

**CHALLENGING BUCKLEY V. VALEO: A LEGAL STRATEGY**

by

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In its 1976 ruling in *Buckley v. Valeo*,<sup>1</sup> the United States Supreme Court sanctioned a system of unlimited campaign spending in federal elections. Since that ruling, this nation has witnessed an explosion of political expenditures. The 1996 election cycle marked the most expensive election in U.S. history, with congressional and presidential candidates spending a total of more than \$2 billion.<sup>2</sup> Campaign spending has also dramatically risen in state and local elections across the country.<sup>3</sup> Unlimited spending poses a serious threat to our democratic process. It undermines public confidence in our elections and in our democratic institutions.<sup>4</sup> It presents an increased danger of actual corruption as large contributors dominate the financing of public election campaigns.<sup>5</sup> It places enormous time pressures on officeholders running for re-election, interfering with their ability to carry out their governing duties.<sup>6</sup> It enables candidates with wealth or access to wealth to drown out the voices of lesser-funded candidates and their supporters.<sup>7</sup> It violates the promise of political equality.<sup>8</sup>

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<sup>1</sup> 424 U.S. 1 (1976) (per curiam).

<sup>2</sup> See Ruth Marcus & Charles Babcock, *The System Cracks Under Weight of Cash; Candidates, Parties and Outside Interests Dropped a Record \$2.7 Billion*, THE WASHINGTON POST, February 9, 1997, at A1.

<sup>3</sup> See Kevin Sack, *High Stakes and Higher Antes in Statehouse Races*, THE NEW YORK TIMES, Sept. 6, 1998, at A24.

<sup>4</sup> See Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1126-31 (1994) [hereinafter Wertheimer & Manes].

<sup>5</sup> See *id.* at 1131-42; see also Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 293-97, 326-28 (1993) [hereinafter Raskin & Bonifaz]; CHARLES LEWIS & THE CENTER FOR PUBLIC INTEGRITY, *THE BUYING OF THE CONGRESS* (1998).

<sup>6</sup> See Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994).

<sup>7</sup> See *infra* text and accompanying notes 50-51.

<sup>8</sup> Raskin & Bonifaz, *supra* note 5, at 332..

The time has come to revisit *Buckley v. Valeo*.<sup>9</sup> The facts and circumstances of unlimited campaign spending have dramatically changed since the *Buckley* ruling. They now demonstrate the necessity for campaign spending limits to protect the integrity of our electoral process. New facts now require a new review. As the Supreme Court has stated:

In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.<sup>10</sup>

This paper will highlight the emergence of a new legal movement for challenging *Buckley*. It will present the arguments developed in several test cases in jurisdictions that have sought to revisit the constitutionality of campaign spending limits by enacting and defending mandatory spending limits.

These beginning efforts – from the cities of Cincinnati, Ohio and Albuquerque, New Mexico, to the State of Vermont – have been launched with the recognition that legal reform may be a long-term project. In 1937 and again in 1951, the Supreme Court upheld the poll tax as constitutional.<sup>11</sup> A fee charged to voters in order to vote did not, the Court found, violate the Equal Protection Clause of the Fourteenth Amendment.<sup>12</sup> In 1966, the Court reversed its prior rulings. In the landmark case of *Harper v. Virginia Board of Elections*,<sup>13</sup> the Court held that “the Equal Protection Clause is not shackled to the political theory of a particular era...Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.”<sup>14</sup>

This article is presented in the spirit of *Harper*. *Buckley* may stand today. But it cannot stand the test of time.

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<sup>9</sup> 424 U.S. 1 (1976).

<sup>10</sup> *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833, 864 (1992).

<sup>11</sup> *Breedlove v. Suttles*, 302 U.S. 277 (1937); *Butler v. Thompson*, 341 U.S. 937 (1951) (mem) (per curiam).

<sup>12</sup> *Id.*

<sup>13</sup> 383 U.S. 663 (1966).

<sup>14</sup> *Harper*, 383 U.S. at 669 (1966) (emphasis added).

I. REVISITING *BUCKLEY* IN THE STATES

In the twenty-two years since *Buckley*, the ruling has generated significant dissent within and outside of the legal community. More than 200 constitutional scholars from across the nation have signed a statement calling for the reversal of *Buckley's* prohibition on spending limits.<sup>15</sup> The attorneys general for 26 states and the secretaries of state or chief election officers for 21 states have gone on record seeking to overturn the ruling.<sup>16</sup> Members of Congress have introduced eleven bills since 1976 which would establish campaign spending limits for federal elections and set the stage for revisiting *Buckley*.<sup>17</sup> Thirty-eight U.S. Senators have supported the call for the reversal of the ruling. The White House and the U.S. Justice Department have also announced their interest in supporting a test case for revisiting *Buckley*.<sup>18</sup> Editorialists around the country have joined the call for a new look at the constitutionality of spending limits.<sup>19</sup>

Sparking this growing support for revisiting *Buckley* are a series of state and local initiatives to halt the spiraling influence of money in elections by enacting and defending limits on campaign spending. The case that has

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<sup>15</sup> See *Statement in Support of Overturning Buckley v. Valeo*, January 28, 1998 (on file with authors).

<sup>16</sup> See Brief in Support of Petition for Certiorari of the States of Arizona, Connecticut, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Vermont, Washington and West Virginia as Amici Curiae in Support of Petitioners, *City of Cincinnati v. Kruse*, 142 F.3d 907 (6<sup>th</sup> Cir.1998 ); see David Stout, *State Attorneys General Urge Limits on Campaign Spending*, THE NEW YORK TIMES, January 28, 1997, at A14 (noting that 24 state attorneys general joined statement in support of City of Cincinnati's spending limits while case was pending before United States District Court). The Secretaries of State or chief election officers of Arkansas, Connecticut, Georgia, Hawaii, Kentucky, Maine, Massachusetts, Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Washington, West Virginia, and Wisconsin joined the same statement.

<sup>17</sup> See S. 1684, 98th Cong. 1<sup>st</sup> Sess. (1983); S. 1185, 98th Cong. 1<sup>st</sup> Sess. (1983); S. 59, 99th Cong. 1<sup>st</sup> Sess. (1985); H.R. 2473, 100th Cong. 1<sup>st</sup> Sess. (1987); H.R. 1456, 101st Cong. 1<sup>st</sup> Sess.; H. Res. 168, 103rd Cong. 1<sup>st</sup> Sess. (1993); H.R. 3571, 103rd Cong. 1<sup>st</sup> Sess. (1993); H.R. 3651, 104th Cong. 2<sup>nd</sup> Sess. (1996); H.R. 3658, 104th Cong. 2<sup>nd</sup> Sess. (1996); S. 1057, 105th Cong. 1<sup>st</sup> Sess. (1997); H.R. 77, 105th Cong. 1<sup>st</sup> Sess. (1997).

<sup>18</sup> See James Bennett, *Clinton Pushes Spending Limits for Candidates*, THE NEW YORK TIMES, June 16, 1997, at B9.

<sup>19</sup> See, e.g., *Time to Rethink Buckley v. Valeo*, THE NEW YORK TIMES, November 12, 1998 at A28; *A Day in Court for Campaign Reform*, THE BOSTON GLOBE, March 17, 1998 at A12.

received the most attention is *City of Cincinnati v. Kruse*,<sup>20</sup> the first test case in twenty-two years to address directly the question of the constitutionality of campaign spending limits. Although the Supreme Court recently declined, without comment, to hear Cincinnati's appeal of a lower court ruling enjoining the limits, the case has had a significant impact in the support it has generated for revisiting *Buckley*. It also generated a significant concurring opinion in the Sixth Circuit which recognized, for the first time, that *Buckley* need not be read as a *per se* ban on all spending limits and that state or local jurisdictions might be able to justify such limits based on new compelling interests not addressed by the *Buckley* Court in 1976. Examination of the *Kruse* case therefore provides an important starting point for understanding the legal and factual issues involved in the movement to revisit *Buckley*. Its lessons will have continued application in future anticipated cases defending spending limits in Vermont, New Mexico, and elsewhere.

A. *Kruse v. City of Cincinnati*

In July 1995, following twenty months of study and deliberation, the Cincinnati City Council enacted limits on campaign expenditures in city council elections. The city council set the limits at the level of three times the annual salary for a city councilmember, a level of approximately \$140,000. In enacting these limits, the city council recognized the Supreme Court's ruling in *Buckley*, but found that new facts and circumstances associated with campaign spending in its local elections demonstrated the necessity for spending limits. In March 1996, John R. Kruse, an unsuccessful city council candidate, his political committee, and two financial contributors filed suit in federal district court in Cincinnati, challenging the limits on *Buckley* grounds. The city retained the National Voting Rights Institute as special counsel to defend the limits.

Throughout the litigation, the plaintiffs contended that *Buckley* stands for the proposition that all campaign spending limits are *per se* unconstitutional.

The facts, the plaintiffs argued, do not matter. In so doing, the plaintiffs stipulated at the summary judgment stage to any and all facts that the city introduced into the record in its defense of the ordinance. This record included the following facts:

- In the past several election cycles, the City of Cincinnati witnessed a dramatic rise in the cost of Cincinnati city council campaigns. The highest candidate expenditure for a winning campaign increased by more than 480 percent, rising from \$75,000 in 1989 to \$362,000 in 1995.

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<sup>20</sup> 142 F.3d 907 (6th Cir. 1998), *cert. denied*, 119 S.Ct. 511 (1998).

- The rise in the overall cost of Cincinnati city council races has caused a corresponding rise in the influence of wealthy donors in Cincinnati's elections. From 1991 to 1995, one-third of one percent of the metropolitan area's population provided more than \$3.9 million in campaign contributions to city council candidates, amounting to nearly 70% of all the money raised by those candidates.
- The public perception in Cincinnati, shared by an overwhelming majority of Cincinnati residents, is that "large campaign contributors wield undue influence on the political system." That same overwhelming majority state that "[t]he amount of money in election campaigns has caused [them] to lose a great deal of faith in the political system." Cincinnati residents "firmly believe that their own and others' level of trust in the integrity of the political system has been eroded by the amount of money in politics."
- The rising costs of Cincinnati's city council campaigns causes city councilmembers to spend increasing amounts of time raising money for the next election, which interferes with their responsibilities for governing the city. This consequence of unlimited campaign spending further has fueled the erosion of public confidence in Cincinnati in its local election process and in its local government.
- The system of unlimited campaign spending in Cincinnati city council elections has caused a "black-out" phenomenon with respect to television advertising time. The policy of local television broadcasters in Cincinnati is to sell television advertising spots on a first-come, first-serve basis. Because there is a limited supply of the most valuable advertising spots available on local television, city council candidates with significant quantities of campaign funds early in a campaign season have been able to preempt effectively the right of other, less well-funded candidates to purchase such advertising time.
- Candidates for Cincinnati city council can run a viable campaign spending less than \$140,000, the limit set by Cincinnati's ordinance. Of the nine winning Cincinnati city council candidates in the 1995 elections, four won election spending less than \$140,000, including one who spent only \$33,000 and a challenger candidate who spent \$97,000.

Based on this record, the city argued that its limits were justified by the compelling governmental interest in preventing corruption and the appearance of corruption in the local election process, freeing its elected officials from the pressures of fundraising so as to ensure that they are able to carry out their representative duties without interference, and preventing some city council candidates from blocking other candidates' access to key television advertising

time. In opposing the plaintiffs' motion for summary judgment, the city further argued that this factual record was sufficient, at a minimum, to demonstrate new facts and circumstances warranting a trial at which the district court could properly weigh the evidence showing the necessity of the limits.

In April 1998, a three-judge panel of the United States Court of Appeals for the Sixth Circuit affirmed the district court's January 1997 ruling granting the plaintiffs' motion for summary judgment and denying the city its opportunity to prove its case at trial. A majority of the Sixth Circuit panel held that, under *Buckley*, Cincinnati's campaign spending limits were *per se* unconstitutional regardless of what the record might show about the impact of unlimited campaign spending.<sup>21</sup> The panel further ruled that, were it to consider the factual record, the City had not demonstrated that spending limits were necessary to prevent corruption and the appearance of corruption in the electoral process.<sup>22</sup> The panel held that Cincinnati could not rely on the twenty-two years of federal election experience with contribution limits since *Buckley* to demonstrate that such limits working alone are insufficient to assure the integrity of the electoral process.<sup>23</sup> The majority acknowledged that the time a candidate must spend raising money for her campaign "detracts an officeholder from doing her job,"<sup>24</sup> but it nonetheless ruled that the interest in reducing the time elected officials spend on fundraising "cannot serve as a basis for limiting campaign spending."<sup>25</sup>

U.S. District Judge Avern Cohn<sup>26</sup> issued a concurring opinion. While joining the majority's affirmance of the District Court's ruling, Judge Cohn disagreed with the majority's reading of *Buckley* with respect to campaign spending limits:

The Supreme Court's decision in *Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional. It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith

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<sup>21</sup> *Kruse*, 142 F.3d at 915.

<sup>22</sup> *Id.* at 916.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 917.

<sup>25</sup> *Id.*

<sup>26</sup> United States District Judge for the Eastern District of Michigan, sitting by designation.

in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest.<sup>27</sup>

In September 1998, Cincinnati filed a petition for certiorari before the Supreme Court. In its petition, the city argued that the Sixth Circuit ruling conflicts with *Buckley*. In the alternative, the city argued that, if the Sixth Circuit correctly read *Buckley* to hold that all campaign spending limits *per se* unconstitutional, *Buckley* should now be overruled. Parts B and C, *infra*, provide an overview of the city's arguments that its campaign spending limits ordinance was narrowly tailored to serve compelling state interests and thus consistent with the First Amendment.

*B. The Compelling Governmental Interest in Preventing Corruption and the Appearance of Corruption Justifies Campaign Spending Limits*

In *Buckley*, the Supreme Court upheld congressional limits on campaign contributions in federal elections as justified by the sufficiently important governmental interests of preventing corruption and the appearance of corruption.<sup>28</sup> The *Buckley* Court specifically cited the dangers associated with public perception of corruption, holding that

Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of

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<sup>27</sup> *Kruse*, 142 F.3d at 920. While accepting the city's argument that *Buckley* permits proof of new facts and new compelling governmental interests that would justify campaign spending limits, Judge Cohn voted to affirm the district court's ruling, stating that the factual record was insufficient to uphold Cincinnati's limits. Judge Cohn did not explain why he viewed the record as insufficient, and his ruling on this point appears inconsistent with the standards governing review of a grant of summary judgment. On a motion for summary judgment, a court may not weigh conflicting evidence; summary judgment is properly granted only "when there exists *no* genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis added). Cincinnati presented facts going directly to Judge Cohn's points concerning "the interest in freeing officeholders from the pressures of fundraising" and "the interest in preserving faith in our democracy." Having made this showing of genuine factual issues, the city should have been granted the opportunity to go to trial to prove its case, and Judge Cohn's concurrence more logically should have been a dissent.

<sup>28</sup> *Buckley*, 424 U.S. at 23-38.

representative Government is not to be eroded to a disastrous extent."<sup>29</sup>

The Court nevertheless rejected the necessity of expenditure limits, expressing its faith, based on the record before it, that the contribution limits alone would be sufficient to address such governmental interests. While the appellate court had ruled that "the expenditure restrictions are necessary to reduce the incentive to circumvent direct contribution limits,"<sup>30</sup> the Supreme Court found:

There is no indication [in the record] that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions.<sup>31</sup>

This pivotal passage from *Buckley* unambiguously reveals that a key empirical judgment -- drawn from the record -- ultimately determined the constitutionality of the congressional campaign spending limits. For what if the record in *Buckley* had established that the "substantial criminal penalties" and the "political repercussion" were not sufficient to "police the contribution provisions?" Clearly, *Buckley* leaves the door open for a different factual record which would justify the need for campaign spending limits. The argument that campaign spending limits are a necessary concomitant to contribution limits was rejected by the *Buckley* Court only as a *matter of fact*.

The Cincinnati record presented new facts and circumstances demonstrating the necessity for campaign spending limits to address the city's interest in preventing corruption and the appearance of corruption in the electoral process. John Deardourff, a public opinion researcher with more than 30 years of experience, documented a pervasive public perception of corruption in Cincinnati with respect to the city council election process. The city demonstrated, through Mr. Deardourff's affidavit, that this crisis in public confidence in Cincinnati with respect to the political system is directly tied to unlimited campaign spending. Cincinnati residents "firmly believe that their own and others' level of trust in the integrity of the political system has been eroded by the amount of money in politics."<sup>32</sup> An overwhelming majority of Cincinnati residents agreed with the statement, "The amount of money in election

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<sup>29</sup> *Id.* at 27, citing *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973).

<sup>30</sup> *Buckley*, 519 F.2d 817, 859 (D.C. Cir. 1975).

<sup>31</sup> *Buckley*, 424 U.S. at 56.

<sup>32</sup> R. No.38, Deardourff Affidavit at 9.

campaigns has caused me to lose a great deal of faith in the political system.”<sup>33</sup>

The record in Cincinnati thus demonstrated that public confidence in the system of representative government in Cincinnati has been “eroded to a disastrous extent,” and that contribution limits alone were insufficient to address this public perception of corruption.

The city also presented crucial expert testimony that “the rise in the overall cost of city council races *has caused* a rise in the influence of wealthy donors in the City’s elections, with such donors increasingly dominating the campaign fundraising process.” From 1991 to 1995, one-third of one percent of the metropolitan area’s population provided more than \$3.9 million in campaign contributions to city council candidates, amounting to nearly 70% of all the money raised by those candidates. The *Buckley* Court did not hear this type of critical evidence linking unlimited campaign spending with a corresponding rise in the influence of wealthy donors in elections.

Like Cincinnati, the nation as a whole has witnessed the harmful impact of unlimited campaign spending in elections, despite the existence of contribution limits for federal elections. In the twenty-two years since *Buckley*, the federal election experience has demonstrated that contribution limits will not, alone, sufficiently address corruption and the appearance of corruption in the electoral process.

Recent public opinion polls confirm that citizens on all sides of the political spectrum perceive both actual and potential corruption in government under the current system of unlimited campaign spending. Notably, in a 1996 poll taken directly after the November elections, Americans ranked the “power of special interest groups in politics” second only to “international terrorists” when asked to identify “major threats” to the future of the country.<sup>34</sup> The same poll revealed that the percent of people who feel the country is “losing ground” in its effort to fight political corruption has grown steadily over recent years.<sup>35</sup>

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<sup>33</sup> *Id.* at 10.

<sup>34</sup> Public opinion survey conducted by Princeton Survey Research Associates on behalf of the Pew Research Center in conjunction with PBS series, *The State of the Union* (November 1996) <<http://www.people-press.org/unionrpt.htm>>.

<sup>35</sup> The steady erosion of confidence in government is documented by numerous other polls: See THE GALLUP POLL: PUBLIC OPINION 1994, at 219 (1994) (finding that 49% of the public believe Congress is more corrupt than in 1974); Ronald G. Shafer, *Washington Wire: Fundraising Flaps Roil the Administration Even as Clinton Backs Overhaul*, WALL ST. J., Jan. 31 1997, at A1 (citing survey results showing 68% of Americans believe politics more influenced by special interests today than twenty years ago); see also JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARDS AMERICAN POLITICAL INSTITUTIONS, 6-7, 31-39

In a 1997 survey of the public's views on the impact of money in politics, sixty-six percent of respondents deemed the excessive influence of political contributions on elections and government policy a "major problem". Sixty-five percent identified as another "major problem" the conflict of interest that occurs when politicians make decisions about issues of concern to those who fund their campaigns while seventy-one percent cited the good people being discouraged from running for office by the high cost of campaigns.<sup>36</sup>

In a February 1997 Gallup poll for CNN-USA Today, fifty-three percent of voters said that "campaign contributions influence the policies supported by elected officials" a "great deal".<sup>37</sup> Two months later, a separate poll determined that seventy-five percent of Americans believe that "public officials make or change policy decisions as a result of money they receive from major contributors."<sup>38</sup>

More recently, in an August 1998 poll of voters in eight states, overwhelming majorities decried actual corruption and expressed desire for systemic reform.<sup>39</sup> A sea change in attitudes has occurred, moreover, as voters now clearly perceive that their own senators are not immune from the corrupting influence of special interest contributions. (Formerly, voters would decry corruption in Congress but disavow the suspicion that their own senators were guilty of ethical lapses.) Between sixty-five and seventy-five percent of voters now believe that campaign contributions affect the votes of their own senators on issues of concern to special interests.

Polling data uniformly demonstrates that the current campaign finance regime has devastated public confidence in government.<sup>40</sup> Contrary to the

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<sup>36</sup> Public Opinion poll conducted by Princeton Survey Research Associates on behalf of the Center for Responsive Politics, *Money and Politics: A National Survey of the Public's View on How Money Impacts our Political System*, (Center for Responsive Politics, 1997).

<sup>37</sup> Public opinion poll commissioned by CNN/USA Today and performed by Gallup (February 1997) (reprinted in *Pacs, Parties, and Potato Chips: Myths and Misconceptions About Reforming the Campaign Finance System* (Public Campaign 1998)). An additional 33% said contributions influenced officials a "moderate amount."

<sup>38</sup> Francis X. Clines, *Most Doubt a Resolve to Change Campaign Finance Reform, Poll Finds*, N.Y. TIMES, Apr. 9, 1997, at A1; see also HIBBING & THEISS-MORSE, *supra* note 35, at 63-64 (indicating that 86% of the population believes that the government is controlled by special interests).

<sup>39</sup> Public opinion poll commissioned by Public Campaign and conducted by The Mellman Group, Inc. (August 1998) <[http://www.publiccampaign.org/poll9\\_3\\_98.html](http://www.publiccampaign.org/poll9_3_98.html)>.

<sup>40</sup> See generally David Schultz, *Revisiting Buckley v. Valeo: Eviscerating the Line*

Court's assurance that "substantial criminal penalties for violating the contribution ceilings" would suffice to "alleviat[e] the corrupting influence of large contributions,"<sup>41</sup> the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in the present regime grows apace. A danger the Court identified as a justification for drastic remedial action has obtained: "confidence in the system of representative government" has undeniably been "eroded to a disastrous extent."<sup>42</sup>

The public's view of the current system, moreover, is not based on imaginary fears.<sup>43</sup> The federal experience teaches that the ingenuity of those who wish to purchase influence in government cannot be squelched by contribution limits alone. Large aggregations of wealth still pour into campaign coffers under practices generally known as bundling.<sup>44</sup> When individuals representing the same corporation, industry or special interest send contributions to a candidate at roughly the same time, they have circumvented the intent of existing contribution limits by bundling together far greater amounts than the law allows. Candidates recognize the actual, unified source of this aggregated largesse and are thus subject to the same "corrupting influence of large contributions" that the Supreme Court reviled.

Typically, a corporation will identify particular candidates and instruct its top brass and employees about where and when to send contributions. Such organized bundling is difficult to monitor because "bundlers" are not required to identify their participation in aggregated donations. By organizing bundles, institutionally related donors evade the important disclosure requirements that apply to PAC's, thereby denying the public critical information regarding attempts by special interest groups to affect public policy.

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*Between Candidate Contributions and Independent Expenditures*, 19 J. L. & POL. 33, 93-00 (1998).

<sup>41</sup> *Buckley*, 424 U.S. at 55-56.

<sup>42</sup> *Id.* at 27 (quoting *United States Civil Serv. Comm'n. v. National Ass'n. of Letter Carriers*, 413 U.S. 548, 565 (1973)).

<sup>43</sup> Even officeholders, in their more candid moments, will confirm the stranglehold that money exerts on the political process. See Marcus & Babcock; *One Day on the Fund-raising Trail: Dawn to Dark/Chasing the Dollars*, THE BOSTON GLOBE, May 16, 1997, at A1, quoting U.S. Senator Robert Byrd of West Virginia in a March 1997 Senate floor speech: "The incessant money chase that permeates every crevice of our political system is like an unending circular marathon. And it is a race that sends a clear message to the people: that it is money, money, money that reigns supreme in American politics." *Id.*

<sup>44</sup> See, e.g., Wertheimer & Manes, *supra* note 4, at 1140-42 (1994); Raskin & Bonifaz, *supra* note 5, at 326-27 (citing LARRY MAKINSON, CENTER FOR RESPONSIVE POLITICS, OPEN SECRETS: THE ENCYCLOPEDIA OF CONGRESSIONAL MONEY & POLITICS (2d ed. 1992).

A notable example is MBNA, a Delaware banking and credit card corporation that ranked as the most profligate bundler of individual contributions in the 1994 election cycle and continues to organize substantial bundled donations today. MBNA organized over \$868,000 worth of bundled contributions to federal candidates in 1994, with the lion's share, roughly \$500,000, going to four senators.<sup>45</sup> Under existing contribution limits, an MBNA PAC would have only been able to donate a total of \$30,000 to these four candidates (\$5,000 per candidate per primary/election), as only three were contesting a seat. (Alfonse D'Amato was not running for election at the time, but became the Chair of the Senate Banking Committee as a result of the Republican shift in 1994.) Through bundling, however, MBNA was able to amplify its message of corporate support by a factor of fifteen.

Sixteen of the top fifty bundlers of contributions to federal candidates in the 1996 election cycle were securities and investment firms. Collectively, the contributions doled out by the employees, officers and/or family members connected with these firms totaled over \$4,420,000. As a sector, the financial industry remains a dominant source of funding for federal candidates, especially through the evasive technique of bundling.

The authors have received anecdotal accounts of the techniques corporations use to encourage their employees to contribute to the company PAC fund or directly to identified candidates. These techniques include bonuses that reimburse the employee for the contribution or other incentives such as promises to match contributions to the employee's charity of choice. Strong evidence of these kinds of illegal, de facto contributions by corporations can only come from insiders who risk their careers by whistleblowing.

Conduits are another method of aggregating individual contributions. Individuals, groups, or PAC's who collect and deliver contributions as conduits can take credit for (and exert influence by) amassing far more money than the law would allow them to give directly. The Technet PAC collected and delivered to lawmakers at least \$180,000 in the 1997-98 elections. An example of their beneficiaries is Sen. Spencer Abraham (R-Mich.), sponsor of Technet backed legislation, for whom \$19,500 was collected.

Candidates also effectively solicit bundled contributions by establishing "Leadership PACs" -- alter-ego campaign committees that allow donors to double the size of their contributions. Though Leadership PACs may not spend money directly on the sponsoring politician's campaign, they may cover "overhead" and the cost of related political activities (like pollsters and consultants) that contribute indirectly to the sponsor's success. Leadership

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<sup>45</sup> All information regarding MBNA bundling available from the The Big Picture: Center for Responsive Politics (1998) <<http://www.crp.org/pubs/bigpicture>>.

PACs also collect funds that the sponsor may pass on to support the campaigns of political allies.

The Sixth Circuit majority opinion in *Kruse* asserted that "[t]he problems uncovered on the federal level are explained primarily by the 'soft-money' loophole in contribution restrictions and do not undermine the Supreme Court's conclusion that spending restrictions are not narrowly tailored to addressing the problem of the corrupting nature of money in politics."<sup>46</sup> There was, however, no record evidence supporting the Sixth Circuit's conclusion that the "soft-money" loophole is the only, or even the primary, source of the system's current problems. While soft money contributions have indeed exploded over the last decade, soft money accounted for only eleven percent of the total amount of money spent in the 1996 federal elections.<sup>47</sup> Accordingly, the courts cannot in good faith conclude that the corrupting failures of the present system are attributable to soft money alone and thereby ignore the corrosive effects of bundled contributions.

*C. New Compelling Governmental Interests Justify Campaign Spending Limits.*

The Court in *Buckley* did not hold that there could never be a new and compelling governmental interest that would justify campaign spending limits. Rather, the Court stated: "No governmental interest *that has been suggested* is sufficient to justify [the congressional campaign spending limits]."<sup>48</sup> The implication is clear. The door remains open to compelling governmental interests that were *not* suggested to the Buckley Court. This Court reaffirmed that point in *NC-PAC*, stating that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests *thus far* identified for restricting campaign finances."<sup>49</sup>

Cincinnati presented two new and compelling governmental interests that justified its campaign spending limits. First, the city has an interest in freeing its elected officials from the pressures of fundraising to ensure that they are able to carry out their representative duties without interference.

The increasing amount of time elected officials spend raising money for their campaigns has fueled the erosion of public confidence in the democratic process in Cincinnati. As the city's Campaign Finance Advisory Board found in its final report to the Cincinnati city council, the time candidates spend raising

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<sup>46</sup> *City of Cincinnati v. Kruse*, 142 F.3d 907, 916 (6<sup>th</sup> Cir. 1998).

<sup>47</sup> See *The Big Picture: Money Follows Power Shift on Capitol Hill* (Center for Responsive Politics 1997).

<sup>48</sup> *Buckley v. Valeo*, 424 U.S. 1, 55 (1976) (emphasis added).

<sup>49</sup> *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985) (emphasis added).

money is directly tied to the rising costs of city council campaigns. Instead of focusing on their responsibilities for governing the city, councilmembers must spend their time chasing the funds they need to compete in an unlimited “arms race” of campaign spending.<sup>50</sup> A regime of unlimited campaign spending has had the same detrimental effect on officeholders’ attention to their duties at the federal level.<sup>51</sup> The *Buckley* Court never addressed whether the compelling interest in preserving officeholders’ time for carrying out their official duties would justify campaign spending limits, and *Buckley* therefore cannot be read as foreclosing reliance on this interest to support reasonable restrictions on campaign spending.

Cincinnati also presented a new and compelling governmental interest in preventing some city council candidates from blocking other candidates’ access to key television advertising time. In Cincinnati, city council candidates with large sums of money early in the election season are able effectively to shut out other candidates from broadcasting their messages on prime time television in the critical weeks leading to election day -- a “black-out” phenomenon. The *Buckley* record did not include this crucial evidence.

As explained in the expert testimony of an advertising executive with 28 years of experience in the creation and production of television advertisements

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<sup>50</sup> See R. No. 38, Advisory Board Report at 4; R.No.38, Smith Affidavit at 4: “[T]he high costs of City Council campaigns today causes our City Councilmembers to spend too much time raising money for the next election, rather than focusing on their responsibilities on governing the city;” R.No.38, League of Women Voters Report, 1: “More time than is reasonable is spent raising money for campaigns, which may interfere with time for governing”; Blasi, *supra* note 6, at 1283: “Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not in essence representatives.”

<sup>51</sup> Blasi, *supra* note 6, at 1281: “Candidates for office spend too much time raising money. This is scarcely a controversial proposition.” *Id.* (citing sources on the burdens of fundraising in federal elections). See also MARTIN SCHRAM, SPEAKING FREELY: FORMER MEMBERS OF CONGRESS TALK ABOUT MONEY IN POLITICS 37-46 (1995) (former Members of Congress discuss the enormous pressures of fundraising and its drain on their time for performing their official duties); DAN CLAWSON ET AL., MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE 7-8 (1992): “The quest for money is never ending . . . . To pay for an average winning campaign, representatives need to raise \$3,700 and senators \$12,000 during every week of their term of office.” *Id.*; PHILIP M. STERN, STILL THE BEST CONGRESS MONEY CAN BUY 119 (1992)(quoting former Congressman Bob Edgar, a Pennsylvania Democrat who resigned from the House to avoid another campaign fundraising cycle: “Eighty percent of my time, 80 percent of my staff’s time, 80 percent of my events and meetings were fundraisers. Rather than go to a senior center, I would go to a party where I could raise \$3,000 or \$4,000.”); 138 Cong. Rec. S115 (daily ed. Jan. 6, 1987)

for Cincinnati city council candidates, well-funded candidates engage in media campaigns which “have the effect of preempting the right of other less well-funded candidates from purchasing the most valuable advertising spots.”<sup>52</sup> Well-funded candidates in Cincinnati make excessive television advertising purchases at an early point in the campaign so that prime-time advertising is unavailable by the time other candidates have raised sufficient funds to purchase such ads. The City’s campaign spending limits provided a means to break up this “effective monopoly on the most valuable advertising time.”<sup>53</sup> Under the reasonable spending limits adopted by Cincinnati, candidates would still be able to purchase substantial television advertising time, but would not be able to freeze out similar purchases by other candidates.

The *Buckley* Court did not discuss whether government may act to regulate spending that is strategically designed to *lessen* the amount of information available to voters. State and local governments should be free to protect all candidates’ access to the marketplace of ideas by preventing the monopolization of important means of communication. Indeed, in the related First Amendment area of television broadcasting, the Supreme Court recently reaffirmed the governmental interest in promoting the widespread dissemination of information from a multiplicity of sources. In *Turner Broadcasting System, Inc. v. FCC*,<sup>54</sup> the Court upheld the “must carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992, declaring that “Congress has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable.” State and local governments surely have at least an equally important interest in preserving candidates’ access to a key medium of communication to the voters during a crucial period in the election campaign.<sup>55</sup>

While the Sixth Circuit’s majority opinion in *Kruse* rejected the possibility that spending limits could ever be justified by new compelling interests not directly addressed in *Buckley*, Judge Cohn’s concurring opinion agreed with the city’s contention that *Buckley* did not foreclose that possibility. Judge Cohn wrote:

The Supreme Court’s decision in  
*Buckley* . . . is not a broad

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<sup>52</sup> *Kruse*, R. No. 38, Affidavit of Jerry Galvin at 4.

<sup>53</sup> *Id.* at 5.

<sup>54</sup> 117 S.Ct. 1174, 1189 (1997).

<sup>55</sup> Cincinnati, of course, would not have had the power to address the “blackout” phenomenon by imposing “fairness” requirements directly on the television stations, given the Federal Communication Commission’s jurisdiction over regulation of broadcast media.

pronouncement declaring all campaign expenditure limits unconstitutional. It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest.<sup>56</sup>

As the first judicial recognition that *Buckley* does not forever foreclose the possibility of placing reasonable limits on campaign spending, Judge Cohn's concurrence represents a substantial development in the legal movement to revisit the question of spending limits.

*D. Avenues for Further Development of Challenges to Buckley*

The Supreme Court, by denying Cincinnati's petition for certiorari in November 1998, passed on its first opportunity since *Buckley* to revisit the issue of spending limits. The denial of certiorari in the first case to present the issue, however, does not necessarily signal that the door is forever barred, as a number of Supreme Court observers pointed out.<sup>57</sup> The Court generally moves slowly in revisiting its prior decisions, even those that have received sustained criticism over time. Reformers must be prepared to sustain a long-term effort to develop favorable cases and to pursue any necessary appeals, so that the Supreme Court will have further opportunities to review the question of spending limits.

To maximize the chances of successfully defending spending limits, jurisdictions adopting such limits should pay careful attention to developing the factual record demonstrating why the limits are both reasonable and necessary.

It is particularly important that the limits be set at a level that clearly permits candidates to communicate effectively with the electorate and to run viable campaigns, taking into account the costs of media, direct mail, and other campaign costs in the jurisdiction. In Cincinnati, the limit of \$140,000 was deemed by the district court to be more than sufficient to run a viable campaign, thus obviating one of the most important potential barriers to the defense of

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<sup>56</sup> *Kruse v. City of Cincinnati*, 142 F.3d 907, 920 (6<sup>th</sup> Cir. 1998).

<sup>57</sup> See Linda Greenhouse, *Justices Reject Appeals in Two Cases Involving Limits on Political Money*, THE NEW YORK TIMES, November 17, 1998 at A11; Edward Felsenthal, *High Court Demurs on Campaign Funds*, WALL STREET JOURNAL, November 17, 1998 at B11.

spending limits. While such a finding will not, as *Kruse* demonstrates, necessarily assure final victory in the courts, an unreasonably low limit will almost certainly lead to quick defeat.

The defense of spending limits also requires careful attention to demonstrating that lesser measures, such as contribution limits alone, have been or are likely to be insufficient to curb corruption and the appearance of corruption. If a jurisdiction has had contribution limits in place for a number of years, public opinion polls showing continued pervasive concern about the influence of money on their elected officials will be extremely useful, and perhaps indispensable, in documenting the necessity for more effective measures. Specific instances of influence-peddling or evasions of contribution limits, if available, provide additional factual support for spending limits. Careful documentation of the need to preserve officeholders' time from the pressures of fundraising is important, especially in light of Judge Cohn's concurring opinion in *Kruse* finding this interest to be new and compelling. The testimony of candidates, political consultants, and other actors familiar with electoral politics in the jurisdiction is also valuable in documenting why expenditure limits are necessary. Demonstrating that dramatic growth in campaign spending has been accompanied by growing numbers of elections in which no one comes forward to challenge the well-financed incumbent further illustrates the antidemocratic effect of unlimited spending, supporting the need for reform.

The stage is already set for additional test cases that will give the courts the opportunity to revisit the question of spending limits. In 1997, the State of Vermont enacted campaign spending limits for its state elections to take effect in the 2000 election cycle, along with a comprehensive system of voluntary public funding for candidates running for governor and lieutenant governor.<sup>58</sup> Vermont's action is significant, because it means that a state legislature has now placed its weight behind the necessity of spending limits to curb the corrupting influence of money and to assure that elected officials will devote their time to governing rather than fundraising. The proponents of Vermont's new law plan to mount an aggressive defense to an expected constitutional challenge to be filed after the law goes into effect in November 1998.

Since 1974, the City of Albuquerque has maintained limits on campaign expenditures for its local elections, making it the only major city in the country with sustained experience with campaign spending limits in operation.<sup>59</sup> Last year, a mayoral candidate and three campaign contributors filed suit in state court seeking to strike down the limits on *Buckley* grounds and obtained a preliminary injunction preventing the enforcement of the limits in the October

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<sup>58</sup> VT. STAT. ANN. 17 § 2805a (effective November 4, 1998).

<sup>59</sup> Albuquerque, N.M. Charter, art. XIII, § 4.

1997 municipal elections.<sup>60</sup> The city, recognizing the emerging movement for revisiting *Buckley*, retained the National Voting Rights Institute to defend its limits. In August 1998, the plaintiffs withdrew their complaint, with the unsuccessful mayoral candidate citing his lack of interest in running for local office again. With the limits back in place, the city, with the Institute, is preparing to defend against an anticipated new lawsuit. Albuquerque's unique posture as the only major city with 20 years' actual experience with spending limits makes it a particularly valuable test case for revisiting *Buckley*. Albuquerque's record shows that spending limits have encouraged electoral competition in city elections, with numerous instances of challengers mounting successful campaigns against incumbents.<sup>61</sup>

In July 1995, the Supreme Court of Ohio revised its judicial code of ethics to set campaign spending limits for that state's judicial elections.<sup>62</sup> A group of judicial candidates promptly challenged the limits in federal court as violative of the First Amendment, relying on *Buckley*. The Ohio Attorney General's Office defended the limits as justified by a new compelling governmental interest in protecting the impartiality of the state judiciary, an interest not presented to, and therefore not addressed by, the *Buckley* Court. Twenty-two states joined an amicus brief in support of the limits at the appellate court level. The brief, co-authored by the Iowa Attorney General's Office and the Institute, argued that judicial elections are distinguishable from legislative elections, and, in the alternative, that if *Buckley* is to be applied, the ruling should be reconsidered in light of new facts and circumstances.

A three-judge panel of the United States Court of Appeals for the Sixth Circuit recently affirmed a district court judgment invalidating the judicial campaign spending limits, rejecting the argument that restrictions on judicial elections should be judged by different and more lenient standards than those applicable to elections for legislative and executive office.<sup>63</sup> The Sixth Circuit's ruling, unfortunately, also placed the case in an awkward posture for review by the United States Supreme Court, because the Sixth Circuit's substantive ruling addressed a set of limits that had been revised by the Ohio Supreme Court during the course of the litigation and were no longer in effect. The Sixth Circuit did not rule upon the constitutionality of Ohio's revised spending limits, leaving that issue to be determined by the district court on remand. The Ohio Attorney General, on behalf of the state supreme court, filed an unsuccessful petition for

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<sup>60</sup> *Murphy v. City of Albuquerque*, No. CV-97-7826 (Second Judicial District of New Mexico).

<sup>61</sup> See Dana Milbank, *Renewed Battle Brewing on Campaign Spending Caps*, THE WALL STREET JOURNAL, March 24, 1998, at A24; Robert Zausner, *Campaign spending limit? In Albuquerque, It's Old Hat*, PHILADELPHIA INQUIRER, October 23, 1998, at A21.

<sup>62</sup> Supreme Court of Ohio Code of Judicial Conduct, Canon VII(C)(6).

<sup>63</sup> *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 890 (1999).

certiorari before the Supreme Court. The constitutionality of the new limits, accordingly, is subject to further litigation in the district court and court of appeals. If the new limits are again struck down by the lower courts, as anticipated, the stage will be set for a second effort to obtain Supreme Court review, this time without the distraction of a procedural bar to consideration of the merits.

## II. REVISITING THE REJECTED *BUCKLEY* GOVERNMENTAL INTERESTS

In addition to the new interests presented in *Kruse*, the Court should reconsider certain justifications for campaign spending limits that it summarily dismissed in *Buckley*. Primary among these is the claim that spending limits are necessary to achieve the political equality that is essential to a just democracy and guaranteed to all citizens under the Equal Protection Clause of the Fourteenth Amendment. Without some guarantee of equal political opportunity, wealth has and will continue to debase our democracy. Another argument deserving reconsideration is the notion that campaign spending should be viewed as communicative conduct and not as ‘pure’ speech. When the Court mistook money for speech in *Buckley*, it applied too strict a standard to marginal abridgements of a purported ‘right to spend’ and mistakenly conferred upon campaign war chests the absolute protection of the First Amendment. Instead, the Court should have analyzed spending limits according to the line of cases that allow partial abridgement of First Amendment rights in the form of time, place and manner restrictions, or alternatively, as necessary regulation of a scarce communicative resource. In this last vein, advocates should also encourage the Court to bring careful scrutiny to the “free market of ideas.” Detailed attention to the actual business of campaigns will inform a more nuanced understanding of the real market for electoral speech. Competition in this marketplace could then be fruitfully analyzed—and protected—under established principles of antitrust law.

### A. *Political Equality*

Scholars have criticized many aspects of the Court’s muddled analytical framework in *Buckley*. Yet, few phrases in that decision have subdued subsequent prudential and legislative debate more than the Court’s famous dictum 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”.<sup>64</sup> A survey of American political philosophy and legal precedent reveal that this claim is overblown, if not, as one scholar observed, “demonstrably incorrect”.<sup>65</sup> While the *Buckley* Court chose summarily

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<sup>64</sup> *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

<sup>65</sup> David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1383 (1994).

to subordinate political equality to the First Amendment, many scholars, jurists, and philosophers see political equality as “the cornerstone of American democracy”.<sup>66</sup>

Even at a time when the franchise was denied to many citizens, American constitutional thought recognized “establishing a political equality among all” as the primary remedy to political evils.<sup>67</sup> As James Madison famously noted:

Who are to be the electors of the Fœderal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people . . .<sup>68</sup>

Modern philosophers place an even higher value on political equality. John Rawls, for instance, recognizes that the “fair opportunity to take part in and to influence the political process” is not merely an aspiration of a just constitutional democracy, but rather a precondition. Noting that “[t]he liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate,” Rawls argues that universal suffrage alone is inadequate to preserve a just system when “the political forum is so constrained by the wishes of the dominant interests that the basic measures needed to establish just constitutional rule are seldom properly presented.”<sup>69</sup> A failure to compensate for the disproportionate effects of wealth in politics thus undermines the value of voting.<sup>70</sup>

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<sup>66</sup> J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?* 82 COLUM. L. REV. 609, 625 (1982); see also A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 10-11 (1948); J. RAWLS, *A THEORY OF JUSTICE* 11-19, 205-07, 221-28 (1971); Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 214 (1972); A. DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 59, 474 (J.P. Mayer & M. Lerner eds., G Lawrence trans. 1966).

<sup>67</sup> JAMES MADISON, 14 THE PAPERS OF JAMES MADISON 197 (Robert A. Rutland et al. Eds., 1983); see also FEDERALIST NO. 57, at 305 (J. Madison) (J. Cooke, ed. 1961).

<sup>68</sup> FEDERALIST NO. 57, at 385 (J. Madison) (J. Cooke, ed. 1961).

<sup>69</sup> JOHN RAWLS, *A THEORY OF JUSTICE*, 221-228 (1971).

<sup>70</sup> Rawls' conclusion is particularly chilling when compared to the Court's own observation that “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

The First Amendment cannot protect speech rights to the exclusion of all other values. In numerous contexts, the Court has upheld restrictions on the speech of some elements of society in order to protect other communal interests.<sup>71</sup> The *Buckley* Court's "ritual incantation of the notion of absolute protection" for the quantity as well as the content of political expression cannot be squared with political reality, nor is it supported in theory. Rawls effectively dismisses the Court's First Amendment absolutism by noting that "basic liberties constitute a family, and that it is this family that has priority and not any single liberty itself". "[P]olitical speech," he concludes, "even though it falls under the basic liberty of freedom of thought, must be regulated to insure the fair value of political liberties."<sup>72</sup> Alexander Meiklejohn recognizes that some regulation of political speech in the name of political equality is necessary for the orderly presentation and intelligent deliberation self-government requires.<sup>73</sup> Similarly, Ronald Dworkin deems the *Buckley* dictum rejecting the interest in political equality a "mistake because the most fundamental characterization of democracy—that it provides self-government by the people as a whole—supposes that citizens are equals not only as judges but as participants as well."<sup>74</sup> Dworkin urges that *Buckley* be overruled because its "rigid rule is not just an inconvenience but a serious loss in the quality of the very democracy" that rule supposedly protects.<sup>75</sup> Thus, even as a matter of pure theory, preservation of the conditions under which free speech may take place cannot be wholly foreign to the First Amendment.

This notion is not merely an academic exercise, but has found expression in the courts as well. In his dissent in *Bellotti*, Justice White argued that some level of political equalization is in fact required by the First Amendment: "The Court's fundamental error is its failure to realize that the state regulatory interests in terms of which the alleged curtailment of First Amendment rights . . . must be evaluated are themselves derived from the First Amendment."<sup>76</sup> In the *Bellotti* context -- the attempted limitation of corporate spending on ballot initiatives that had no direct effect on the corporation's business -- the value of promoting free political debate required the prevention of corporate domination. Justice White recognized that the issue is not whether

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<sup>71</sup> See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Cox v. Louisiana*, 379 U.S. 559 (1965); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

<sup>72</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 356-63 (1993).

<sup>73</sup> MEIKLEJOHN, *supra* note 66, at 23.

<sup>74</sup> Ronald Dworkin, *The Curse of American Politics*, *THE NEW YORK REVIEW OF BOOKS*, Oct. 16, 1996, at 19, 23.

<sup>75</sup> *Id.* at 22.

<sup>76</sup> *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 803-04 (1978).

First Amendment rights may be abridged at all but instead whether the state has chosen “the best possible balance” between “competing First Amendment interests.”<sup>77</sup>

Indeed, it is crucial to remember that marginal regulation of campaign contributions and expenditures does not effect real political equality. In the context of contribution limits, one thousand dollars still represents a substantial sum of money. Most working persons simply do not have sufficient disposable income to contribute anywhere near the limit, even if they feel tremendous passion about the candidates in question. Accordingly, contribution limits marginally encourage, but do not guarantee, real equality of input in the political system. Similarly, raising the floor through public election financing or capping the ceiling through spending limits will not equalize the output of all political voices. At best, such a regime would prevent certain candidates from monopolizing communications media while giving less wealthy candidates a basic, meaningful opportunity to campaign before the general public.

Creating a ceiling on expenditures does not raise the floor for those whose economic status precludes even the most basic forms of mass political communication. A reform law that employs both spending limits and public financing would more comprehensively serve the interest of political equality. In Vermont, the new spending and public financing regime that is set to take effect in the year 2000 will, once challenged, offer just such a test case for the courts, allowing advocates to set forth arguments regarding the factual circumstances and civic interests that justify comprehensive campaign spending limitations. The Vermont legislature specifically found that mandatory spending limits were necessary to protect the viability of the public funding program they had also devised. In contrast, some jurisdictions that provide for elective public funding allow candidates to abandon or supplement the public funding program when an opposition candidate spends beyond certain limits. Such opt-out provisions, of course, may undermine the purpose of public funding statutes by leaving them vulnerable to any non-participants who elect to instigate an escalating spending contest. Vermont, by contrast, opted to pre-empt war chest competition (and its consequent debasement of political discourse) by protecting its public financing statutes with mandatory spending limits. In doing so, Vermont created a regulatory regime that effectively serves the interest of political equality, thereby presenting a test case through which to reevaluate that principle.

Also, the modern Supreme Court’s seminal rulings striking down wealth discrimination in the electoral process are rooted in the principle of political equality. In 1966, two years after the Twenty-Fourth Amendment banned poll taxes in federal elections, the Court in *Harper v. Virginia Board of Elections*<sup>78</sup>

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<sup>77</sup> *Id.* at 804-12 (White, J., dissenting); see also *id.* at 825-27 (Rehnquist, J., dissenting).

<sup>78</sup> 383 U.S. 663 (1966).

invalidated a poll tax of \$1.50 in Virginia state elections. The Court found that:

a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth . . . .<sup>79</sup>

In *Bullock v. Carter*,<sup>80</sup> the Court again recognized the “real and appreciable impact on the exercise of the franchise” which voters face under a system that excludes them on the basis of their lack of wealth. In *Bullock*, the Court struck down filing fees ranging from \$150 to \$8,900 that the state of Texas required primary candidates to pay to their political parties. The Court found that “the very size of the fees imposes under the Texas system [gave] it a patently exclusionary character.”<sup>81</sup> The fees violated the equal protection rights of both voters and candidates. Prospective candidates without wealth were precluded from seeking office, and the fees thus limited voters’ choices of candidates and burdened less affluent voters more heavily. As the Court noted:

Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support.<sup>82</sup>

“[W]e would ignore reality,” the Court continued, “were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.”<sup>83</sup> In *Lubin v. Panish*, the Court struck down California’s \$701.60 filing fee for county supervisor election, ruling that filing fees do not “test the genuineness of a candidacy or the extent of the voter support of an aspirant for public office.”<sup>84</sup> “[O]ur tradition,” the Court noted, “has been one of hospitality toward all candidates without regard to their

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<sup>79</sup> *Id.* at 666.

<sup>80</sup> 405 U.S. 134, 144 (1972).

<sup>81</sup> *Id.* at 143.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 144.

<sup>84</sup> 415 U.S. 709, 717 (1974).

economic status.”<sup>85</sup>

Many have compared *Buckley* to the notorious, pre-New Deal case *Lochner v. New York*, which relied on an idealized notion of the freedom of contract to strike down maximum hour labor laws.<sup>86</sup> As in *Lochner*, the *Buckley* Court relied on idealized notions of a free marketplace of ideas to strike down reasoned attempts to preserve basic democratic values. To persuade the Court that it has erred, advocates must shed light upon the discontinuities between the Court’s idealized view of politics and the reality that we have endured over the past twenty years. Defenders of our present plutocratic electoral system elide the substantial relationship between government enforcement of a free market economic regime and the distribution of access to speech in the political arena.<sup>87</sup> Some even resort to a form of latter-day red-baiting by insisting that reformers want government to “enter the business of redistributing both *economic* and *political* power.”<sup>88</sup> Aside from such deliberate misrepresentations of the scope and effect of reform proposals, such arguments ignore the fact that the economic inequality begets political inequality. Even if one agrees that government should not allocate economic resources in the private realms of property and contract, such a conclusion has no bearing on a government’s duty to constitute itself through just electoral procedures, in which each citizen has a meaningful opportunity to participate. Only if one assumes that money is speech does the enforcement of political equality raise *re*-distributive questions. To say that each of us enjoys the right to amass as much wealth as birth, talent, and luck bestow is not to say that we may use that wealth to dominate the process of democratic deliberation.

While spending limits may not necessarily render the voices of all contestants absolutely equal, they nonetheless serve the interest of political equality by making the prospect of political participation more realistic for a

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<sup>85</sup> *Lubin*, 415 U.S. at 717-718. In *M.L.B. v. S.L.J.*, 519 U.S. 102, (1996), the Court recently reaffirmed its landmark holdings in *Bullock*, *Lubin*, and *Harper*. “The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license.” *Id.* (citing *Bullock v. Carter*, 405 U.S. 134 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974); *Harper v. Virginia Board of Election*, 383 U.S. 663 (1996)).

<sup>86</sup> *Lochner*, 198 U.S. 45 (1905); See also JOHN RAWLS, *POLITICAL LIBERALISM* 362-63 (1993); DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 219 (1986); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 97-98 (1993).

<sup>87</sup> See, e.g., Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1262-66 (1994) (rejecting Professor Sunstein’s imputation of state action in creating and preserving existing distributions of wealth); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L. J. 1049 (1994).

<sup>88</sup> BeVier, *supra* note 87, at 1266.

greater number of citizens. This compelling rationale alone offers ample justification for their adoption. By broadening access to the marketplace of ideas, spending limits not only ameliorate the present state of political inequality but also enrich the diversity and depth of civic discourse. As set forth below in section B, such an understanding of spending limits concords with established First Amendment doctrine regarding the protection of key political processes through carefully tailored regulation.

### *B. Money and Speech*

The central obstacle to regulation of campaign spending is the Court's widely criticized equation of money and speech.<sup>89</sup> The objections to this equation are legion, and will not be rehearsed here. It suffices to note that the *Buckley* decision equivocates on this very point. The Court approved contribution limits on the theory that a contribution "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for support." Hence, the "quantity of communication does not increase perceptibly with the size of his contribution."<sup>90</sup>

If money is, in fact, meaningful speech, this cannot be true: a contribution of one dollar must mean something different from a contribution of a million. Conversely, under the Court's rejection of spending limits, spending ten million dollars to repeat a television ad ten thousand times must mean something significantly different from running that same ad one hundred times—an extremely doubtful proposition. Clearly, the correlation between spending and speech is not absolute. Within certain limits, spending arguably bears a high correlation with meaningful speech (e.g., running an ad enough to achieve a basic saturation, quantifiable as a gross market share rating); but beyond such limits, spending takes on the attributes of conduct, as in *Cincinnati*, where better financed candidates purchased all available advertising space well in advance of the election season, effectively preventing opposition candidates to use the medium of television themselves.

Of pressing concern to the reform advocate is the challenge of lending empirical support to the notion that campaign spending cannot be deemed pure speech. Any empirical data tending to rebut the alleged correspondence of spending to ideas will bolster the argument that campaign spending is properly understood as a form of conduct related to speech. Studies analyzing the content (or lack thereof) as well as the effect of repetition in political advertising could prove helpful in this regard. Such data, in turn, will allow advocates to

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<sup>89</sup> See generally J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L. J. 1001 (1976).

<sup>90</sup> *Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

urge courts to apply the more flexible First Amendment analysis applicable to speech-related conduct outlined in *United States v. O'Brien*.<sup>91</sup>

In a related vein, advocates should challenge the *Buckley* Court's decision that spending limitations cannot be sustained as reasonable time, place and manner regulations which do not discriminate among speakers or ideas. This analysis was rejected by the Court because<sup>92</sup> the *Buckley* Court assumed that more spending must mean more speech, i.e. more substantive contribution to issues of public concern.

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.<sup>93</sup>

This statement, however, does not bear up well when examined under the light of experience. Political campaigns are dominated by thirty and sixty second television ads that contain a negligible amount of reliable information and typically involve either oversimplified vitriol concerning the opponent's failings or anodyne montage associating the candidate with sunrises and smiling babies. More critically, as Ronald Dworkin argues, repetition, the hallmark of television ad campaigns, does not improve collective knowledge on issues of public import.<sup>94</sup> As Judge Skelley Wright observed, "[m]oney may register intensities . . . but money by itself communicates no ideas."<sup>95</sup>

The most forceful analogy in the line of cases dealing with time, place and manner restrictions is the truck-mounted loudspeaker at issue in *Kovacs*.<sup>96</sup> There, the Court upheld an ordinance prohibiting the use of loud and raucous loudspeakers to broadcast messages on city streets. While the decibel limits in *Kovacs* were upheld on account of the nuisance they created, spending limits serve a far more critical interest. The *Buckley* Court distinguished *Kovacs* and

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<sup>91</sup> 391 U.S. 367 (1968). The *Buckley* Court rejected an *O'Brien* analysis of campaign finance reform with little analysis. By mistaking "suppressing communication" for suppressing a particular message, the Court ignored the fact that spending limits cap, but do not preclude communication, as well as the fact that more campaign spending does not necessarily lead to more communication.

<sup>92</sup> 424 U.S. at 18.

<sup>93</sup> *Buckley*, 424 U.S. at 19.

<sup>94</sup> See Dworkin, *supra* note 72, at 22.

<sup>95</sup> See Skelley Wright, *supra* note 66, at 1004.

<sup>96</sup> *Kovacs v. Cooper*, 336 U.S. 77 (1949).

other time place and manner restrictions in an unconvincing manner, noting that “expenditure limitations impose direct quantity restrictions on political communication and association.”<sup>97</sup> As Judge Skelly Wright observed, this distinction is untenable, as the time, place and manner regulations can also be seen as quantity restrictions on speech.<sup>98</sup> In the *Kovacs* context, muted loudspeakers would reach a far more limited number of citizens.

*C. Reasonable Regulation of a Limited Resource: The Marketplace of Ideas*

Traditional First Amendment discussions often begin by allusion to the inviolable right of citizens to assemble in public parks to speak their minds. But the park analogy does not reflect the reality of political communication in the modern era. Reconciling this inexact analogy with existing system of unequal access to the dominant media of mass communication would entail certain grim realizations: the “park” is actually owned by (regulated) private companies who charge a fee for those who wish to mount their soapbox. Furthermore, to the extent that the poor may enter the “park” to speak, they may place their soapboxes only in the marshy swamps where the public rarely strays. Their voices fail to reach those gathered, of necessity, in the well-traveled pathways. The din of wealthy men with bullhorns and amplifiers drowns out all hope of effective communication with the public at large.

With these images in mind, it is incumbent on those who seek reform in the courts to demonstrate empirically that the media used in political speech are in fact limited. For example, in *Kruse*, the City of Cincinnati assembled data to support the argument that television advertising space in city elections is subject to a “black-out effect.”<sup>99</sup> It is critical to note in this regard that the limited resource in question is in fact the access to viewers and not to air time. Theoretically, with the advent of digital transmission and cable services, there is an immense capacity for transmitting multiple channels into households. But as every advertising consultant knows, the critical determinant of the value of an advertising spot is the ratings share of the program it accompanies. There are a finite number of households with televisions and the value of a given advertisement spot is determined by the proportional share of total households tuned into a broadcast at a given time. Network sales agents and advertisers rely upon the scientific quantification of viewership provided by independent rating services like the Nielsen Service when negotiating the price of different spots.<sup>100</sup> Free market idealists would deny that there exist meaningful limits to

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<sup>97</sup> *Buckley*, 424 U.S. at 18.

<sup>98</sup> See Skelly Wright, *supra* note 66, at 1010-11, n. 41.

<sup>99</sup> See *supra* text and accompanying notes 50-51.

<sup>100</sup> See *Turner Broadcasting*, 520 U.S. at 232-33 (O'Connor, J., dissenting). In her dissent in *Turner Broadcasting*, Justice O'Connor appears to acknowledge that the critical issue in the analysis of the First Amendment value of televised communication

communicative resources on the naïve assumption that demand for the public's attention will always engender new supply. This premise, however, is flatly contradicted by the market data used in the real world to assign value to the limited space available for televised political speech.

The Court made clear in *Red Lion Broadcast. Co. v. F.C.C.* that, when a medium of communication is limited, the government cannot help but abridge the speech rights of some to allow effective communication in that medium to take place.<sup>101</sup> In *Red Lion*, the Court unanimously upheld the FCC's fairness doctrine, noting that "[t]he right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others."<sup>102</sup> Drawing on the public's interest in receiving a diversity of viewpoints, the Court held that "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed in this unique medium."<sup>103</sup> Clearly, the abridgements of free speech rights approved in *Red Lion* (the denial of broadcast licenses) are more extreme and profound than those incidental to campaign spending limitations. When the state allocates broadcast licenses to a special minority of applicants, "the rest must be barred from the airwaves."<sup>104</sup> "[T]o deny a station license because 'the public interest' requires it 'is not a denial of free speech'."<sup>105</sup> Analogously, the question is not whether the state can properly limit the amount of spending on campaigns, but rather how can the state preserve the rights of all classes in society to participate in self-government. If, as the Court stated in *Red Lion*, "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas ... may not constitutionally be abridged . . . by Congress,"<sup>106</sup> then surely it may not be abridged by a wealthy minority who exercises economic control over the means of mass communication.

Antitrust law also recognizes that markets cease to function efficiently when dominated by firms with inordinate market share. Innovation and accountability disappear when the price of entry for new competitors becomes too large. The Court has unequivocally established that "promoting fair

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is viewership: "[w]hether cable poses a 'significant' threat to a local broadcast market . . . depends on whether viewers actually watch the stations that are dropped or denied carriage." *Id.* Analogously, whether wealthy candidates pose a significant threat to poor candidates depends on whether viewers actually watch the programming alongside which poorer candidates can afford to advertise.

<sup>101</sup> *Red Lion Broadcasting Co. v. Fed. Comm. Comm'n.*, 395 U.S. 367, 388 (1969).

<sup>102</sup> *Red Lion*, 395 U.S. at 387.

<sup>103</sup> *Id.* at 390.

<sup>104</sup> *Id.* at 389.

<sup>105</sup> *Id.* (quoting *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943)).

<sup>106</sup> *Id.* at 390.

competition is a legitimate and substantial Government goal.”<sup>107</sup> In *Turner Broadcasting System, Inc. v. Fed. Comm. Comm.*,<sup>108</sup> four justices concluded that must carry provisions of the Cable Act of 1992, which undeniably burdened the First Amendment rights of cable operators, were in part justified by the deleterious effect that an absence of such provisions would have on the economic survival of local broadcast stations. The Supreme Court also reaffirmed the governmental interest of promoting the widespread dissemination of information from a multiplicity of sources.<sup>109</sup> In the area of elections, citizens surely have at least an equally important interest in preserving candidates’ access to a key medium of communication to the voters during a crucial period in the election campaign.<sup>110</sup>

The law is fond of analogy, not only for its rhetorical heft, but also for its power of elucidation. In *Buckley*, the Supreme Court resorted to analogy to justify its absolute rejection of limits on campaign expenditures, likening such limits to a deprivation of fuel for a car: “Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.”<sup>111</sup> This casual metaphor deserves scrutiny, as it both reveals and obscures crucial aspects of the present unjust system of political participation.

The misconceived car trope rests upon a host of assumptions that are entirely in conflict with political reality. What makes our present electoral system so tragic a violation of the constitution’s promise of equal protection is the fact that the vast majority of Americans cannot afford a go-cart, much less a car, nor can they pay the tolls to access the highways of public discourse. And for those who can scrape up enough cash to ride the roads of civic debate, the political highway is already jammed by the thundering semis and SUV’s of the wealthy. The Court’s metaphor perhaps unintentionally concedes the two essential features of the present political landscape: a) the limited resource of communicative “space”; and b) the wealth barrier to entry.

As with arguments concerning political equality, advocates must address

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<sup>107</sup> *Turner Broadcasting*, 520 U.S. at 232 (O’Connor, J. dissenting).

<sup>108</sup> *Turner Broadcasting*, 520 U.S. at 180 (1997).

<sup>109</sup> See *id.* (upholding the “must-carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992: “Congress has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable.”).

<sup>110</sup> Cincinnati, of course, would not have the power to address this phenomenon by imposing “fairness” requirements directly on the television stations, given the Federal Communications Commission’s jurisdiction over regulation of broadcast media.

<sup>111</sup> *Buckley v. Valeo*, 424 U.S. 1, 19 n.18 (1976).

both the theoretical and empirical errors in the Court's assumptions about access to and competition within the marketplace of ideas. A basic tenet of the moral justification for free markets, as identified by its proponents from Adam Smith through Milton Friedman, is the equality of opportunity (as distinguished from equality of outcomes). When, however, money is mistaken for speech, relative poverty becomes a very real and quantifiable barrier to entry in civic discourse. Once one acknowledges that ideas are the only acceptable specie in the marketplace of ideas, one must accept equality of access to the arena of political debate as the *sine qua non* of a morally justifiable constitutional system. Advocates must marshal such arguments, armed with empirical data about the actual operation of political speech in specific media, to persuade the Court to abandon its staunch, formalistic opposition to campaign spending limits.

### III. CONCLUSION

As the most recent decision sounding in campaign finance makes plain, the members of the present Court share little agreement on the basic principles at stake in proposed regulation of campaign spending.<sup>112</sup> Members of the Court have expressed dissatisfaction with *Buckley*, albeit for differing reasons, and have suggested that the time to revisit the case approaches. Advocates of reform should view this discord and confusion as an opportunity to proffer new evidence and analyses that challenge the long-held misconceptions about our political reality.

The Court has invited proponents of campaign finance reform to prove that change is necessary. In *Bellotti*, the Court noted that if the case for reform "were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes", it would merit consideration as a compelling interest justifying government regulation of campaign spending. As canvassed above, the evidence is available; indeed, it has become difficult to ignore. Reform advocates must be prepared to support state legislatures and city councils that have the foresight to make the case for reasonable expenditure limits and the political courage to defend such limits in the face of court challenges. Through such efforts, we can hope that *Buckley's* conflation of money with speech will eventually join the constitutional curiosity shop on the shelf next to poll taxes

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<sup>112</sup> See *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n.*, 116 S. Ct. 2309 (1996); see also Anthony Corrado et al. *CAMPAIGN FINANCE REFORM: A SOURCEBOOK* 65-66 (1997).