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A NATURAL LAW DEFENSE OF BUCKLEY V. VALEO

Jack B. Sarno*

"Man is by nature a political animal . . . ."1

—St. Thomas Aquinas

—Aristotle

INTRODUCTION

By most accounts, philosophy departments and law schools are paying renewed attention to the natural law.2 Contemporary natural law theorists have provided sophisticated accounts of practical reasoning that have significantly contributed to contemporary moral debate.3 Although the natural law tradition, also referred to as the "perfectionist tradition,"4 dates back to Aristotle,5 it has proved timeless enough to weigh in on fundamental modern debates over the inviolability of

* I am grateful to Eugene Harper, adjunct professor, Fordham University School of Law, for his helpful instruction and comments. This Note is written, as the Jesuits say, ad majorem Dei gloriam.


2. See Robert P. George, Recent Criticism of Natural Law Theory, 55 U. Chi. L. Rev. 1371, 1372 (1988) (remarking that natural law theory has "again found an audience in the secular academy") [hereinafter Recent Criticism]; see also Steven D. Smith, Natural Law Theory: Contemporary Essays, 10 Const. Comment 489, 490 (1993) (book review) (observing that recent natural law scholarship has provided "new vigor to academic thinking on this subject"); Kevin M. Staley, New Natural Law, Old Natural Law, or the Same Natural Law?, 38 Am. J. Juris. 109, 109 (1993) (assessing the "renewal" of natural law theory in the works of Germain Grisez, John Finnis, and Joseph Boyle). The "natural law" generally refers to the universal moral law that man can discover by reason. See Black's Law Dictionary 1026 (6th ed. 1990).


4. The "perfectionist tradition" refers generally to the "argument extended through time" that law and politics play a valid role in making citizens virtuous. See generally Robert P. George, Making Men Moral 19-21 (1993) [hereinafter Making Men Moral] (describing the perfectionist tradition).

5. See Aristotle, Nicomachean Ethics 1134b18-20 (Terence Irwin trans., Hackett Publishing Co. 1985) [hereinafter Ethics] ("One part of what is politically just is natural, and the other part legal."). Aristotle (384-322 B.C.) claimed that the law should direct members of the political community to be "good and just." Politics, supra note 1, at 1280b12.

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human rights, the justice of so-called "morals legislation," and the doctrine of unjust laws (lex injusta non est lax).

Perfectionist theory has frequently had the most impact in the area of contentious social issues. This disparate impact, however, should not obscure contemporary natural law theory's potential influence in all matters of human thought, choice and action. Modern partisans of the perfectionist tradition have presented comprehensive theories of political morality and human well-being that address more than just so-called "hot button" issues. The natural law equips citizens and legislators to respond effectively and reasonably to any moral question.

The natural law theory that this Note outlines in the pages that follow, and part II in particular, is not original. After all, the natural law is a "tradition" as much as it is a political theory or a school of thought. It is a "tradition" because adherents of the natural law, while squabbling internally on several interpretive points, generally

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6. See Natural Law and Natural Rights, supra note 3, at 223-26 (noting that natural law theory, unlike utilitarian theories practiced by many governments, protects absolute rights).

7. See Making Men Moral, supra note 4, at 71-82. "Morals legislation" refers to laws that proscribe so-called private or victimless immoral conduct such as assisted suicide, euthanasia, dissemination and use of pornography, abortion, adultery, and homosexuality.

8. See Natural Law and Natural Rights, supra note 3, at 351-66. The unjust law doctrine holds that positive law that is contrary to the requirements of the common good and practical reasonableness imposes no moral obligation on the citizen. Id. at 359-60.


10. For a natural law explanation of bankruptcy law, see Natural Law and Natural Rights, supra note 3, at 188-93.


12. See Making Men Moral, supra note 4, at 19.
agree on certain fundamental matters. Natural law theorists openly build upon and reshape the work of their perfectionist predecessors. St. Thomas Aquinas, for example, interpreted and expanded upon Aristotle's work and provided the critical link between ancient and modern natural law thought. Contemporary perfectionist theorist German Grisez borrows extensively from Aquinas's theory. John Finnis, in turn, acknowledges that components of the ethical theory he advances in *Natural Law and Natural Rights* are "squarely based" on his interpretation of Grisez's work. Robert George's recent book, *Making Men Moral: Civil Liberties and Public Morality*, adds to these contributions by presenting the natural law tradition in the modern parlance of civil liberties. Whereas these prolific scholars have already articulated the principle components of general natural law theory, this Note will apply the theory to a current "moral" debate—the ongoing effort to reform the federal campaign finance laws.

Specifically, this Note will advance a perfectionist defense of *Buckley v. Valeo*. *Buckley* is the seminal case on the campaign finance question and one that is roundly criticized by legal commentators and politicians who advocate stricter campaign financing. The criticism of *Buckley* and the advocacy of stricter campaign financing has its philosophical roots in the "liberal" tradition. This Note, therefore, will illuminate specific differences on campaign finance policy, as well

13. Id.
14. See id. at 19-20.
15. Aquinas's (1225-1274) influence on western philosophical thought should not be understated. See On Law, supra note 1, at xi, xiii, xxi. His works include the unfinished *Summa Theologiae*, the *Sentences of Peter Lombard*, commentaries on Aristotle's *Ethics and Politics*, the *Summa Contra Gentiles*, and *On Kingship (De Regno)*. *Id.* at xx. He initiated the medieval revival of classical Greek philosophy. The Church made him a saint in 1323. *Id.* at xiii. In 1879, Pope Leo XIII ushered in a neo-scholastic revival in the seminaries by calling for a Church-wide return to Thomism. See Thomas Guarino, *Before the Papacy*, First Things, Apr. 1998, at 39 (reviewing Rocco Buttiglione, *Karol Wojtyla: The Thought of the Man Who Became John Paul II*), which discusses Wojtyla's philosophical upbringing and recounts the encyclical of Pope Leo XIII (Aeterni Patris).
17. Natural Law and Natural Rights, supra note 3, at vii.
18. See *Making Men Moral*, supra note 4, at 190. In *Making Men Moral*, Professor George contends that perfectionist theory is consistent with modern notions of pluralism and individual rights. See id.
20. See infra note 145-152 and accompanying text.
as the broader and deeper philosophical differences between the perfectionist and liberal traditions. Only through what philosophers refer to as “practical reasoning” can a citizen or a legislator decide whether the Buckley decision is sound and whether to support the latest efforts to enact new campaign finance restrictions.

22. Contemporary liberal political theory can be roughly divided into at least three schools of thought. Some liberals adopt John Stuart Mill’s utilitarian political theory. See John Stuart Mill, On Liberty 14 (Curtin V. Shields ed., 1956) (1859) [hereinafter On Liberty] (stating that he “regard[s] utility as the ultimate appeal on all ethical questions”). Under Mill’s utilitarianism, decisions are evaluated and rights are granted with a view to the greatest benefit to society as a whole. See id. at 13. Natural law theorists criticize utilitarian liberals for assuming that one can decide among incompatible options by weighing the amount of “benefit” each choice would realize. For a discussion of this incommensurability thesis, see infra notes 292, 324, 331 and accompanying text. Other liberals adopt the course that Mill explicitly rejected: determining moral questions with reference to the idea of “abstract right.” See On Liberty, supra, at 14. These theorists argue that one or more abstract principles dictate that certain individual rights exist irrespective of their utility to society as a whole. See Making Men Moral, supra note 4, at 83-84. For example, liberal theorist Ronald Dworkin bases his theory on an abstract right to equal “concern and respect.” See Ronald Dworkin, Taking Rights Seriously 199 (1977) [hereinafter Taking Rights Seriously]. Under this theory of political morality, the government has no business regulating affairs with a view to a particular moral or religious conception of the good life. See Ronald Dworkin, A Matter of Principle 191 (1985) [hereinafter A Matter of Principle]. For the natural law critique of Professor Dworkin’s theory, see infra part II.E. Other liberals eschew Professor Dworkin’s “procedural liberalism” in favor of a philosophy that does not require the government to be neutral among the conceptions of what constitutes the “good life.” See Michael J. Sandel, The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues, 66 Fordham L. Rev. 1, 2 (1997). Under Professor Sandel’s civic republican theory, it is proper for politics and law to instill certain civic virtues in the members of the political community so that they can “share in self-rule.” See id. at 3. Natural law theorists concur with civic republicans that the state plays a “formative” role in promoting certain virtues. See id. at 20 (noting that civic republicans and natural law theorists both criticize procedural liberalism on its requirement that the state avoid the promotion of any conception of the good life). Natural law theorists, however, ask why law and politics should merely promote certain civic virtues and not any other sort of virtue. See id. at 19 (natural law professor Eugene Harper querying Professor Sandel on why, given the formative nature of his project, he does not more fully embrace Aquinas and other natural law theorists).

23. This Note does not presume that all, or even any, natural law theorists will share the conclusions reached in this Note about the campaign finance laws. At the very least, however, this Note provides a method for legislators and citizens to approach these questions, even if a particular legislator or citizen eventually reaches different conclusions. These conclusions may be entirely valid, so long as they comport with the rules of practical reasoning. See infra part II.B-D for a description of the requirements of practical reasonableness.

Critics often claim that the perfectionist tradition’s premises yield rigid conclusions and threaten liberty. See Making Men Moral, supra note 4, at 76-78. Professor George notes the irony in the criticism: “The legislator acting on the tradition’s premises may, of course, make mistakes. . . . He may fall victim to his own peculiar prejudices or to prejudices widely shared in his culture. The premiss he accepts, however, requires him to reason about the [decision.]” Id. at 77-78. Thus, a legislator debating campaign finance reform who accepts the premises of this Note may nonetheless draw slightly different conclusions on precise questions of campaign finance. In all cases, however, the tradition requires the legislator to provide public reasons to justify his conclusions and, furthermore, to avoid non-rational impulses like bias or
Part I presents an overview of the campaign finance debate as it has played out in the judiciary, the scholarly journals, and the Congress in the last twenty-five years. This part examines the relevant case law, focusing primarily on the seminal Buckley decision. In addition, this part will detail the latest reform effort by Buckley opponents in Congress. Part II provides a general account of perfectionist theory as outlined by contemporary natural law theorists—primarily John Finnis, Germain Grisez, and Robert George. Part III then moves from general natural law theory to identify and defend a natural law free speech principle. Armed with this free speech principle and the rules of practical reasonableness, a legislator can intelligently decide how to vote on the campaign finance issue. Part IV contends that a legislator who applies practical reasoning to this issue should conclude that the major criticisms of Buckley are unwarranted. This part also applies natural law principles to the latest campaign finance reform proposal in Congress.

I. Overview Of The Campaign Finance Debate

This part will analyze the campaign finance debate as it has played out over the last twenty-five years. Part I.A describes the federal law that started the debate over campaign finance. Part I.B explains Buckley v. Valeo, the Supreme Court decision that nullified portions of that law. The Buckley holding remains undisturbed by subsequent case law despite a barrage of criticism from commentators and legislators. Part I.C discusses the philosophical roots of the criticism of Buckley. Part I.D details the latest version of campaign finance "reform" sponsored by critics of Buckley in Congress. Although it has been almost twenty-five years since Buckley, the campaign finance debate has changed very little over the years.

A. Federal Election Campaign Act of 1974

The Federal Election Campaign Act of 1971 and the 1974 amendments thereto (collectively "FECA") sought to remedy the appear-
ance of a corrupt political process in the wake of Watergate and to level the electoral playing field by reducing campaign costs. Under FECA, Congress (a) limited individual political contributions to any federal candidate in an election to $1000, with a total annual limitation of $25,000 to all federal candidates by any single contributor; (b) limited individual contributions to political committees to $5000 per year; (c) limited contributions from registered political action committees ("PACs") to a federal candidate to $5000; (d) limited "independent expenditures"—expenditures not coordinated with the candidate or his campaign—by individuals and groups "relative to a clearly identified candidate" to $1000 per year; (e) limited total campaign spending by a federal candidate and his campaign organization based on a district-by-district formula; (f) restricted a candidate's use of personal funds in his campaign; and (g) limited expenditures by political parties in connection with federal election campaigns.

28. 2 U.S.C. § 441a(a)(1)(A), (3) (1994). FECA also limits individual contributions to national political parties to $20,000 per year. Id. § 441a(a)(1)(B).
29. Id. § 441a(a)(1)(C). A "political committee" is any "group of persons which receives contributions . . . or which makes expenditures aggregating in excess of $1,000 during a calendar year." Id. § 431(4)(A). The Supreme Court upheld the $5,000 limit on individual contributions to political committees in California Medical Assoc. v. FEC, 453 U.S. 182, 184-85 (1981) (plurality opinion).
30. See id. 2 U.S.C. § 441a(a)(2)(A) (1994). A PAC (also referred to as a "multi-candidate political committee") is an organization registered as a political committee for at least six months, which has received contributions from at least 50 people and which has contributed to at least five candidates. Id. § 441a(a)(4). Contributions from PACs to national political parties may not exceed $15,000 per year. Id. § 441a(a)(2)(B).
32. See 18 U.S.C. § 608(c) (1970 & Supp. IV 1974) (repealed 1976). The overall Senate campaign expenditure limits were based on a formula tied to the size of the applicable state's voting population, with minimum amounts for sparsely-populated states. Id. The overall House campaign expenditure limit was $70,000 for both primary and general election campaigns, with a "carve-out" for thinly-populated states. Id. FECA indexed these expenditure limitations for inflation. See id. § 608(d). The Buckley Court struck down this provision as a violation of the First Amendment. See infra note 66 and accompanying text.
33. See 18 U.S.C. § 608(a)(1) (1970 & Supp. IV 1974) (repealed 1976). This provision limited expenditures from personal funds or the personal funds of his immediate family in each calendar year to $50,000 for Presidential and Vice Presidential candidates, $35,000 for Senate candidates, and $25,000 for most candidates for the House of Representatives. Id. The Buckley Court found this provision unconstitutional. See infra note 65 and accompanying text.
34. See 2 U.S.C. § 441a(d) (1994). In Senate elections and House races in states with only one representative, this provision prohibits spending by a state committee of a political party the greater of $20,000 or $.02 multiplied by the voting age population of the state "in connection with" a federal campaign. Id. § 441a(d)(3)(A). In all other House elections, FECA prohibits the party from spending more than $10,000 on behalf of the candidate. Id. § 441a(d)(3)(B). In the case of a presidential candidate,
addition, the law mandated public disclosure of all contributions above a threshold level, in addition to other reporting requirements. Finally, FECA created both the public funding system for presidential campaigns that exists today and the Federal Election Commission

FECA allows party expenditures in an amount not greater than $0.02 multiplied by the voting age population of the United States. Id. § 441a(d)(2). The Supreme Court recently held that the party expenditure restriction as applied to uncoordinated party independent expenditures was unconstitutional. See Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996). For a more detailed discussion of Colorado Republican Fed. Campaign Comm., see infra notes 89-106 and accompanying text.

35. See 2 U.S.C. § 434 (1994). FECA requires all political committees to register with the FEC, id. § 433(a), to maintain records of all contributions received in a calendar year, id. § 432(c), and to record any disbursements in excess of $200. Id. § 432(c)(5). Political committees, including the authorized campaign committees of federal candidates, must file periodic reports to the FEC detailing the amount of cash on hand, id. § 434(b)(1), the total amount of contributions and other receipts for the reporting period and the calendar year, id. § 434(b)(2), the identification of contributors and other financial sources that contribute in excess of $200 in a calendar year, id. § 434(b)(3), the total amount of disbursements for the reporting period and the calendar year, id. § 434(b)(4), and the names and addresses of recipients of expenditures by the political committee that exceed $200. Id. § 434(b)(5)(A). Congress authorized the FEC to conduct periodic audits of these reports. Id. § 438(b). Finally, FECA requires every individual and group, other than a political committee or candidate, to file a disclosure statement to the FEC with respect to independent expenditures that exceed $250 in a calendar year. Id. § 434(e).

36. 26 U.S.C. §§ 9001-9042 (1994) [hereinafter Presidential Fund Act]. The Presidential Fund Act induces presidential candidates of the major parties to abide by certain funding restrictions in exchange for partial public financing. See id. § 9006. The statute established three separate accounts to help subsidize certain presidential campaign activities. These accounts are funded in the aggregate amount designated by individual and joint taxpayers by the means of the voluntary dollar check-off system. First, the Presidential Fund Act provides up to $4,000,000 for a major party's presidential nominating convention, id. § 9008(b)(1), so long as the party's expenditures do not exceed the dollar amount, id. § 9008(d)(1), and do not go for anything but convention expenses. Id. § 9008(c). Minor parties receive a portion of the major party amount based on a ratio determined by party's vote count in the last election. Id. § 9008(b)(2). The statute indexes both amounts for inflation. Id. § 9008(b)(5).

Second, the Presidential Fund Act provides presidential candidates of the major parties up to $20,000,000 for the general election and $10,000,000 for the primary election—the amounts indexed for inflation beginning in 1976. See 2 U.S.C. § 441a(b)(1)(A)-(B), 441a(c) (1994). The statute conditions these funds on the candidate's pledge not to spend amounts in excess of the amounts provided in section 9004 and not to solicit contributions except to the extent the fund is insufficient to finance the full expenses. See 26 U.S.C. § 9003(b) (1994). Again, minor parties receive these funds based on their performance in the last election. See id. § 9004(a)(2)(A). The Presidential Fund Act prohibits personal expenditures in excess of $50,000, id. § 9004(d), prompting recent wealthy presidential hopefuls, Ross Perot and Steve Forbes, to eschew public financing. See David Frum, An End to Money Grubbing: Changing the Campaign Finance System, Wkly. Standard, Jan. 15, 1996, at 25, 26. Finally, the statute establishes a fund to help defray primary election costs. See 26 U.S.C. § 9037(a) (1994). If a presidential candidate raises at least $5,000 from at least twenty states, counting only the first $250 of each contribution, id. § 9033(b)(3), and abides by the spending limits in section 9033, the fund provides him with matching funds according to a formula. See id. § 9034(a).
("FEC") to administer and enforce the law. In sum, FECA set up an unprecedented, comprehensive system of campaign finance regulation that touched on all aspects of the federal election funding process.

B. The Buckley Decision

Shortly after Congress enacted FECA, Senator James L. Buckley, a conservative Republican from New York, Eugene McCarthy, a liberal Presidential aspirant from Minnesota, and various political parties and civil liberties organizations challenged most of FECA's major provisions on First Amendment grounds.

1. The Lower Court Decision

The plaintiffs sought a declaratory judgment that FECA's major provisions were unconstitutional and an injunction against enforcement of the provisions. The federal district court for the District of Columbia entered an order adopting certain findings of fact and sent the case up to the Court of Appeals. On plenary review, the Court of Appeals sustained FECA's provisions, holding that contributions and expenditures involve "conduct" and only incidentally affect "speech." The court analogized contribution and expenditure limitations to the criminal prohibition against draft card burning that the Supreme Court upheld in United States v O'Brien. In O'Brien, the Court held that when activity, like draft card burning, involves both speech and non-speech elements, a court should apply relaxed constitutional scrutiny. In other words, a sufficiently important government interest in regulating the non-speech element can justify incidental First Amendment restrictions. The Court of Appeals viewed contributions and expenditures as involving both elements of speech and conduct. Following O'Brien, the Court of Appeals applied lenient scrutiny and upheld all but one of the challenged provisions.

38. Petitioners included the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, the New York Civil Liberties Union, the American Conservative Union, the Conservative Victory Fund, and Human Events. See Buckley v. Valeo, 424 U.S. 1, 8 (1976) (per curiam). Respondents included the Secretary of the United States Senate and the Clerk of the House of Representatives, in their official capacities, the United States Attorney General, and the Comptroller General of the United States. Id.
39. Id. at 8-9.
40. Id. at 9.
42. 391 U.S. 367 (1968).
43. See id. at 376-77.
44. Id.
based on the government's "clear and compelling interest" in preserving the integrity of the campaign finance system.\footnote{45. See Buckley, 519 F.2d at 841. The lower court struck down a reporting provision under section 437a as unconstitutionally vague. See \textit{id.} at 843.}

2. The Supreme Court Decision

On appeal, the Supreme Court rejected the \textit{O'Brien} analogy.\footnote{46. See Buckley v. Valeo, 424 U.S. 1, 16 (1976) (per curiam).} The Court observed that even if contributions and expenditures could be characterized as "conduct," these restrictions directly, and not just incidentally, suppressed speech.\footnote{47. \textit{Id.} at 17.} In \textit{O'Brien}, the Court conceded that the government's interest was to preserve draft cards, and the suppression of the symbolic speech was only incidental.\footnote{48. See United States v. \textit{O'Brien}, 391 U.S. 367, 376-77 (1968).} By contrast, the government's interest in regulating political contributions and expenditures "arises in some measure because the communication [or more precisely, the quantity of communication] allegedly integral to the conduct is itself thought to be harmful."\footnote{49. See Buckley, 424 U.S. at 17 (quoting \textit{O'Brien}, 391 U.S. at 382).}

The Court concluded that FECA's contribution and expenditure limitations imposed direct quantity restrictions on political speech.\footnote{50. \textit{Buckley}, 424 U.S. at 18.}

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.\footnote{51. \textit{Id.} at 19.}

The Court made clear that political spending is entitled to the highest constitutional protection and that Congressional efforts to restrict valid political spending must withstand strict scrutiny.\footnote{52. \textit{See id.} at 17.} This premise has remained a foundation of the Court's campaign finance jurisprudence since \textit{Buckley}.\footnote{53. \textit{See infra} Part I.B.3.}

Nevertheless, the \textit{Buckley} Court did not find that contribution and expenditure restrictions posed equal threats to the First Amendment.\footnote{54. \textit{See Buckley}, 424 U.S. at 23.} While the contribution restrictions involved only "marginal restriction[s]" on an individual's ability to communicate,\footnote{55. \textit{Id.} at 20. The Court reasoned that a contribution serves as a "symbolic expression of support" for the candidate and his positions. \textit{Id.} at 21. The communicative value of a contribution, unlike an expenditure, does not "increase perceptibly with the size of his contribution." \textit{Id.} At most, the Court explained, the size of a contribution is only a rough measure of the intensity of the contributor's support for the candidate. \textit{Id.} The Court cautioned, however, that "contribution restrictions could have a severe
diture restrictions "substantially" restrained the total quantity of political communication. The government offered three rationales to justify these restrictions: (1) to prevent corruption and the appearance of corruption; (2) to equalize the relative ability of individuals and groups to influence the election process; and (3) to control the alleged "skyrocketing" costs of political campaigns, thereby opening up the political process to those without large amounts of resources. The Court found the government's interest in preventing quid pro quo corruption compelling enough to justify the limitations on contributions from individuals and PACs. The Court reasoned that the contribution limits were narrowly tailored provisions that served the compelling purpose of deterring the practice of exchanging contributions for political favors and eliminating the appearance of a corrupt political process. Significantly, the Court found that the contribution restrictions did not appear to "undermine to any material degree the potential for robust and effective discussion." The Court viewed FECA's expenditure provisions with more suspicion. In addition to limiting overall expenditures by candidates and parties, FECA restricted "independent expenditures" by individuals and groups "relative to a clearly identified candidate." In contrast to the contribution provisions, the Court found it "clear that a primary effect of [the] expenditure limitations is to restrict the quantity of cam-

impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." Id. Statistics indicated to the Court that the $1000 contribution limit would not have this adverse effect. See id. at 21-22 & n. 23. In fact, courts have since struck down some state-imposed contribution restrictions precisely on these grounds. See Carver v. Nixon, 72 F.3d 633 (8th Cir. 1995) (permanently enjoining enforcement of Missouri's $300 individual contribution limitation to state candidates), cert. denied, 116 S.Ct. 2579 (1996); see also California Prolife Council Political Action Comm. v. Scully, No. CIV.S-96-1965LKKDAD, 1998 WL 7173, at *10 (E.D. Cal. Jan. 6, 1998) (concluding that state contribution limits unconstitutionally "prevent the marshalling of assets sufficient to conduct a meaningful campaign"); see generally Note, William J. Connolly, How Low Can You Go? State Campaign Contribution Limits and the First Amendment, 76 B.U. L. Rev. 483, 486 (1996) [hereinafter How Low Can You Go?] (arguing that courts should not engage in a technical "number's game" analysis when determining the constitutionality of contribution limits because contribution limits do not substantially burden free speech).

56. See Buckley, 424 U.S. at 39. The Court cited statistical findings by the district court indicating that over 25% of the major-party Senatorial candidates spent more than FECA would have allowed. Id. at 20 n.21.
57. Id. at 25-26.
58. Id. at 29, 35, 38.
59. See id. at 26-27. The theory is that, by limiting the amount one can contribute to a candidate, the contributor and the candidate are less likely to enter into a corrupt quid pro quo relationship. See id. One may question whether someone otherwise disposed to bribery or other corrupt practices would be overly concerned with the niceties of campaign finance laws.
60. Id. at 29. Finding the corruption rationale compelling, the Court did not address the other two rationales with respect to FECA's contribution restrictions. See id.
61. See supra note 31 and accompanying text.
campaign speech by individuals, groups, and candidates.”62 Unlike the contribution provisions, the Court found that the government interest in preventing corruption could not justify any limitation on expenditures.63 In the case of “independent expenditures,” the Court reasoned that this type of political spending did not present the same risk of corruption as direct contributions to candidates—mainly because of the absence of “prearrangement and coordination” with the candidate.64 Nor could the corruption rationale justify the ceilings on per-

62. Buckley, 424 U.S. at 39. For example, the Court noted that:

The plain effect of [the restriction on independent expenditures] is to prohibit all individuals, who are neither candidates nor owners of institutional press facilities, and all groups, except political parties and campaign organizations, from voicing their views “relative to a clearly identified candidate” through means that entail aggregate expenditures of more than $1,000 during a calendar year. The provision, for example, would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement “relative to a clearly identified candidate” in a major metropolitan newspaper.

Id. at 39-40.

63. Id. at 45, 53, 55.

64. Id. at 47. FECA treats controlled or coordinated expenditures as contributions subject to the $1,000, $5,000, and $25,000 limits. See 2 U.S.C. § 431(8)(A) (1994). Thus, the Court rejected the argument that the independent expenditures limitation was necessary to prevent otherwise-restricted contributors from circumventing the contribution limits by directly paying for a candidate’s media or other campaign expenditures. Buckley, 424 U.S. at 46-47. This potential “backdoor” to quid pro quo corruption is shut by FECA’s broad definition of contribution. Id. at 47.

The plaintiffs initially challenged the independent expenditure restriction as unconstitutionally vague. Id. at 40. The provision prohibited expenditures “relative to a clearly defined candidate during a calendar year which, when added to all other expenditures . . . advocating the election of such candidate,” exceeded $1,000. See 18 U.S.C. 608(c)(1) (1970 & Supp. IV 1974) (repealed 1976). The Court acknowledged that the vagueness of the word “relative” could be construed to refer to expenditures that “advocat[e] the election or defeat of [a] candidate.” Buckley, 424 U.S. at 39 (citations omitted). That interpretation, however, did not solve the vagueness problem because the distinction between discussion of issues and advocacy of electoral success or defeat “may often dissolve in practical application” because candidates are “intimately tied to public issues.” Id. at 42. The Court found that the vagueness problem could only be solved by interpreting the provision to apply only to expenditures on communication that advocate the election or defeat of a candidate in express terms. Id. at 44. In a footnote, the Court explained that the independent expenditure provision would only apply to communications that included the so-called “magic words” of express advocacy—“vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” and “reject.” Id. at 44 n.52.

Although the Court solved the vagueness problem by setting up the express advocacy test that figures prominently in later campaign finance cases, it nevertheless held that the corruption rationale did not justify the re-interpreted independent expenditure ceiling. Id. at 45. The distinction between express advocacy and issue advocacy is significant, even if it did not ultimately determine the fate of FECA’s independent expenditure restriction. The Court applied this bright-line test to distinguish between issue advocacy and express advocacy with respect to FECA’s disclosure requirements. See infra note 69. The net effect of the Buckley Court’s application of the express advocacy test to both provisions was to render issue advocacy—expenditures that do not use explicit language to advocate the election or defeat of a candidate—entirely immune from campaign finance regulation. This Note discusses the latest congres-
sonal expenditures by candidates, the Court reasoned, because candidates obviously cannot bribe themselves. With respect to the ceilings on total campaign expenditures by candidates, the Court found that given FECA's other corruption-preventing measures, like the disclosure requirements and the contribution limits, the corruption danger was not compelling enough.

The Court's distinction between contribution limits and expenditure limits has often been criticized by both sides of the campaign finance reform debate. Advocates of stricter campaign finance restrictions, citing Justice White's dissent in Buckley, argue that corruption is a compelling enough reason to uphold contribution limits and expendi-

65. See Buckley, 424 U.S. at 53. As the Court stated, “[t]he candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates.” Id. at 52. The corruption rationale, the Court noted, is actually weakened when the candidate relies on personal funds rather than outside contributions. Id. at 54.

66. Id. at 56. FECA supporters argued unsuccessfully that the expenditure limitations were necessary to reduce the incentive to circumvent the contribution limits. See id. The Court was unconvinced, however, that the “substantial criminal penalties for violating the contribution ceilings” and the “[e]xtensive reporting, auditing, and disclosure requirements” were insufficient to deter illegal contributions. Id.

67. See Lillian R. BeVier, Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform, 73 Cal. L. Rev. 1045, 1063 (1985) [hereinafter Money and Politics] (describing the distinction as having been “so severely criticized that it may no longer support a different level of scrutiny”).
tute limitations. On the other side, Justice Burger argued that, in light of FECA's disclosure requirements, the corruption rationale was not weighty enough to justify restrictions on expenditures or contributions. Nevertheless, the Court has maintained the distinction between contributions and expenditures in subsequent cases.

It is the Court's rejection of the other two rationales offered by FECA defenders—to equalize influence in political campaigns and to curb the alleged "skyrocketing" costs of elections—that has fueled the

68. Justice White would have sustained the expenditure limits. See Buckley, 424 U.S. at 261-64 (White, J., concurring in part and dissenting in part) (arguing that the Court should defer to Congress's judgement that the danger of corruption warrants contribution and expenditure restrictions). Many liberal commentators concur with Justice White. See Andrew Stark, Strange Bedfellows: Two Paradoxes in Constitutional Discourse Over Corporate and Individual Political Action, 14 Cardozo L. Rev. 1343, 1347 n.11 (1993) (asserting that "few constitutional jurists and scholars" support the distinction between contributions and expenditures); Cass R. Sunstein, Political Equality and Unintended Consequences, 94 Colum. L. Rev. 1390, 1395 (1994) [hereinafter Political Equality] (arguing that the distinction between contributions and expenditures may be irrelevant).

69. The petitioners challenged FECA's disclosure requirements, see supra note 35 and accompanying text, as constitutionally over-broad as applied to minor-party and independent candidates and to contributors of an amount as small as $11 or $101. Buckley, 424 U.S. at 60-61. The petitioners also challenged the disclosure requirement that applied to independent expenditures. Id. at 61. Although the Court acknowledged the potential danger disclosure requirements pose to free association, it found that FECA's disclosure requirements "serve substantial governmental interests." Id. at 68. These interests include informing the electorate about the sources of a candidate's financial support, deterring actual and apparent corruption, and providing a means to detect violations of the contribution limits. Id. at 66-68. But, like the independent expenditure provision, see supra note 64, the disclosure provisions posed vagueness problems. In order to avoid the vagueness problems, the Court construed "expenditure" for purposes of the disclosure requirements to include only express advocacy. See Buckley, 424 U.S. at 80. Thus, pure issue advocacy that eschews the "magic words" do not fall under FECA's disclosure requirements. See id. at 78-80.

70. See id. at 241-44 (Burger, J., concurring in part and dissenting in part) (commenting that, in failing to strike down contribution limits, the Court "ignores the reasons it finds so persuasive in the context of expenditures"); see also Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309, 2325 (1996) (Thomas, J., concurring in part and dissenting in part) (arguing that the distinction lacks "constitutional significance"). For commentary that basically concurs with Justices Burger and Thomas on this point, see Money and Politics, supra note 67, at 1064 (arguing that "a rule that accords less first amendment protection to contributions than to expenditures severely infringes upon the right of association").

most criticism of the *Buckley* decision. With respect to the cost-cutting rationale, the Court dismissed the notion that Congress has the power to determine the proper amount of political spending in federal elections. On the contrary, the Court maintained that it is the people—as individuals, candidates, associations and parties—that should determine how much money is spent on federal election campaigns.

The equalization rationale offered by FECA's supporters fared no better before the Court. There was little doubt that FECA "equalized" each citizen's political influence by effectively lowering the amount of permissible spending by all. The Court rejected the principle underlying the effort to level the playing field: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources..." Thus, the Court recognized the danger of quid pro quo corruption and the appearance thereof as the only compelling rationale for campaign finance restrictions. Furthermore, even the corruption rationale can not justify expenditure limitations.

3. Subsequent Case Law

Despite a torrent of criticism, the Court, far from backtracking from *Buckley*, has affirmed—and even expanded—its original rationale. In *Buckley*, the Court invalidated FECA's restriction on in-
dependent expenditures by individuals.\footnote{Bu\-cky, 424 U.S. at 39-51.} Nine years after \textit{Buckley}, the Court moved to protect the First Amendment right of PACs to make independent expenditures in \textit{FEC v. National Conservative Political Action Committee.}\footnote{470 U.S. 480 (1985).} In \textit{National Conservative Political Ac-

Yet, four years later, the Court seemed to contradict \textit{Bellotti} in \textit{FEC v. National Right to Work Committee}, 459 U.S. 197 (1982). In \textit{National Right to Work Committee}, the Court upheld a provision that limited the persons that for-profit and nonprofit corporations could solicit for contributions to the corporation’s political committee. \textit{Id.} at 209-11. In upholding the restriction as it applied to both for-profit and nonprofit corporations, the Court recognized the compelling government interest in containing corporate political spending. \textit{Id.} at 210-11. The Court reasoned that the corporate form grants state-created advantages which facilitate the formation of capital and which could provide corporations with an unfair financial advantage in terms of political advocacy. \textit{Id.} at 207. The \textit{National Right to Work Committee} holding is inconsistent with \textit{Bellotti} in its recognition of corporate corruption as a compelling reason to restrict political spending.

Then, the Court seemed to move away from \textit{National Right to Work Committee} in 1986 when it decided \textit{FEC v. Massachusetts Citizens For Life}, 479 U.S. 238, 259-60 (1986). In \textit{Massachusetts Citizens For Life}, a nonprofit corporate advocacy group spent over $9,000 from its general treasury to publish a newsletter urging readers to “vote pro-life.” \textit{Id.} at 241-44. The FEC charged the nonprofit corporation with violating the FECA provision that prohibits direct corporate expenditures “in connection with any election to any public office.” 2 U.S.C. § 441b (1994). The Court, unlike \textit{National Right to Work Committee}, distinguished between nonprofit advocacy organizations and for-profit corporations, finding that \textit{Massachusetts Citizens For Life} “was formed to disseminate political ideas, not to amass capital.” \textit{Massachusetts Citizens For Life}, 479 U.S. at 259. The corporate corruption rationale did not apply to organizations like \textit{Massachusetts Citizens For Life}. First, the Court determined that the purpose of the organization was to promote political ideas, thus ensuring that political resources reflect popular support. \textit{Id.} at 264. Then, the Court noted that the organization had no shareholders or others with a claim on its earnings. \textit{Id.} Finally, the Court found that the pro-life organization was not created by a corporation or labor union and did not accept contributions from either. \textit{Id.} The Court analyzed these three factors—purpose of the organization, presence of financial affiliates, and potential that the group is a mere conduit—and determined that the potentially-chilling FECA provision could not withstand constitutional scrutiny as applied. \textit{Id.} at 263-64.

Four years after \textit{Massachusetts Citizens For Life}, the Court applied this three-part test in \textit{Austin v. Michigan State Chamber of Commerce}, 494 U.S. 652 (1990). In \textit{Austin}, a nonprofit corporation challenged a state law similar to FECA which imposed certain requirements on corporations that seek to influence polities. \textit{Id.} at 656. The Court held that the nonprofit corporation, unlike \textit{Massachusetts Citizens For Life}, failed to satisfy the three-part test and, thus, was not exempt from the statute’s requirements. \textit{Id.} at 662-65. The \textit{Austin Chamber of Commerce} failed the first prong of the test by engaging in activities beyond the promotion of political ideas. \textit{Id.} at 662-63. Second, although the chamber of commerce had no shareholders, it did have members who benefited financially by associating with the organization. \textit{Id.} at 663. Finally, unlike the pro-life association in \textit{Massachusetts Citizens For Life}, the Court did not view the chamber of commerce as sufficiently independent of for-profit corporations. \textit{Id.} at 664. The promising sign for critics of \textit{Buckley} in these later cases seems to be the Court’s recognition that the corruption rationale encompassed not only the quid pro quo variety, but the “distorting effects of corporate wealth” on the political process. See Lisa Gordon, \textit{Colorado Republican Federal Campaign Committee v. Federal Election Commission: A Court Divided—One Opinion Properly Subjects Campaign Finance Jurisprudence to a Reality Check}, 81 Minn. L. Rev. 1565, 1581 (1997).
tion Committee, the FEC sought a declaratory judgment against a PAC based on the PAC's alleged violation of a provision of the Presidential Election Campaign Fund Act that limited independent expenditures to $1000 when a Presidential candidate accepted federal funding. 82 The lower court denied the FEC relief, but did not hold the provision unconstitutional because the PAC did not counterclaim on the issue. 83 On appeal, the Supreme Court did not hesitate to hold the provision unconstitutional. 84 First, the Court found that PACs—as organizations of like-minded individuals—deserved full First Amendment freedoms. 85 Again making a distinction between contributions and expenditures, the Court found that the corruption rationale was not compelling enough to sustain the independent expenditure restrictions. 86 The Court reasoned, as it did in Buckley, that independent expenditures are, by definition, not coordinated with the candidate. 87

Most recently, the Court addressed whether FECA could constitutionally restrict national, state, and local political parties from making independent expenditures “in connection with” federal candidates. 88 The lower court narrowly interpreted “in connection with” to mean those expenditures expressly advocating the election or defeat of a candidate. 89 Finding that the advertisement at issue did not contain express advocacy, the lower court granted the political party summary judgment. 90 On appeal, the FEC urged the Court of Appeals to adopt its broader interpretation of the party expenditure provision to cover, not just express advocacy, but any “electioneering message” with respect to a “clearly identified candidate.” 91 The Court of Appeals agreed with the FEC’s interpretation and ordered judgment against the state party. 92 The Supreme Court reversed and found the provision unconstitutional as applied. 93

As an initial matter, Justice Breyer determined that the expenditure at issue was indeed an independent expenditure that was uncoordinated with the candidate, rather than a contribution. 94 Dutifully following Buckley, he found that the party expenditure restriction

82. Id. at 482-83.
83. Id. at 484.
84. Id. at 501.
85. Id. at 494.
86. Id. at 496-97.
87. Id. at 497.
88. See supra note 34.
91. See id. (plurality opinion).
92. See id. (plurality opinion).
93. See id. at 2314-15 (plurality opinion).
94. See id. at 2315 (plurality opinion).
significantly impair[ed] the ability of individuals and groups to engage in direct political advocacy.” Justice Breyer concluded that the corruption rationale could not sustain the restriction on independent party expenditures. He rejected the notion that all party expenditures are coordinated with the party’s candidate and, therefore, potentially corrupting. Justice Breyer noted that the legislative history of the party expenditure provision demonstrated that Congress passed the provision, not so much to prevent corruption, but because Congress wanted to reduce excessive spending in campaigns. Thus, the plurality found the provision unconstitutional as applied to independent expenditures, but did not decide the broader facial challenge to the constitutionality of the restriction on party coordinated expenditures.

Justice Kennedy’s opinion endorsed Justice Breyer’s conclusion that the party expenditure provision was unconstitutional as applied to the state party’s independent expenditures. Justice Kennedy, however, held that political party spending, independent or coordinated, could never be considered “contributions” within the Buckley framework:

It makes no sense, therefore, to ask, as FECA does, whether a party’s spending is made “in cooperation, consultation, or concert with” its candidate. The answer in most cases will be yes, but that provides more, not less, justification for holding unconstitutional the statute’s attempt to control this type of party spending.

Justice Kennedy viewed party expenditures as almost indistinguishable from expenditures by candidates, which Buckley granted full First Amendment protection. Finding that parties play a crucial role in, among other things, selecting candidates and advancing candidacies, he held that the party expenditure limitation substantially diminished a party’s ability to engage in political discussion. Whatever the precise rationale, the Court has shown no inclination to

95. See id. at 2315 (plurality opinion).
96. Id. at 2316 (plurality opinion).
97. Id. at 2317-19 (plurality opinion). “We are not aware of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction.” Id. at 2316 (plurality opinion).
98. Id. at 2317 (plurality opinion) (citing Buckley, 424 U.S. 1, 57 (1976) (per curiam)). The Buckley Court did not recognize this rationale as compelling. See supra note 73 and accompanying text.
100. Id. at 2319 (plurality opinion).
101. Id. at 2321 (Kennedy, J., concurring in part and dissenting in part).
102. Id. at 2322 (Kennedy, J., concurring in part and dissenting in part).
103. Id. (Kennedy, J., concurring in part and dissenting in part).
104. See id. at 2323 (Kennedy, J., concurring in part and dissenting in part).
105. Id. at 2322.
106. Id. at 2323.
upset the basic *Buckley* holding that gave substantial constitutional protection to political spending.\(^{107}\)

### C. Liberal Critique Of *Buckley* And Conservative Rebuttal

The Court, in *Buckley* and in subsequent campaign finance cases, has consistently rejected the other rationales to justify campaign spending limits—namely, the interest in equalizing the relative ability of individuals and groups to participate in the election process and the interest in reducing the amount of money spent in political campaigns.\(^{108}\) It is this part of the *Buckley* holding that has arguably provoked the most criticism, especially from those working in the liberal tradition.\(^{109}\) Without much elaboration, the *Buckley* Court, as noted earlier, rejected the equalization rationale, saying that the "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."\(^{110}\) The Court dismissed the "too much money" rationale because it held that Congress has no business determining how much money should be spent on politics.\(^{111}\) At the heart of the *Buckley* controversy, then, lies a fundamental disagreement over principles: whether the "equal participation" principle is valid;\(^{112}\) whether the people and not Congress should determine the amount of money spent on politics;\(^{113}\) and whether it is proper to give full First Amendment protection to political spending.\(^{114}\)

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107. Justice Thomas provided the seventh concurring vote on the judgment, but argued for a modification in *Buckley* to give both contributions and expenditures full constitutional protection. *See id.* at 2330-31 (Thomas, J., concurring in part and dissenting in part). He would have overturned that part of *Buckley* which held that "[b]road prophylactic bans on campaign expenditures and contributions" are not narrowly-tailored to the government's interest in deterring corruption. *Id.* at 2329.

Justice Ginsberg joined Justice Stevens in dissent, who considered all party expenditures "to secure the election of its candidate" as a "contribution" under FECA. *Id.* at 2332 (Stevens, J., dissenting). Justice Stevens found the limitation justified because the close relationship between party and candidate creates the danger of the party unduly influencing the candidate. *Id.* (Stevens, J., dissenting). Secondly, the party expenditure restriction serves to supplement other FECA provisions. *Id.* (Stevens, J., dissenting). Finally, the dissent considers "leveling the electoral playing field" by lowering the costs of campaigns a compelling government interest. *Id.* (Stevens, J., dissenting).

108. *See supra* notes 72-75 and accompanying text.

109. *See infra* notes 145-152 and accompanying text.


111. *See id.* at 48-49.

112. *See infra* Part IV.A.3 (defending the *Buckley* Court's rejection of this principle).

113. *See infra* Part IV.A.4 (defending the Court's holding that the people as individuals, groups, parties, and candidates should determine the "proper" amount of political spending).

114. *See infra* Part IV.A.1 (defending the full constitutional protection for political spending).
Some of the strongest criticism of *Buckley* has come from prominent liberal political philosophers,\(^\text{115}\) like Professor Ronald Dworkin, who argue that the Court was indeed wrong to fully protect political spending and wrong to reject the egalitarian rationale.\(^\text{116}\) Professor Dworkin argues that “money is the biggest threat to the democratic process,”\(^\text{117}\) and, given the importance of money in contemporary politics, the current system fosters political inequality.\(^\text{118}\) Consequently, some citizens can speak louder in political campaigns than others.\(^\text{119}\)

He explains:

> [w]hen wealth is unevenly distributed and money dominates politics, then, though individual citizens may be equal in their vote and their freedom to hear the candidates they wish to hear, they are not equal in their own ability to command the attention of others for their own candidates, interests, and convictions.\(^\text{120}\)

This right to *equal* political influence flows naturally from Professor Dworkin’s conception of a political democracy in which each citizen is an “equal partner[ ] in a cooperative political enterprise.”\(^\text{121}\) Thus, Professor Dworkin argues that the *Buckley* court erroneously rejected the egalitarian rationale as not compelling.\(^\text{122}\) He presumably favors current reform proposals that impose expenditure ceilings, eliminate PAC contributions, and crack down on the spending of outside organizations because these provisions would presumably reduce the amount of money in politics, thereby equalizing each citizen’s ability to influence the political process.\(^\text{123}\)

Professor Dworkin’s position on campaign finance is illustrative of his larger theory of political morality. He argues that individual rights should prevail even when the collective good would benefit by their suppression.\(^\text{124}\) Individual rights are not derived from considerations of the collective good, or, indeed, from any conception of the “good.”\(^\text{125}\) The government, in Professor Dworkin’s conception of political morality, should remain “neutral” among the various conceptions of the “good.”\(^\text{126}\) Individual rights are derived from an abstract right to be treated by the government with “equal concern and re-

\(^{115}\) For a discussion of the liberal philosophical tradition, see *supra* note 22 and *infra* notes 124-129 and accompanying text.

\(^{116}\) See *Curse of American Politics*, *supra* note 21, at 23.

\(^{117}\) See *id.* at 19.

\(^{118}\) *Id.*

\(^{119}\) *Id.* at 23.

\(^{120}\) *Id.*

\(^{121}\) *Id.*

\(^{122}\) *Id.*

\(^{123}\) See *id.* at 21, 24 (suggesting a “straight legal ceiling on all campaign expenditures by candidates or parties” or “any reasonable and effective device” to “circumvent” *Buckley*).

\(^{124}\) See *Taking Rights Seriously*, *supra* note 22, at 199.

\(^{125}\) See *A Matter of Principle*, *supra* note 22, at 191-92.

\(^{126}\) See *id.*
spect." From this equality principle, Professor Dworkin can identify the traditional liberal rights to privacy and free speech, among others. In Professor Dworkin's basic theory, individual rights trump the collective good. Whereas the job of the legislature is to promote the collective good, the judiciary's job is to protect individual rights.

According to Professor Dworkin, the First Amendment's guarantee of freedom of speech means "the freedom to speak or publish when denying that freedom would damage some other individual right that free speech protects, or when it would impair democracy itself." Focusing on the "impair democracy" prong of this free speech principle, Professor Dworkin identifies two conditions for a just democracy. First, the people as a whole must have the final authority over their government. The government violates this principle, for example, when it censors certain speech to protect the government from criticism or because the political opinion expressed "is less worthy or more dangerous than any other." The second condition of a just democracy is that each citizen must be able to "participate on equal terms in both formal politics and in the informal cultural life that creates the moral environment of the community." This principle, itself derived from his underlying equality principle, would prohibit the government from censoring neo-Nazis, pornographers, and flag-burners.

Professor Dworkin argues that campaign expenditure restrictions violate neither of these principles. Campaign finance restrictions do not protect the government from criticism—in fact, Professor Dworkin believes that tighter restrictions would help challengers. Moreover, campaign finance limitations are content neutral. Professor Dworkin dismisses the argument that expenditure restrictions would impermissibly diminish the overall quantity or diversity of the political

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128. Id. at 266-78.
129. See id. at 199.
130. See id. at 88-89.
132. See id.
133. See id.
134. See id. Professor Dworkin cites to the Pentagon Papers Case as an example of the U.S. Supreme Court properly applying this First Amendment principle. See New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (finding that the United States could not justify enforcement of a prior restraint involving publication of classified materials).
136. Id.
137. Id. This assertion has been challenged by those who argue, persuasively, that further campaign finance restrictions would serve to further entrench incumbents and immunize them, to some degree, from criticism. See infra text accompanying notes 508-513.
According to Professor Dworkin, today's debate largely consists of negative television advertising. He concedes that expenditure restrictions would reduce the ability of a candidate to broadcast political advertisements, but finds that this is no great loss because the ads are "negative, witless, and condescending." After all, "the curtailed broadcasts would almost certainly have repeated what the candidate had said on other occasions." Furthermore, he asserts that, even with expenditure restrictions, there is little danger that a citizen could not discover the positions and background of any serious candidate.

As noted above, Professor Dworkin's principal objection to Buckley is the Court's ruling that the "equal political participation" principle is "foreign" to the First Amendment. According to Professor Dworkin, the Court erred by not recognizing that each citizen, in a just society, must have "a fair and reasonably equal opportunity" to participate in the political process. In his view, campaign finance reform would remedy the current problem of unequal influence.

Professor Dworkin has formidable allies on the campaign finance issue, including prominent newspaper editorial boards, public watchdog groups, and many legal scholars and pundits. In
often apocalyptic terms, this camp calls for “dramatic” campaign finance reform to end the allegedly corrupt influence of money in politics once and for all.\textsuperscript{52} This call has become louder as some shady campaign practices of the 1996 campaign have been brought to light.\textsuperscript{53}

The opposing camp consists of a rather odd coalition of the ACLU,\textsuperscript{154} most Republicans,\textsuperscript{155} a few noted legal scholars\textsuperscript{156} and outside political advocacy groups from both sides of the political spectrum.\textsuperscript{157} This coalition raises both philosophical and practical objections to the liberal view of campaign finance reform. First, on a philosophical level, this group is skeptical about any “reform” that burdens the right of individuals, groups, candidates, and parties to organize and attempt to influence politics.\textsuperscript{158} This camp objects to con-

\begin{thebibliography}{99}
  \bibitem{156} See infra note 158.
  \bibitem{157} See 143 Cong. Rec. S10359 (daily ed. Oct. 6, 1997) (statement of Sen. McConnell) (inserting article by James Bopp, Jr. citing the efforts of the Free Speech Coalition). The Free Speech Coalition consists of issue-oriented organizations who have little in common except their opposition to liberal campaign finance reform efforts. The coalition ranges from the American Conservative Union, Fund for the Feminist Majority, the National Rifle Association, the Coalition to Stop Gun Violence, abortion rights groups, and the National Right to Life Committee. \textit{Id}.
tribution and expenditure limitations generally because these regulations limit the quantity of debate and make it more difficult for individuals, candidates, associations, and parties to disseminate their message.\footnote{159} From a more practical standpoint, this camp contends that the 1974 campaign finance restrictions have caused many of today’s alleged problems with campaign financing.\footnote{160} Strict campaign finance restrictions simply make fund-raising more time-consuming and corrupting.\footnote{161} Expenditure restrictions, for example, invariably hurt challengers by not allowing them to raise the funds they need to counter the built-in advantages of incumbency like name recognition and free media opportunities.\footnote{162} Indeed, according to this camp, the biggest myth in the campaign reform movement is that there is too much money in politics.\footnote{163} This coalition concurs with \textit{Buckley} that it is for the people—as individuals, groups, candidates, and parties—and not the Congress to determine how much money is spent on politics.\footnote{164}

\textbf{D. Legislative Debate}

It is not surprising that the philosophical dispute over \textit{Buckley} has spilled over into the legislative arena. Legislators sympathetic to the liberal tradition’s egalitarian principles have tried numerous times to

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\footnotesize\textsuperscript{159} See Mitch McConnell, \textit{The Money Gap}, Nat’l Rev., June 30, 1997, at 36 (“The reformers do not care or, in some cases, cannot accept that spending limits limit speech.”).

\footnotesize\textsuperscript{160} See Bradley A. Smith, \textit{Why Campaign Finance Reform Never Works}, Wall St. J., Mar. 19, 1997, at A19. Professor Smith explains that “since passage of [FECA] and similar state laws, the influence of special interests has grown, voter turnout has fallen, and incumbents have become tougher to dislodge. Low contribution limits have forced candidates to spend large amounts of time seeking funds.” \textit{Id.} The pro-

\footnotesize\textit{Buckley} camp generally argues that campaign finance reform invariably yields unintended consequences. As one commentator notes, “limits on individual contributions helped to increase the number of PACs; limits on hard money contributions stimulated the proliferation of soft money contributions; and limits on contributions generally spurred the growth of independent expenditures.” Kathleen M. Sullivan, \textit{Political Money and Freedom of Speech}, 30 U.C. Davis L. Rev. 663, 687-88 (1997) [hereinafter \textit{Political Money}].

\footnotesize\textsuperscript{161} See David S. Broder, \textit{Gingrich’s Heresy}, Wash. Post, Nov. 14, 1995, at A19. Curtis Gans, author of a campaign study for the liberal Committee for the Study of the Electorate stated that, “[t]he overwhelming body of scholarly research . . . indicates that low spending limits will undermine political competition by enhancing the existing advantages of incumbency.” \textit{Id.} The libertarian Cato Institute reached the same conclusion. \textit{Id.} For further discussion on the pro-incumbent effects of campaign spending limits, see infra notes 508-514 and accompanying text.

\footnotesize\textsuperscript{162} See infra notes 509-509 and accompanying text.

\footnotesize\textsuperscript{163} See Broder, supra note 161.

\footnotesize\textsuperscript{164} See George F. Will, \textit{So, We Talk Too Much?}, Newsweek, June 28, 1993, at 68 (lamenting that certain congressmen seek to “hack away at the Bill of Rights in order to shrink the permissible amount of political discourse”).
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get around or blunt the effects of Buckley. On more than one occasion, congressmen frustrated with the Buckley holding have tried to amend the First Amendment to give unprecedented power to Congress to regulate federal election campaigns.\(^1\)

1. Past Reform Efforts

Indeed, the movement for a constitutional amendment is only one chapter in the colorful and contentious history of campaign finance reform.\(^2\) For example, in the 100th Congress, the Democrats tried to pass a reform bill consisting of a combination of taxpayer funding of elections and spending limits.\(^3\) Senate Republicans blocked the bill by leading a record-breaking filibuster that survived eight cloture votes.\(^4\) Then-Majority Leader Robert Byrd (D-WVA.) at one point during the debate directed the Sergeant-at-Arms of the Senate to arrest absent Senators.\(^5\)

In the 101st Congress, the parties waged another fight over a taxpayer-funded system of spending limits.\(^6\) This time, the Senate passed the bill.\(^7\) The House of Representatives, however, did not act on the bill before the legislative session ended and the bill died.\(^8\) Democrats tried again in the 102nd Congress. After a bruising, week-long floor fight, a typical reform bill passed the Senate.\(^9\) This time, the House passed a similar bill.\(^10\) After each house hurriedly ap-

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165. See Edwin Chen, Senate Votes Down Constitutional Amendment on Campaign Spending, L.A. Times, Mar. 19, 1998, at A13 (reporting that the Senate rejected by a vote of 38-61 a proposed constitutional amendment to give Congress the power to enact spending limits); see also Will, supra note 164, at 68 (reporting a Senate vote (52-43) on a resolution to amend the First Amendment to permit spending limits).

166. These reform efforts have almost all been efforts to, in one way or another, add further restrictions to political contributions and expenditures. See 143 Cong. Rec. S998 (daily ed. Sept. 26, 1997) (statement of Sen. Feingold) (“For the last 21 years, since [the Buckley] decision, Democrats have tried to overcome obstacles put in place by that ruling.”); Office of Senator Mitch McConnell, CFR Time-Line in Campaign Finance Reform (available on file with the Fordham Law Review) [hereinafter CFR Time-Line].


169. CFR Time-Line, supra note 166.

170. Id.


172. See CFR Time-Line, supra note 166.


proved the conference report, President Bush dashed the hopes of the reformers by promptly vetoing the bill.175

President Clinton’s election in 1992 breathed new life into a spending limit proposal. After a month-long battle and several cloture votes, the Senate passed a bill banning PAC contributions and imposing a tax on candidates who exceed “voluntary” spending limits and.176 Late in 1993, the House approved a slightly different campaign finance bill.177 Almost a year later, after intra-party squabbling, Democrats finally appointed conferees in an attempt to resolve the differences between the bills.178 Senator Mitch McConnell (R-Ky.), a staunch supporter of Buckley, shattered the Democrats’ hopes by objecting to the appointment of conferees, normally only a formality.179 Senator McConnell’s unprecedented, round-the-clock filibuster eventually prevailed.180 It was reportedly the first time in Senate history that a Senator filibustered the appointment of conferees.181

2. The McCain-Feingold Bill

The Bipartisan Campaign Reform Act of 1997 (“McCain-Feingold”)182 is the latest attempt at campaign finance reform. All 45 Democratic Senators and 7 Republican Senators in the 105th Congress supported the bill.183 Nevertheless, despite the overwhelming support of editorial pages,184 pundits,185 and public watchdog

176. CFR Time-Line, supra note 166.
177. Id. The House bill provided for partial public funding to House candidates who agree to abide by overall campaign expenditure limits. See Wealth Primary, supra note 72, at 332.
178. CFR Time-Line, supra note 166.
181. CFR Time-Line, supra note 166.
183. Alison Mitchell, Deadlock in Senate Blocks Campaign Finance Reform, All But Killing It for Year; Bill Lacks 9 Votes, N.Y. Times, Feb. 27, 1998, at A1, A22. The final tally on McCain-Feingold was 51-48 in favor of McCain-Feingold, nine votes shy of the 60 needed to break a filibuster. Id. Senator Tom Harkin (D-Iowa), a supporter of McCain-Feingold, was absent for the final vote. Id.
185. Some pundits even suggest that Buckley and the alleged corruption that ensued led to the recent lowering of the top tax rates on income and capital gains—an unfortunate development to many political liberals. Scott Turow, The High Court’s 20-Year-Old Mistake, N.Y. Times, Oct. 12, 1997, at A15 (suggesting “that Buckley may well come to be regarded as a sort of 20th-century stepchild to Dred Scott”).
groups in the wake of the 1996 election “scandal,” McCain-Feingold’s supporters could not get the requisite 60 votes for cloture. Although Senator McConnell proudly pronounced the bill “dead,” supporters in the Senate vowed to introduce it at a later date. The House plans to take up the issue late in the 105th Congress and is expected to consider proposals modeled after McCain-Feingold. Judging from the history of the legislative efforts to enact campaign finance reform, McCain-Feingold, or some variation thereof, will reemerge—if not this year, then some following year. McCain-Feingold, as originally proposed and in later versions, is a typical example of the type of reform bill that opponents of Buckley advocate. This section will now turn to an analysis of McCain-Feingold’s major provisions.

187. See David Johnston, Campaign Finance Measure Blocked in 2 Senate Votes; Main Foe Says Bill is ‘Dead’: Clinton Lawyer is Subpoenaed on Tape Delay, N.Y. Times, Oct. 8, 1997, at A1 (reporting criticism of the Clinton re-election campaign by chairman of the Senate committee investigating campaign finance abuses).
188. See Mitchell, supra note 183, at A1.
189. Id. Senator McCain vowed that, “We will not quit and we will prevail.” Id.
190. Id. The House leadership initially attempted to avoid voting on the House version of McCain-Feingold. See David Rogers, Gingrich in Reversal, to Allow Debate On Changing Campaign-Finance Laws, Wall St. J., Apr. 23, 1998, at A2. Proponents waged a campaign to compel a vote on the bill using a procedural device known as a “discharge petition.” Id. Speaker Newt Gingrich (R-Ga.) recently agreed to schedule a vote on the bill later in the session. Id. Despite this procedural victory, McCain-Feingold nevertheless faces an uphill battle in both chambers. See id.
192. Unless otherwise indicated, this Note will analyze the version of the McCain-Feingold Bill that was placed on the Senate calendar on September 25, 1997. The McCain-Feingold Bill that was initially introduced early in the 104th Congress bears little resemblance to the McCain-Feingold Bill that the Senate most recently rejected in February. Compare Senate Campaign Finance Reform Act of 1995, S. 1219, 104th Cong. with the Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. Supporters dropped the voluntary spending limit provisions and the outright ban on PAC contributions, as well as certain other restrictions, in an ultimately unsuccessful effort to win more support. See 144 Cong. Rec. S830 (daily ed. Feb. 23, 1998) (statement of Sen. McCain) (offering an amendment to his original bill that contains a ban on soft money and restrictions on issue advocacy, but no spending limits or PAC contribution limits); McCain-Feingold, at Last, supra note 184 (noting that latest “compromise” version had less draconian restrictions on issue advocacy than the previous vote in October, 1997). Nevertheless, it is useful to analyze McCain-Feingold’s original provisions because they are illustrative of the approach to campaign finance that critics of Buckley take.
a. Expenditure Restrictions

The McCain-Feingold Bill's central provision would create a system of voluntary spending limits in Congressional elections.\(^{193}\) The provision induces candidates to comply with spending limits by granting complying candidates a series of benefits and by penalizing non-complying candidates.\(^{194}\) A candidate who agrees to comply with the bill's conditions would be allowed to spend anywhere from a minimum of $950,000 to a maximum of $5,500,000, depending on the population of the Senate candidate's state.\(^{195}\) The overall spending provision would prohibit the Senate candidate from the median-populated state, for example, from spending more than roughly $1,150,000 in the general election.\(^{196}\) The bill also places a limit on the amount of money that a candidate and his campaign committee can spend in the primary and runoff campaigns, if applicable.\(^{197}\)

If the candidate adheres to the overall expenditure limits, as well as the limit on use of the candidate's personal funds,\(^{198}\) the bill provides the complying candidate with the benefits of free television broadcast time,\(^{199}\) discount broadcast media rates,\(^{200}\) and reduced postage

193. Specifically, the bill would grant certain benefits, see infra notes 199-200, to candidates that complied with the conditions of the bill. The primary condition is an overall limit on the candidate's spending. See Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. § 101 (1997). The coercive nature of this "voluntary" scheme raises the specter of an unconstitutional condition. See generally Adam S. Tanenbaum, Comment, Day v. Holahan: Crossroads in Campaign Finance Jurisprudence, 84 Geo. L.J. 151, 157-58 (1995). This provision was removed by sponsors of McCain-Feingold before the Senate vote this year. See supra note 192.


195. Id. (proposed as § 503 of FECA). The bill provides that, with certain exceptions for states with extremely limited media outlets, expenditures by candidates and their authorized campaign committees shall not exceed the lesser of $5,500,000 or the greater of $950,000 or $400,000 plus $0.30 multiplied by the voting-age population up to 4,000,000 and $0.25 multiplied by the number of eligible voters over 4,000,000. Id. (proposed as § 503(d) of FECA).

196. Id. While $1,150,000 may appear to be sufficient funds to disseminate one's message, a Senate candidate has to communicate state-wide. The mass media needed to disseminate one's message to such a large constituency is expensive. In South Carolina, the twenty-fifth most populated state according to the 1990 census, the McCain-Feingold Bill would allow a Senate candidate to spend roughly $0.45 on each eligible voter in a general election. The primary and general election expenditure limits are indexed for inflation. Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. § 101 (proposed as § 503(g) of FECA).

197. Under the bill's primary expenditure provision, Senate candidates may spend no more than the lesser of 67% of the general election expenditure limit or $2,750,000. Id. (proposed as § 503(b)(1)-(2) of FECA). Candidates in runoff elections may spend up to 20% of the general election expenditure limit. Id. (proposed as § 503(e) of FECA).

198. Id. (proposed as § 503(a)(1)(A)-(B) of FECA). This provision forbids a candidate or his authorized campaign committee from spending more than the lesser of $250,000 or 10% of the general election expenditure limit from personal funds of the candidate and the candidate's immediate family. Id.

199. Id. (proposed as § 504(1) of FECA). A complying candidate is entitled to receive a total of 30 minutes of free broadcast minutes, to be used in increments not to
rates. These benefits are also conditioned on the candidate meeting a threshold contribution level, complying with certain primary and general election filing requirements, and staying within the limit on out-of-state contributions. McCain-Feingold has a punitive feature as well: if a competing candidate does not comply with the spending limits, the complying candidate's spending limits are raised either 50% or 100%, depending on how much the non-complying candidate exceeds the limits contemplated in the bill. McCain-Feingold provides for civil penalties and the revocation of benefits for eligible candidates that fall out of compliance with these requirements. Finally, Title I of the bill imposes strict disclosure requirements on both complying and non-complying Senate candidates.

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200. Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. § 101 (proposed as § 504(2) of FECA). A complying candidate is entitled to receive a 50% reduction in the applicable broadcast rate for the applicable period. Id. § 103(a).

201. Id. § 101 (proposed as § 504(3) of FECA). The bill grants complying candidates the reduced postage rates provided in 39 U.S.C. § 3626(e).

202. Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. § 101 (proposed as § 502(a)(1)(B) of FECA). McCain-Feingold requires eligible candidates and their authorized campaign committees to raise in allowable contributions during the applicable period at least 10% of the general election expenditure limit or $250,000 and to certify this to the FEC. Id. (proposed as § 502(d)(1)(A)(i)-(ii) of FECA).

203. The bill requires a complying candidate to file with the FEC within a certain time prior to the campaign a declaration that the candidate will comply with the bill's various spending limits and out-of-state contribution limit. Id. § 101 (proposed as § 502(a)(1)) of FECA). The FEC then must certify that the candidate has met the bill's threshold requirements and, that the candidate's filings are accurate. Id. § 101 (proposed as § 502(a)(2) of FECA).

204. The complying candidate generally must raise at least 60% of his contributions from legal residents of his state. Id. § 101 (proposed as § 502(e)(1)(A) of FECA). The bill provides a limited exception for the smallest states. Id. (proposed as § 502(e)(1)(B) of FECA).

205. Id. § 101 (proposed as § 503(e) of FECA). This section even provides for a limit increase for the complying candidate to counter independent expenditures made by outside advocacy groups in support of a competing candidate. Id. § 101 (proposed as § 503(f) of FECA).

206. Id. § 101 (proposed as § 505(c) of FECA) (requiring FEC to revoke benefits of a candidate who violates the bill's requirements); Id. § 101 (proposed as § 506(n)-(b) of FECA) (providing for civil penalties based on amount non-complying candidate exceeds expenditure restriction).

207. See id. § 106(a)-(b). The bill imposes more extensive disclosure duties on candidates that exceed the personal fund expenditure limit. See id. § 106(b). McCain-Feingold also requires all candidates to disclose as part of their regular FEC filings the portion of contributions from in-state residents. Id. at § 106(a)(3).
b. Ban on PAC Contributions/Ban on Soft Money

Title II of the original version of McCain-Feingold, entitled "Reduction of Special Interest Influence," would totally ban PAC contributions to Senate candidates. In addition to banning PAC contributions, McCain-Feingold would sharply reduce the ability of political parties to use so-called "soft money." Soft money refers to the funds that national, state, and local political parties raise for grassroots activities, get-out-the-vote efforts and, increasingly, political advertising. Soft money, in contrast to direct contributions and expenditures, is largely unregulated by FECA. This provision aims to substantially eliminate the ability of national, state, and local parties to spend soft money to influence a federal election. The crackdown on soft money comes in the wake of the 1996 election, in which soft money was used by the national parties to skirt the "hard money" restrictions and aid both Presidential and other federal candidates di-

208. See id. § 201. The original version of the bill provides that only individuals and political committees may contribute to a candidate or a candidate's authorized campaign committee, principal campaign committee or committees associated with the political parties, but not the outside advocacy organizations known as PACs. See id. § 201(a). For the definition of "PACs," see supra note 30. Many constitutional experts considered this provision flatly unconstitutional, see 143 Cong. Rec. S10347 (daily ed. Oct. 6, 1997) (inserted testimony of Lillian R. BeVier before Senate Rules Committee), and the sponsors of McCain-Feingold dropped the provision prior to the final vote this year, see supra note 192.


212. Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. § 211. McCain-Feingold accomplishes this goal in two principal ways. First, the bill prohibits a national committee of a political party, or an entity controlled by or acting on behalf of a national party, from soliciting or receiving contributions or spending any funds that are not subject to the limitations, prohibitions and reporting requirements of FECA and McCain-Feingold. Id. § 211 (proposed as § 325 of FECA). Second, McCain-Feingold subjects all funds spent by a state, district, or local committee of a political party (or an entity controlled by or acting on behalf of such a committee) during a federal election year "for any activity that might affect the outcome of a federal election" (which is a standard that the bill defines broadly) to the limitations, prohibitions and reporting requirements of FECA as amended by McCain-Feingold. See id. (proposed as § 325(b)(1) of FECA). The bill exempts expenditures for certain purely local, grassroots activities by local party committees. See id. (proposed as § 325(b)(2) of FECA). The bill also cracks down on party committees' ability to make coordinated expenditures on behalf of favored federal candidates. See id. § 404. This provision forces party committees to forswear independent expenditures with respect to a particular candidate in order to make coordinated expenditures on behalf of a favored candidate. See id. Moreover, the provision broadens the definition of "coordination" to sweep under the bill's coverage even the slightest contact between the party committee and the candidate—such as merely providing the candidate with polling data over the course of the election. Id.
Supporters of McCain-Feingold cite soft money as the primary cause of an unhealthy rise in the political influence of well-heeled contributors, if not outright quid pro quo arrangements, and a sharp increase in the costs of campaigns. Title II of McCain-Feingold seeks to address these concerns.

c. Restrictions on Independent Expenditures and Issue Advocacy

FECA distinguishes between expenditures made by individuals, outside organizations, and parties that are "coordinated" with a federal candidate, and "independent expenditures" that are, as the term suggests, uncoordinated with a federal candidate. The classification is significant because a coordinated expenditure is considered a "contribution" to the coordinating candidate subject to FECA's dollar limitations, while independent expenditures are not. Nevertheless, independent expenditures are still subject to FECA's disclosure obligations. Title IV of McCain-Feingold defines contribution to include expenditures made "for the purpose of influencing [a federal election] and that is a payment made in coordination with a candidate." The bill then broadly defines "payment made in coordination with a candidate." In fact, McCain-Feingold would expand the definition of "coordination" to include practically any contact of a political nature between the person or group making the expenditure and the candidate.

Title IV of McCain-Feingold also imposes fresh restrictions on issue advocacy and independent expenditures. Initial versions of McCain-Feingold would have prohibited all political spending by orga-
organizations other than political parties and individuals under FECA.\textsuperscript{223} The most recent version, while not prohibiting this "issue advocacy" outright, makes it more difficult for associations to engage in this type of political spending by re-classifying it as "express advocacy" subject to FECA's potentially-chilling disclosure requirements.\textsuperscript{224} FECA currently defines "independent expenditure" as an uncoordinated expenditure that contains "express advocacy."\textsuperscript{225} Under McCain-Feingold, "express advocacy" becomes not just communications that use specific words to urge the election or defeat of a candidate as under current law,\textsuperscript{226} but any communication that costs more than $10,000 and is made within 30 days of a primary election or within 60 days of a general election that "a reasonable person would understand as advocating the election or defeat of the candidate."\textsuperscript{227} This definition of "express advocacy" eschews the "magic word" test\textsuperscript{228} and sweeps formerly unregulated issue advocacy—like voter guides that outline a candidate's position on various issue of concern to an organization—under FECA's jurisdiction.\textsuperscript{229}

FECA designates as a "political committee" subject to registration with the FEC any group of individuals which receives contributions or makes expenditures in excess of $1000 per year.\textsuperscript{230} Under FECA, "political committees" must retain a treasurer\textsuperscript{231} and maintain certain records including the names and addresses of persons who contributed more than $50 to the group.\textsuperscript{232} FECA also requires political committees to keep detailed information with respect to any disbursements in excess of $200.\textsuperscript{233} Thus, to the extent issue-oriented organizations engage in "express advocacy" as newly-defined under McCain-Feingold in an amount exceeding $1000, the group is subject to the disclosure requirements under FECA.\textsuperscript{234} The net effect of the expanded defini-

\textsuperscript{223} See Senate Campaign Finance Reform Act of 1995, S. 1219, 104th Cong. § 201.
\textsuperscript{224} See Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. § 241 (subjecting any independent expenditure in excess of $1,000 to reporting within 24 hours and any independent expenditures in excess of $10,000 within 48 hours with additional reports when necessary).
\textsuperscript{225} Id. § 406.
\textsuperscript{226} For a discussion of the express advocacy test, see supra note 64.
\textsuperscript{227} See Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. § 406(b).
\textsuperscript{228} See supra note 64.
\textsuperscript{230} See 2 U.S.C. § 431(4) (1994). For the distinction between political committees and PACs, see supra notes 29-30.
\textsuperscript{231} See 2 U.S.C. § 432(a) (1994).
\textsuperscript{232} See id. § 432(c)(2). For further discussion of FECA's disclosure provisions, see supra note 35.
\textsuperscript{233} See id. § 432(c)(5).
\textsuperscript{234} For a discussion of a political committee's disclosure obligations under FECA, see supra note 35.
tion of "coordination" and "express advocacy" and the narrowed defini-
tion of "independent expenditure" is to incorporate formerly
protected political activities under the jurisdiction of FECA.

McCain-Feingold contains other regulatory features that provide
for, among other things: strict disclosure requirements,\textsuperscript{235} tighter con-
trol of contributions through intermediaries and conduits,\textsuperscript{236} expanded
random audits by the FEC,\textsuperscript{237} enhanced penalties for willful viola-
tions,\textsuperscript{238} tighter control over the content of political advertising,\textsuperscript{239} lim-
its on the incumbent candidate's use of the Congressional franking
privilege,\textsuperscript{240} and a prohibition of contributions from individuals not
qualified to vote.\textsuperscript{241} In short, McCain-Feingold is comprehensive in
scope and would fundamentally alter the way federal (or at least Sen-
ate) elections are financed. The bill's provisions reflect the general
policy direction that the campaign finance reform movement has ad-
vocated ever since \textit{Buckley}: stricter limitations and regulations on
political spending by individuals, groups, candidates, and parties.

E. Framing The Questions

The \textit{Buckley} Court's jealous protection of political spending and its
rejection of the "level-the-playing-field" rationale was concomitantly
a recognition that political spending realizes significant human
goods—goods that cannot be sacrificed at the altar of abstract egalita-
rian principles. If, however, political spending does not contribute to
the well-being of the citizenry and, in fact, does little more than breed
corruption and inequality, then one should rightly criticize \textit{Buckley}
and urge: (1) Congress to amend the First Amendment or otherwise
circumvent the unjust holding, and/or (2) pass McCain-Feingold. Sim-
ilarly, if Professor Dworkin and others are correct that a just society
requires citizens to have more-or-less equal influence on political and
moral matters, then citizens and Congress should take appropriate ac-
tion including, presumably, pursuing McCain-Feingold or similar
"equalization" legislation.\textsuperscript{242} If, however, political spending is largely
a genuinely valuable activity worth protecting and the equal participa-
tion principle and cost-cutting rationale cannot be defended, legisla-

\textsuperscript{235} See Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. §§ 213(a),
241, 304.
\textsuperscript{236} See id. § 231.
\textsuperscript{237} See id. § 302. McCain-Feingold also contains a provision that allows the FEC
to seek injunctions against probable violators in the middle of the campaign—thus
raising the specter of prior restraint. See Bipartisan Campaign Reform Act of 1997, S.
25, 105th Cong. § 303.
\textsuperscript{238} See Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. § 305.
\textsuperscript{239} See id. § 402.
\textsuperscript{240} See id. § 403.
\textsuperscript{241} See id. § 306.
\textsuperscript{242} See Curse of American Politics, supra note 21, at 21. Indeed, thirty-eight Sena-
tors voted this past year for a resolution that would amend the First Amendment in
order to circumvent \textit{Buckley}. See supra note 165.
 tors should leave *Buckley* alone and abandon the pursuit of legislation like McCain-Feingold.

Parts III and IV argue that this latter view is indeed the correct position. As part IV.A.3 explains, the "equal political participation" principle suffers from the same underlying weaknesses that plague equality-based liberal theories. The egalitarian principle, therefore, cannot justify either the criticism of *Buckley* or the current reform proposals. Drawing from the perfectionist tradition and borrowing substantially from theorists like John Finnis, Germain Grisez and Robert George, this Note specifically criticizes the equal participation principle that is inherent in the current campaign reform proposals. In the process, this Note offers a perfectionist account of the First Amendment and argues that political spending deserves the heightened protection that the *Buckley* Court bestowed upon it. As part IV details, political spending realizes valuable human goods that those who criticize *Buckley* and support McCain-Feingold simply fail to take into account. To provide context for this discussion, the next part outlines, in broad terms, new natural law theory.

II. Natural Law Theory

Although there are many variations of natural law theory,243 the central natural law tradition dates back to Aristotle244 and Saint Thomas Aquinas.245 Perfectionist theory is designed to assist citizens, legislators and judges246 in distinguishing what is sound and reason-


244. See Ethics, supra note 5. This Note does not attempt to resolve any doctrinal disputes within the perfectionist tradition.

245. See On Law, supra note 1.

246. Some argue that judges properly interpret the positive law to comport with the natural law. See, e.g., Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (contending that the natural law should overrule manifestly unjust positive law). While legislators should always apply practical reasoning, it seems that judges should not employ natural law principles in their decisions if applying these principles means exceeding the limited (interpretative) role of the judge. In the end, a judge acts unjustly if his action exceeds the limits of his authority. Thus, a federal judge, for example, should not deviate from the text of a federal statute in a particular case even if, in his mind, natural law principles compel a different result. At the same time, the common law judge has significant latitude to apply natural law principles in rendering specific decisions. See Antonin Scalia, A Matter of Interpretation 3-14 (1997). Indeed, the English common law was largely fashioned by judges applying practical reasoning according to natural law principles. See id. at 11 (quoting Robert Rantoul saying that "[the] Common Law is the perfection of human reason").

Critics of the perfectionist tradition worry that judges will embrace natural law principles in rendering decisions on specific cases, despite the positive law at issue. See Laurence Tribe, *Natural Law and the Nominee*, N.Y. Times, July 15, 1991, at A20. The judge acting outside the authority granted to him by the positive law would be, however, violating natural law principles. The issues surrounding this dilemma arose
able from what is unsound and unreasonable. And while many perfectionist propositions remain controversial, it cannot be denied that natural law theory, "[long relegated to merely historical interest (at least outside of Roman Catholic intellectual circles), . . . is once again a competitor in contemporary philosophical debates about law, politics, and morals."

This part will set forth the basic framework of recently in a case involving a violation of the federal abortion access law by a conscientious-objecting bishop and monk. See United States v. Lynch, 952 F. Supp. 167, 168 (S.D. N.Y. 1997). The bishop and the monk had been enjoined by a court order to not violate, or aid or abet the violation of, the Freedom of Access to Clinic Entrances Act of 1994. Id. at 168. Notwithstanding the court order, the enjoined defendants sat in the clinic's driveway, preventing vehicles from entering the parking lot of the clinic. Id. Despite police warnings, they continued their modest sit-in until they were carried away by the police and ultimately charged with criminal contempt by the U.S. Attorney's office. Id. In a non-jury trial, Judge Sprizzo found that the defendants "acted out of a sense of conscience and sincere religious conviction." Id. at 169. He briefly addressed whether the defendants could raise either justification or necessity as a defense to the criminal contempt charge. Id. at 169-70. The government argued that the legality of abortion under the positive law precluded either defense. Judge Sprizzo viewed that argument with some skepticism, asking:

Were a person to have violated a court order directing the return of a runaway slave when Dred Scott was the law, would a genuinely held belief that a slave was a human person and not an article of property be a matter the Court could not consider in deciding whether that person was guilty of a criminal contempt charge? And if so, what moral justification could be offered for trying government officials, including judges, for implementing the positive laws of Nazi Germany?

Id. at 170 n.3. Judge Sprizzo did not decide the necessity or justification issues, finding instead that the government failed to prove the willfulness element. Moreover, even if the government was able to show willfulness, Judge Sprizzo would have "exercise[d] . . . the prerogative of leniency" in his role as fact-finder and acquitted the defendants anyway. Id. at 171 (citing John Peter Zenger trial).

Many accused Judge Sprizzo of smuggling his own natural law principles into a case that was a seemingly clear-cut violation of the positive law. Bruce Fein, Tilted Criticism of Judicial Activism, Wash. Times, Jan. 28, 1997, at A17 (accusing Judge Sprizzo of "throwing the rule of law into a paper shredder") Defenders of Judge Sprizzo point out that he had substantial latitude because he was acting, not only as judge, but also as the jury. Needless to say, Judge Sprizzo's decision in Lynch raises many intriguing issues—including conscientious objection, unjust laws, necessity and justification, and judicial review—that natural law theorists have written about in the past and deserve further attention in the future. See, e.g., John Finnis, Unjust Laws in a Democratic Society: Some Philosophical and Theological Reflections, 71 Notre Dame L. Rev. 595 (1996) [hereinafter Unjust Laws] (considering the moral questions involved in "cooperating" with unjust laws); Kirk A. Kennedy, Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas, 9 Regent U. L. Rev. 33, 36 (1997) (examining the natural law as a "jurisprudential tool" of Justice Thomas).

This Note does not attempt to solve the issue of the proper degree of judicial activism in situations where the positive law does not comport with the natural law. Rather, this Note defends the Buckley decision as morally correct and argues that legislators and judges (for slightly different reasons) should follow the principles articulated in Buckley. In so doing, legislators and judges will be complying with both natural law principles and properly interpreting the First Amendment.

247. See Recent Criticism, supra note 2, at 1396.
248. Id. at 1371.
contemporary natural law theory as articulated by some of the most prominent perfectionist theorists.

A. Misconceptions Of Natural Law

Due to the many popular misconceptions of what natural law is, perhaps it is wise to initially describe what natural law is not.\(^{249}\) First, adherence to natural law principles does not require belief in a deity or a Christian theology.\(^{250}\) Aristotle, writing 350 years before Jesus Christ was born, is the most prominent example of a non-Christian natural law philosopher. The natural law has prescriptive jurisdiction over every person who has reached the age of reason regardless of theological beliefs.\(^{251}\) Modern perfectionists hold that objective standards of morality and the universal requirements of practical reasoning can be located independent of a deity.\(^{252}\)

Second, natural law philosophers do not hold that individuals must adhere to a single, uniform way of life.\(^{253}\) Critics of the perfectionist tradition charge that natural law principles yield rigid conclusions that ultimately threaten liberties.\(^{254}\) This criticism may stem from an improper interpretation or understanding of contemporary natural law theory. While natural law theorists certainly hold that there are objective and unchanging truths\(^{255}\) at the same time they recognize many choices and ways of life as morally valid, so long as the choices and pursuits can sustain the requirements of practical reasoning.\(^{256}\) The first principles of natural law ultimately yield certain absolute moral norms.\(^{257}\) But it is these same first principles that provide citizens with unlimited opportunities, projects, and commitments that can (and must) be freely and authentically chosen, consistent with a citizen’s own coherent plan of life and other moral responsibilities.\(^{258}\)

\(^{249}\) For a detailed discussion of the popular misconceptions of contemporary perfectionist theory, see Natural Law and Natural Rights, supra note 3, at 23-49.

\(^{250}\) See Natural Law and Natural Rights, supra note 3, at 48-49. This is a prominent criticism of natural law theory. See Philip Soper, Some Natural Confusions About Natural Law, 90 Mich. L. Rev. 2393, 2405 (1992).

\(^{251}\) See Natural Law and Civil Rights, supra note 11, at 150.

\(^{252}\) See Recent Criticism, supra note 2, at 1397.

\(^{253}\) See Recent Criticism, supra note 2, at 1397.

\(^{254}\) See Natural Law and Civil Rights, supra note 11, at 148, 152-53.

\(^{255}\) See id. at 143-44.

\(^{256}\) See Leo Strauss, Natural Right and History 10 (1965). Strauss contends: \[\text{[K]}\text{nowledge of the indefinitely large variety of notions of right and wrong is so far from being incompatible with the idea of natural right that it is the essential condition for the emergence of that idea realization of the variety of notions of right is the incentive for the quest for natural right.}\]

\(^{257}\) See Recent Criticism, supra note 2, at 1396-98. For a discussion on the first principles and the intermediate principles of natural law, see supra part II.B-C.

\(^{258}\) See Natural Law and Civil Rights, supra note 11, at 148. Another misconception of natural law theory is that it is simply a blueprint for political conservatism. While the perfectionist tradition can defend many conservative positions, many self-
Third, new natural law theory does not require belief in a “normative natural order,” in the sense that one can derive ethical rules from descriptive facts.\(^{259}\) In this way, the term “natural law” can be misleading.\(^{260}\) Natural law practical reasoning answers the question, “what is reasonable” and thus “morally right?” and not, “what is in accordance with human nature?”\(^{261}\) The human intellect, through the process of practical reasoning, moves from a practical inquiry into the constitutive “natural” aspects of a flourishing citizen to the principles and moral norms that this inquiry implies.\(^{262}\)

styled conservatives and libertarians actually work within the liberal (broadly defined) tradition. They often speak in the rhetoric of the liberal tradition: rights, hostility to state regulation (of some activity), and individual freedom. See Walter Berns, Freedom, Virtue and the First Amendment 46 (1957); see also Making Men Moral, supra note 4, at 93-94. Professor George explains that:

American conservatism has, by and large, left the liberal understanding of individual rights and collective interests unchallenged. . . . Those libertarian-minded conservatives who denounce governmental interference with ‘capitalist acts between consenting adults’ rightly claim to be not so much ‘conservative’ as ‘classical liberals.’

Id. at 1382. Natural law theorists are split on the fundamental question of ontology. Neo-scholastic natural law theorists hold that prescriptive principles can be derived from factual truths about human nature. Id. at 1384-84. New natural law theorists, including Grisez, defend a cognitivist prescriptive theory that remains fiercely independent of speculative inquiry into human nature. Id. at 1378-80.

\(^{259}\) See Recent Criticism, supra note 2, at 1382.

\(^{260}\) See Natural Law and Natural Rights, supra note 3, at 35.

\(^{261}\) See id. at 35-36; Saint Thomas Aquinas stated:

Whatever is contrary to the order of reason is, properly speaking, contrary to the nature of man, as man; while whatever is in accord with reason is in accord with the nature of man, as man. Now man’s good is to be in accord with reason, and his evil is to be against reason, as Dionysius states. . . . Therefore human virtue, which makes a man good, and his works good, is in accord with man’s nature in so far as it accords with reason; while vice is contrary to man’s nature in so far as it is contrary to the order of reason.

Saint Thomas Aquinas, Summa Theologicae, I-II, q. 71, art. 2 reprinted in 2 Basic Writings of Saint Thomas Aquinas 561-62 (Anton C. Regis ed., 1945); see also Robert P. George, A Defense of the New Natural Law Theory, 41 Am. J. Juris. 47, 47-48 (1996) [hereinafter Defense of New Natural Law] (new natural law principles ascertain what ought to be done, not “about what is the case”). That said, new natural law theorists acknowledge that ethical inquiry must begin by some practical reflection of the ends of human nature. See Recent Criticism, supra note 2, at 1378.

\(^{262}\) Professor Finnis explains this subtle point:

The basic forms of good grasped by practical understanding are what is good for human beings with the nature they have. Aquinas considers that practical reasoning begins not by understanding this nature from the outside, as it were, by way of psychological, anthropological, or metaphysical observations and judgments defining human nature, but by experiencing one’s nature, so to speak, from the inside, in the form of one’s inclinations. But again, there is no process of inference. One does not judge that ‘I have [or everybody has] an inclination to find out about things’ and then infer that therefore ‘knowledge is a good to be pursued’. Rather, by a simple act of non-inferential understanding one grasps that the object of the inclination which one experiences is an instance of a general form of good, for oneself (and others like one).
B. Major Characteristics Of The Natural Law Tradition

Before more fully exploring the principles of natural law, this subpart identifies some general characteristics of the perfectionist tradition. First, the perfectionist tradition is decidedly non-relativist. Perfectionist theorists hold that citizens can identify, and are bound by, an objective moral law. Second, new natural law theory, unlike Hume's theory, embraces a cognitivist ethics. New natural lawyers assert that individuals are indeed capable of acting on reasons, in addition to passions. Third, natural law theory differs starkly from the modern liberal tradition in its theory of jurisprudence. Perfectionist theorists reject the harm-principle morality test that many liberal moral theorists espouse. They similarly reject the modern notion that the state should be neutral as to any conception of what constitutes a "good life." In the perfectionist tradition, the state is correctly concerned for the moral well-being of the citizens and, by

263. See Natural Law and Civil Rights, supra note 11, at 145. In this article Professor George quotes Justice Clarence Thomas's criticism of relativism and conventionalism: "[t]hose who deny natural law cannot get me out of slavery." Id. The point is that apart from the Thirteenth Amendment, the relativist has no principle upon which to justify abolition. Id.


265. See David Hume, A Treatise of Human Nature: Being an Attempt to Introduce the Experimental Method of Reasoning Into Moral Subjects 375 (Dolphin Books 1961) (1739-1740) ("Reason is and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.").

266. See Defense of New Natural Law, supra note 261, at 47. New natural law theorists make the cognitivist claim by referring to the non-instrumental reasons for human action. Id. at 48-51. Professor George defends the cognitivist claim:

"Unless non-cognitivists can show[ ] that there are no noninstrumental reasons for action, cognitivists are perfectly entitled to believe that people sometimes want to do things, not as a brute matter of psychological fact, but precisely because they grasp the noninstrumental point, and thus, the intelligible intrinsic value, of doing them."

Id. at 51; see also Robert P. George, Can Sex Be Reasonable?, 93 Colum. L. Rev. 783, 784-90 (1993) (book review) (challenging Richard Posner's instrumental conception of rationality). The first precepts of the natural law address the non-instrumental reasons for action. See supra Part II.B.

267. See A Reply, supra note 24, at 308 ("Grisez and Finnis insist on analytically distinguishing reasons for action from emotional motives."); Defense of New Natural Law, supra note 261, at 49 ("Someone who acts for a noninstrumental reason acts ultimately not on the basis of a brute desire . . . ").

268. See Making Men Moral, supra note 4, at 71-82.

269. See A Reply, supra note 24, at 311-12.

270. See On Liberty, supra note 22, at 13. Mill is the founder of the harm principle, which he claimed was "entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control" whether in the form of legal compulsion or moral coercion. Id. Society can rightly interfere with an individual to prevent harm to others, but never out of a concern for the individual's own good. Id.

271. See Making Men Moral, supra note 4, at 84.
extension, the moral well-being of the community at large.\textsuperscript{272} An individual who acts immorally "harms" himself and often others, even if the immoral act would otherwise be characterized by liberal theorists as victimless.\textsuperscript{273} The immoral choice itself harms the actor by corrupting his will and "damaging that aspect of [his] own well-being which consists in establishing and maintaining an upright moral character."\textsuperscript{274} He harms others by his immoral act, if not "directly" in the traditional sense, certainly indirectly by contributing to a culture that is less conducive to moral virtue.\textsuperscript{275} Perfectionist theorists simply reject the distinction between private and public morality as the basis for determining what activities the state may properly regulate.\textsuperscript{276} As discussed in more detail in the subpart dealing with natural "rights,"\textsuperscript{277} the perfectionist tradition holds that there is no principal difference between the well-being of individuals and the well-being of the state.\textsuperscript{278} The well-being of the community consists of and, indeed, is dependent upon, the flourishing of the individual citizens.

C. The First Principles Of Natural Law

The most basic precepts of natural law are known as the "first practical principles."\textsuperscript{279} The first principles provide underived reasons for human choice and action which refer to certain basic human goods that are intrinsically, as opposed to merely instrumentally, valuable.\textsuperscript{280} Perfectionist theorists have identified the basic reasons for action: knowledge and aesthetic experience, life and health, excellence in work and play, religion, interpersonal harmony (which includes cooperation and friendship), marriage and practical reasonableness.\textsuperscript{281} These "basic human goods" are not extrinsic to the person like some

\begin{footnotes}
\item[272] Id. at 20.
\item[273] Id. at 168-69.
\item[274] Id. at 169.
\item[275] Aristotle, for his part, scoffed at the sophist Lycophron who maintained that law is only "a convention" or merely a "surety to one another of justice," lacking the authority or ability to make citizens virtuous. See Politics, supra note 1, at 74. The true definition of a state "is not a mere society, having a common place, established for the prevention of mutual crime and for the sake of exchange . . . . a state, [is rather] a community of families and aggregation of families in well-being, for the sake of a perfect and self-sufficing life." Id.
\item[276] See Making Men Moral, supra note 4, at 169. That said, natural law theorists often recognize that certain prudential considerations might militate against enacting or vigorously enforcing legal prohibitions of so-called private immoralities. See Marriage and the Liberal Imagination, supra note 9, at 319-20 (examining prudential considerations involved in the prohibition of contraception).
\item[277] See infra Part II.C.
\item[278] See Politics, supra note 1, at 168.
\item[279] See Recent Criticism, supra note 2, at 1390.
\item[280] See id. at 1390-94.
\item[281] See Natural Law and Natural Rights, supra note 3, at 85-90; John Finnis, Liberalism and Natural Law Theory, 45 Mercer L. Rev. 687, 691-92 (1994) [hereinafter Liberalism and Natural Law Theory].
\end{footnotes}
Platonic form, but are "instantiated," or participated in, as "intrinsic aspects of human flourishing." These "goods," as interpreted by contemporary perfectionist theorists, lack normative content at the initial stage of the practical reasoning process. The practical intellect merely grasps these basic goods as intelligible, non-instrumental reasons for action.

For example, knowledge is a basic human good. The corresponding, self-evident, pre-moral "first principle" reads: knowledge is a basic good to be pursued, protected, and promoted. The intrinsic worthiness of knowledge as a basic reason for action cannot be proved, nor need it be. It is self-evident, or "per se nota," and therefore neither its intelligibility nor its force rests on any further principle. The basic human goods and the corresponding first principles are not ranked in a hierarchy, nor are they commensurable. One cannot, for example, measure the value of life alongside the value of play, or the value of one life compared to the value of another life or, for that matter, the value of fifty "young" lives compared to the value of one "old" life: these basic goods are all as incommensurable as the sum of four pints and three inches.

282. See A Reply, supra note 24, at 310.
283. Recent Criticism, supra note 2, at 1389.
284. Id. at 1394. "Goods," in the context of the first principles, are not "morally good." The basic human goods, which the basic reasons for action refer to, are pre-morally "good"—in that it is something worthy of pursuit. Id.
285. Id. at 1394-95.
286. See Natural Law and Natural Rights, supra note 3, at 63.
287. See id. The flip side of the principle reads, "ignorance is to be avoided." Id.
288. Indeed, if one could prove the existence of the first principles, then the principles would not be undervield/self-evident. See id. at 289.
289. See id. at 69. The primacy of self-evidence in natural law theory has generated controversy. Critics charge that self-evidence is a dubious concept. See A Reply, supra note 24, at 304. As Robert George responds, however, the basic reasons for action "cannot be deduced, inferred, or derived. The premises needed for such deductions, inferences, or derivations are unavailable. If the intelligibility of knowledge as an ultimate reason for action is to be grasped, that intelligibility must be picked out of the data by non-inferential acts of understanding." Robert P. George, Human Flourishing As A Criterion of Morality: A Critique of Perry's Naturalism, 63 Tul. L. Rev. 1455, 1462 (1989). By definition, a self-evident proposition can only be supported by dialectical arguments or by the weakness of opposing arguments. See Natural Law and Natural Rights, supra note 3, at 64-69.
291. See Natural Law and Natural Rights, supra note 3, at 92.
292. The incommensurability of the basic human goods provides the most powerful criticism of utilitarian liberalism and militates against assigning too large a role for the school of thought known as "law and economics." See generally Richard A. Posner,
Natural law philosophers can only defend the self-evidence of the first practical principles—like "knowledge is a good to be pursued"—by employing dialectical arguments. For example, any contention that knowledge or truth is not worthy of pursuit is operationally self-refuting. This is because the skeptic, in denying the good of knowledge and truth, is offering his own statement for its truth. He thinks that his statement—that knowledge is not worthy of pursuit—is "worth making qua true." Similarly, while one often makes friends for instrumental or even ulterior motives, this need not always be so. A person may become "friends" with someone to help advance his career, to get a ride to work, or to carry out a criminal conspiracy. Any one of the above instrumental reasons answers the question: Why are you becoming friendly with her? If none of the above reasons apply, however, a reasonable answer to the question could also be simply "to make a friend." In other words, friendship or interpersonal harmony provides an intelligent, non-instrumental reason for choice and action. This is what the tradition means by a basic human good.

The good of practical reasonableness plays a special role in perfectionist theory because it provides the rules that guide how one ought to participate meaningfully in all the other basic human goods. Practical reasoning ultimately enables citizens to distinguish between choices that are reasonable, and therefore moral in the normative sense, from those that are either unreasonable or less reasonable. Practical reasonableness is itself a fundamental good that is realized by intelligently, creatively, authentically, and reasonably choosing projects and commitments.

A person who has reached the age of reason can grasp the intrinsic value of basic human goods like knowledge and friendship, and the accompanying self-evident first principles. Up to this point, however, the person has not confronted any rules or moral norms. As Professor Finnis states, the first practical principles serve only to "orient one's practical reasoning" and "suggest new horizons for human activity." In fact, it is the multiplicity of basic human goods and infinite ways to instantiate a good or combination of goods that

Sex and Reason (1992) (analyzing sex from a law and economics perspective). While the natural law theorist would acknowledge the importance of efficiency in some contexts, consequentialism cannot, in the final analysis, secure any inviolate rights. See Politics, supra note 1, at 1325b6-8 ("[H]e who violates the law can never recover by any success, however great, what he has already lost in departing from excellence.").

293. See supra note 289 and accompanying text.
294. Natural Law and Natural Rights, supra note 3, at 74.
295. Id.
296. Id. at 100.
297. See id. at 101.
298. See id. at 65.
299. Id. at 63.
prompts moral questions in the first place.300 One can be fully cognizant of the basic human goods and still be in the dark as to what decision to make in specific cases. Practical reasoning is simply the entire process of moving from self-evident, basic reasons for action—such as knowledge, play, and friendship, inter alia—to specific conclusions and undertakings. The questions that practical reasoning address are merely the questions raised in the traditional study of "ethics."301

D. The Intermediate Principles Of Natural Law

Any act, therefore, requires a person to choose between and among the various basic human goods.302 Acting in a morally upright fashion requires application of all the intermediate requirements of practical reasonableness.303 These requirements are derived from what new natural law theorists call the "first principle of morality" which provides: "In voluntarily acting for human goods and avoiding what is opposed to them, one ought to choose and otherwise will those and only those possibilities whose willing is compatible with a will toward integral human fulfillment."304 Integral human fulfillment is not some "supreme" good that stands even above the basic human values.305 Integral human fulfillment is nothing short of the full flourishing of each individual in every respect.306 This goal is simply not attainable "short of the heavenly kingdom," and must, therefore, remain only an ideal.307 The standard of morality is not the unreachable state of "integral human fulfillment" but, rather, a will compatible with this ideal.308 This abstract first principle of morality is self-evident,309 but it is obviously too general to be of much help to the moral agent.310 It must be broken down into more specific methodological requirements

300. See Recent Criticism, supra note 2, at 1380.
301. See Natural Law and Natural Rights, supra note 3, at 101 ("'Ethics', as classically conceived, is simply a recollectively and/or prospectively reflective expression of [the problem for practical reasonableness] and of the general lines of solutions which have been thought reasonable.").
302. For example, should one choose to become a doctor (and instantiate the good of life and health) or should one become a professor (and instantiate the good of knowledge)?
303. See Making Men Moral, supra note 4, at 17.
305. See Recent Criticism, supra note 2, at 1397. Given the incommensurability of the basic human goods, a principle of morality that directs choice and action to a state of integral human fulfillment would open natural law theory to charges of consequentialism. See id. at 1397-98.
306. See Law, Morality, and Sexual Orientation, supra note 9, at 37.
307. Id.
308. See Recent Criticism, supra note 2, at 1397 ("Inasmuch as no human choice, or set of choices, can realize anything more than aspects of complete human well-being, integral fulfillment cannot be a grand operational objective (whether of an individual, a community, or the whole human race.").
309. See id. at 1399.
310. See id. at 1397-98.
that direct morally upright decision-making. Each of the specific methodological requirements are derived from the first principle of morality. As derivations, then, these requirements are not self-evident—unlike the first principles of practical reasonableness and the first principle of morality. Professor George explains the derivation of the intermediate principles of practical reasonableness:

[W]e often have incentives, and therefore confront temptations, to treat integral human fulfillment in some of its aspects... as expendable for the sake of others. When we act on these incentives, we opt for possibilities the willing of which is simply incompatible with the guiding ideal. We choose with a bad will, and hence, immorally. Under the Grisez-Finnis theory, the modes of responsibility... identify the various incentives to choose incompatibly with a will to integral human fulfillment, and they direct the chooser not to act on these incentives. The modes thus provide premises for the often complex moral analysis by which persons can reason their way to specific moral norms.

The “modes of responsibility” fully equip the moral agent to reason from the abstract first principle of morality to specific moral norms.

Through the centuries, political theorists have, upon philosophical reflection, recognized each of these basic ethical “modes of responsi-

311. See Making Men Moral, supra note 4, at 14.
312. At one point, there was some question whether the methodological requirements of practical reasonableness were self-evident. Professor Finnis at least suggested as much in Natural Law and Natural Rights. See Natural Law and Natural Rights, supra note 3, at 102. Since then, however, prominent “new natural law” theorists have made it clear that these intermediate rules are derived from the self-evident first principle of morality. See Recent Criticism, supra note 2, at 1396.

Professor Finnis explains the multiple roles the basic requirements of practical reasonableness play in the perfectionist tradition:

Each of these requirements concerns what one must do, or think, or be if one is to participate in the basic value of practical reasonableness. Someone who lives up to these requirements is thus Aristotle’s phronimos; he has Aquinas’s prudencia; they are requirements of reasonableness or practical wisdom, and to fail to live up to them is irrational. But, secondly, reasonableness both is a basic aspect of human well-being and concerns one’s participation in all the (other) basic aspects of human well-being. Hence its requirements concern fullness of well-being. . . . So someone who lives up to these requirements is also Aristotle’s spoudaios (mature man), his life is eu zên (well-living) and, unless circumstances are quite against him, we can say that he has Aristotle’s eudaimonia (the inclusive all-round flourishing or well-being—not safely translated as ‘happiness’). But, thirdly, the basic forms of good are opportunities of being; the more fully a man participates in them the more he is what he can be. And for this state of being fully what one can be, Aristotle appropriated the word physis, which was translated into Latin as natura. . . . So Aquinas will say that these requirements are requirements not only of reason, and of goodness, but also (by entailment) of (human) nature.

Natural Law and Natural Rights, supra note 3, at 102-03 (citations omitted).
313. Recent Criticism, supra note 2, at 1398.
314. See id. at 1399.
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bility" in some form or another. Indeed, as Professor Finnis laments, "[e]ach of these requirements has ... been treated by some philosopher with exaggerated respect, as if it were the exclusive controlling and shaping requirement." Upon reflection, however, one realizes that one must comply with each and every one of the requirements to lead a morally upright life. Like the basic human goods, each of the intermediate requirements is no less significant than any other.

One recognizes that, all too often, human beings act out of bias, selfishness, shortsightedness or excessive emotion. The intermediate requirements of practical reasonableness address these human inadequacies. The methodological requirements of practical reasonableness dictate that one should: (1) have a coherent plan of life; (2) make no arbitrary preferences among the basic human goods; (3) make no arbitrary preferences among persons; (4) retain detachment and commitment in decision-making; (5) choose to act for ba-

315. Natural Law and Natural Rights, supra note 3, at 102.
316. Id.
317. Id. at 103.
318. Id. at 105.
319. John Rawls and others have identified the requirement that one ought to have a rational plan of life. See John Rawls, A Theory of Justice 407-24 (1971). While this rule does not mandate unwavering adherence to a detailed blueprint of one's life plans, it does require that one pursue a general direction in life given the infinite combination of projects and commitments that one can pursue. See Natural Law and Natural Rights, supra note 3, at 104. Can anyone dispute that it is unreasonable to needlessly squander opportunities or to "live merely from moment to moment, following immediate cravings, or just drifting[?]" Id.
320. This intermediate principle directs one never to intentionally or negligently omit any of the basic human goods from the moral equation. See Natural Law and Natural Rights, supra note 3, at 106-07. Of course, the very multiplicity of the basic human goods compels individuals, consistent with a coherent plan of life, to choose to pursue one or more goods at the expense of one or more other goods. Nevertheless, one ought not think, will, or act in a way that fails to at least account for each of the intrinsic goods in life. To the extent one denies that a basic good is not a fundamental aspect of human flourishing and acts consistent with this denial, one acts unreasonably. Id. at 106.
321. This requirement is frequently referred to by theologians and others as the "golden rule": "Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets." Matthew 7:12; see also Luke 6:31 ("And as ye would that men should do to you, do ye also to them likewise."). In philosophical terms, the rule means that one's moral choices must be "universalizable." Natural Law and Natural Rights, supra note 3, at 107. As many ethicists have shown, it is unreasonable to arbitrarily favor an individual or group of individuals over another. Id. at 108-09 (citing John Rawls's "social contract" as an insurer of the "golden rule"). While this rule forbids selfishness, thoughtlessness, duplicity, and bias, it nonetheless leaves room for a "reasonable scope for self-preference." Id. at 107. After all, as an autonomous actor, an individual can more effectively address his own well-being than that of others, even as he also exhibits due concern about the well-being of others.
322. This rule is closely related to the first requirement of practical reasonableness and further ensures that, in all of the various opportunities and circumstances that one confronts, one will be receptive to all of the basic goods and participate creatively
sic human goods over merely instrumental goods—and act efficiently in pursuing these goods;\(^3\) (6) avoid acts that in themselves do nothing but damage a basic human good (the rule that the ends do not justify the means);\(^3\) (7) advance the requirements of the common

in them. See Natural Law and Natural Rights, supra note 3, at 109-10. The first component of this two-part rule dictates that one ought to act with a certain degree of detachment—so as to guard against becoming fanatical toward any one project or commitment. \(Id.\) at 110. The second component of this requirement safeguards against the trait that stands opposed, in many ways, to fanaticism: apathy. \(Id.\) While it is unreasonable to focus exclusively on one project or commitment, it is equally unreasonable to not pursue \emph{any} projects, or to fail to be open to new, creative ways to carry out existing projects. \(Id.\)

323. Professor Finnis remarks that this rule poses “problems which go to the heart of ‘morality.’” \(Id.\) at 111. On a broad level, this rule requires individuals to act efficiently and effectively in the pursuit of projects and commitments. The rule should not, however, be confused with a broad consequentialism or utilitarianism. See supra note 22 for a discussion of utilitarian principles. The rule only requires that one weigh the consequences of certain actions, at least in limited contexts. One can safely say, for example, that one should prefer an intrinsic good (life) to a mere instrumental good (money). One can be quite confident, in another example, that it is better to pay less than more, because all things being equal, it is more prudent to preserve resources than to simply waste them. In other words, in certain limited contexts, an individual can accurately weigh the consequences and decide the most efficient course of action. But the perfectionist ethicist is quick to point out that this rule must be applied along with all the other rules. The other rules of practical reasonableness, and the incommensurability of human goods rule out, for example, efficiency and weighing of consequences in choosing to intentionally kill one hostage to save ten. See Natural Law and Natural Rights, supra note 3, at 111-12.

324. This rule is one of Kant’s “categorical imperatives.” See Immanuel Kant, Metaphysics of Morality (1785) reprinted in The Philosophy of Kant: As Contained in Extracts from his Own Writings 246 (John Watson trans., 1934). The potency of the efficiency requirement discussed above, is blunted somewhat by the rule that one should never choose an act “which of itself does nothing but damage,” or frustrate an opportunity to participate in a basic human good. Natural Law and Natural Rights, supra note 3, at 118. The only reason to act directly against a basic human good is the consequentialist hope that the damage done will be outweighed by the “good” consequences that are expected. But, as Professor Finnis reminds the consequentialists, “outside merely technical contexts, consequentialist ‘weighing’ is always and necessarily arbitrary and delusive” due to the impossibility of assigning a “value” to any of the basic human goods. \(Id.\) at 118-19; see supra note 292 and accompanying text.

The rule has the most force in the kinds of ethical dilemmas like the opportunity to save ten hostages by killing some innocent man—an opportunity that traditional ethicists would reject. See Rights and Wrongs, supra note 9, at 96. While ten may be worth more than one when counting beans, this kind of calculus cannot be made in the hostage dilemma. As Professor Finnis notes:

The goods that are expected to be secured in and through the consequential release of the hostages (if it takes place) would be secured not in or as an aspect of the killing of the innocent man but in or as an aspect of a distinct, subsequent act, an act which would be one ‘consequence’ amongst the innumerable multitude of incommensurable consequences of the act of killing. Natural Law and Natural Rights, supra note 3, at 119. This rule obviously provides the rationale for the inviolability of human rights, including the right to life. See Rights and Wrongs, supra note 9, at 93-113 (analyzing this mode of responsibility in the abortion context).
good;325 and (8) follow one’s conscience.326

Applying these methodological requirements, any citizen can reason to the most specific moral injunctions like those found in the Ten Commandments and the Model Penal Code.327 Practical reasoning should guide a legislator, just as it guides an individual citizen, when making his policy conclusions. Thus, legislative proposals that are inconsistent with the principles of practical reasoning are unjust.

E. “Rights” In Natural Law Theory

Before identifying and justifying a natural right to free speech, it is necessary to define a “right” in the context of natural law theory. In the perfectionist tradition, individual rights are not “opposed” to the collective interests,328 as they are in certain liberal political theories.329 Professor Dworkin, for example, argues that individual rights must trump the aggregate, collective good.330 But a natural lawyer observes that Professor Dworkin’s juxtaposition of collective interests and individual rights is untenable: “The incommensurability of basic human goods undermines any aggregative conception of collective interests. Hence, ‘collective interests’ are, in reality, the interests of individuals. There simply are no ‘collective interests’ not reducible to concrete aspects of the well-being of individual members of the collectivity.”331

This means that Professor Dworkin’s division of labor—the legislature’s role in advancing collective interests and the court’s role in protecting individual rights332—is equally untenable.

Unlike liberals, natural law theorists conceive of collective interests in a non-utilitarian, non-aggregative way.333 Individual rights are not limitations on the pursuit of the common good, but are really constitutive parts of the common good.334 The common good is not the great-
est good for the greatest number,\textsuperscript{335} but instead consists of the conditions that favor \textit{each} individuals' integral human fulfillment.\textsuperscript{336} Thus, by definition, the non-aggregative common good cannot be advanced by policies that infringe upon individuals' moral rights.\textsuperscript{337} Understood properly, rights are merely "expression[s] of what is implicit in the term 'common good', namely that \textit{each} and everyone's well-being, in each of its basic aspects, must be considered and favoured at \textit{all} times by those responsible for co-ordinating the common life."\textsuperscript{338}

Like the courts, the legislature has a duty to protect these rights.

Thus, natural lawyers demand from Professor Dworkin some grounding for the right to "equal concern and respect."\textsuperscript{339} The principle of equality, after all, is not a self-evident first practical principle "nor does one contradict oneself in denying [this] abstract right."\textsuperscript{340} While natural law theorists certainly agree that every citizen deserves "respectful consideration" in the distribution of the common benefits, citizens have no right to "identical treatment" in these distributions.\textsuperscript{341} The "equal concern and respect" principle poses problems as a foundational rule for political morality because equality is not the ultimate objective.\textsuperscript{342} A principle of equality, therefore, should remain subordinate to the first principles that refer to the truly basic aspects of human flourishing in each and every individual—the common good.\textsuperscript{343} With the ultimate goal of the common good in mind, one realizes that "there is no reason to suppose that this flourishing of all is enhanced by treating everyone identically when distributing roles, opportunities, and resources."\textsuperscript{344}

### III. Natural Law Free Speech Principle

Thus, with full knowledge of the ultimate reasons for human action, the requirements of practical reasonableness, and the place of "rights" in the perfectionist tradition, part III will defend a natural law free speech principle.

\textsuperscript{335} For a discussion of utilitarian political theory, see \textit{supra} note 22.
\textsuperscript{336} \textit{See} \textit{Making Men Moral, supra} note 4, at 92.
\textsuperscript{337} \textit{Id.} at 93.
\textsuperscript{338} \textit{See} \textit{Natural Law and Natural Rights, supra} note 3, at 214.
\textsuperscript{339} \textit{See} \textit{id.} at 221-23.
\textsuperscript{340} \textit{Making Men Moral, supra} note 4, at 86.
\textsuperscript{341} \textit{See} \textit{Natural Law and Natural Rights, supra} note 3, at 223. Note that the third methodological requirement of practical reasoning mandates no arbitrary preferences among persons. There may be good reasons for not treating everyone identically—including the needs, function, merit, and relationship of the parties involved. \textit{Id.} at 173-77.
\textsuperscript{342} \textit{Id.} at 174.
\textsuperscript{343} Note that the "common good" in natural law parlance should be distinguished from the utilitarian's notion of "collective general welfare."
\textsuperscript{344} \textit{See} \textit{Natural Law and Natural Rights, supra} note 3, at 174.
A. Traditional Justifications For A Free Speech Principle

For a long time, philosophers and legal scholars have tried, with varying degrees of success, to defend the heightened protection given to free speech in many societies. This part will analyze some traditional defenses of free speech and offer, in their place, a perfectionist free speech justification.

1. Utilitarian/Truth-Based Defense

Perhaps the most prominent justification for a free speech principle is the argument from truth. John Stuart Mill argued in On Liberty that suppression of speech has potentially unsettling implications for the pursuit of truth. Mill noted:

The peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation—those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error. To refuse a hearing to an opinion because they are sure it is false is to assume that their certainty is the same as absolute certainty. All silencing of discussion is an assumption of infallibility.

Mill knew very well that "experience refutes" the claim that truth always prevails over falsehood. Nevertheless, over "the course of ages" the true statement will continue to resurface until it can "withstand all subsequent attempts to suppress it." The modern proponents of the truth-based free speech justification have developed the language of the "marketplace of ideas."

The truth-based approach has some obvious appeal to a scholar working in the perfectionist tradition. Knowledge/truth is an ultimate, intelligible reason for action and, thus, a basic human good. Moreover, Mill and Justice Holmes are assuredly correct that the exchange

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347. See id. at 21-22.
348. See id. at 34.
349. Id. at 36.
350. See Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Homes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."); see also Thornhill v. Alabama, 310 U.S. 88, 95 (1940) ("Abridgement of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error . . . ."). For a general discussion of the truth-based defense of free speech, see Free Speech, supra note 345, at 15-34 (discussing and criticizing "the argument from truth").
351. See supra Part II.C.
of ideas facilitated by freedom of speech often yields the truth.\textsuperscript{352} Indeed, the natural law theorist has no problem accepting the two assumptions implicit in the truth-based defense: that man is capable of rational thought and that man can discern objective truth.

Yet, many have recognized the fundamental weakness of the truth-based justification. Professor Schauer asks the relevant question: "Does truth [necessarily] prevail when placed side-by-side with falsity?"\textsuperscript{353} Critics of the truth-based argument point out that the "marketplace of ideas" theory is, all too often, simply divorced from reality, particularly in times of irrational passion.\textsuperscript{354} Because ignorance and falsity often prevail in this marketplace, "there is no reason to assume that open debate and discussion will automatically and in every case be beneficial."\textsuperscript{355} Thus, the truth-based defense, while powerful and supportable in many instances, does not always justify free speech.

2. Democratic/Procedural Defense

In contrast to the truth-based defense of the freedom of speech, some scholars maintain that the free speech guaranty follows naturally from the ultimate sovereignty of the citizenry in a democracy.\textsuperscript{356} Free speech enables citizens in a democracy to obtain the necessary information, deliberate, and ultimately vote on the issues.\textsuperscript{357} In addition, a right to free speech grounded in principles of democracy provides citizens with the means to speak out against corruption and injustice on the part of the government.\textsuperscript{358} The democracy-based argument, therefore, depends on notions of self-government: the sovereign people have the right to participate in the "shap[ing] of the polity."\textsuperscript{359} Professor Dworkin's free speech principle consists of a "just democracy" prong that incorporates the democracy-based justifications.\textsuperscript{360}

Over-reliance on principles of sovereignty, however, poses problems for the democracy-based defense of free speech. The most prominent flaw in the argument from democracy is illustrated when the sovereign citizenry decides, as a whole and as a sovereign, to

\textsuperscript{352} See Free Speech, supra note 345, at 26 (noting the truth-based argument's "substantial validity" in the academic and scientific fields).
\textsuperscript{353} Id. at 25.
\textsuperscript{354} See Rodney A. Smolla, Free Speech in an Open Society 6-7 (1992) [hereinafter Open Society].
\textsuperscript{355} Free Speech, supra note 345, at 33.
\textsuperscript{356} See Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 26 (1960). This defense poses problems because it may not justify freedom of speech in a community not organized as a democracy. See Making Men Moral, supra note 4, at 206-07; Free Speech, supra note 345, at 35.
\textsuperscript{357} See Open Society, supra note 354, at 12.
\textsuperscript{358} Id.
\textsuperscript{359} Id.
\textsuperscript{360} For Professor Dworkin's account of the First Amendment, see supra part I.C.
A free speech right that ultimately relies on the consent of the sovereign may not be secure. What the sovereign grants, it can take away. Unless the sovereignty is willing to forgo inclinations to censor and otherwise “make adequate provision for self-criticism and self-restraint,” what is to prevent censorship? As Professor Schauer notes, if a separate free speech principle is to mean anything, it surely must include free speech in the face of majoritarian impulses.

Various scholars, including Professor Dworkin, have addressed the flaws inherent in a “pure” argument from democracy. They have adjusted that argument accordingly to prevent an unscrupulous majority from taking away the free speech rights of the minority. This argument depends on the existence of a separate foundational principle of equality, which is hotly debated.

3. Self Expression/Dignity Defense

Beyond the search for truth or the principles of democracy, some First Amendment scholars justify free speech on the grounds that speaking one’s mind “provides the speaker with an inner satisfaction and realization of self-identity essential to individual fulfillment.” The natural law theorist would not quibble that speech often instantiates the good of human dignity—that is, so long as the speech is integrated around valuable ends. To the extent that the self-expression/dignity defense suggests “an unseemly ring of hedonism,” however, the perfectionist theorist parts company with the dignity-based defender.

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361. See Free Speech, supra note 345, at 40. Another criticism of the argument from democracy is its “exclusive emphasis” on matters of public policy and seeming neglect of private speech. See id. at 44.
362. Id. at 45.
363. Id.
364. See supra Part I.C.
365. Professor Schauer points out the similarities between the democracy-based defense and the equality-based defense: “[A]s we shift from a sterile notion of democracy as majority rule to democracy as equal participation, free access to information becomes more a matter of respect for individual dignity, individual choice, and equal treatment of all individuals, and less an idea grounded in notions of sovereignty.” Free Speech, supra note 345, at 41.
366. See supra Part I.C.
367. Part IV.A.3 criticizes the right to free speech founded solely on notions of equality.
368. See Open Society, supra note 354, at 9.
369. Cf. Making Men Moral, supra note 4, at 203 (“As an instrumental good, speech is only valuable if it used for good purposes.”) Although “abusive, defamatory, obscene, or merely manipulative speech” can arguably be self-expressive, these forms of self-expression are immoral and, therefore, properly limited by the political community. See id.
370. See Open Society, supra note 354, at 9-10. To the extent that any self-expression has effects contrary to the common good, it is not worth protecting. Sheer self-expression that fails to advance the common good is not a “right.” To the extent that
The dignity-based defense suffers from other problems, as well. For example, to the extent the dignity-based defense considers speech or self-expression an end in itself, the defense misses the mark. As discussed in the next subpart, speech can only be instrumentally worthwhile. Second, it is not clear what activities the dignity-based defense actually protects. The dignity defense, in fact, seems more properly directed to the right to think, not speak. In fact, as Professor Schauer notes, "[b]ecause virtually any activity may be a form of self-expression, a theory that does not isolate speech from this vast range of other conduct causes freedom of speech to collapse into a principal of general liberty." A strong free speech principle must rest on more than just self-expression.

B. Natural Law Defense Of Free Speech

The natural law defense of freedom of speech and association traces back, like many other aspects of perfectionist theory, to the work of Aristotle. Aristotle maintained that "man is by nature a political animal." Aristotle therefore maintained that "men, even when they do not require one another's help, desire to live together; not but that they are also brought together by their common interests in so far as they each attain to any measure of well-being." Aristotle and other perfectionist theorists have recognized that citizens can only participate in the various human goods by cooperating with one or more other citizens in one's projects, commitments, and associations. Even the smallest and most trivial activities often require some degree of cooperation. Cooperation often takes the form of, or has as its impetus, communication or speech. Speech, therefore, is a highly val-

the speaker's will is integrated around upright purposes, including the intrinsic good of authenticity (a part of the basic human good of practical reasonableness), see supra part II.C, the self-expression is worthy of protection.

371. See Open Society, supra note 354, at 9; see also Free Speech, supra note 345, at 49 (discussing the view that speech is an intrinsic good).
372. See infra note 380 and accompanying text.
373. See Open Society, supra note 354, at 10-11.
374. Free Speech, supra note 345, at 52.
375. See Politics, supra note 1, at 1253a.
376. See id. at 1253a3, 1278b19-20. In Aristotle's argument that the state is a creation of nature, he suggests the grounding for the right to free speech:
Now, that man is more of a political animal than bees or any other gregarious animals is evident. Nature, as we often say, makes nothing in vain, and man is the only animal who has the gift of speech. And . . . the power of speech is intended to set forth the expedient and inexpedient, and therefore likewise the just and the unjust. And it is a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the like, and the association of living beings who have this sense makes a family and a state.
377. Id. at 1253a7-18.
378. See Making Men Moral, supra note 4, at 192.
uable instrumental good because it "mak[es] possible co-operation in the pursuit of morally upright purposes."

While communication is only instrumentally valuable, cooperation is intrinsically valuable in that true cooperators jointly participate in the basic good of "interpersonal harmony" whether or not their motive is to become friends. True friendship consists of the good of interpersonal harmony/cooperation realized in its fullest form; interpersonal harmony, in its weakest form, has mostly instrumental value. Thus, human cooperation/interpersonal harmony ultimately provides the rationale for a free speech principle—a principle that can be defended even in non-democratic societies and even when the cooperation does not yield the truth.

To summarize, most speech deserves protection because of its tremendous instrumental value in the coordination of activities toward the pursuit of the common good. Yet, as important, speech fosters genuine cooperation, interpersonal harmony and even full friendship that has intrinsic value. Interpersonal harmony is a basic aspect of both a flourishing citizen and a flourishing state. Thus, "cooperating activities" which allow citizens to accomplish instrumental goals and participate in the intrinsic good of interpersonal harmony should be protected. The First Amendment's protection of speech, press, assembly and the communal aspects of religion is justified because these "cooperating activities" instantiate substantial human goods. First Amendment freedoms can indeed be thought of in reciprocal

380. Id. at 194. The proposition that speech is valuable for its own sake is, therefore, highly questionable. See Free Speech, supra note 345, at 47-59.
381. Making Men Moral, supra note 4, at 196.
382. See Natural Law and Natural Rights, supra note 3, at 88. Aristotle considered "friendship . . . the greatest good of states and what best preserves them against revolutions." Politics, supra note 1, at 1262b.
383. See Making Men Moral, supra note 4, at 197, 207.
384. The political community—which includes all of the specific institutions like advocacy groups, political campaigns, and political parties—is itself only an instrumental good. See Liberalism and Natural Law Theory, supra note 281, at 693. However, the act of forming these organizations, the act of funding them, and the act of participating in the organization's activities will regularly yield intrinsic as well as instrumental benefits. Id. While most of the time these acts can not be said to instantiate the fullest form of interpersonal harmony known as complete friendship, they nonetheless instantiate the intrinsic goods of harmony and cooperation in justice. Cf. Making Men Moral, supra note 4, at 197 (noting that "[speech that facilitates genuine co-operation for worthy ends is valuable because it always realizes the intrinsic value of interpersonal harmony").
385. A simple example will show the connection between speech and cooperation. Assume that two individuals (or organizations, for that matter) share the same particular goal but are pursuing that goal in different geographical areas, unaware of each other's presence or efforts. In one sense, their several-but-not-joint efforts "cooperate" towards the shared goal. But, in reality, they are not cooperating at all. One may be confident that one individual (or group) would express goodwill to the other, perhaps consider cooperating with the other, and perhaps even consider developing a full friendship with the other individual based on their common interests. The only way that this "alliance" could be formed, however, is by communication, leading inev-
terms. For example, one has a right to disseminate a particular idea over the Internet, in addition, one has a right to receive a particular idea over the Internet—and then cooperate with the disseminator to expand on the idea and perhaps fulfill some goal. Thinking of the various activities protected by the First Amendment in reciprocal terms reveals that the ultimate justification of a free speech right is the basic human good of human cooperation.

Some may object here to the (over)reliance on the intrinsic good of friendship/cooperation as the ultimate rationale for a free speech principle. After all, two people can speak without cooperating or becoming friends, as that term is commonly understood. They can, in fact, cooperate without even speaking or learning one another’s name. Moreover, one often directs speech to people one does not consider friends. Nevertheless, truly cooperating parties participate in the intrinsic value of interpersonal harmony even in small, less-personal in-

386. John Garvey offers a slightly different natural law defense of free speech by distinguishing between freedom of speech and freedom of association. On the one hand, he defends free speech because it permits citizens to pursue the intrinsically valuable good of knowledge. See John H. Garvey, What Are Freedoms For? 65 (1996). By contrast, the right to freely associate with others derives from intrinsic interpersonal goods, or friendship. Id. at 134. This Note treats the two rights as substantially indistinguishable. See Making Men Moral, supra note 4, at 217 (assembly and speech are merely two means of cooperating). Freedom of speech, no less than freedom of association (or press and religion in many cases) facilitates the realization of all human goods—and not just the pursuit of knowledge. While knowledge is one of the goods that First Amendment activities invariably instantiate, the right to speech and association are more naturally derived from the good of friendship, broadly defined.

387. See Free Speech, supra note 345, at 10 (describing “other-regarding” aspects of First Amendment); see also Staub v. City of Baxley, 355 U.S. 313, 321 (1958) (striking down anti-solicitation statute). In Staub, the Court struck down a municipal ordinance that made it an offense to “solicit” community members to become members of any “organization, union or society” on First Amendment grounds. Id. This protected associational right assures that the solicitor can solicit and the potential cooperator/future member can be solicited and, thus, can evaluate the issues raised by the solicitor and eventually decide whether to cooperate further by joining.

388. It is true that this “sharing” of interior thoughts takes place on a large scale in the political context, and that this “sharing” often becomes crude and impersonal. Nevertheless, this does not detract from the valuable goods the even impersonal “sharing” instantiates.
stances of cooperation\textsuperscript{389}—or even when the cooperation fails to achieve the instrumental goal.\textsuperscript{390} As Professor George points out:

Whether or not unified action is motivated precisely by the good of interpersonal harmony, that good is always realized, at least as a welcome side-effect, in truly co-operative action. . . . It is realized to some extent, however, even in small acts of neighborliness and friendship, such as pleasantly chatting with a co-worker about the weather, or directing a stranger to the train station.\textsuperscript{391}

Understanding friendship, as Aristotle did, to be a spectrum of human goods—purely instrumental on one end and purely selfless on the other\textsuperscript{392}—demonstrates how the multi-faceted good of friendship justifies a right to free speech even with respect to less personal activities.\textsuperscript{393}

Aristotle distinguished between several different types of friendship. He defined "complete friendship" as "friendship of good people similar in virtue," whose concern for another's well-being is for the other's own sake.\textsuperscript{394} He acknowledged, however, that complete

\textsuperscript{389} See Making Men Moral, \textit{supra} note 4, at 196. The fact that many cooperative political activities, including political spending, are impersonal should not significantly detract from the interpersonal goods they instantiate. One can think about political contributions, for example, in much the same way the Church views charitable contributions. As Germain Grisez points out, charitable giving is an act of fellowship or participation (\textit{koinonia}). See \textit{Difficult Moral Questions}, \textit{supra} note 11, at 430; \textit{see also} Romans 15.26-27 ("For it hath pleased them of Macedonia and Achaia to make a certain contribution for the poor saints which are at Jerusalem. It hath pleased them verily; and their debtors they are.") Although charitable contributions differ from political contributions in many respects, they are similar in two significant ways: both acts instantiate the intrinsic good of fellowship and both acts reflect (often, but not always) a genuine concern about the common good. The Church teaches that the realization of these goods (with respect to charitable giving) does not require a personal relationship. See \textit{2 Corinthians} 8.1-9.15; \textit{Difficult Moral Questions}, \textit{supra} note 11, at 431. For similar reasons, a political contribution made for the right reasons does not need a personal relationship to instantiate the intrinsic good of fellowship/interpersonal harmony.

\textsuperscript{390} See Making Men Moral, \textit{supra} note 4, at 197.

\textsuperscript{391} Id. at 196.

\textsuperscript{392} See Judith A. Swanson, The Public and the Private in Aristotle's Political Philosophy 166-67 (1992) [hereinafter Aristotle's Political Philosophy].

\textsuperscript{393} Friendship, however, should not be confused with "goodwill." One may express goodwill toward or "root" for a favorite politician in much the same way one can exhibit goodwill toward and root for a baseball player. But no one would confuse the fan for a friend. Aristotle himself held "that friends are aware of reciprocated goodwill. For many a one has goodwill to people whom he has not seen but supposes to be decent or useful. . . ." \textit{Ethics}, \textit{supra} note 5, at 1155b34-36. Thus, goodwill is merely inactive friendship.

One expresses goodwill toward these men, not because they are necessarily one's friends, but because one recognizes and admires in them certain virtuous characteristics (in the politician's case, perhaps skill in the intrinsic good of knowledge, and in the baseball player's case, skill in the intrinsic good of play). It is precisely the willingness to cooperate with them, perhaps initially only for instrumental or ulterior motives but later for noble reasons, that raises the relationship to friendship.

\textsuperscript{394} Id. at 1156b7.
friendship was rare. The community participates in concord when it (i) is in general agreement on the fundamental reasons for acting as a community and (ii) provides an acceptable decision-making vehicle to "act on their common resolution." It is a unique species of friendship that is concerned with what affects life as a whole in the community and encompasses the friendship that can develop between legislators and constituents. Political action united around true principles of justice always instantiates concord. Part IV will address the campaign finance implications of the intrinsic good of concord in more detail.

Naturally, not all cooperation, much less all speech, is valuable. Cooperation can be for evil or valueless ends. Speech is valuable only when it fosters genuine cooperation toward valuable ends, even when that cooperation ends in failure. Speech or cooperation that fails to advance any human good is not worthy of protection. On the other hand, speech that fosters genuine cooperation for valuable purposes, as a general proposition, is worthy of protection. This means that freedom of speech is not an absolute right. For example, communities sometimes rightly place time, place, and manner regulations on speech. Again, some speech and cooperation is clearly harmful and deserves no protection whatsoever—such as "cooperating" statements amongst co-conspirators in furtherance of a crime. Yet, even when speech is less worthy of protection, prudential concerns about the potential for government abuse in regulating speech might militate

395. Id. at 1156b25.
396. Id. at 1155a25-26, 1159b25; Aristotle's Political Philosophy, supra note 392, at 184.
397. See Unjust Laws, supra note 246, at 596.
398. See Ethics, supra note 5, at 1167a28-31.
399. See id. at 1167b3-5.
400. See Aristotle's Political Philosophy, supra note 392, at 187-89. Aristotle suggests that "rulers may take into account the wishes of [the constituents] and in this sense 'be ruled in turn' by them." Id. at 188. (citations omitted).
401. See Making Men Moral, supra note 4, at 195.
402. See id.
403. Cooperation that is valueless should not be confused with cooperative efforts that fail. In the case of cooperation that falls short of the goal, the cooperators still realize the intrinsic value of friendship (to whatever degree), if only as a welcome side effect. Moreover, initial failures often result in later success. See id.
404. See Making Men Moral, supra note 4, at 197. For example, a unanimous Supreme Court defended truly valuable speech in NAACP v. Alabama, 357 U.S. 449, 463 (1958) (holding that an order compelling organization's membership list violated members right to freedom of association because enforcement of order would impair the ability of the organization and its members "to foster beliefs" and possibly "induce members to withdraw . . . and dissuade others from joining").
406. See Making Men Moral, supra note 4, at 199.
against censoring some less worthy speech. 407 This Note will address some of the prudential considerations involved in the campaign finance debate in part IV.B.

Although not an absolute right, freedom of speech should “enjoy a strong presumption.” 408 Thus, speech restrictions are justified only under one of the following three conditions: 409 First, when the speech is not of the kind that fosters genuine communication and cooperation; 410 second, when the speech in question fosters cooperation for manifestly evil ends, as is true in the case of criminal conspiracies; and third, when the speech is “likely to result in serious harms or injustices” such as speech that reveals national security secrets. 412

IV. APPLYING THE NATURAL LAW FREE SPEECH PRINCIPLE TO THE/CAMPAIGN FINANCE DEBATE

Under the natural law free speech principle, political spending is valuable because it facilitates genuine cooperation by citizens in their various projects, commitments, and associations. Grounded in this principle, this part turns first to an analysis of the virtue of the various components of the Buckley holding. Then, this part criticizes the latest effort in Congress to restrict political spending by individuals, groups, parties and candidates.

A. The Buckley Decision Is Morally Correct

This sub-part addresses the major holdings of the Buckley decision and defend them using the natural law free speech principle developed in the last part. First, this sub-part vindicates the Court’s grant of heightened constitutional protection to political spending. Then, this sub-part defends the Court’s limited acceptance of the corruption justification and its outright rejection of the non-corruption rationale offered by proponents of strict campaign finance rules.

407. See id.
408. Id. at 198.
409. Id. at 198-99.
410. Id. This category includes speech that is gratuitously abusive or purely manipulative. Id.
411. Id. at 199.
412. Id. A free speech principle that ultimately depends on the value of the cooperative ends has the advantage of minimizing the unhelpful O’Brien speech/act framework. See supra notes 42-46 and accompanying text for a discussion of O’Brien in the campaign finance context. The value of speech is wholly unrelated to whether the communication is considered traditional “speech” or an “act.” See Making Men Moral, supra note 4, at 205 (suggesting that many forms of speech can yield valuable cooperation). The natural law free speech principle justifies both speech and action that constitutes a genuinely cooperative pursuit of valuable ends.
1. Political Spending Deserves Heightened Protection

Whether or not one accepts the definitional claim that political spending constitutes "speech,"\(^{413}\) it is clear that political spending can foster genuine cooperation for valuable ends.\(^{414}\) Thus, although this Note does not directly address the constitutional interpretation question,\(^{415}\) it is important to note, as the *Buckley* Court did, that political spending can be as valuable as other forms of traditionally-protected speech.\(^{416}\) As a result, the simplistic criticism of *Buckley* that money does not equal speech\(^{417}\) fails to account for the practical necessity of money in a large, mass-media-based political community that seeks to genuinely and efficiently cooperate for the common good. Under a regime of strict campaign financing, candidates would find themselves with less resources to spend on everything from travelling the district to meet constituents to purchasing media to communicate and sharpen the candidate’s message.\(^{418}\) Proposed campaign finance regulations invariably provide disincentives for issue-oriented associations to stay engaged with legislators and the public issues.\(^{419}\)

In short, political communities require a substantial quantity of free speech to function well. Political speech is justifiably at the “core” of the free speech liberty because it fosters cooperation within the community as a whole.\(^{420}\) While the political community as an institution or group of institutions is merely instrumentally valuable,\(^{421}\) the actions taken by members of the community in forming various political and social relationships and in pursuing of specific political projects instantiate both instrumental and intrinsic goods.\(^{422}\) All of the activities protected by the First Amendment provide a means by which two


\(^{414}\) See *The Real Truth About Federal Campaign Finance*, supra note 158, at 783 (noting that PACs have contributed to increased minority representation in Congress).

\(^{415}\) See *Money and Politics*, supra note 158, at 1053.

\(^{416}\) See *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) ("The First Amendment affords the broadest protection to [political spending] in order ‘to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’" (citing *Roth v. United States*, 354 U.S. 476, 484 (1957))).

\(^{417}\) See *Wealth Primary*, supra note 72, at 278.

\(^{418}\) See *Faulty Assumptions*, supra note 25, at 1060 (noting that less political spending by a candidate yields a poorly-informed electorate).

\(^{419}\) See id. at 1076. Professor Smith states that PACs serve an important interest by "monitoring" legislators that would be lost if their role were diminished. Campaign finance reform, as currently proposed, would diminish this valuable role. See id. It should be added that PACs not only “monitor” officeholders, but provide valuable information to legislators on a particular issue that is important to the association. See *Specious Arguments*, supra note 158, at 1275.

\(^{420}\) See *Making Men Moral*, supra note 4, at 205.

\(^{421}\) See *Liberalism and Natural Law Theory*, supra note 281, at 693.

\(^{422}\) See *Making Men Moral*, supra note 4, at 195.
or more citizens can share their "interior thoughts" on political issues of the day, or anything else, and act on them to the extent their goals are in common.423 These actions often achieve instrumental goals. More than that, the initiation, retention, and cultivation of these political relationships, which is often aided and abetted by political spending, invariably yields some degree of friendship—a basic aspect of the common good.424

Critics of Buckley scoff at the idea that forming, funding and otherwise participating in an impersonal political organization, for example, can do anything more than accomplish instrumental and often selfish political goals.425 In response to this incredulity, it is worth quoting the Congressional testimony of a member of the political "special interest" known as EMILY's List426 to illustrate how political spending can realize deeper goals:

When De Tocqueville wrote his famous chronicle of America, he marveled at the rich civic life of this young nation, noting that Americans seemed forever to be forming associations of one kind or another, including political associations. My membership in EMILY's List is a way for me to be connected to the political life of the nation and to my fellow citizens; it allows me to band together with others who share my views and work toward a common end. I do not pretend to be a Constitutional scholar. But like most Americans, I carry with me an almost innate knowledge of my First Amendment rights of citizenship—freedom to practice religion, freedom to speak my mind, freedom to assemble with fellow citizens in support of a common goal. I believe without a doubt that my membership in EMILY's List is secured by such rights.427

This citizen, admittedly no constitutional scholar and (in all likelihood) no natural law theorist, nonetheless recognizes her "innate" right to participate in the good of political "fellowship" with like-minded citizens.428 She testified strongly against McCain-Feingold, not because she thinks that money equals speech in some abstract sense, but because she realizes that restrictions on political spending erode her opportunity to work in harmony with her fellow citizens in the pursuit of common ends.429

423. See id. at 194.
424. See id. at 196.
425. See Wealth Primary, supra note 72, at 276 (quoting Congressman Bernard Sanders stating that the American political system is dominated by "greed and self-interest of a ruling elite.").
426. EMILY's List is a political advocacy association that supports female Democratic candidates.
428. See id.
429. See id.
Proponents of *Buckley* seek to foster robust discussion and effective cooperation regarding matters that pertain to the well-being of the political community. Most campaign spending goes for valuable activities that involve sharing information with other citizens, highlighting various injustices in the community, and, finally, persuading other political actors to cooperate for the common good. All of the above activities redound to the benefit of the intrinsic good of concord—a species of friendship.

An observer of the American political scene would possibly conclude that the American political community is rather “discordant” on quite a few basic matters. He might, as a result, object to the position that political participation—and political spending—yields even the aspect of friendship known as concord. After all, the bitterness of politics on certain issues seems to indicate that political action actually produces disharmony, instead of the desired goal of unity regarding the “essentials.” The natural law theorist, however, would not reach this conclusion. No matter how bitterly divided citizens are on a fundamental issue, present-day discord does not mean that concord is not worthy of pursuit, or that citizens should abandon the goal of unity around what is good. Rather than following a discordant path and withdrawing from the debate, the natural law theorist recognizes that the community will never fully participate in concord without political action in this area. The very act of attempting to attain the noblest aspects of concord through political action is itself a realization of substantial intrinsic goods.

This is particularly true with respect to political action seeking to correct injustice in the community. If the members of the political community experience dramatic examples of injustice and discord, it is political action, not passivity, that can blunt the effects of the discordant acts. First, political action, including political spending, united against injustice realizes cooperation and (partial) concord among those who are so united. Second, political action and spending that seeks unity around true principles of justice serves to blunt further

430. See *Making Men Moral*, supra note 4, at 205.
431. See id. at 204. Free political speech enables “[p]eople who are likely to have information and ideas relevant to good decision-making” to communicate with fellow citizens and legislators to realize some good. *Id.*
432. See *Faulty Assumptions*, supra note 25, at 1090 (listing benefits of unregulated political speech).
433. For an account of the good of concord, see supra notes 396-99 and accompanying text.
434. See *Unjust Laws*, supra note 246, at 596-97. The abortion question reveals discord in the American political community. See *id.* at 596-99.
435. See *id.* at 596-97.
436. See *Making Men Moral*, supra note 4, at 196 n.2.
437. See *Unjust Laws*, supra note 246, at 599.
438. See *Making Men Moral*, supra note 4, at 196.
Third, political action/speech/spending that strives to rectify injustice in the political community engages those with the opposing view and entreats them to provide reasons for their position. Professor George observes that,

Democrats and Republicans . . . sharply disagreeing over important policy matters, may co-operate for the common good precisely by engaging in debate over these matters fairly and in good faith . . . . Bona fide criticism of putative injustice, whether or not it is on the mark, is essential to the well-being of any political community and to most other types of communities.

Thus, political action can yield concord whether agreement on the essential questions has fully materialized and whether the community presently endures "putative injustices." Liberal and conservative "special interests" participate in the good of concord even when they bitterly disagree on specific issues. This political action can, and often does, have the salutary effect of nudging citizens to consult the "law written on [their] hearts" and reconsider their positions. The illumination of injustice thus provides additional, albeit related, reasons why it is prudent to cultivate an environment of active and even vigorous political participation. One way to ensure that this type of environment exists is to avoid enacting chilling regulation that restricts the ability of citizens to act on political matters.

Concord would seem, then, to justify a right to political speech and political spending regardless of whether the community disagrees on certain fundamental matters. A robust environment of political spending promotes the kind of political action that is necessary to achieve the goal of concord, especially when the community faces grave injustices. Without political speech and political spending, the citizenry remains powerless to effectuate both instrumental cooperation and cooperation for its own sake, whether in the form of complete friendship, concord, or some other aspect of interpersonal harmony.

439. See Unjust Laws, supra note 246, at 598.
440. See id.
441. See Making Men Moral, supra note 4, at 196 fn.2.
442. See id.
443. See Unjust Laws, supra note 246, at 598.
444. As Professor George states, "discussion and debate are crucial to matters . . . [that] are morally important. [Indeed], [t]he avoidance (or rectification) of unjust or otherwise immoral policies by people of goodwill is powerfully served by permitting, indeed, encouraging, vigorous debate, criticism, and dissent." Making Men Moral, supra note 4, at 202. This is why associations like the National Right to Life Committee remains unalterably opposed to efforts like McCain-Feingold to restrict political spending. See Alison Mitchell, Foes of Abortion Split Sharply Over Campaign Finance Bill, N.Y. Times, Mar. 26, 1998, at A21 (reporting that the National Right to Life Committee is "lobbying hard" against McCain-Feingold).
2. The Court Properly Limited The Corruption Rationale

Naturally, not all political spending is for such noble purposes.\textsuperscript{445} Sometimes a citizen gives, or a politician accepts, a contribution for personal gain or favor; this is the scenario of the so-called quid pro quo.\textsuperscript{446} The Supreme Court recognized this valueless form of speech in \textit{Buckley} when it accepted corruption as a compelling reason to uphold FECA's contribution limits (but not compelling with respect to the expenditure restrictions).\textsuperscript{447} But critics of \textit{Buckley} and advocates of further campaign finance restrictions suggest that private political contributions are—at least partially—\textit{per se} tainted by corruption.\textsuperscript{448} The coverage of political news, at times, suggests that Congressmen and other politicians are regularly bought and sold.\textsuperscript{449} Critics of \textit{Buckley} often presume that the relationship between the modern political contributor and the candidate amounts to nothing more than that of a debtor and a creditor.\textsuperscript{450} If the relationship is not as inherently corrupting as critics of \textit{Buckley} would suppose, then \textit{Buckley}'s limited application of the corruption rationale can be defended plausibly.

Clearly, many unscrupulous contributors view their relationship as some kind of quid pro quo.\textsuperscript{451} But, in reality, most of the relationships between contributor and candidate are less like a debtor-creditor arrangement and more akin to a benefactor-beneficiary relationship—a relationship that Aristotle considers an aspect of


\textsuperscript{447} See supra notes 58-59 and accompanying text.

\textsuperscript{448} See \textit{Wealth Primary}, supra note 72, at 274-76. Their conception of corruption includes more than just the quid pro quo variety. Some argue that corruption included the "effects that spending might have not only on the behavior of elected officials but on the electoral process itself." \textit{Specious Arguments}, supra note 158, at 1270. Under this theory, private wealth drowns out ordinary citizens. \textit{Id.} at 1266-67. This rationale is closely related to the equalization rationale. See \textit{id.} at 1267; see also supra note 79 (discussing corrupting effects of corporate wealth beyond mere quid pro quo relationships). For some practical problems with this theory, see \textit{id.} at 1266-69.


\textsuperscript{450} See \textit{Wealth Primary}, supra note 72, at 276 (noting title of CNN news special on campaign finance, "The Money Trail: Democracy For Sale").

\textsuperscript{451} See Rosenbaum, supra note 445, at A1.

\textsuperscript{452} See \textit{Faulty Assumptions}, supra note 25, at 1068-71. Citizens contribute money essentially for one or more of the following reasons, according to Curtis Gans, director of the Committee for the Study of the Electorate: "1. That they are friends with the candidate or officeholder. 2. That the candidate or officeholder has views congruent to the giver on one or more key issues. 3. That the opponent has views which are anathema on one or more key issues. 4. To gain access to the candidate/officeholder...
friendship.\textsuperscript{453} It is of course true that most contributors favor certain policies and contribute, and may seek access to, those candidates that, if (re)elected, will likely advance these policies.\textsuperscript{454} Yet it is also true that, more often than not, the money follows the policy position, not the other way around.\textsuperscript{455} Candidates generally maintain a set of fairly consistent positions that citizens can, with a little investigation, ascertain (and then support or reject).

If there were hard evidence that money regularly "buys" votes or evidence of rampant vote switching subsequent to well-placed political donations, the danger of the quid pro quo would be more menacing.\textsuperscript{456} The evidence, however, shows that Congressmen generally...
base their legislative votes on ideology, party affiliation and constituent needs—not fund-raising opportunities.\textsuperscript{457} It is not surprising that candidates maintain a rough consistency in their positions given the existence of fund-raising opportunities on both sides of virtually any significant issue of public policy. Even the largest corporate contributors must ultimately prevail on the merits of the issue—not the size of the check.\textsuperscript{458}

Thus, it is simply a gross overstatement that most political spending takes the form of the debtor-creditor relationship. Aristotle recognized, as critics of \textit{Buckley} should, the difference between the debtor-creditor relationship and the benefactor-beneficiary relationship.\textsuperscript{459} At first glance, Aristotle concedes that the benefactor, in many ways, appears to play a role similar to the creditor.\textsuperscript{460} By the same token, it may appear at first glance (especially to the cynical) that the contributor plays the role of the creditor. Under this scenario, the candidate is the debtor who must "repay" the contributor in exchange for the corporate PAC contributions—from large tobacco companies, for example—are frequently cited as an example of this more subtle form of corruption. Yet, even the influence of wealthy corporate interests, like those of the tobacco lobby, seems to turn on the merits of the public policy views that they espouse. Contributions from tobacco PACs did not prevent the Republican-controlled Senate Commerce Committee from passing punitive anti-tobacco legislation in early 1998 by a vote of 19 to 1. See Jill Abramson, \textit{Tobacco Industry Steps Up Flow of Campaign Money: Proposed Settlement Leads to Record Giving Even as Political Opposition Grows}, N.Y. Times, Mar. 8, 1998, at A1 (noting that "[e]ven some top recipients of contributions over the last seven years [including House Commerce Committee Chairman Thomas Bliley (R-Virginia), a Republican representing a tobacco-intensive district] have joined a chorus of industry critics"); Alison Mitchell, \textit{For Tobacco, A Big Gamble}, N.Y. Times, Apr. 10, 1998, at A1, A16 (observing diminished level of political support in Congress for tobacco companies); Jeffrey Taylor and Jeanne Cummings, \textit{Clinton, in Tobacco Territory, Chastises Cigarette Firms for Resisting Legislation}, Wall St. J., Apr. 10, 1998, at A12 (quoting House Speaker Newt Gingrich (R-Georgia) saying that tobacco lobby has "zero" influence in Congress). Critics may respond by saying that contributions from the tobacco lobby delayed certain members of Congress from acting in the public interest on tobacco-related questions. At some point, however, the claim becomes increasingly speculative and, consequently, loses force.

\textsuperscript{457} See \textit{Faulty Assumptions}, supra note 25, at 1068. Professor Bradley Smith states that "a substantial majority of those who have studied voting patterns on a systematic basis agree that campaign contributions affect very few votes in the legislature." \textit{Id.} (citation omitted). It is noteworthy that the most criticized incident in the 1996 campaign, at least from the perspective of Senator\textsuperscript{s} on the campaign finance investigation committee and the media, was an oilman's $300,000 soft money contribution to the Democratic Party to aid in his efforts to secure approval for his pipeline project. See supra note 445. Although this contributor gained a brief meeting with President Clinton, he never received approval for his project. \textit{Id.} Thus, even this example of "access" does not seem particularly "dangerous." See Robert J. Samuelson, \textit{Making Pols Into Crooks: Campaign-Finance "Reform" Criminalizes Politics and Deepens Public Cynicism}, Newsweek, Oct. 6, 1997, at 53.


\textsuperscript{459} See \textit{Ethics}, supra note 5, at 1167a28-33.

\textsuperscript{460} \textit{Id.} at 1168a20-26.
tributor's largesse. Yet, unlike creditors, benefactors seek more than repayment: "benefactors love and like their beneficiaries even if they are of no present or future use to them." Most contributors are, like benefactors, pure of heart. While they may make contributions with a specific policy (or more likely a specific policy direction) in mind, they also do it for the sake of the candidate (and/or members of the organization) and out of a genuine concern for the well-being of their neighbors and the community at large. Most people who contribute to political campaigns would never consider their relationship a mere debtor-creditor arrangement. Indeed, the contributor-candidate relationship is not unlike the benefactor-beneficiary relationship that Aristotle identified 2300 years ago as an instantiation of the intrinsic good of friendship.

While the Court recognized that bribery attempts (the pure debtor-creditor arrangement) are not worthy of protection, it also recognized that a community requires a substantial amount of cooperation and communication and, thus, political spending, to effectively function. Thus, whether the Court drew the "corruption" line at precisely the correct place, the Court was correct in not using the rationale as a blunt instrument to inhibit otherwise valuable cooperative opportunities. The corruption rationale is simply not weighty enough to sustain the expenditure limitations. If anything, the Buckley Court can be perhaps criticized, as Justice Burger and Justice Thomas have, for holding that the corruption rationale, in light of other quid pro quo safeguards, justifies even the contribution restrictions. Immediate disclosure of large direct contributions seems to be a narrowly-tailored remedy that serves to inform the voter of any potentially troubling relationships, while maintaining a robust environment of political

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461. Id. at 1168a31-33.
463. See supra notes 389 and 452 and accompanying text.
464. The closest that the modern-day political contributor gets to a debtor-creditor relationship seems to be the situation in which a particular interest group gives to both political parties in order to "hedge their bet." In some cases, this relationship may be not much more than an instance of instrumental friendship. Even in this scenario, however, it is not inherently evil to give to both parties, when one's legitimate interests (which presumably, in the case of a business PAC, include the interests of shareholders, employees and other constituencies) are regularly at stake in Congress. Truly genuine cooperative relationships can exist even under this scenario.
466. See id. at 48-49.
467. See supra note 70 and accompanying text.
468. See 143 Cong. Rec. S100021 (daily ed. Sept. 26, 1997) (statement of Sen. Grams). Senator Grams argued that "[If there are those in Congress or any place else who would sell their integrity for a $2,000 contribution rather than representing the millions of people back home . . . they would be easily found out. . . . [and] will be thrown out." Id.
cooperation. Ultimately, corruption is not caused by the system of campaign finance, but by the moral failings of individual citizens and officeholders.469

3. Buckley Properly Rejected The Equalization Principle

Buckley can be defended against the other major criticism: that the Court failed to recognize the egalitarian, “level-the-playing-field” rationale as compelling.470 The stated intention of the campaign finance reformer, as evidenced by McCain-Feingold, is to increase the voice of those without deep pockets.471 But McCain-Feingold achieves this goal in only in a relative sense. Campaign finance restrictions in reality do nothing to increase the voice, in any absolute sense, of those with modest resources. The restrictions serve merely to bring every citizen into roughly the same position—a position in which everyone equally lacks opportunities for political cooperation! Thus, the ongoing strategy of campaign finance “reformers” consists of “balancing speech rights away” and viewing the First Amendment as “a libertarian barrier to equality.”472

The natural law recognizes an equality principle under which the fundamental dignity and equality of every human being is an indispensible truth.473 This “universizable” principle fords trading away the fundamental rights of some in favor of others.475 Indeed, such favoritism, even if “in the name of human rights,” can only be the result of a contorted view of “rights” as “severable from the just requirements of morality and the common good.”477 Of course, it is not necessarily true that forbidding the millionaire from writing a large check robs him of his “fundamental dignity and equality.” The reality, however, is that worthwhile organizations, candidates, and political causes need funding to flourish. To the extent that campaign finance reform impedes these “subsidiary” organizations from flourishing, it impoverishes the common good—and, therefore, the rights of citizens.

470. See supra text accompanying note 75.
472. See Faulty Assumptions, supra note 25, at 1089.
474. See supra note 321.
476. For the natural law account of “rights,” see supra part II.E.
478. See infra note 534.
As noted in part II.E, the ultimate goal of any community should be the common good rather than some abstract and counterproductive notion of equality. Natural law theorists criticize Professor Dworkin and other liberal theorists for making this principle of equality more fundamental than the first principles of natural law that refer to the basic reasons for human action and serve as the starting point in all moral reasoning. Acting on the basis of equality should remain instrumental to the bottom-line pursuit of the common good. This common good—the full protection and realization of every basic aspect of human flourishing in each individual may or may not be most fully advanced by equal distribution or treatment in any particular area.

Thus, the merit of the redistribution of political influence can only be determined by reference to its potential to foster valuable political cooperation in each and every citizen. It is not at all clear—in fact, it is quite improbable—that proposals to restrict spending across-the-board on individuals, candidates, parties and associations in the name of equality will produce an environment conducive to political cooperation. History teaches that one individual or a small group of individuals often can most effectively promote, at least initially, a worthy political goal. Thus, a small group of wealthy contributors advanced Senator Eugene McCarthy's "peace" campaign for President in 1968. In that situation, few complained that "big money" or "unequal influence" corrupted the cause. Campaign finance restrictions would impede this kind of valuable political cooperation, as well as more grassroots-oriented political activity. The equalization strategy does not seem likely to yield either the quantity or quality of political participation that is possible under a regime that avoids strict campaign finance restrictions. Thus, because the goal of equalization can only be instrumental in a sound perfectionist theory and because the reality of the American political community suggests that the equalization strategy would have deleterious effects on the common good, the Buckley Court correctly rejected this rationale.

On a more practical level, although the equalization rationale as conceived by Professor Dworkin does not go so far as to require distribution of precisely equal rations of political influence and aims only

479. See supra notes 336-44 and accompanying text.
480. See supra note 338-44 and accompanying text.
481. See Natural Law and Natural Rights, supra note 3, at 174.
482. See supra text accompanying notes 336-38.
483. See Natural Law and Natural Rights, supra note 3, at 174.
484. Cf. id. ("If redistribution means no more than that more beer is going to be consumed morosely before television sets by the relatively many . . . than it can scarcely be said to be a demand of justice.").
485. Faulty Assumptions, supra note 25, at 1073; 144 Cong. Rec. S876 (daily ed. Feb. 24, 1998) (statement of Sen. Bennett) (recalling testimony that had McCarthy been limited to $1000 contributions, he could "never have been able to challenge Lyndon Johnson" in 1968).
for an ideal, it also does not speak to the other resources that are often unevenly distributed in any political community: speaking ability, good looks, family reputation, and popularity. This suggests that the goal of an equal right to political influence is illusory. For example, Citizen A could give $10,000 to a candidate, while Citizen B cannot afford to contribute any money to political campaigns. But Citizen B, just because he cannot spend $10,000 on politics, does not necessarily have less political influence than Citizen A. Citizen B may regularly write letters to the editor, call in to political programs on C-Span, sport a political bumper sticker on his car and volunteer time at the candidate’s phone bank and help drive supporters of the favored candidate to the polls on election day. It is not clear anymore that Citizen A still has more “influence” than Citizen B. The point is that any meaningful equal participation principle does not seem feasible, much less desirable, in a free society consisting of individuals with different talents and different interests.

From a natural law perspective, the fundamental flaw of the equalization rationale is its reliance on a foundational equality principle that appears constructed, not self-evident. As discussed earlier, the underlying equality principle rests on a weak philosophical foundation in which rights are separated from the requirements of the common good. Under McCain-Feingold, a citizen would presumably be comforted by the notion that, while he cannot cooperate politically with other individuals, candidates, parties and groups to the extent he may want to, no one else can either. McCain-Feingold tramples on citizens’ cooperative rights in the pursuit of some abstract, and ultimately impossible, “level playing field.” Thus, a legislator, consistent with Buckley, is morally correct to reject the “equalization” rationale as the moral basis of strict campaign finance laws.

4. The Court Properly Rejected The “Too Much Money” Argument

As mentioned in part II.B., the Buckley Court also rejected the argument that the American political community is awash in too much money. Money is a neutral instrumental good. When individuals and associations use money for genuinely valuable purposes, too much money, all other things being equal, is better than too little. Thus, there can only be “too much” of it if it is being used for immoral purposes. But, as argued in the last sub-part, while the occasional contribution is tainted, most political spending is valuable. Once one

486. See Curse of American Politics, supra note 21, at 23 (noting that his ideal of self-government “will never be perfectly fulfilled” in a “pluralistic contemporary society”).
487. See Making Men Moral, supra note 4, at 86.
488. See supra notes 336-44 and accompanying text.
489. See supra text accompanying notes 73-74.
realizes that political spending serves an important function in the well-being of the citizenry, the cry of "too much" money rings rather hollow. Indeed, this argument is merely illustrative of an instinct on the part of critics of *Buckley* to attack political spending rather indiscriminately.

Once again, the question must be asked: how much money is "proper"? Due to the substantial human goods that can be realized by individuals and associations that spend money on politics, the better course is to follow the *Buckley* Court and leave these determinations to the people themselves. The total amount of money spent for all offices in 1996 was roughly $4 billion, or less than 1/20th of 1% of the country's gross domestic product ("GDP"), which works out to approximately 20% of what Americans spend on dry cleaning and laundry.490 After accounting for all of the sundry coordination problems that involve all the various requirements of the common good in a diverse nation with such a large GDP, the amount of money spent on politics does not appear as threatening. As political science professor Herbert E. Alexander of the University of Southern California testified before Congress:

[T]here are no universally accepted criteria by which to determine where political campaign spending becomes excessive. No one knows precisely how much is too much, but it is clear that we spend a lot more on other endeavors, many of them arguably less important to the welfare of the republic than choosing our government leaders.491

Unless one views Congressmen as hopelessly corrupt or political matters just not that weighty, one has little reason to accept the argument that there is "too much" money in politics.

B. *McCain-Feingold Is Practically Unreasonable*

This subpart examines the major provisions of the McCain-Feingold Bill, mindful of the basic perfectionist rationale for protecting categories of speech from government restriction and comfortable that *Buckley* was rightly decided. First, this subpart focuses on the proposed "voluntary" ceilings on overall spending by candidates. Then, this subpart assesses the merit of McCain-Feingold's restrictions on issue advocacy and other expenditures by political associations.

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491. See Campaign Finance Reform: Hearings on S. 1219 Before the Senate Committee on Rules and Administration, 104th Cong. (1996) (statement of Herbert E. Alexander, Professor of Political Science and Director of the Citizen Research Foundation).
1. Spending Limits

As explained in part II.D., the intermediate requirements of practical reasonableness provide that one should remain open to each of the basic human goods. This rule most obviously prohibits choices that directly attack a basic good: no direct taking of innocent life, no lying when the truth matters, no adultery, etc. But most of the time violations of this rule involve a “discounting” or insufficient regard for one or more basic human goods. Of course, this rule does not mean, as some might suppose, that one has the duty to take up every opportunity to participate in a basic human good. Inevitably, in whatever choice one makes or project one pursues, one chooses to realize one or more basic values at the expense of others.

McCain-Feingold’s spending restrictions, like most of the other major provisions of the bill, violate this intermediate requirement of practical reasonableness by paying insufficient regard to the intrinsic value of cooperation that political spending often yields. McCain-Feingold, as noted in part I.D.2., induces candidates to adhere to spending limits by offering a generous set of benefits to complying candidates and by punishing non-complying candidates. Yet, candidate expenditures are a primary means for the candidate to communicate, and ultimately cooperate, with his constituency. Expenditure limitations inherently inhibit to some degree the ability of a candidate to explain a difficult vote, respond to a critical editorial or otherwise communicate, and cooperate with the citizenry on crucial public policy issues. This, in turn, detracts from the aspect of concord that deals specifically with friendship between “rulers and ruled.”

This dynamic involves the candidate listening and speaking to his constituents and, ultimately, cooperating with them.

492. See supra note 320.
493. See supra notes 320 and 324 and accompanying text.
494. See Natural Law and Natural Rights, supra note 3, at 105-06.
495. See id. at 100.
496. See supra note 194 and accompanying text.
498. See Faulty Assumptions, supra note 25, at 1061 (noting that spending caps could prevent a candidate from responding to negative advertising by his opponent late in the campaign).
499. See Aristotle’s Political Philosophy, supra note 392, at 189; Ethics, supra note 5, at 1361a11-14, 32-34.
500. This dynamic includes communicating and cooperating through political advertisements on television. Consider the following experience of Senator Bennett:

I am currently spending all the money that I am currently raising in building a [grassroots] organization.... It is going right now into building a precinct-by-precinct, voting-district-by-voting-district campaign organization so that if I have no money for television, I have at least one person for every 10 or 20 households who will go out and knock on doors on my behalf.... However, my personal experience says that I cannot energize these folks without some ads on television. I can gave them all the letters, I can give them all
Thus, once the rationale for free speech is considered, it is clear that the Buckley Court was entirely justified in giving heightened protection to political spending and striking down FECA's spending limits. Expenditure restrictions, whether induced or imposed directly, curtail the ability of the candidate and the citizenry to cooperate for the sake of shared political goals—and for the sake of interpersonal harmony (or concord) itself. As such, McCain-Feingold's spending limits infringe upon the "rights" of both candidates and citizens. It is no doubt true that supporters of spending limits are hoping to realize some goods—fairness and confidence in government—even if their proposals are off-the-mark. But, even conceding good intentions, the legislator, truly receptive to all the basic goods, would address unfairness and cynicism more creatively—and thus more reasonably—than by limiting candidates' and citizens' cooperative rights.

Furthermore, supporters of McCain-Feingold arguably can be charged with not merely neglecting a basic human good, but acting directly against it. The rule provides that one should never choose an act that directly attacks a basic good, either as an end in itself or as a means. The basic concept of McCain-Feingold is to suppress the political spending ability of some (candidates, outside issue groups, parties) to achieve certain goals, namely enhancing the relative political voice of others, guarding against corruption, and reducing the amount of money in politics in general. In other words, the professed goals are attained only by impeding the genuine cooperative rights of others.


501. See supra part II.E. for an examination of "rights" in natural law theory.

502. See Buckley v. Valeo, 424 U.S. 1, 17 (1976) (per curiam) (noting that government interest in limiting political spending "arises mainly because the communication [(or more precisely, the quantity of communication)] is itself thought to be harmful." (quoting United States v. O'Brien, 391 U.S. 367, 382 (1968))).

503. See supra note 324 and accompanying text.

504. This is a familiar strategy by the "reformers." See Faulty Assumptions, supra note 25, at 1089. The relevant ethical question is whether spending limits directly attack the good of cooperation or whether proponents of McCain-Feingold really intend to impair the good of cooperation as a means to their professed ends. Philosophers address this kind of dispute with the "doctrine of double effects." See Rights and Wrongs, supra note 9, at 102-12. The doctrine helps determine whether the bad effects of an individual's act were intended either as the end or the means to the end. See Rights and Wrongs, supra note 9, at 102-03. If an individual chooses the ill effects either as the ends or the means, the individual has acted immorally by violating the requirement not to choose to directly damage a basic good. See A Reply, supra note
Even if it could be plausibly argued that supporters of McCain-Feingold do not improperly intend to suppress legitimate political cooperation as a means to some other goal, the spending limits appear to transgress other requirements of practical reasonableness. Even if one grants the legitimacy of the corruption-deterring goal of McCain-Feingold, the efficiency rule\(^{505}\) warns the proponents of spending lim-

\(^{24}\) at 313. For a discussion of this requirement of practical reasonableness, see supra note 324. One can posit two scenarios that might help determine whether proponents of McCain-Feingold choose the contra-cooperative effects of spending limits either as an end or a means. In the first scenario, the cash-strapped school board grudgingly eliminates the budget for new library books to constrain costs and remain operational. The school board’s goal is noble: it wants to remain solvent so as to continue educating the students (thus choosing a contra-knowledge act for the sake of realizing the good of knowledge). Here, one could confidently say that the contra-knowledge effects of a poorly-stocked library, in light of the budgetary constraints, were chosen merely as unfortunate, incidental side effects. See Rights and Wrongs, supra note 9, at 103 (addressing this question in the abortion context). Thus, the school board did not choose the bad effects either as an end or a means. The relevant question is, “If presented with an option in which the anti-knowledge effects could be averted without the school becoming insolvent, would the school board have chosen it?” See A Reply, supra note 24, at 313 (asking a similar question to determine whether halting a sporting event in the event of a bomb threat is a direct act against the basic good of a skilled performance). In the hypothetical, it is clear that the school board would not have cut the library budget if it were not faced with crisis. In the second scenario, the school board forbids (or restricts) certain well-performing students from using the library in order to enhance the self-esteem of poorly-performing students (by allowing them, in effect, to “catch up”). Or perhaps the goal of the second school board is to equalize the intellectual abilities or the student body or even to ensure that each student could “participate on equal terms in formal politics and in the informal cultural life that creates the moral environment of the community.” See Curse of American Politics, supra note 21, at 21. In this case, one can posit that the contra-knowledge aspect of the decision, while not intended as the end, was likely intended as the means. The banishment from the library is more than merely a foreseen and undesired side-effect. Thus, it is fair to say that the school board acts immorally when it chooses to enhance the self-esteem or the intellectual abilities or the political influence of some students, by barring the pursuit of knowledge by well-performing students (at least in the library). The second school board’s decision was not out of budgetary necessity as it was in the first scenario. The choice in the second case is immoral because, unlike the school board in the first case, it wills the affront on the good of knowledge as the precise means to achieving some other goods.

This Note does not aim to resolve the complex issues surrounding the rule of double effects. It is only to suggest that the theory behind McCain-Feingold’s spending limits and, indeed, most campaign finance restrictions as proposed over the years, is not unlike that of the second school board. In fact, as noted above, the rationales of the second school board and the proponents of McCain-Feingold could be precisely the same. The second school board could bar the good students from the library to prevent them from becoming too articulate or knowledgeable so as to have a disproportionate influence in the political community. (After all, it is difficult to see how one’s intellectual capacities bear any less directly on one’s ability to influence the political community than one’s fund-raising prowess. Moreover, it is evident that intellectual abilities, including oratorical skills, often bear directly on fund-raising ability.) In both cases, a rigid egalitarian goal is attained precisely through the curtailment of someone else’s rights. The more reasonable solution in both cases, however, is to find a way to enhance the political influence (or intellectual abilities or self-esteem) of the less well-off citizens without depriving others of their rights.

\(^{505}\) See supra note 323.
its to use the most narrowly-tailored means to advance the stated
goals.\textsuperscript{506} If circumstances compel legislators to substantially limit the
opportunities for valuable political cooperation, they should limit only
what they have to. As noted in part IV.A.2., it seems that the most
efficient deterrent is instantaneous disclosure of contributions above a
certain threshold. That way, the voters (and the prosecutors) can
readily determine who contributes what to whom and for what re-
result.\textsuperscript{507} If a voter feels that his Senator is too beholden to contribu-
tions from large tobacco companies, for example, he can vote
accordingly. Sweeping measures like spending limits apply indiscrimi-
nately to illegitimate and appropriate political spending alike, violat-
ing this requirement. Thus, even assuming a corruption-fighting
motivation on the part of the "reformers," they violate the efficiency
rule by proposing a too-sweeping response.

In addition to the corruption rationale, advocates of spending limits
often justify their bill as a way to level the playing field between in-
cumbents and challengers.\textsuperscript{508} But proponents fail to realize that in-
cumbents start out with enormous advantages.\textsuperscript{509} Incumbents enjoy
name recognition, the "power of the purse," and franking privileges to
name just a few advantages. Sharp spending limits, like those pro-
posed in McCain-Feingold, will likely have the unintended conse-
quence of protecting incumbents and penalizing challengers.\textsuperscript{510}
Studies indicate that it is not overall campaign spending that deter-
mines how successful a challenger is. Rather, the key to a strong chal-
lenge is, not spending more than the incumbent, but by spending a
certain minimum threshold.\textsuperscript{511} In many cases, the spending limits
would penalize challengers by not allowing them to reach the mini-
imum threshold.\textsuperscript{512} More money generally produces more competitive
races.\textsuperscript{513} And, as outlined in part III, vigorous, even bruising, political
debate realizes to some extent the good of cooperation.\textsuperscript{514}

Finally, in a time of increased political apathy and low voter turn-
out, one should not, as Professor Dworkin does, lightly brush aside
calls that expenditure restrictions would further reduce the diver-
sity and depth of the political debate. Today's political debate, as Pro-

\textsuperscript{506} See supra note 323.
\textsuperscript{507} Newspapers and public watchdog organizations play a critical role in this dis-
closure process. For example, the New York Times and other news organizations
hired a private contractor to better keep track of campaign contribution records.
About the Campaign Database, N.Y. Times, Feb. 15, 1998, at 40. The ability of voters
to access this information—and decide for themselves whether a candidate is
"bought"—lessens the need for broader efforts to deter the quid pro quo.
\textsuperscript{508} See Curse of American Politics, supra note 21, at 19.
\textsuperscript{509} See Faulty Assumptions, supra note 25, at 1072-75.
\textsuperscript{510} Id. at 1074.
\textsuperscript{511} Id.
\textsuperscript{512} Id.
\textsuperscript{513} Id. at 1072-75.
\textsuperscript{514} See Making Men Moral, supra note 4, at 196 n.2.
Professor Dworkin rightly observes, too often dissolves into sound-bites and attack advertising. It should be added that what little political coverage the news media provides (particularly on the major television networks), consists mainly of "horse-race" analysis (who's ahead in the polls?) instead of substantive examination of the issues (what are their positions?). As a result, candidates increasingly need to go outside the mainstream media to get their message out. Spending limits invariably weaken the candidates ability to convey his message unfiltered—which turns out to be a bigger concern for challengers than incumbents.

Part of the motivation of proponents of spending limits is no doubt to limit "negative advertising" by candidates. Although Professor Dworkin derides negative advertising, this form of political speech is valuable because it educates the voter, even if in crude terms. Studies have shown that increased campaign spending, even on negative advertising, results in a more informed electorate. This education is the first step in the political cooperation process. If nothing else, a negative advertisement can identify an issue or a proposal to the voter. Moreover, it does not follow that less money in politics will result in less negative campaigns. Some commentators have argued that the current low contribution limits have in part caused candidates to turn to negative advertising. With less access to resources, candidates must turn to the most cost-effective campaign tactic—often negative ads. Even if a connection exists between liberal spending limits and negative campaigning, mere crudeness in political advertising does not seem to be justification for a wholesale limitation of political speech rights.

515. See supra note 142 and accompanying text.

The best way you can help the challenger in the field of money is to allow the challenger to raise more money than the incumbent. If you level the playing field and say to the challenger... you cannot raise any more money than the incumbent but the incumbent starts out with all of the name recognition, and the years of going to Rotary Clubs and bar mitzvahs, all of the staff paid for by the taxpayers available to him, all of the record of answering letters and doing favors and congressional constituent service... you have decapitated the challenger and guaranteed that the incumbent is going to get reelected in virtually every circumstance.

Id. (Statement of Sen. Bennett).
518. See Curse of American Politics, supra note 21, at 19.
519. See id. (calling political advertisements "negative, witless, and condescending").
520. See Faulty Assumptions, supra note 25, at 1060-61.
521. See id. at 1060.
522. See id. at 1061.
523. See id.
Negative ads that are manifestly untruthful or purely manipulative are obviously immoral. Nevertheless, certain amounts of exaggeration and blustering are customary in political campaigning and should be permitted. Here, newspapers play useful roles when they "breakdown" political advertisements for their accuracy. Outright lies should be vigorously condemned. Nevertheless, it is in the interest of the common good to allow robust debate, even in the often crude and exaggerated terms of political negative advertising. Political advertising often serves to highlight various injustices, or to merely present alternative policy proposals. Perfectionist theorists note that, even when criticism is off the mark, the default rule should favor a robust environment for criticism.

2. Restrictions on Issue Advocacy By Non-Candidates

As observed in part I, McCain-Feingold seeks to reduce the "influence" of outside political organizations including PACs and other issue-advocates. The bill, in its original form, would ban PACs from contributing to federal candidates entirely. In addition, the bill cracks down on expenditures made by political associations on their own behalf by subjecting these expenditures to chilling disclosure requirements and other restrictions. By proposing these restrictive provisions, proponents of McCain-Feingold exhibit a hostility to, or at least a neglect of, the valuable aspects of political cooperation that pertain to the activities of these political associations.

In recent years, "PACs" and "special interests" have become pejorative terms. But PACs and issue-oriented political associations are, in one sense, pure units of valuable political cooperation. PACs and other political associations allow citizens of modest means to pool their resources to promote the common good. The provisions limit-

524. Cf. Making Moral, supra note 4, at 198-99 (giving example of manipulative advertising that "induce[s] anxious elderly people to invest in sham life-insurance policies").
525. See David Tell, In Praise of Dirty Campaigning, Wkly. Standard, July 8-15, 1996, at 9-10 ("It's a seductive impulse, this sense that modern politics would be better if less rambunctious and smaller, its layers of 'dirt' removed.").
526. See Making Men Moral, supra note 4, at 196.
527. See supra note 192.
528. See supra note 208.
529. See supra note 217.
530. See 143 Cong. Rec. S10,011 (daily ed. Sept. 26, 1997) (statement of Sen. Bennett joking that "special interest" is "a group that is against what I am trying to do.").
531. This conclusion holds whether the political association's view of the requirements of the common good are off-the-mark. See Making Men Moral, supra note 4, at 196 n.2. Again, associations, candidates, and parties almost always realize the good of concord by debating the requirements of the common good openly and fairly. Id. Almost all political action aims to correct a perceived injustice, thus instantiating the first component of concord which consists of unity around true principles of justice. See supra notes 396-99 and accompanying text. Most political groups that McCain-Feingold seeks to restrict evidence an intent to strive for true principles of justice,
ing the amount and manner in which these associations can spend to further various cooperative efforts are unjust for the same basic reasons that the restrictions on candidate expenditures are. Both sets of restrictions neglect or openly attack the basic human good of cooperation—which is an constitutive aspect of every citizen’s well-being. This is why the courts have so jealously guarded issue advocacy.\textsuperscript{532} Recently, for example, the European Court of Human Rights ruled that an English law restricting the political spending of non-candidates to five pounds violated the right to expression under the European Convention on Human Rights.\textsuperscript{533}

The movement to diminish the influence of PACs and other political associations undermines the natural law principle of “subsidiarity.”\textsuperscript{534} The principle recognizes that:

\begin{quote}
[T]he proper function of association is to help the participants in the association to help themselves or, more precisely, to constitute themselves through the individual initiatives of choosing commitments (including commitments to friendship and other forms of association) and of realizing these commitments through personal inventiveness and effort in projects (many of which will, of course, be co-operative in execution and even communal in purpose).\textsuperscript{535}
\end{quote}

This principle grants responsibility to those smaller and more private organizations and communities that are closest to the persons whose well-being is at stake.\textsuperscript{536} These organizations serve, as the state does, to promote the collective good in their particular “spheres of influence.”\textsuperscript{537}

So while candidates and the media have their own spheres, they should exhibit due respect for the spheres of political associations. PACs and outside organizations maintain a “sphere of influence” that serves multiple benefits. First, they provide a vehicle to effectuate joint political participation in pursuit of instrumental goods—which precisely because it is a common effort, invariably realizes interpersonal goods—often the species of friendship known as concord. Second, these organizations provide expertise in a particular area and

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\textsuperscript{532} See supra note 64.
\textsuperscript{534} See Natural Law and Natural Rights, supra note 3, at 169. The principle of subsidiarity is a requirement of justice in natural law theory. \textit{Id.} The principle is derived from the requirement that one should foster the common good, \textit{id.} at 125, and, to a lesser extent, the rule requiring efficiency. See \textit{id.} at 146-47, 159.
\textsuperscript{535} \textit{Id.} at 146.
\textsuperscript{536} See On Human Rights, supra note 473, at 21.
\textsuperscript{537} \textit{Id.}
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highlight potential injustices in that area—both to the legislators and the community at large.\textsuperscript{538} Thus, these organizations fulfill their proper subsidiary role of advancing the common good. This dual role often necessarily includes uniting around certain proposals and candidates in the form of political participation which invariably involves some form of political contribution or expenditure. Thus, it is reasonable to conclude that “regulation of these associations should never (in the case of the associations with a non-instrumental common good) or only exceptionally (in case of instrumental associations) be intended to take over the formation, direction or management of these personal initiatives and interpersonal associations.”\textsuperscript{539} McCain-Feingold, with its flat prohibition of even modest contributions by PACs and its harsh restrictions on independent expenditures and issue advocacy, detracts from, rather than promotes, the principle of subsidiarity by diminishing the role that these (instrumental) associations play.

Many PACs and other grass-roots organizations will find their vital role as political participators limited by the provisions in McCain-Feingold. As noted in part I.D., McCain-Feingold would subject valuable issue advocacy to regulation under FECA. In the latest draft of McCain-Feingold, Congress would restrict these outside advocacy groups from political advertising which uses the name or likeness of a candidate within 60 days of the election.\textsuperscript{540} This rather Orwellian concept—censoring criticism at the time when it matters most—is incriminating evidence of unreasonableness on the part of proponents of McCain-Feingold.

For this reason, some of the largest grass-roots political organizations stand most strongly opposed to McCain-Feingold.\textsuperscript{541} Most of these organizations are single-issue groups that will associate with certain candidates only to the extent that the candidate supports their issue. As pure issue groups, these organizations—the Christian Coalition, the National Right to Life Committee, the Sierra Club, the Farm Bureau—pose virtually no threat of corruption and, instead, seek to unite the political community around certain principles of justice. Their activities invariably realize both aspects of concord: the activities promote united action around the requirements of the common good and the activities validate an open and largely democratic decision-making process in which subsidiary associations serve a role in shaping the common good.

\textsuperscript{538} See Specious Arguments, supra note 158, at 1275.
\textsuperscript{539} See Law, Morality and Sexual Orientation, supra note 9, at 34.
\textsuperscript{540} See supra notes 221-27 and accompanying text.
If newspaper editors could only spend a limited sum to disseminate their publication or were forced to register with the FEC, for example, they would be rightly outraged. It is not surprising, then, that political associations have expressed outrage at McCain-Feingold and have vigorously assailed the proposal as an infringement of their rights. Advocacy groups from all parts of the ideological spectrum formed an organization called the Free Speech Coalition to ward off proposals such as McCain-Feingold. The coalition represents over fifty non-profit organizations "from the American Conservative Union to the Fund for the Feminist Majority." The joint opposition from such a various collection of groups should cause proponents of McCain-Feingold to question whether they are not transgressing legitimate rights of citizen groups. If they would put themselves "in the shoes" of the diverse members of the Free Speech Coalition, they would perhaps realize that the proposed restrictions will indeed restrict the cooperative opportunities of these vital organizations.

It is tempting for politicians to try to muzzle outside advocacy organizations whose primary purpose, in many cases, is to criticize the politician's voting record. But there is nothing inherently evil about outside issue-advocacy organizations attempting to influence the political process—through voter guides, independent political advertising or by developing relationships with legislators. These issue organizations are not influential because their members are wealthy; rather, it is because these groups have thousands, even millions, of members who cooperate by donating small amounts. McCain-Feingold's treatment of issue advocacy is clear and convincing evidence of an intent on the part of its sponsors to shirk the requirements of the common good, among which include promoting instrumental and intrinsic cooperation among the citizenry.

McCain-Feingold's ban on soft money should undergo the same analysis as the restrictions on issue advocacy. Banning soft money means that political parties would be severely restricted in their ability to engage in issue advocacy or otherwise spend money to influence the political process. It is difficult to see for what other purposes the political parties exist.

543. Id.
544. See Mitchell, supra note 444, (reporting that National Right to Life Committee viewed McCain-Feingold's issue advocacy restriction as "crippling" to the pro-life movement).
545. See supra note 321.
546. See supra note 212 and accompanying text.
Conclusion

Supporters of the McCain-Feingold seek to capitalize on current headlines and tap into public cynicism. In so doing, they are acting with shortsightedness. Supporters of McCain-Feingold will no doubt be able to find plenty of public cynicism directed at government and politicians to exploit. But the American people deserve sound policies that conform to all the rules of practical reasoning, not rash reform efforts that make good sound bites but would produce undesired consequences. Defenders of Buckley are not naïve enough to think that the current system is flawless. Nor is anyone naïve enough to think that the ideal that is portrayed in these pages—the modest contributor joining an association to advance true principles of justice, and, in the process, forming meaningful friendships with fellow citizens—is always and everywhere fulfilled. Nevertheless, current campaign finance proposals, untrue to the spirit of Buckley, move away from this ideal instead of toward it.

Critics of Buckley working in the liberal tradition seek to impose a comprehensive set of regulations that would seriously stifle genuinely valuable political cooperation. In so doing, they violate the requirements of practical reasoning. The “reformers” clearly do not sufficiently consider the intrinsic value of cooperation realized in a more-or-less unregulated campaign finance environment. By promoting equality to a foundational principle, by exaggerating the pervasiveness of corruption, and by allowing Congress to determine how much political cooperation is allowed in an election cycle, critics of Buckley short-change the well-being of every “political animal.”