

133. See *McDonald v. Smith*, 472 U.S. 479, 481 (1985).



many advertisements as he or she would like, the sum total of advertisements is less.

But what is the result? Have democracies that reasonably restrict electoral expenses suffered from a lack of knowledge about candidates and issues? Do we want a system where qualified candidates are prevented from seeking office because they lack the resources and access to immense amounts of money? Instituting spending limits levels the playing field and provide more candidates with the possibility of waging a competitive campaign.

The *Buckley* decision held that imposing mandatory spending limits on a candidate impinges on free speech.<sup>134</sup> Regrettably, the real speech issue today as a result of the *Buckley* decision is that money talks.

MR. BARRET: Thank you Mr. Kastin. Mr. Kayser is next. He is a partner in the New York City law firm of Kayser & Redfern

MR. KAYSER: Thank you. I would like to thank the *Fordham Intellectual Property, Media & Entertainment Law Journal* for giving me a chance to speak today.

I have practiced law here in New York City for about twenty-seven years. I had been politically dormant for about thirty years, until a friend of mine, George Pataki, thought he might have an opportunity to beat and unseat an incumbent governor: Mario Cuomo.

I have known George Pataki since he was about eighteen years old. I spoke to him and thought that maybe he should make a race for the governorship. As no one knew who he was at the time, I offered to help him raise some money—he didn't have any—to make it possible for him to make the race. Later, the party leadership gave him support;<sup>135</sup> then he won the party nomination<sup>136</sup> and

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134. *Buckley v. Valeo*, 424 U.S. 1, 51 (1976).

135. See James Dao, *The 1994 Campaign: Pataki In a Fury of Campaigning, Candidates Pursue Last Minute Votes; Pataki and his Party, From L.I. to Albany, Show a United Front*, N.Y. TIMES, Nov. 6, 1994, at A49.

136. See David Bauder, *Pataki Wins Conservatives' Backing Gubernatorial Primary is Set*, RECORD (N.J.), June 5, 1994, at A6; James Dao, *Conservatives Choose Pataki for Governor*, N.Y. TIMES, June 5, 1994, at A42.

later was elected. So I have been active for the last three years helping him raise money and I have seen the system from that perspective.

I am also a constitutional lawyer who has been involved in First Amendment issues. I was involved in the ACLU's opposition to the government petition for Supreme Court review in *United States v. Progressive, Inc.*,<sup>137</sup> in which the government tried to restrict the publication of instructions for making a hydrogen bomb: even though that information was already in the public sphere.

I also have written in the area of campaign finance. I think there needs to be reform in the current law, just like the Common Cause speaker Erik Joerss believes. Common Cause has examined this issue for a long time. A number of years ago, a fellow named Fred Wertheimer, proposed the statute that the *Buckley v. Valeo* reviewed.<sup>138</sup>

In that case, the United States Supreme Court interpreted the First Amendment and found that there is a direct correlation between money and access to speech.<sup>139</sup> Now, is there anyone who thinks that the government can restrict the number of pamphlets you can print and circulate in an election, which would be a direct restriction on printing and distribution for political purposes? Can the government restrict how many advertisements you can buy in the free market on the radio or television? Can the government restrict any other way of reaching people? Doesn't the First Amendment protect us against that? The United States Supreme Court found that there is a direct correlation between money and

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137. 467 F. Supp. 990, *dismissed as moot*, 610 F.2d 819 (7th Cir. 1979). The federal government voluntarily withdrew its petition for certiorari prior to consideration by the Supreme Court.

138. See Dierde Shesgreen, *Campaign Finance Reform Movement Gathers Momentum*, TEXAS LAW., Nov. 3, 1997, at 4; Edwin M. Yoder, *Reform an Oxymoron to Campaign Cash*, HOUSTON CHRONICLE, Nov. 9, 1996, at 34. Fred Wertheimer is head of Democracy 21 and is President of Common Cause. He has given testimony on honoraria and salary levels for top-level government officials before Congressional committees. See Ann McBride, *Ethics in Congress: Agenda and Action*, 58 GEO. WASH. L. REV. 451, 487.

139. See *Buckley*, 424 U.S. at 19, 26, & 266 (White, J., concurring in part, dissenting in part) (stating that “[o]ne of the points on which all Members of the Court agree is that money is essential for effective communication in a political campaign”).

the ability to reach people.<sup>140</sup> In fact, there is a consensus there.<sup>141</sup>

To try to overrule that proposition, to argue that way—and I have heard a couple of people argue that way—is the same as trying to overrule *Roe v. Wade*<sup>142</sup> on abortion. The debate is over. It is settled law that the government has to stay out of certain areas of decisions with respect to reproductive issues,<sup>143</sup> and the government cannot prevent parties or individuals from spending as much money as they can raise or choose to spend in legitimate purposes for propagating ideas.<sup>144</sup> That will not change. So anyone who is advocating legislation which is premised upon the law changing in that area is whistling Dixie in New York City.

Now, also there is a relationship between money and success. Ron Lauder was mentioned earlier, he was on the Conservative Party line and ran for mayor spending \$13 million or some large amount.<sup>145</sup> Did Ron Lauder expect to be elected mayor on the Conservative Party line in New York City? I think he got about two percent of the vote or something like that;<sup>146</sup> it was a small vote. The answer is no.

During that race he discussed term limits for city government,

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140. *See id.*

141. *Compare Buckley*, 424 U.S. at 266, with *Clifton v. FEC*, 114 F.3d 1309, 1319 n.6 (1st Cir. 1997) (disagreeing with the Court in *Buckley*, but admitting that “virtually every means of communicating ideas in today’s mass society requires the expenditure of money”). *See also* Frank J. Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1357 (1994).

142. 410 U.S. 113 (1973).

143. *See generally* Robert A. Sedlerfn, *The Constitution and Personal Autonomy: The Lawyering Perspective*, 11 T.M. COOLEY L. REV. 773, 787 (1994) (stating that the Court’s decisions “make[] it clear, as the Court affirmed in *Roe v. Wade*, that reproductive freedom is a fundamental right, so that any interference with reproductive freedom must be tested under the exacting compelling governmental interest standard of review”); Loye M. Barton, *The Policy Against Federal Funding for Abortions Extends Into the Realm of Free Speech After Rust v. Sullivan*, 19 PEPP. L. REV. 637 (1992) (noting that abortion is a settled issue).

144. *See Gora*, *supra* note 110, at 140-68 (arguing against government intervention in campaign finance).

145. Ron Lauder ultimately spent \$14.2 million. *See* Frank Lynn, *Giuliani Reports \$200,000 Loan From the GOP*, N.Y. TIMES, Oct. 7, 1989, § 1, at 27.

146. *See* Sam Roberts, *Dinkins Defeats Giuliani in a Close Race; Wilder Seems Virginia Winner, Florio In; Voters, 5-4, Approve New York Charter*, N.Y. TIMES, Nov. 8, 1989, at A1.

city council, and the mayor.<sup>147</sup> Everybody else running for mayor had no interest in discussing term limits. But he was propagating an idea. Well, it went to a referendum in the City of New York twice so far, and it has won twice, and Ron Lauder is the man responsible for that based on the money he spent to get out that idea. The political establishment in New York City hates it, but that is the power of leaving campaign spending unlimited.

Now, if you cannot cap spending, you need to find some other means of reform because the current law does not work. I am for campaign finance reform. I would like to see stricter disclosure requirements. I would like to see tight, high criminal penalties for violation of those disclosure requirements. The disclosure must be rapid so that the press can inform the electorate about contributions. I agree with my fellow panelist Ed Hayes entirely that disclosure is the remedy for this problem because of the anomalies under this hybrid situation. But because you cannot cap expenditures—it is equivalent to free speech—you are left with limiting contributions.<sup>148</sup> I also think that if the United States Supreme Court were to review again the statute that *Buckley* reviewed, the contribution limit, \$1,000 per person for a candidate for federal office,<sup>149</sup> would be overturned.

So the campaign finance reform that I advocate is repeal of the substantial portion of the present statute. That is, repeal of the provisions that establish any limitation on contributions or expenditures—which are not successful anyway—and full disclosure. That would be real reform and would simplify the situation.

What do you say when someone maintains that somebody is going to give too much money to a candidate and have too much influence? Well, disclosure takes care of knowing where those interests lay. And if you do not have the limits, you have competing

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147. See Kevin Flynn & Ellis Henican, *Voter's Guide '89*, NEWSDAY, Nov. 5, 1989, at 4; Doug Ireland, *Clean Out the Vote*, VILLAGE VOICE, Mar. 17, 1998, at 26; Steven L. Meyers, *The 1993 Elections: New York City Roundup; Vallone Says Term Limits Issue Is Not Dead*, N.Y. TIMES, Nov. 4, 1993, at B2.

148. See Michael J. Klapman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 511 (1997).

149. See 18 U.S.C.A. § 608(b) (West 1998 & Supp. 1998) (providing that “no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed \$1,000”).

interests in our society. We have competition in the marketplace of ideas. That is what the United States stands for; that is what has made us great. The First Amendment protects us from those controls, and competition for ideas can take the form of money too. There are enough good people in our society who would support valid, bona fide change.

That is my position, and I think it is the best position in light of the First Amendment of the United States.

MR. BARRET: Thank you. Next is Mark Lopez, an attorney with the American Civil Liberties Union at the national office in New York City.

MR. LOPEZ: Good afternoon

The issue of campaign finance reform has been largely dormant since *Buckley* was decided in 1976. But, in the last two or three years, reformers have come along and successfully sponsored a number of state initiatives and legislation that have brought the issue back into focus.<sup>150</sup> I happen to have been in the right place at the right time and the issue has fallen on my desk; I have become the point person for the ACLU on the issue.

I am an attorney and I am involved in a number of cases around the country in which we are challenging this reform.<sup>151</sup> In some of those cases I am direct counsel; in others I am playing a less prominent role, whether it be an amicus writer or merely a consultant.

Having said that, let me tell you that the ACLU itself is divided on this issue.<sup>152</sup> There is debate within the organization whether the dangers or the evils that the proponents of this legislation offer, justify the restrictions on the First Amendment. Within the organization we are divided.

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150. See Hugo Martin, *Alarcon-Katz Senate Race a Test for Prop. 208 Politics: New fund-raising rules and legal challenge to term limits make picking a winner anyone's guess*, L.A. TIMES, Dec. 15, 1997, at B1 (stating that limits for candidates for the state legislature are \$250 or \$500 for those who agree to spending caps of \$300,000 for primaries and \$400,000 for general elections).

151. See *Vanatta v. Keisling*, 931 P.2d 770 (1997); *Brown v. State*, 680 So.2d 1179 (1996).

152. See Mary E. Gale & Ramona Ripson, *Who'll Stop the Flood of Campaign Dollars*, DAILY NEWS (Los Angeles, Cal.), Nov. 4, 1997, at N11.

It is one of those issues, I think, where a significant percentage of our constituency disagrees with us, but the national organization believes that the principled position is that those restrictions are unconstitutional under prevailing precedent. In addition, we believe that those precedents should be extended to invalidate some of the more creative reforms that are being proposed out there.

It is not the first time we have had disagreement within the organization.<sup>153</sup> You have probably all heard of the Skokie incident.<sup>154</sup> If you have not, the Skokie incident involved the Nazi march through a neighborhood in the suburbs of Chicago where many Holocaust survivors lived.<sup>155</sup> In the short term, that incident caused our membership to decrease significantly, I believe. But ultimately, with exposure, our membership increased dramatically, and I think history has shown that the ACLU was on the correct side of the issue.<sup>156</sup>

Proponents of campaign finance reform point out a lot of problems with the current system.<sup>157</sup> The ACLU really has no disagreement with a lot of those problems that are being asserted. That is not an unusual posture for the organization. There are always problems in society—whether it is drugs, whether it is extreme violence, whether it is teen pregnancy—but it is the solutions we often point to when we find ourselves fighting laws passed in response to those problems. This is another example where we think the government, in an attempt to come to grips with what is admittedly a problem, has abandoned any attempt at precision, which is required by constitutional jurisprudence, and cast a broad net over the entire problem. This is a very typical government response to perceived problems out there—and actual

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153. See Amy Keller, *Shop Talk*, ROLL CALL, Mar. 30, 1998.

154. See *Village of Skokie v. National Socialist Party of Am.*, 373 N.E.2d 21 (Ill. 1978); see also *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

155. See J.R. Reid & Bob Warden, *3,000 Protest Against Nazis in Chicago's Loop*, WASH. POST, June 25, 1978, at A4.

156. See Richard B. Sapphire, *The Constitutional Status of Hate Speech: Comments on Delgado and Stefanic*, 23 N. KY. L. REV. 491, 499 (1996); see also Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?*, 46 CASE W. RES. L. REV. 449 (1996).

157. See John Anderson, *Colloquai Election Campaign Finance Reform*, 8 ADMIN. L.J. AM. U. 205 (1994).

problems out there.

We would urge the courts and the legislatures to take some effort and work within constitutional frameworks that exist for some of society's problems. We believe, as we have heard from some of the speakers today, that disclosure, accountability, and enforcement of existing corruption laws are all sufficient to redress the problems.

Take the issue of foreign money coming into the country and influencing elections. As I understand that, it is illegal.<sup>158</sup> So our suggestion is not to overhaul the whole system of campaign finance, but to enforce those laws that make it a crime for foreign money to influence federal elections.<sup>159</sup>

During the last several years, a number of organizations around the country have successfully placed state initiatives on the ballots and have dramatically changed the face of money in the election process in this country.<sup>160</sup>

The ACLU is monitoring those situations and we are involved in many of those suits. About twenty states are going down that road right now.<sup>161</sup> They have proposed changes in their laws or they have enacted changes in their laws that take many different forms. The most common form is a substantial reduction in the contribution limits that are out there.

That actually takes me back to *Buckley*. *Buckley* upheld a \$1,000 limit.<sup>162</sup> For twenty years, most states lived with the \$1,000 limit established by the Federal Election Campaign Act ("FECA") and the provisions that were upheld in *Buckley*. Only recently have the states pulled those limits down, and this is their idea of reform.<sup>163</sup> So we are talking about limits coming all the

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158. See 2 U.S.C.A. § 441e (West 1998 & Supp. 1998).

159. See *id.*

160. See Martin, *supra* note 150; see also Geeta Anand, *Mass. Ballot Initiatives Paying Off for Business*, BOSTON GLOBE, Mar. 9, 1998, at B1.

161. See, e.g., FLA. STAT. ANN. § 106.08 (West 1998) ("[N]o person . . . may . . . make contributions in excess of \$500 to any candidate").

162. *Buckley v. Valeo*, 424 U.S. 1, 29 (1976).

163. See, e.g., FLA. STAT. ANN. § 106.08 (West 1998) ("[N]o person . . . may . . . make contributions in excess of \$500 to any candidate").

way down from \$1,000 to \$50 or \$100, sometimes \$200.<sup>164</sup> Not surprisingly, candidates and supporters of those candidates have brought challenges to those laws and, by and large, have prevailed.<sup>165</sup>

Perhaps two weeks ago you heard about the California limits. I think they were \$250 and \$500 for state-wide office.<sup>166</sup> I am talking about the state elections. You understand that a state cannot pass a law that impacts a federal election because of pre-emption by FECA. So I am talking about state-wide offices, such as state assemblymen, state senators, and mayors. It could be local elections as well. By and large, those efforts have been rejected by the courts, and we think we will continue to enjoy some success in that forum.

Let me take you back to *Buckley*. It is important to understand what exactly occurred in *Buckley*. The Court had before it basically four pieces of legislation: it had contribution limits;<sup>167</sup> it had independent expenditures;<sup>168</sup> it had limits on candidate spending,<sup>169</sup> and it had the system for financing presidential elections.<sup>170</sup> The Court upheld the \$1,000 limit, so contributions by individuals to candidates could not exceed \$1,000.<sup>171</sup> That rule extended to contributions by groups, organizations, corporations, and unions as well.<sup>172</sup> It was a \$1,000 limit.

The law carved out an exception for political action committees (“PACs”).<sup>173</sup> We all know PACs give more than \$1,000. So a

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164. See Howard Schneider & Hamil R. Harris, *District Voters Overruled on Campaign Gift Limits; Council Raises \$50, \$100 Caps Approved in '92*, WASH. POST, Apr. 3, 1996, at B1 (discussing campaign gift limits in Washington, D.C.).

165. *State of Florida v. Dodd*, 561 So.2d 263, 267 (1990) (holding that “the Campaign Financing Act is unconstitutional for its overbroad intrusion upon rights of free speech and association”).

166. See CAL. GOV'T CODE § 85301 (West 1997).

167. See *Buckley v. Valeo*, 424 U.S. 1, 23-35 (1976).

168. See *id.* at 39-60.

169. See *id.* at 39-55.

170. See *id.* at 85-109.

171. *Id.* at 35.

172. See *id.*; see also 18 U.S.C.A. § 591(g) (West 1998 & Supp. 1998).

173. See 2 U.S.C.A. §§ 441(a)(2)(A), 608(b)(2) (West 1998); see also *Buckley v. Valeo*, 424 U.S. 1, 29 n.31 (1976) (noting that certain political committees can donate up to \$5,000 per candidate).



union PAC or a corporate PAC—and corporations and unions typically have many, many PACs—was allowed to give up to \$5,000 to a candidate.<sup>174</sup>

And then, of course, there was an aggregate limit on the amount of money you could contribute to all candidates and PACs, and I believe that was \$25,000.<sup>175</sup>

Now, the Court said you could not limit a candidate's own spending.<sup>176</sup> So if a rich candidate came along, that candidate of course was free to spend his or her own money as well as all the money lawfully raised. That is still the law, as demonstrated by the Huffington and Perot examples.<sup>177</sup>

The Court struck down the limits on non-coordinated independent expenditures.<sup>178</sup> That is a mouthful, non-coordinated independent expenditures. What are non-coordinated independent expenditures?

Let me first tell you what coordinated expenditures are. A coordinated expenditure is when a contributor talks with a candidate or the candidate's committee and then goes out and takes an advertisement that urges the candidate's election or defeat.<sup>179</sup> That is a coordinated expenditure. The Supreme Court said that they were going to treat that as a contribution.<sup>180</sup> I think that makes sense to most people.

But non-coordinated independent expenditures are those expenditures where the contributor does not talk to the candidate and takes out an advertisement or prints 1,000 leaflets.<sup>181</sup> The Supreme Court said supporters have an unequivocal constitutional right to

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174. See 2 U.S.C.A. § 441(a)(2).

175. See 2 U.S.C.A. § 441a(a)(2)(C); see also *Buckley v. Valeo*, 424 U.S. 1, 38 (1976).

176. *Buckley*, 424 U.S. at 59 n.67 (noting that such limits violate the First, Fifth, and Ninth Amendments).

177. See Bob Hohler, *Election Finance Targeted in Equality Fight, Big Money Seen as Insidious Force*, BOSTON GLOBE, Nov. 29, 1997, at A1; see Lauder, *supra* note 125.

178. *Buckley*, 424 U.S. at 51-54; see also *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604 (1996).

179. See *Buckley*, 424 U.S. at 23-36, 46-48.

180. *Id.*

181. See *Colorado Republican*, 518 U.S. 604.

do that.<sup>182</sup> The Supreme Court has since affirmed that basic principle in many subsequent decisions, including a decision in Colorado as recently as two years ago.<sup>183</sup>

So there is really no reason to believe that the Supreme Court is going to retreat from these two basic rules. If anything, as Mr. Kayser pointed out, they are going to revisit the limit on contributions because it is just dated—the \$1,000, if anything, should be adjusted upwards to \$3,000 to take into effect inflation—and it really has not worked. Some of the premises that the law is posited on are really not there anymore. Plus, the Court has moved in a different direction, I think, from where it was in 1976.<sup>184</sup>

Because the Court at that time split the pie, so to speak, between upholding limits on campaign contributions and striking down the limits on independent expenditures, guess what? FECA cannot work. It cannot work with that dichotomy, because all the money that was going into the candidates' coffers is now being diverted to independent expenditures. Therefore, nothing has been accomplished. Maybe the Court knew that when it split the pie. But that is what has gone on.

Well, understandably, people are frustrated with that, and that is why there have been all those reform efforts. But the answer is not to reduce the contribution limits from \$1,000 down to \$100. The answer, if anything, it seems to me, is to address the problem of independent expenditures, because there is no accountability with independent expenditures, except that they must be reported.

Like I said, the Court is not going to revisit that issue on independent expenditures. We have to live with that. I think that is correct. I think the Court is correct. That is speech at its best. I—or you—should be able to go out there and take out an advertisement in a newspaper and spend as much money as I want supporting a candidate, as long as it is not a direct contribution to that candidate.

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

183. *Colorado Republican*, 518 U.S. 604; see also *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

184. See *Buckley*, 424 U.S. at 85; see also Daniel H. Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAP. U. L. REV. 381 (1992).

The third part of *Buckley*, which is a significant predicate for the discussion, regards the public financing of elections.<sup>185</sup> Now, forget contributions and forget independent expenditures. Public financing of elections is when you accept government funds in exchange for an agreement to forgo reliance on private funding.<sup>186</sup> That is what we have at the federal level for presidential elections. *Buckley* upheld that system, as long as the decision to participate was voluntary and not coerced.<sup>187</sup>

There is not a similar system in place for the House of Representatives or Senate. Understand that. Congress right now is struggling with whether or not to change the content of the presidential public financing system that is in place and they are also struggling with whether or not to extend that system to the House and Senate races.<sup>188</sup> I think, however, that the prospects of that legislation going anywhere are really very slim.

We at the ACLU are concerned with the states that have rushed to fashion their own public financing alternatives.<sup>189</sup> The problem is that the states have not patterned those programs after the federal system. They have, by and large, substantially deviated from those programs. We believe that those states—Maine,<sup>190</sup> Massachusetts,<sup>191</sup> Hawaii,<sup>192</sup> Kentucky,<sup>193</sup> and Minnesota,<sup>194</sup> just off the top of my mind—have designed programs that are calculated to force you into the public financing alternative and to remove any intelligent choice from the process. In other words, they establish a sys-

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185. See *Buckley*, 424 U.S. at 85, 293-329.

186. See *Don't Expand Public Financing of Elections*, USA Today, Apr. 4, 1997, at A13; Doug Ireland, *Clean Out the Vote*, VILLAGE VOICE, Mar. 17, 1998, at 26; John E. Yang & Helen Dewar, *Gingrich Would End Caps On Election Contributions; In Surprise Move, Senate to Begin Debate Today*, WASH. POST, Sept. 26, 1997, at A14.

187. *Buckley*, 424 U.S. at 85-86.

188. See H.R. 794, 105th Cong. (1997); H.R. 229, 105th Cong. (1997); S. 57, 105th Cong. (1997); S. 243, 105th Cong. (1997); see also Yang & Dewar, *supra* note 186.

189. See Grant Moos, *States Look to Public Campaign Financing to Clean Up Election System*, WEST'S LEGAL NEWS, July 29, 1996, at 7698, available in West, WESTLAW, 1996 WL 419511.

190. ME. REV. STAT. ANN. tit. 21A, § 1121 (West 1997).

191. MASS. GEN. LAWS. ANN. ch. 55A, § 6 (West 1998).

192. HAW. REV. STAT. § 11-226 (1997).

193. KY. REV. STAT. ANN. § 121A (Banks-Baldwin 1998).

194. MINN. STAT. ANN. § 211A (West 1997).

tem of inducements for participation and penalties for non-participation.

I will just summarize the system we are challenging in Maine. This will give you an idea of how much some of those states are willing to push the envelope. Not all states, however, have pushed the envelope. For example, the New York system described by my colleague is really very modest, and I do not think anyone has challenged the New York system.<sup>195</sup> I do not think the ACLU has any problem with the New York system.

But some of the states have really pushed the envelope. Maine is a case I am involved in.<sup>196</sup> Here are the basic parameters: If a candidate qualifies for public financing in a Maine state election, which is a big if, the candidate can get a lot of money up-front.<sup>197</sup> Basically right up-front, on the day the candidate qualifies, the candidate will be paid the equivalent of the amount that was spent in the last election.<sup>198</sup> So the candidate receives a big chunk of money up-front.

The candidate will also be certified by the State of Maine as a “Maine Clean Election Candidate.”<sup>199</sup> There is a question right now whether or not that certification is going to appear on the ballot to alert voters.<sup>200</sup> Those are significant inducements.

In addition to that, if a candidate’s non-participating opponent nevertheless is able to raise a greater amount of money than the spending limits the candidate agreed to in exchange for the receipt of those public funds, Maine will waive those spending limits and pay the candidate the amount of the excess.<sup>201</sup>

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195. The federal system, however, has been challenged. *See Albanese v. Federal Election Comm’n*, 884 F. Supp. 685 (E.D.N.Y. 1995) (dismissing challenge to the congressional election finance system for lack of standing).

196. *See* ME. REV. STAT. ANN. tit. 21A, § 1121 (West 1997).

197. *See id.* § 1125; *see also* Jack Beaudoin, *Tax Forum Includes Campaign Fund Box, Main Legislative Candidates Would Be Able to Use the Public Funds*, PORTLAND PRESS HERALD, Feb. 2, 1998, at B1.

198. *See* ME. REV. STAT. ANN. tit. 21A, § 1125(8)-(9). The actual amount of funding reflects a one-time 25% reduction in the average of amounts spent in the 1996 and 1998 elections. *See id.* § 1125(8)(D).

199. *See id.* § 1125(5).

200. *See id.*

201. *See id.* § 1125(9).

To make matters worse, Maine will calculate independent expenditures by third parties—by a person who may not even know the outside candidates—and will take the value of those independent expenditures and provide a matching fund to the candidate who agrees to public financing.<sup>202</sup> Independent expenditures benefiting the clean candidate, however, do not count toward that candidate's spending limit.

Under those circumstances, we think that a candidate has no choice but to participate in the public financing alternative, and that is pretty much the heart of the case. I think we will prevail—I hope we will prevail—because we believe that the public financing choice should be voluntary and we believe that this system corrupts or destroys the voluntariness in that program.

I would just add that there are many variations on this program. Maine is not the most pernicious example out there. Under the system in Kentucky,<sup>203</sup> once the outside candidate's spending waives the spending limits, that is, exceeds the amount of money that was allocated to the "clean" candidate, the clean candidate receives matching funds from the state at a two-to-one rate.<sup>204</sup> So all of a sudden, the inside candidate, who was even with the outside candidate, receives a two-to-one match for every excess dollar the outside candidate raises. We think a program that is designed like that is not voluntary.

In Rhode Island, clean candidates can raise contributions in \$2,000 increments, while outside candidates can only raise it in \$1,000 increments.<sup>205</sup> In Minnesota<sup>206</sup> and Hawaii,<sup>207</sup> donors to clean candidates may take a tax deduction; donors to outside candidates cannot take a tax deduction.<sup>208</sup> Under those circumstances we think that the supporter of the outside candidate is being directly penalized; it is a direct tax on that person's speech.

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202. *See id.* §§ 1019, 1125(9).

203. *See* KY. REV. STAT. ANN. § 121A (Banks-Baldwin 1998).

204. *See id.* §§ 121A.030, 121A.060, 121A.080.

205. *See* R.I. GEN. LAWS § 17-25-19 (1998).

206. *See* MINN. STAT. ANN. § 211A (West 1997).

207. *See* HAW. REV. STAT. § 11-226 (1997).

208. *See* MASS. GEN. LAWS. ANN. ch. 55A, § 6; MINN. STAT. ANN. § 211A; HAW. REV. STAT. §§ 11-226, 11-235-7(g)(2).

Those are some of the programs that are out there. Some are more benign than others. I think the ones that push the envelope are going to fall. I think the ones that come closer to resembling New York's are going to be upheld. Ultimately, however, the Supreme Court is going to have to decide the issue and revisit *Buckley*.

MR. BARRETT: We are going to open up to some questions. I just want to start with one. Several of the speakers relied on me essentially. Those who were opposed to expenditure caps relied on the media and disclosure as a key element in dealing with the problems of quid pro quos and the problems of the campaign finance system.

Well, I tried to address that in my brief remarks at the start, which is that basically the quid pro quo story is a withering story. It is dying on the pages of newspapers. Television certainly will not cover it to any substantial degree; they would not even cover a senatorial investigation of it. Media managers believe the public is not interested in those stories. I have to fight to get them into the pages of the *Village Voice*.<sup>209</sup> And certainly, Rupert Murdoch and Mortimer B. Zuckerman, who have their own dealings with the governments, have not and are not going to give great play to campaign finance abuses.

So in regard to disclosure, I find it ironic that Mr. Kayser, who was on the Pataki Campaign Committee, supports disclosure because the Pataki Campaign Committee files their disclosure forms alphabetically by first name,<sup>210</sup> so it is impossible for reporters to discern. Because the disclosures are filed alphabetically by first name, the campaign finance documents must be re-collated and re-organized. And Mr. Kayser believes disclosure is the answer.

I think the question that Mr. Kayser posed is a hard question for everyone on the panel, and I would like to have each member of the panel try to address it. He asked, does anyone think government can restrict the number of advertisements you can buy or the amount of literature you can print?

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209. Mr. Barrett is published regularly in the *Village Voice*.

210. See Wayne Barrett, *Papering Over Giuliani & Pataki*, VILLAGE VOICE, Jan. 6, 1998, at 49.

I just want to say one other thing about the Ron Lauder campaign. I covered the Ron Lauder campaign. Mr. Kayser is confusing two facts. Mr. Lauder has always been a tremendous champion of term limits. He has spent millions of dollars promoting term limits. He did not spend one of the \$13 million he spent on his campaign to promote term limits.<sup>211</sup> All of that money was spent on the most negative campaign we have ever seen in New York City, directed at mayoral candidate Rudolph Giuliani, because Mr. Lauder was then an agent of Alfonse D'Amato.<sup>212</sup> He was not really running for mayor. He never did a positive commercial about himself. He spent \$13 million in 1989 attacking Rudolph Giuliani, now the incumbent mayor, for not supporting term limits.<sup>213</sup> Mr. Kayser is confusing that with other television campaigns that Mr. Lauder did conduct supporting term limits.<sup>214</sup>

But I think each member of the panel might want to address Mr. Kayser's question, and certainly Mr. Kayser should get a chance to rebut some of my statements. Does anyone think government can restrict the number of advertisements you can buy or the amount of literature you can print? Would anybody want to address that?

MR. JOERSS: Yes. No, I do not think government can directly limit the amount of advertisements you can buy. What government can do is set up voluntary systems similar to the Maine system, which I do not think goes too far. Government can also try to talk the media into giving free and discounted air time. The broadcast rights and the airways used by the media are public property.<sup>215</sup> The rights to the airways are leased by the broadcasters.<sup>216</sup>

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211. See Howard Kurtz, *The Sound Bites & the Fury for N.Y.'s Mayoralty: Koch and Challengers Rev It Up for Tomorrow's Primary*, WASH. POST, Sept. 11, 1989, at D1.

212. See *id.*

213. See *id.*

214. See Wayne Barrett, *Rudy Probed Al: The Agent Branded a Spy Investigated D'Amato*, VILLAGE VOICE, July 11, 1995, at 12 (reporting that Ron Lauder initiated a separate campaign on the term limits issue).

215. See Thomas F. Ackley, Note, *Political Candidates' First Amendment Rights Can Be Trumped By Journalists' Editorial Rights: Candidates Barred From Public Television Debate in Marcus v. Iowa Public Television*, 31 CREIGHTON L. REV. 475, 484-85 (1998); Camille Kimball, *Political Candidate Need to Speak Freely*, ARIZ. REPUBLIC, Mar. 28, 1998, at D7; Newton N. Minow, *Freeing the Public Airwaves From All Forms of "Free Air Time"*, CHI. TRIB., Apr. 2, 1998, at 23.

In that lease, Congress reserves the right to use those broadcast airways for the public good.<sup>217</sup> So there is legal ground for using the airways for debates or candidate advertisements. This is a way that candidates can get their messages out without having to rely on raising millions of dollars.

MR. BARRETT: Anybody else? Mr. Kastin, I think this goes directly to the system that you are operating.

MR. KASTIN: Right. I think one point to keep in mind is the limits that we are talking about. For example, the spending limit for the recent mayoral election—the general election, not the primary—was \$4.7 million. I think that is a very reasonable number to set for a mayoral campaign that lasts from September to November. Technically, any spending limit can be interpreted as limiting in effect the number of pamphlets ultimately printed, but is it really affecting the quality of the campaign? Do New Yorkers honestly believe that the number of issues that were raised during the campaign and the level of political debate were hindered by the spending limit? I think that because the spending limits are set high enough to allow for a reasonable campaign, there is no danger.

MR. BARRETT: Mr. Kayser, anyone else?

MR. KAYSER: I suppose, as a point of personal privilege, I would like to respond to a couple of remarks made by Wayne Barrett.

One, I did not cover the Lauder campaign as a journalist, the way Wayne did, but I disagree with his characterization of Ron Lauder's campaigning efforts. In an election, you vote for the candidate whose propositions you agree with. Wayne acknowledges that Ron Lauder was a significant supporter of term limits. So when Ron Lauder injects himself into a campaign and spends his money and raises his profile—and there were a lot of organizations that supported him—there was Change New York and other groups involved in fund-raising efforts for financing term limits. It may be that Wayne elected not to cover those aspects or did not re-

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216. See Ackley, *supra* note 215, at 484-85; Minow, *supra* note 215, at 23.

217. See 47 U.S.C.A. §§ 396, 548, 554 (West 1998).



alize that there was also an agenda relating to term limits. But there was, in terms of organizations and developing infrastructure and things that led to the successful campaign later.

You have to lay the groundwork for change in campaigns. I think, for example, Steve Forbes is doing the same thing with respect to his profile and persona with the issues that he has taken in terms of tax reform in the United States, which will probably be very fruitful a few years from now. But you cannot do it overnight. There is an educational process associated with it.

As to the fact that the Pataki campaign donors are listed alphabetically by first name. I am aware of this situation, and my awareness of that is why I say there is room for reform. That leads back to the disclosure laws. There can be much more effective disclosure. You can require by statute how things are to be done—the timeliness, how things are to be posted, how it is going to be organized. All of that can be legislated.

I am advocating those changes for disclosure. I believe the disclosure should be effective and should not be used as a subterfuge, it should not be done at the last minute, and it should be done in an easy way for journalists to have access. We do need change in that area. So I do not disagree with Wayne at all in that regard.

MR. LOPEZ: I would like to return to the question on the distribution of literature. There are two ways to look at this. If you are talking about placing limits on candidates in exchange for the receipt of public financing, I think that is one constitutional question. I think it is quite another, however, if you are talking about imposing limits on my right or your right as a non-candidate to spend your money on the distribution of literature. I would hope that no one here is suggesting that under *any* circumstance that is an appropriate remedy for what many people see as an evil independent expense.

MR. BARRETT: All right. How about some questions from the audience? Anybody have any questions?

QUESTION: A question I know previous speakers have touched on but I would like to hear more about is enforcement. I have filled out the Federal Election Commission (“FEC”) reports and they lack a lot of basic information. The FEC is also very lax

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on enforcement. I also believe that currently the FEC only has about a handful of investigators, which hampers any investigation. For example, presidential campaigns from 1988 have just paid their FEC fines in the last few years.<sup>218</sup> Do you think that a stepped-up enforcement or the creation of a more non-partisan and more powerful FEC would help resolve some of the problems we have? I would also like to hear Mr. Kastin's comments on how New York City handles those kind of problems.

MR. KASTIN: One important difference between New York City's program and the FEC is that the City's program conducts enforcement during the election cycle. So, for example, in 1997 the Giuliani campaign was fined prior to the election.<sup>219</sup> Because the FEC conducts investigations after the elections, candidates may be less concerned about violating campaign finance regulations. That element alone does lend some bite to New York City's program because candidates are aware that they may face a fine prior to the election if they fail to follow the requirements.

Another difference between the two is that the members of the Campaign Finance Board are non-partisan and the FEC is appointed equally between Democrats and Republicans.<sup>220</sup> That factor also lends an element of gridlock in the FEC because you naturally are going to have certain members aligned with one candidate.

MR. BARRETT: Let's just say that the FEC does not have Father O'Hare,<sup>221</sup> who, speaking of the First Amendment rights, may

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218. See Benjamin Weiser & Bill McAllister, *The Little Agency That Can't; Election-Law Enforcer is Weak by Design, Paralyzed by Division*, WASH. POST, Feb. 12, 1997, at A1; *What About FEC? A Simple Route to Cleaner Campaigns*, MINNEAPOLIS-ST. PAUL STAR TRIB., Oct. 17, 1997, at A26.

219. In 1997, the New York City Campaign Finance Board fined Mayor Giuliani's re-election campaign \$243,490 for exceeding contribution limits. See Clifford J. Levy, *Giuliani Campaign Is Fined \$220,000 Over Contributions*, N.Y. TIMES, Sept. 19, 1997, at A1; Jonathan P. Hicks, *Chairman of City Campaign Finance Board Calls For Sharp Changes in Rules*, N.Y. TIMES, Feb. 26, 1998, at B8, C2 (reporting that the Campaign Finance Board temporarily cut off public funds to the Giuliani campaign after finding that hundreds of thousands of dollars in contributions to Giuliani had violated the rules).

220. See 2 U.S.C.A. § 437c(a)(1) (West 1998 & Supp. 1998) ("No more than 3 members [of the 6 appointed by the President] . . . may be affiliated with the same political party."); NEW YORK CITY ADMIN. CODE § 3-708(1).

221. Father Joseph O'Hare is chairman of the New York City Campaign Finance

not be re-appointed based on some of the things he just did.<sup>222</sup>

MR. GARNER: I am Robert Garner, managing editor of the *Fordham Intellectual Property, Media & Entertainment Law Journal*, and I have a broader question on First Amendment rights for Mr. Lopez. You mentioned that there might be a problem with conditioning the number of campaign advertisements and pamphlets and such on the receipt of public funds. I want to ask you if that would fall under the doctrine of unconstitutional conditions?

MR. LOPEZ: Right. We do not believe that the government should be able to condition the receipt of government benefits on the waiver of a constitutional right. The unconstitutional conditions doctrine grew out of cases in which the Supreme Court said that you could not do that.<sup>223</sup>

Unfortunately, there has been a retreat from those cases, most recently in the arts funding context and also in the hospital funding context. According to the recent cases, for example, if you want to receive government funds, you cannot conduct abortions;<sup>224</sup> if you want to get government grants to create art, you cannot do art

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Board and the President of Fordham University.

222. See William Murphy, *Missing Out on Budget Process*, NEWSDAY, Apr. 3, 1998, at A36.

223. The state cannot attach unconstitutional conditions to the receipt of government benefits. See *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (holding that the state cannot revoke or withhold a benefit as a penalty for exercising a constitutional right); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding that the state cannot deny a benefit, including a contract or other privilege, simply because the intended recipient refuses to relinquish a constitutional right); *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) (same); *Frost v. Railroad Comm'n*, 271 U.S. 583 (1926) (refusing to allow California to impose unconstitutional conditions on the use of its highways). *Frost* set forth one of the earliest, best-known, and most forceful statements of the doctrine of unconstitutional conditions:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. . . . It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

*Id.* at 593.

224. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (ruling that a state need not commit any resources to performing abortions because nothing in the Constitution requires states to enter or remain in the abortion business or entitles private physicians and their patients to access to public facilities for the performance of abortions).

which is pornographic art.<sup>225</sup>

MR. GARNER: If I may follow up, didn't the Court make a distinction between unconstitutional conditions and the purchase of government services, as in case regarding federal funding for family planning clinics?<sup>226</sup>

MR. LOPEZ: Yes, but it is one of those distinctions that we really think is not a distinction,<sup>227</sup> and I guess that is where we would part company with the Court.

MR. BARRETT: Anyone else?

MR. KAYSER: If I could comment on that question for a minute. One of the general problems that we have in our society today is that we do not live long enough, so our collective memories from generation to generation are pretty short. There are not many of us who have a recollection of the way the United States was in the 1920s, for example, or the 1930s, before the New Deal.

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225. See, e.g., *Advocates for Arts v. Thomson*, 532 F.2d 792 (1st Cir. 1976) (ruling that governor and Executive Council of New Hampshire did not stifle free expression by reversing art grant awarded to literary magazine due to the magazine's publication of a purportedly offensive poem). But see *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1475-76 (C.D. Cal. 1992) (striking down the National Endowment for the Arts' ("NEA") "decency" clause for artistic grants), *aff'd*, 100 F.3d 671 (9th Cir. 1996), *cert. granted*, \_\_\_ U.S. \_\_\_, 118 S. Ct. 5541 (1997); *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F. Supp. 774, 785 (C.D. Cal. 1991) (finding NEA's certification requirement unconstitutional).

226. See *Rust v. Sullivan*, 500 U.S. 173, 196-97 (1991) (allowing the government to prevent the use of federal funds to disseminate abortion-related advice at federally-funded family planning clinics). As the Court explained in *Rust*, "when the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 194.

227. *Rust* stands for the proposition that the government may make content-based choices when it is the speaker or when it enlists private entities to convey its own message. The Court cautioned, however, that its holding in *Rust* would not apply to public fora or to universities, which occupied "a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted." *Rust*, 500 U.S. at 200. That distinction was tested in *Rosenberger v. Rector and Visitors of the University of Virginia*, in which the Court ruled that a public university could not deny funding to a student publication based on its religious content: as long as the publication did not speak for the university. 515 U.S. 819 (1995). In both *Rosenberger* and *Rust*, the Court attempted to draw a fine line between conditions imposed on government-funded private speech and conditions imposed on the government's own speech or that of its surrogates.

During this century, the government's involvement in all sorts of different areas of people's lives has continued to increase. So we face problems with conditioning some government benefit upon the release of some right.<sup>228</sup> For example, in exchange for public housing, one might be forced to waive his Fourth Amendment right against unreasonable search and seizure. This type of exchange is endemic in our society.

The best way of dealing with it, in my opinion, is to move toward mechanisms which do not depend upon government financing and which have more empowerment and protections for the individual. In this way, you might avoid raising those issues in the beginning. So, for example, you can privatize public housing, you sell it off, and you distribute it, basically co-op it, and give people the right to own what they are living in. You put capital into the hands of individuals and then you could add greater property protections for individuals in our society.

We need a smaller, less intrusive government, with less dependency upon government. That will protect us with respect to our constitutional rights and those unreasonable conditions requiring a person to waive constitutional rights.

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228. See, e.g., *Perry v. Sinderman*, 408 U.S. 593 (1972) (ruling that a state college could not refuse to renew a non-tenured professor's contract in retaliation for his public criticism of the school administration). In *Perry*, the Court held that a state cannot condition a benefit on a restriction of protected First Amendment activity even where the benefit is discretionary, rather than an entitlement:

For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. . . . Such interference with constitutional rights is impermissible.

*Id.* at 587 (citation omitted); see also, e.g., *Speiser v. Randall*, 357 U.S. 513 (1958). In *Speiser*, the Court ruled that California could not deny a tax exemption to applicants who refused to sign a loyalty oath. The Court rejected the idea that because the tax exemption was a discretionary "privilege" or "bounty," the limitation placed on the "privilege" could not be a First Amendment violation:

[A] discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. . . . To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.

*Speiser*, 357 U.S. at 518.

MR. BARRETT: Who is next?

QUESTION: This is a question for anyone who wants to address it. In light of the Supreme Court's decision two years ago in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*,<sup>229</sup> where they said that political parties can basically spend limitless amounts of money on behalf of political candidates. Besides contribution limits of \$1,000 per individual or \$5,000 per PAC, what is really left to the campaign finance laws when any group or any individual can basically run a campaign for a candidate?

MR. LOPEZ: Let me clarify something you said about that case that is a mistake. The Court said that political party spending does not violate the contribution limits set down by FECA as long as the political party's spending is not coordinated with the candidate.<sup>230</sup> In other words, the political party has the right to go out and expressly advocate the election or defeat of a particular candidate. The FECA folks said, by definition, political party is the alter-ego of the candidate.<sup>231</sup> The Supreme Court did not accept it.<sup>232</sup> The Court said, as long as it is not coordinated, they are independent creatures.<sup>233</sup>

QUESTION: Just to look at that again. What is to stop the Republican Party from running Bob Dole's campaign for him?

MR. KAYSER: I can answer that. First, the question you are raising is actually the focal point of the investigation and the decision by U.S. Attorney General Janet Reno not to appoint a special prosecutor for President Clinton.<sup>234</sup> President Clinton raised money and directly oversaw the Democratic National Committee's running of his advertisements during his campaign.<sup>235</sup> There was clear coordination in fund-raising and everything, all under one en-

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229. 518 U.S. 604 (1996).

230. *See id.* at 608, 613.

231. *See id.* at 613.

232. *Id.* at 613-14.

233. *Id.* at 614-16.

234. *See* Ronald J. Ostrow & Jonathan Peterson, *Reno Won't Seek Special Counsel on White House Calls Politics*, L.A. TIMES, Dec. 3, 1997, at A1.

235. *See* Lena H. Sun, *Huang Accused of Seeking to Mask DNS Funds*, CHI. SUN-TIMES, Feb. 20, 1997, at 16.

tity.

But Janet Reno basically has made the decision, as attorney general of the United States, that we no longer have any restrictions to speak of that are meaningful under the current statutory system. That is the de facto decision of the attorney general of the United States.

In some ways I agree with her. I think the best thing is just to junk it, move away from it, have full disclosure, effective disclosure, and accept Janet Reno's decision. I think that basically that is what the American public has decided too. That is why we do not have the people up in arms over what is going on here. The American people do not want the restrictions on either the contributions or expenditures.

I think that is the minority position. It has the support and it is resonated in journals like the *New York Times* and in certain other journals, who already have a forum and would like to restrict people who do not control the media but who need a outlet, because that enhances the media on a relevant basis. As my fellow panelist Ed Hayes mentioned earlier, it is a question of whose ox is gored: who is trying to advocate something to the detriment of somebody else.

But the First Amendment is there, fortunately, and we have a Supreme Court that is going to stand behind it. The sooner that we call it the way it is, move ahead, and get over this—we are wasting an awful lot of time over a debate that is going nowhere in terms of change in the direction of more restrictions. What we ought to move toward is more liberty, more freedom, more competition, and full disclosure. I think that is what most people want. I think if there were a vote held today, that is the way it would be in the United States.

But the majority decision is not the way it is going to be determined. It is going to be determined by the law—the United States Constitution.

MR. BARRETT: We are running out of time. We have time for one more question.

MR. JOERSS: One quick point. I think the idea of removing all spending and contribution limits and increasing disclosure and

calling it reform is somewhat preposterous. To remove all of the laws would create a legalized system of bribery: based on which candidates are receiving the money. There are enough ways that the party can run that money around, even with strong disclosure laws, that we are not going to get good answers about this. The fundamental problem remains: Huge amounts of capital coming in from individuals, which is subverting the democratic process.

MR. BARRETT: Mr. Joerss, didn't you indicate in your presentation that the poll showed substantial support for it?

MR. JOERSS: In the CBS News/*New York Times* poll, nine out of ten Americans supported radical reform of the campaign finance structure and say it is broken.<sup>236</sup>

MR. BARRETT: Do the polls indicate whether or not they favor restrictions on contributions or expenditures, or just that they want to see some radical change?

MR. JOERSS: They said the system is broken and needs fixing. Whether they specifically want to scrap all existing laws except disclosure, I do not know, but I would not think so.

MR. KASTIN: In New York City, the media and public often place heavy pressure on politicians to join the program.<sup>237</sup> As a result, the numbers for joining are very high. As far as New York City goes—this may be different than the rest of the country—it is clear that the media and the public do want politicians to abide by limits.

MR. BARRETT: Last question.

QUESTION: Mr. Kayser, wouldn't the net effect of the system that you are proposing, in which there were no restrictions at all, lead to having the exact opposite effect of what you are saying?

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236. See Lewis *supra* note 63, at F32.

237. See ROAD TO REFORM, *supra* note 121, at 10. The Campaign Finance Board reported that candidates responded to media pressure to join the program:

One reason participation has increased from election to election may be the increasing attention the Program has received from the media. Considerable dissatisfaction has been expressed by editorial boards at "politics as usual" campaigns, and participation in the Program is regarded as an important criterion by which to judge whether a campaign has rejected these practices.

*Id.*



Would there be, in fact, a new exclusivity of access to media and to campaigning—restricted to those who could afford to buy it, or is that just the way it is and that's unfair?

MR. KAYSER: I do not know. But when you talk about exclusivity, you are assuming that there is a monolithic aspect to wealth and that people who have money all agree with one position. I assume that that is the corollary of what you are saying.

My experience is that we have a fairly wide distribution of wealth in the United States and in the world, but particularly in the United States, and that there is a lot of diversity. I do not find that people who have wealth necessarily agree on issues. In fact, I find that people who have wealth are intellectually pretty acute with respect to issues and there is a lot of disagreement. Therefore, the idea that people with money in the private sector or the personal sector are going to speak with one voice is just wrong.

Also, I think that there are diverse opinions embodied in different sources, whether it be in television or in newspapers. We have plenty of diversity in the United States. To suggest that you need to put caps on people's access with money in order to avoid exclusivity or a monopoly on ideas is ludicrous, just ludicrous. It cannot be supported by any objective analysis.

Why try to regulate something that does not need to be regulated and under our Constitution cannot effectively be regulated? It has been shown that way. Why try to? The United States is not broken. To the extent that we have tried to do some things under our statutory system, which clearly does not work, that is broken. And if you want to talk about the public wanting radical reform, yes, I am a reformist, I would be in the majority of the poll taken.

If the right questions were asked, I would suggest that the position that I am articulating is the majority position. But I am saying that is really not the issue; the issue is the analytically correct position under our Constitution, and that is what should govern the day.

MR. BARRETT: I want to thank everybody for coming and for participating in this symposium discussion. Thank you.