

Notes

Campaign Finance Reform and the Return of *Buckley v. Valeo*

Kenneth J. Levit

Faced with an angry electorate, the prospect of term limits, and a potential third party full of disenchanted outsiders, political figures are renewing efforts for electoral reform after a twenty-year hiatus. Chanting the mantra of change, Bill Clinton won the presidency and pledged to restore the democratic process.¹ Ross Perot sounded a call to “clean out the barn,” and garnered more support than any third party candidate has since Theodore Roosevelt.² In 1992, voters in fifteen states passed ballot initiatives to limit the terms of their elected officials.³ Not since the post-Watergate period have the currents of political discontent been so strong and the prospects for overhauling election law so good. Nevertheless, today’s reformers would do well to remember that the effort to alter election law ends not in the legislative arena but in the

1. In his inaugural speech, President Clinton said, “To renew America we must revitalize our democracy And, so I say to all of you here, let us resolve to reform our politics so that power and privilege no longer shout down the voice of the people.” *The Inauguration; ‘We Force the Spring’: Transcript of Address by President Clinton*, N.Y. TIMES, Jan. 21, 1993, at A15.

2. Perot won 19% of the popular vote in 1992 in comparison to 27% for Theodore Roosevelt in 1912. John Anderson won only 7% in 1980. Steven A. Holmes, *An Eccentric But No Joke; Perot’s Strong Showing Raises Questions on What Might Have Been, and What Might Be*, N.Y. TIMES, Nov. 5, 1992, at A1.

3. Timothy Egan, *House Speaker and Ex-Attorney General Dueling over Term Limits*, N.Y. TIMES, July 29, 1993, at A16.

courts, where judges have zealously guarded the First Amendment values threatened by regulation of the political process.⁴

Congress should have learned this lesson after the U.S. Supreme Court struck down its last attempt to rein in campaign financing in congressional elections. In *Buckley v. Valeo*,⁵ the Court held that *mandatory* expenditure limits on candidates for federal office violated the First Amendment. Prohibited from directly capping campaign expenditures, Congress has now proposed *voluntary* spending limits and plans to offer federal financial subsidies and other incentives to candidates who adhere to those limits. The Senate has passed such a version of campaign finance reform and is awaiting floor action in the House of Representatives.⁶

However, this reform strategy begs a fundamental question: Can Congress do indirectly what it is prohibited from doing directly? In passing a bill that benefits candidates who accept limits and penalizes those who do not, Congress is arguably making a legislative end-run around the Supreme Court's prohibition on mandatory spending limits. This approach directly implicates the doctrine of unconstitutional conditions, which holds that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right."⁷ Advocates for reform cannot resolve the constitutional difficulties this doctrine poses simply by labelling the proposed limits "voluntary." To try to do so would be to place in jeopardy the first major opportunity to improve the congressional election system in nineteen years.

This Note scrutinizes the proposed legislation and argues that portions of an aggressive campaign reform plan can survive application of the doctrine of unconstitutional conditions. Part I of the Note discusses the principles articulated in *Buckley* when the Court reviewed Congress' last effort to overhaul the electoral finance system. It also outlines the current campaign reform plan and demonstrates how the plan's authors attempted to craft it within *Buckley*'s parameters. Part II describes the doctrine of unconstitutional conditions and its relevance for this election financing plan. Despite the doctrine's precarious position in current jurisprudence, the Court's hostility to

4. Congress' first major attempt to restrict campaign finances came in 1907 with the passage of the Tillman Act which prohibited corporate and banking contributions to federal candidates. A lower court upheld the Act in *United States v. United States Brewers Ass'n*, 239 F. 163 (W.D. Pa. 1916) (citing government's interest in guarding elections from corruption).

5. 424 U.S. 1 (1976).

6. See *infra* notes 32-34 and accompanying text. In each session of Congress since the mid-1980's, proposals have been pending that combine the use of federal subsidies and penalties to encourage compliance with spending limits. When first introduced in the 103d Congress, the bills in the House and Senate, HR-3 and S-3, were identical to the proposal approved by Congress in 1992 but vetoed by President Bush. *Federal Elections, Clinton Meets with Leaders to Urge Prompt Action on Campaign Finance Reform*, DAILY REP. FOR EXECUTIVES (BNA) No. 22, at D-33 (Feb. 4, 1993). The Senate later amended S-3 significantly by reducing benefits given to candidates who comply with the limits and increasing the punishments for those who spend above the ceilings. See *infra* Part III. The House of Representatives has yet to pass or fully consider HR-3.

7. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 (1989).

expenditure limitations might lead it to use the doctrine to invalidate the reform bill. Part III first examines the similarities between the current congressional proposal and the system for presidential election financing that was approved in *Buckley*. It concludes that the congressional proposal is voluntary, and thus constitutional, to the extent that it conforms to the presidential system. Next, Part III identifies the plan's departures from the presidential system, and analyzes whether each departure constitutes an offer or a threat.⁸ Where the plan uses threats, it is coercive and must satisfy the strict-scrutiny test that applies to infringement of First Amendment rights. The Note concludes that the program recently passed by the Senate is more coercive than voluntary, and thereby imposes on the exercise of free speech by candidates. However, if the Court can be convinced to recognize as a compelling interest the public's confidence in the integrity of the democratic system and to differentiate between free-speech rights at varying levels of campaign spending, much (but not all) of the reform program, should still survive scrutiny.

I. THE CONSTITUTIONAL STRATEGY

As politicians vow to clean up Washington and reform legislation inches toward final passage, the likelihood grows that the Court will soon be faced with a case that asks it to do what reformers have longed for—revisit *Buckley*. Since that 1976 decision, lawmakers seeking to control the cost of campaigns have been severely constrained. Prevented from imposing mandatory limits, reformers have proposed other ways to encourage candidates to reduce their expenditures. These proposals involve dispensing benefits to candidates who comply with statutory spending ceilings and levying penalties on those who do not. A legal challenge to this strategy would enable the Court both to reexamine the underpinnings of the *Buckley* decision and to assess the use of government largesse to place pressure on constitutional rights.

A. *The Federal Election Campaign Act and Buckley v. Valeo*

The modern framework for campaign reform emerged in 1974, when Congress passed a series of substantial amendments to the Federal Election Campaign Act of 1971 (FECA).⁹ This ground-breaking initiative established the Federal Election Commission to enforce a variety of new regulations, including optional public financing for presidential campaigns, full disclosure of all campaign contributions and expenditures, rigid contribution and

8. See *infra* Part II.C. for an explanation of the theoretical framework used to distinguish between offers and threats.

9. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974); see also Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

expenditure limits for all federal campaigns, and restrictions on contributions from personal wealth. In short, the legislation constituted "by far the most comprehensive, reform legislation passed by Congress concerning the election of the President, the Vice-President and members of Congress."¹⁰

Immediately after FECA's passage, a diverse group of plaintiffs that ranged from Republican Senator James Buckley of New York to liberal activist Stewart Mott challenged the Act under expedited procedures as violating the First and Fifth Amendments.¹¹ The circuit court approved virtually the entire bill, justifying spending restrictions on the basis that they were conduct-related rather than speech-related and therefore subject to a lesser standard of First Amendment review.¹² However, after 294 pages and five separate opinions, the Supreme Court "handed down an opinion . . . that rewrote the rule book for congressional and presidential campaign fundraising and spending, creating a legal paradigm for reform that stands untouched seventeen years later."¹³ Most important, the Court rejected the view that money spent in a campaign could be separated from its speech component, stating: "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment."¹⁴ The Court refused to treat expenditures as conduct analogous to burning a draft card¹⁵ or the spending limits as a form of time, place, or manner restriction.¹⁶ Either view would have led the Court to apply a lesser standard of judicial scrutiny. Rather, the Court stated:

[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has

10. *Buckley v. Valeo*, 519 F.2d 821, 831 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976).

11. Other plaintiffs in this broad spectrum included Democratic presidential candidate Eugene McCarthy, the Conservative Party of the State of New York, the New York Civil Liberties Union, and the American Conservative Union. *Id.* at 833 n.1.

12. *Buckley*, 519 F.2d at 840 (applying conduct analysis established in *United States v. O'Brien*, 391 U.S. 367 (1968)).

13. Beth Donovan, *The Case that Wove the Intricate Web . . . of Campaign Finance Restrictions*, 51 CONG. Q. 432 (1993).

14. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

15. *See O'Brien*, 391 U.S. at 367 (holding that burning of draft card was conduct, not speech, and therefore subject to criminal penalties).

16. *See Buckley*, 424 U.S. at 17-18. Time, place, and manner restrictions are a form of legislative regulation traditionally more acceptable than content-based regulation. *United States v. Grace*, 461 U.S. 171, 177 (1983) (involving regulation of political displays on grounds of Supreme Court).

made these expensive modes of communication *indispensable instruments* of effective political speech.¹⁷

As Justice White observed in dissent, the majority embraced the maxim that “money talks” without reservation or serious analysis, thereby simply equating money with speech in the political context.¹⁸ Rejecting arguments for lesser scrutiny, the Court concluded that the FECA restrictions operated “in an area of the most fundamental First Amendment activities.”¹⁹

The Court essentially rewrote the Act by ruling selectively on various of its components. In an important victory for the reform plan, the Court held that contribution limits were justified by the Act’s “primary purpose” of avoiding corruption.²⁰ This victory was undermined, however, by the Court’s invalidation of spending limits, a reform lying at the heart of the program. In making the distinction between contributions and expenditures, the Court established a dichotomy that has since governed campaign-finance regulation though it continues to be assailed by legal scholars and political observers.²¹

The distinction depended on two highly problematic conclusions. First, the Court understood the corruption risk solely in terms of the threat of quid pro quo corruption—dollars given in return for political favors. Large contributions heightened this risk while unrestrained expenditures did not. In limiting its conception of corruption to the quid pro quo variety, the Court ignored the role excessive campaign spending plays in compromising the electorate’s confidence in the democratic process.²² By restraining contributions while allowing overall expenditures to soar, the Court’s decision spawned a money chase that requires constant fundraising and continued reliance on wealthy donors. A broader corruption theory would have recognized the dangers inherent in a process where election outcomes depend on which candidate has access to the most money.

Second, the Court also distinguished between contribution and expenditure regulations on the basis of their impact on rights protected by the First

17. *Buckley*, 424 U.S. at 19 (emphasis added).

18. *Id.* at 262-66.

19. *Id.* at 14.

20. *Id.* at 26-27.

21. One recent critique states that “the distinction between expenditures and contributions has been so severely criticized that it may no longer support a different level of scrutiny for contributions than for expenditures.” Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1063 (1985); see also Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 55-73 (1980) (discussing elusive quality of contribution/expenditure distinction). Justice Marshall reversed his position on the contribution/expenditure distinction in *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U.S. 480, 520-21 (1985) (“I disagree that the limitations on contributions and expenditures have significantly different impacts on First Amendment freedoms. . . . In summary, I am now unpersuaded by the distinction established in *Buckley*.”).

22. *Buckley*, 424 U.S. at 57 (“[T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending . . .”).

Amendment. The Court held that expenditure limits infringed free speech more significantly than contribution limits did. The Court stated:

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. . . . The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.²³

On the other hand, the Court employed a vague, almost metaphysical, argument to defend the free-speech ramifications of contribution limits. The Court stated:

A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for support. The quantity of communication by the contributor does not increase perceptibly with the size of the contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.²⁴

This distinction between free speech harms does not hold up to close analysis. Preventing a donor who is passionately committed to a candidate from contributing to that candidate creates a very significant speech burden. Because the contribution limit hinders the contributor's ability to express the extent of his or her support, the ceiling hampers expressive potential. Furthermore, where the above-ceiling contribution could launch a candidacy that otherwise would fail, the contribution limit prevents the donor's views, or the candidate's, from being heard at all. On the other hand, the speech harm from an expenditure limit is slight when a candidate who has already purchased \$5.5 million in advertisements is merely prevented from adding another campaign employee to his or her staff.

While disallowing *mandatory* spending limits in congressional races as violative of First Amendment rights, the Court approved *voluntary* spending limits in the presidential system. Providing no rationale for distinguishing between these two situations, the Court accepted a regime where major-party presidential candidates could each receive \$20,000,000 in subsidies if they agreed not to raise and spend private funds.²⁵ In short, the government could

23. *Id.* at 19.

24. *Id.* at 21.

25. *Id.* at 85-90. This figure is tied to the rate of inflation and increases for every election. In the 1992 election cycle, Bill Clinton and George Bush each received \$73 million in the general election. John W. Mashek, *1996 Election Fund May Run Short as Only 19% of Taxpayers Check Off*, BOSTON GLOBE, Dec. 15, 1992, at 10.

bribe presidential candidates to cap spending, but it could not compel congressional candidates to do so. Rather than explain the constitutional significance of the distinction between voluntary and mandatory limits, the Court only addressed the equal protection objections raised by minor parties who argued unsuccessfully that the system disadvantaged them.

B. *The Legislative Response to Buckley*

The *Buckley* decision casts a long shadow over congressional efforts to revamp campaign finance laws. While some lawmakers have advocated a direct assault on *Buckley*,²⁶ Congress has mainly sought to effectuate the type of reforms disallowed by the Court within the *Buckley* framework. Most important, reformers have clung to the objective of establishing expenditure ceilings, in some form, on electoral spending despite the Court's clear pronouncement that mandatory spending limits violate the First Amendment.²⁷ A principal reason for this continued demand for reform is the spiralling cost of campaigns, a cost which has risen over more than 300% since 1980.²⁸ On average, a successful candidate for the Senate, for example, raises more than \$4 million in a six-year term. In other words, an incumbent Senator must raise more than \$12,000 each week throughout a six-year election cycle.²⁹ In the House of Representatives, a candidate in a contested race faces a burden of raising approximately \$4,000 each week for a total of \$400,000 in a two-year term.³⁰ To reduce the role of money in politics within the framework of *Buckley*, Congress has proposed "voluntary" expenditure limits. Congress would offer financial benefits to induce compliance with the limits, as well as penalties to discourage noncompliance. This approach was approved by both

26. In the 103d Congress, Senators Ernest F. Hollings (D-S.C.) and Arlen Specter (R-Pa.), both of whom narrowly won reelection in 1992 after expensive races, introduced a joint resolution, S.J. Res. 10, 103d Cong., 1st Sess. (1993), calling for a constitutional amendment to allow Congress and state legislators to set spending limits. Similar legislation has been introduced in the House of Representatives by Representative John Dingell (D-Mich.). H.R.J. Res. 20, 103d Cong., 1st Sess. (1993). While the constitutional amendment to overrule *Buckley* has been proposed before, it has never gained the requisite nation-wide momentum. However, the Senate recently passed by a 52-43 margin a resolution expressing its support for a constitutional amendment allowing reasonable limits on congressional campaign expenditures. 51 CONG. Q. 1389 (1993) (Vote no. 129).

27. On the opening day of the 1993 legislative session, the Democratic leadership renewed its commitment to spending limits, calling them the central feature of its electoral reform package. Rules Committee Chairman Wendell Ford (D-Ky.) stated, "[I]n past debates, I have said there can be no real reform without meaningful spending limits. I believe that the terms of these spending limits remain negotiable. But the issue of whether to establish spending limits is not." 139 CONG. REC. S241 (daily ed. Jan. 22, 1993).

28. Ellen Miller, Executive Director of the Center for Responsive Politics, Remarks at the Consultation on *Buckley v. Valeo* 3 (Apr. 19, 1993 at National Press Club in Washington, D.C.) (transcript on file with Center for Responsive Politics, Washington, D.C.) (analysis based on reports filed with the Federal Election Commission).

29. SARA FRITZ & DWIGHT MORRIS, GOLD-PLATED POLITICS: RUNNING FOR CONGRESS IN THE 1990S 3, 14-17 (1992).

30. *Id.*

the House and Senate in 1992, but President Bush vetoed the proposal, and Congress failed to override him in a vote that fell largely along party lines.³¹

As the 103d Congress first convened, Democratic leaders in the Senate introduced a bill essentially identical to the conference report approved by the previous Congress in the hope that newly elected President Clinton would sign the measure into law.³² The bill's numerical title, Senate Bill #3 (hereinafter S-3), denotes its high priority on the congressional agenda.³³ In the House, an identical companion bill, House Resolution #3 (hereinafter HR-3), was introduced.³⁴ As originally proposed, the Senate and House bills in part

31. Guy Gugliotta, *Veto of Campaign Finance Reform Bill Upheld; 57-42 Senate Vote Falls Well Short, Reaffirming Partisan Stalemate*, WASH. POST, May 14, 1992, at A12.

32. S. 3, 103d Cong., 1st Sess. (1993), reprinted in 139 CONG. REC. S225-240 (daily ed. Jan. 21, 1993) (as originally proposed) (hereinafter S. 3 as Proposed). Chief sponsors of the bill include its author, Senator David Boren (D-Okla.), Senate Majority Leader George Mitchell (D-Me.), and Senate Rules Committee Chairman Wendell Ford (D-Ky.). Democrats were buoyed by President Clinton's campaign remarks that he would have signed the bill vetoed by President Bush as well as by remarks during the previous day's inaugural address in which the President called for reform of election laws. *Id.* at S224. A one-page memorandum from the Clinton-Gore campaign outlined a bill very similar to the congressional plan, with voluntary spending caps for House and Senate candidates. Tim Curran, *If Bill Clinton Wins, Campaign Reform Will Follow Soon After; But Do Democrats Want Sweeping Changes?*, ROLL CALL, Sept. 14, 1992, at 34.

33. See 139 CONG. REC. S224 (daily ed. Jan. 21, 1993) (statement of Sen. Boren). For a descriptive summary of the bill's provisions, see Beth Donovan, *Campaign Finance Bill*, 50 CONG. Q. 1651 (1992), which describes the measure when it was approved in June 1992. In its original form, and as approved by the Senate Rules Committee in March 1993, the bill provided public funding at the outset of the campaign for candidates complying with spending limits in addition to extra funds when an opponent exceeds voluntary limits. The bill also dealt, when proposed, with both House and Senate elections.

The original bill proposed to cap spending on races for the House of Representatives at \$600,000. S. 3 as Proposed, *supra* note 32, sec. 121, § 601. According to the bill, if the candidate agreed to spending limits and successfully raised through private donations \$60,000 in payments of \$250 or less, she would be eligible for \$200,000 in matching funds. *Id.* § 604(a)-(c). Complying candidates could also mail up to one piece of mail per eligible voter at the lowest third-class nonprofit rate. *Id.* at sec. 132 (amending 39 U.S.C. 3626(e)). Contingency money in the form of matching funds and allowances for additional private fundraising would be provided to complying candidates once non-participating candidates violated the voluntary spending limits. *Id.* at sec. 121, § 601(d); Donovan, *supra*, at 1652.

The bill established voluntary spending limits for the Senate that range from \$635,000 to approximately \$8.9 million depending on the voting-age population of the state and on whether the candidate faced both a primary and general election opponent. S. 3 as Proposed, *supra* note 32, sec. 101, §§ 501-502; Donovan, *supra*, at 1652. To be eligible, the Senate candidate would have to agree to the spending limit and raise the lesser of \$250,000 or 10% of the spending limit from small contributions of \$250 or less, half of which must come from the candidate's home state. S. 3 as Proposed, *supra* note 32, sec. 101, § 501(e). A noncomplying candidate would be forced to run a disclaimer on her advertising indicating that she did not abide by voluntary spending limits. *Id.* at sec. 104. Complying candidates would receive an array of benefits, including communication vouchers worth 20% of the spending limit that could be used to buy advertisements. *Id.* at sec. 101, § 503(a)-(c). Participating candidates would also receive allowances for one piece of mail per eligible voter at the lowest third class-nonprofit rate and 50% broadcasting discount rates for the general election period and the last days of a primary. *Id.* §§ 131-132 (amending 47 U.S.C. 315(b) and 39 U.S.C. 3626(e)). Once a noncomplying candidate exceeded the spending limit, the participating candidate would receive contingency funds to match the opponent's excessive spending. *Id.* at sec. 101, § 503(b)(3).

34. H.R. 3, 103d Cong., 1st Sess. (1993). Congress approved the reforms in this bill in 1992, and Representative Sam Gejdenson (D-Conn.) reintroduced the legislation as H.R. 3 this year since the proposal never became law. Because the House Bill is the same as the final campaign reform bill passed by both houses of Congress in 1992, the legislation deals with both House and Senate elections. In contrast, the recently passed Senate Bill only addresses Senate elections. The Senate will await passage of a House bill addressing House elections before convening a House-Senate conference committee to combine the two

tracked the presidential system, providing automatic public financing for those who limited campaign expenditures. The main innovation of the congressional plan was that additional benefits would flow to the complying candidate once an opponent surpassed the spending limits.³⁵

In light of new support in the White House, most observers believed Congress would quickly approve campaign reform. In fact, the bill's progress has been less than impressive, probably because lawmakers now realize their plan will likely be signed into law and are therefore far more cautious. After a long filibuster, the Senate was able to pass a scaled-down version of S-3 on June 17, 1993. In its current form, S-3 no longer provides funds to all complying candidates. Instead, it gives out "triggered" public funds (in the form of advertising vouchers and postage discounts) only when a noncomplying opponent exceeds the spending limit.³⁶ These vouchers are to be paid for by removing the current tax exemption for campaigns and imposing a tax of the highest corporate rate (thirty-four percent at time of passage) on those campaigns that do not abide by spending limits.³⁷ These changes lowered S-3's costs by eliminating automatic public financing for complying candidates. No action has taken place in the House, where the main vehicle remains HR-3, a replica of the bill approved in the 102d Congress.

While reformers are guardedly optimistic about prospects for the first major overhaul of electoral law since the 1974 FECA amendments, their critics are preparing a widely anticipated court challenge under the *Buckley* precedent. The plan's most vigorous opponent, Senator Mitch McConnell (R-Ky.), has indicated that he is already forming a litigation group to challenge the proposal. He has said, "We fully expect to be in the court before the end of the year if this bill passes."³⁸ Referring to the 1976 plaintiff in *Buckley*, McConnell boasted that "I'll be the Jim Buckley of 1993," and noted that "there is a chance that if this matter goes to this Supreme Court, they could disallow any spending limits. This is a very different Court."³⁹ Since S-3 provides that any court ruling addressing its constitutionality can be appealed directly to the Supreme Court, the high court could soon be faced with a momentous campaign reform dispute.⁴⁰

bills into a comprehensive congressional campaign finance law. Typically, each body defers to the other in regulating their respective campaigns. As this Note goes to press, the House has not begun floor debate on campaign finance reform.

35. *Id.* at sec. 121, § 601; S. 3 as Proposed, *supra* note 32, sec. 101, § 503 (1993).

36. *Infra* Part III.B.1.

37. *Id.*

38. Tim Curran, *This Time Around, It's for Real*, ROLL CALL, Jan. 18, 1993, at 15.

39. Curran, *supra* note 32, at 35.

40. S. 3, 103d Cong., 1st Sess. § 804 (1993), *reprinted in* 139 CONG. REC. S7444, S7452 (daily ed. June 17, 1993) (as passed by Senate) (hereinafter S. 3 as Passed). Section 804 of the bill states that an appeal may be taken directly to the Supreme Court from any interlocutory order or final judgment, decree, or order issued by any court ruling on the constitutionality of any provision in the Act. It further requires the Court to accept jurisdiction over the appeal, advance it on the docket, and expedite it to the greatest extent possible.

II. THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

The trend in the Court's opinions since *Buckley* does not bode well for the legislation. In all but a few cases, the Court has been hostile to regulations in the political sector.⁴¹ The sharp rhetoric of the Court's conservatives leaves little doubt that they look with suspicion on efforts to equalize the power of speakers in the political forum. In *Austin v. Michigan Chamber of Commerce*,⁴² Justice Scalia vigorously dissented from Justice Marshall's majority decision upholding prohibitions on corporate use of general treasury funds for independent expenditures on behalf of candidates in state elections. Scalia wrote:

"Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate: _____" In permitting Michigan to make private corporations the first object of this ORWELLIAN announcement, the Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe.⁴³

Justices Kennedy and O'Connor branded the majority a "censor" and said the result "reveals a lack of concern for speech rights that have the full protection of the First Amendment."⁴⁴ Nor can reformers necessarily rely on the more liberal members of the Court. Justice Stevens joined the majority in *Buckley* and has shown no willingness to undermine its basic conclusions. Justice Blackmun dissented in *Buckley* on the grounds that *both* contribution and expenditure limits should be held unconstitutional. And, most significant, Congress has lost a strong ally in Justice White, a dissenter in *Buckley* and an ardent protector of Congress' campaign reform prerogatives.

Although political opponents have not yet couched the argument in formal legal terms, they will undoubtedly invoke the doctrine of unconstitutional conditions.⁴⁵ This doctrine posits that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the

41. See *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985) (striking down statutory restrictions on political action committee expenditures in presidential campaigns); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (striking down Massachusetts law prohibiting corporate expenditures in statewide referendum).

42. 494 U.S. 652 (1990).

43. *Id.* at 679 (Scalia, J., dissenting).

44. *Id.* at 713 (Kennedy, J., dissenting).

45. For discussions of this doctrine, see Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Kathleen M. Sullivan, *supra* note 7; Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990).

government may withhold that benefit altogether. Not found in the text of the constitution itself, this doctrine is a logical inference from that text, the creation of judicial implication.⁴⁶ As campaign reform marches through Congress, it is critical to assess the doctrine's relevance today and to highlight the underlying concepts that animate the theory. In this era of governmental largesse, the doctrine of unconstitutional conditions serves as a much needed constraint on government power. It should not work, however, as a total bar to the government's objectives. When the condition infringes a fundamental right, it should be allowed as a legitimate use of government power if it is narrowly tailored to an objective of compelling importance. This "compelling interest" analysis is nothing more than the strict scrutiny courts apply whenever they face legislation restricting a protected liberty, such as restrictions on free speech in the electoral arena.

A. *The Competing Views of the Doctrine*

The doctrine of unconstitutional conditions prevents those who control the public fisc from using that power to extract objectionable waivers of constitutional rights. Recently, the Court has wrestled with problems posed by unconstitutional conditions in several contexts. They include President Bush's promulgation of regulations that prohibit recipients of Title X funds from engaging in activities advocating abortion,⁴⁷ the federal government's attempt to induce states to cede police powers in return for federal highway funds,⁴⁸ and Congress' prohibition on the use of federal funds for editorializing on public television.⁴⁹ In this tradition, opponents of campaign reform argue that if *Buckley* prohibits the government from placing a mandatory limit on candidate spending, it prohibits the government from conditioning the receipt of federal subsidies upon the waiver of the right to spend privately raised donations freely.⁵⁰ These opponents argue that the reform plan makes candidates an offer they cannot refuse, and thereby coerces them into ceding their constitutional rights.

The doctrine's origins can be traced to the 1920's, when states tried to condition corporate activity within their borders on such concessions as an agreement by the corporation not to invoke the authority of federal courts on

46. See Epstein, *supra* note 45, at 10-11. Epstein likens the doctrine to "Banquo's ghost" appearing infrequently but persistently throughout constitutional law.

47. See *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

48. *South Dakota v. Dole*, 483 U.S. 203 (1987).

49. *Federal Communications Comm'n v. League of Women Voters*, 468 U.S. 364 (1984).

50. Senator McConnell stated the objection more bluntly in response to a question concerning the impact of voluntary spending limits: "[T]here's nothing voluntary about these spending limits. In fact, they are mandatory. They're like a hammer. If you were so audacious as to want to speak too much . . . all kinds of bad things happen to you." *McNeil-Lehrer News Hour*, (P.B.S. television broadcast, May 7, 1993), available in LEXIS, Nexis Library, Currt File.

diversity jurisdiction. True to the *Lochner*-era ethos of economic rights, the Court deployed the doctrine of unconstitutional conditions to invalidate these efforts as improper pressure on fundamental rights.⁵¹

Just as the doctrine played a significant role in the *Lochner* era to protect the economic liberties of corporations, it enjoyed a renaissance during the Warren Court as a mechanism to protect constitutional liberties, especially free speech.⁵² In *Perry v. Sindermann*,⁵³ for example, the Court permitted a professor to claim that his First Amendment rights were infringed when he was denied tenure after criticizing the state university. Justice Stewart seemed to accord special status to the First Amendment when evaluating the constitutionality of how benefits are allocated. He wrote:

[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to “produce a result which [it] could not command directly.”⁵⁴

The *Perry* decision relied heavily on Justice Brennan’s opinion in *Speiser v. Randall*,⁵⁵ where the Court held that tax exemptions to veterans could not be conditioned upon the taking of a loyalty oath because that condition amounted to a penalty for their ideas. The Court in *Speiser* stated:

It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. . . . So here, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech.⁵⁶

Those who dismiss the doctrine of unconstitutional conditions often argue that the government’s power to grant a benefit includes the lesser power to restrict that benefit as it chooses. The power to condition benefits upon the waiver of a constitutional protection is deduced from the power to grant the benefit in the first place.⁵⁷ As paradigmatic of this position, commentators

51. See *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922) (holding unconstitutional state law revoking license of foreign corporations that resort to federal courts); see also *Frost & Frost Trucking Co. v. R.R. Comm’n*, 271 U.S. 583 (1926) (holding that private carrier’s use of state highway does not entitle state to require carrier to assume all burdens typically assumed by common carriers).

52. See Sullivan, *supra* note 45, at 1416.

53. 408 U.S. 593 (1972).

54. *Id.* at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

55. *Speiser v. Randall*, 357 U.S. 513 (1958).

56. *Id.* at 518.

57. Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1595-96 (1960).

point to Justice Holmes' opinion in *McAuliffe v. Mayor of New Bedford*.⁵⁸ *McAuliffe* involved a policeman who had been fired for violating a regulation prohibiting political affiliation for public employees. Justice Holmes wrote, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."⁵⁹ Chief Justice Rehnquist has adopted Holmes' approach to state power and his hostility to the doctrine of unconstitutional conditions. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,⁶⁰ the Court held that the state may require a gambling operation to forfeit some of its First Amendment rights since the state had the authority to permit gambling in the first instance. Justice Rehnquist wrote that "it is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising."⁶¹

Commenting on Justice Holmes' analysis, Judge Patricia Wald has called the reasoning "stunningly unresponsive."⁶² Holmes failed to recognize that the petitioner's claim was not that the regulation prevented him from being a police officer but that it severely restrained his ability to exercise his First Amendment rights. As Judge Wald noted, the greater-includes-the-lesser argument requires a second premise to be accepted, namely that an unconstitutional infringement of speech occurs only if the sanction for exercising free speech is the deprivation of some other constitutionally protected liberty. Yet there is a fundamental fallacy in the notion that the power to condition is a *lesser* power. Equal protection theory since the 1950's has recognized that discrimination in the disbursement of a public benefit is a potent and frequently invidious use of government power.⁶³ While the state might be constitutionally authorized to regulate casino advertising, particularly because it is commercial speech, the argument made by the Chief Justice in *Posadas* presents serious constitutional difficulties since the same argument could be made, for instance, to allow a state legislature to dock pay from casino employees engaged in union or other political activities.

58. 29 N.E. 517 (Mass. 1892).

59. *Id.* at 517.

60. 478 U.S. 328 (1986).

61. *Id.* at 346 (emphasis omitted). See also Justice O'Connor's dissent in *Federal Energy Regulatory Commission v. Mississippi*, where she criticizes the majority's reliance on the "greater-includes-the-lesser" contention since it would dissolve all constitutional limits on federal regulation of state action. 456 U.S. 742, 785-87 (1982).

62. Patricia Wald, *Government Benefits: A New Look at an Old Gifhorse*, 65 N.Y.U. L. REV. 247, 251 (1990).

63. Imagine a decision to deny welfare benefits to all opponents of the war in the Persian Gulf, or to restrict drivers' licenses to those adhering to a particular religious faith.

B. *Unconstitutional Conditions after Rust v. Sullivan*

The doctrine of unconstitutional conditions teeters precariously since the Court's decision in *Rust v. Sullivan*.⁶⁴ In *Rust*, Chief Justice Rehnquist brushed aside that doctrine in upholding regulations promulgated by the Department of Health and Human Services prohibiting the use of Title X funding for abortion counseling, referral, and activities advocating abortion as a method of family planning. Recipients of family-planning funds argued unsuccessfully that the regulation violated the First Amendment in two ways. First, they contended that the regulations imposed impermissible viewpoint-discriminatory conditions on government subsidies.⁶⁵ Second, they argued that the regulations conditioned receipt of the benefit of Title X funding on the relinquishment of constitutionally protected rights of abortion advocacy and counseling.⁶⁶ The Court disagreed.

Although *Rust* signalled a retreat from the doctrine of unconstitutional conditions, the decision did not completely abandon the doctrine in the First Amendment context, and the doctrine may return to haunt campaign reformers. Chief Justice Rehnquist took an important step to distinguish *Rust* from other cases holding that the government may not deny a benefit on a basis that infringes free speech. Rehnquist carved out an expansive exception to the Court's approval of conditioned benefits, finding certain arenas where Congress could not regulate funding in conjunction with restrictions on speech. He wrote, "[T]his Court has recognized that the existence of a Government 'subsidy' . . . does not justify the restriction of speech in areas that have 'been traditionally open to the public for expressive activity.'" ⁶⁷ This exception provides room for the Court to maneuver if and when it is asked to pass judgment on a federal election regulatory scheme, since it allows the Court to conclude that an election campaign, like a university, should be subject to the highest level of scrutiny.

The doctrine's revival in the electoral arena seems more likely in light of Rehnquist's opinion in *Pacific Gas & Electric*,⁶⁸ where he revisited the distinction the Court made in *Buckley* between contribution and expenditure limitations. Whereas the *Buckley* court had stressed that contributions could be regulated because of their close relationship to corruption, Rehnquist argued that the distinction owed more to the heightened speech value of expenditures

64. 111 S. Ct. 1759 (1991). The so-called "gag rule" upheld by the Court in *Rust* was subsequently rescinded in the opening days of the Clinton Administration. Memorandum on the Title X "Gag Rule," 29 WEEKLY COMP. PRES. DOC. 87 (Jan. 22, 1993).

65. 111 S. Ct. at 1771-72.

66. *Id.* at 1773-74.

67. *Id.* at 1776 (citing *United States v. Kokinda*, 110 S. Ct. 3115, 3119 (1990)). Interestingly, the doctor-patient relationship did not constitute one of these special areas.

68. *Pacific Gas & Elec. v. Public Util. Comm'n*, 475 U.S. 1 (1985).

per se.⁶⁹ Therefore, the analysis in *Rust* and *Pacific Gas & Electric* indicates that the Court is prepared to use the doctrine of unconstitutional conditions in specific arenas traditionally open for public expression to invalidate contingent benefits. It is reasonable to assume that expenditures in an election contest would be included in this category.

C. *Two Tests for Contingent Benefits: Coercion and Connection to Government Interest*

The Warren Court protected constitutional liberties by applying the doctrine of unconstitutional conditions to strike down laws that infringed the freedom of speech. But the Court provided little explicit discussion to guide its implementation. While coercion emerges as a central issue in both *Speiser*⁷⁰ and *Perry*,⁷¹ it is extremely difficult to distinguish between a penalty for noncompliance with a government program on the one hand, and a bonus for participation on the other. In Seth Kreimer's seminal work on the theory of unconstitutional conditions, he proposes an analytical framework for courts to use in making a threshold distinction between offers and threats.⁷² Threats are allocations that make an actor worse off than she would have been had she not exercised her constitutional rights.⁷³ Threats are coercive in that the actor must comply with them or suffer a loss. Offers, on the other hand, leave the actor in a better position by expanding the options available.⁷⁴ Offers, while often persuasive, are not coercive because they have no negative effect if not accepted.⁷⁵ A statute, for example, that took away welfare from a woman who obtained an abortion would constitute a threat, while a state's decision to pay money to a woman who puts her child up for adoption would reflect an offer.

Implicit in the case law are two tests used to evaluate the constitutionality of conditioned benefits. First, the courts try to distinguish between programs that represent offers to induce waiver of constitutional rights and those that use threats to coerce waiver. Offers are largely acceptable, but threats are subject

69. 475 U.S. at 29 n.2. While contribution limits involve "indirect and minimal effect on First Amendment interests," Justice Rehnquist distinguished expenditure limits, writing that "the relatively greater effect of these limitations on affirmative speech triggered heightened scrutiny, and a rational basis was no longer sufficient to justify them." *Id.*

70. 357 U.S. 513 (1958).

71. 408 U.S. 593 (1972).

72. Kreimer, *supra* note 45, at 1351-59.

73. *Id.* at 1300-01.

74. *Id.*

75. Although offers might not pose problems of coercion, some types of offers may be considered impermissible. For instance, the government arguably should not be allowed to make offers where an inalienable right is involved, such as the Thirteenth Amendment right not to be sold into slavery and the Eighth Amendment prohibition against cruel and unusual punishment. *Id.* at 1307-08.

to strict scrutiny to determine whether the condition is narrowly tailored to achieve a compelling government interest.

1. *Voluntary Offer or Coercive Threat*

In *Rust*, the opinion emphasized the fact that “[t]he employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project.”⁷⁶ Regardless of whether employees in fact remained free to engage in abortion counseling, this statement reflects the Court’s ostensible concern about whether the program was coercive. Because the plaintiffs allegedly possessed the same degree of freedom after the agency promulgated the rules, the Court maintained that coercion was not a problem. Similarly, the absence of coercion was the determinative factor for Justice Scalia in his dissent in *Arkansas Writers’ Project v. Ragland*, where he argued in favor of upholding the denial of a tax exemption to a certain class of publications.⁷⁷ He stated:

The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily “infringe” a fundamental right is that—unlike a direct restriction or prohibition—such a denial does not, as a general rule, have any significant coercive effect. It may, of course, be manipulated so as to do so, in which case the courts will be available to provide relief.⁷⁸

Although he acknowledged that manipulation could turn a tax exemption into a coercive device, Scalia distinguished such a situation from the one at hand by pointing out that the exemption policy did not hinder the magazine. He stated: “It is implausible that the 4% sales tax, generally applicable to all sales in the State with the few enumerated exceptions, was meant to inhibit, or had the effect of inhibiting, this appellant’s publication.”⁷⁹ Because, in his view, the magazine had not been penalized, Scalia did not see a problem presented by the doctrine of unconstitutional conditions. Unless such a distinction was made, Scalia wrote, the Court would cast into doubt all preferences and subsidies relating to the First Amendment that make distinctions based on subject matter.⁸⁰

76. *Rust v. Sullivan*, 111 S. Ct. 1759, 1775 (1991).

77. 481 U.S. 221, 237 (1987) (Scalia, J., dissenting).

78. *Id.* at 237.

79. *Id.*

80. *Id.* at 238.

2. *Strict Scrutiny for Threats*

When a program uses threats to induce compliance, the program should be subjected to the same heightened scrutiny as a sanction for exercising that right. First, a condition burdening a fundamental right must be justified by a compelling state interest.⁸¹ Second, proper and improper state pressure must be distinguished by assessing the fit between the condition and the policy objective sought.⁸² An overly broad condition is more likely aimed at curtailing a right than at realizing a legitimate government objective. In *Regan v. Taxation With Representation*,⁸³ the Court allowed Congress to deny nonprofit organizations tax benefits for their lobbying activities in accordance with the objective of not subsidizing lobbying activities. Three justices concurred on the basis that the nonprofit organizations did not lose the tax benefits for their nonlobbying activities, and they were still free to make known their views without penalty on legislation through affiliate organizations.⁸⁴ Because of the close connection between Congress' desire to ensure that tax-deductible contributions not be used for lobbying and the removal of the tax benefit only for lobbying activities, the Court accepted the rationale offered by Congress and did not reject the provision as an effort to quash speech rights.

The Court extended this logic in *FCC v. League of Women Voters*⁸⁵ by striking down a regulation that prohibited publicly funded television stations receiving grants from the Corporation for Public Broadcasting from engaging in editorializing. The Court found that, unlike the statute in *Taxation with Representation*, the condition was only loosely connected to the objective of not subsidizing televised editorials with public funds. Had the law prohibited only the use of public funds and contained a mechanism for public television stations to use private funds for editorializing, the Court would have allowed this more narrowly-tailored limitation on First Amendment rights. In *Rust*, Justice Rehnquist tried to turn *League of Women Voters* to his advantage, pointing out that the federal law in *League of Women Voters* banned *all* editorializing and failed to distinguish between editorializing financed by public and by private funds, whereas the rule at issue in *Rust* permitted a Title X grantee to engage in abortion activity using private funds separately from

81. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (stating that "where a prohibition is directed at speech itself and the speech is directly related to the process of governing, 'the state may prevail only upon showing a subordinate interest which is compelling.'" (quoting *Baker v. City of Little Rock*, 361 U.S. 516, 524 (1960))); see also *Republican Nat'l Comm. v. Federal Election Comm'n*, 487 F. Supp. 280, 284-85, *aff'd*, 445 U.S. 955 (1980).

82. In the First Amendment context, the Court requires the government to "employ means 'closely drawn to avoid unnecessary abridgement.'" *Bellotti*, 435 U.S. at 786 (quoting *Buckley*, 424 U.S. at 25).

83. 461 U.S. 540 (1983).

84. *Id.* at 552-53 (Blackmun, J. concurring).

85. 468 U.S. 364 (1984).

the project. Essentially, Rehnquist applied an overbreadth analysis and found the *Rust* rule satisfactory. Similarly, in *Harris v. McRae*,⁸⁶ the Court said it would have disallowed withholding of *all Medicaid benefits* for abortion seekers even though it did permit denial of *benefits for abortions*. The denial of benefits for abortion procedures alone was narrowly tailored to the state's anti-abortion objectives, but a total restriction of welfare would have been invalidated as an effort to coerce sacrifice of a constitutional liberty, the right to an abortion.

III. S-3 AS AN UNCONSTITUTIONAL CONDITION?

A constitutional challenge to S-3 would present the Court squarely with an opportunity to synthesize its previous decisions on the doctrine of unconstitutional conditions. In doing so, the Court should assess whether the campaign reform proposal coerces candidates to sacrifice their protected free-speech rights and, if so, whether its coercive provisions are closely related to compelling state interests.

If the legislation in its final form adheres to the presidential model of campaign financing,⁸⁷ providing automatic subsidies for compliance, it should be treated as an offer and held to be constitutional. To the extent that the legislation departs from the presidential model, however, relying more on punitive mechanisms such as triggered subsidies, the provisions become harder to classify as offers rather than threats and become subject to the Court's strict scrutiny analysis.

In determining the acceptable framework for distinguishing offers from threats, the approach developed by Seth Kreimer is an effective starting place. A bargain is an offer if, by refusing it, potential recipients are made no worse off than they would have been if the program had never existed; it is a threat if, by refusing it, they are made worse off. This distinction between offers and threats is easiest to apply in analyzing bargains between the government and an isolated individual. It is more difficult to apply in the competitive atmosphere of a political campaign, where a benefit to one candidate means a loss for another. What appears simply to be an offer to a complying candidate may actually be a threat to a noncomplying candidate. To the extent that a candidate's exercise of free-speech rights is considered noncompliance, and noncompliance results in the candidate being placed in a worse position, the program is coercive and runs head-on into the doctrine of unconstitutional conditions. Such a program should be rigorously evaluated and approved only if it is narrowly tailored to meet compelling state interests.

86. 448 U.S. 297, 317 n.19 (1980).

87. 26 U.S.C. §§ 9001-9012 (1988).

A. *The Presidential System as Model for Congressional Campaign Reform*

Supporters of the S-3 reforms will surely point to the presidential system as evidence of the constitutionality of the voluntary spending limits S-3 establishes. Under the presidential system, candidates have a choice between receiving subsidies in exchange for limiting their campaign expenditures, or foregoing subsidies in exchange for unlimited private fundraising. The presidential system provides massive public financing—\$20 million per candidate in 1974 dollars—in the general election for candidates who agree not to incur expenses in excess of fixed aggregate amounts.⁸⁸

Judicial precedent concerning the presidential system is relevant but not dispositive in evaluating whether S-3 imposes unconstitutional conditions on political candidates. The Supreme Court has not addressed the unconstitutional conditions argument as it affects the presidential system. Furthermore, the proposal in S-3 uses the presidential model only as a building block and deviates significantly from that system.

The best evidence that the Court would extend its *Buckley* rationale (upholding the presidential system) to S-3 is a single footnote in the 239-page decision. In that footnote, the Court stated:

For the reasons discussed in Part III, *infra*, Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forego private fundraising and accept public funding.⁸⁹

On its face, the language of this footnote supports voluntary limits, but it would be foolish to depend solely on this footnote to defend the constitutionality of the voluntary limits established in S-3. The footnote is ambiguous and curious: Part III, the section of the Court's opinion analyzing the presidential system, never addressed Congress' power to condition benefits. Instead, that section focused on equal-protection concerns raised by third-party candidates about the eligibility of such candidates for subsidies under the presidential system. The precedential value of this footnote is weak because the Court never offered a theory explaining why voluntary limits satisfied constitutional analysis while mandatory limits did not. Even if that footnote sufficed as binding precedent for the presidential system, the current plan involves significant departures from that model.⁹⁰

88. 26 U.S.C. § 9004 (1988); 2 U.S.C. § 441a(b)(1) (1988).

89. *Buckley*, 424 U.S. at 57 & n.65.

90. See *infra* Part III.B.

The ambiguity in *Buckley* regarding voluntary limits inspired a direct challenge to the public funding conditions for presidential elections four years later in *Republican National Committee v. Federal Election Commission*.⁹¹ The plaintiffs asserted the right to raise and spend both private and public monies without limits even though the use of public funding was designed as a substitute to private solicitation.⁹² Although the plaintiffs argued that the doctrine of unconstitutional conditions precluded the enforcement of the spending limits, the district court found these objections unpersuasive. The district court offered several important justifications for upholding the presidential system's constitutionality. First, it applied a "coercion" test and pointed out that each candidate could spend more than the \$20 million provided in public funding by opting out of the system and raising all of the money privately. "[A]s long as the candidate remains free to engage in unlimited private funding and spending instead of limited public funding," the statute would be valid.⁹³ Second, the court characterized the program not as requiring the sacrifice of a right but instead as requiring a choice between two methods of exercising the same right.⁹⁴ Third, the court ruled that requiring such a choice was constitutional as long as any diminution of the First Amendment right was justified by a compelling state interest.⁹⁵ Applying these principles, the court ruled that the limits did not infringe upon First Amendment rights, and that even if they did, the burden would be justified by the interests advanced by the legislation. Since the Supreme Court merely affirmed the lower court's decision without rendering an opinion, it is unclear to what extent the Court would adopt the district court's reasoning.⁹⁶

As originally introduced in the 103d Congress, the core of S-3 was analytically identical to the presidential system. The original bill proposed to establish a system under which candidates who comply with limits would receive numerous benefits automatically.⁹⁷ Although the Senate eventually eliminated automatic public funding, the measure before the House still relies heavily on the presidential model. For example, HR-3 would provide all complying House candidates with matching funds to supplement money raised

91. 487 F. Supp. 280 (S.D.N.Y. 1980), *aff'd*, 445 U.S. 955 (1980).

92. *Id.* at 283.

93. *Id.* at 284.

94. *Id.* at 284-85.

95. *Id.* at 285 (finding compelling state interest in eliminating reliance on large contributions and reducing time devoted to fundraising).

96. Opponents of the presidential system point out that because the Supreme Court rendered no opinion, the district court's determination is less conclusive. See Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE W. RES. L. REV. 97, 120 (1989) (citing *Bowers v. Hardwick*, 478 U.S. 186, 188 (1986) as recent example of the Court's revisiting summary affirmation).

97. S. 3 as Proposed, *supra* note 32, sec. 101, § 503(c) (1993) (dispensing vouchers redeemable to buy advertising).

privately⁹⁸ and provide complying Senate candidates automatically with communication vouchers equal to twenty percent of the general election spending limit.⁹⁹

In order to assess the constitutionality of the presidential model for congressional campaigns, we must first determine whether the choice presented to congressional candidates constitutes an offer or a threat. The presidential system does not present the candidate with a Godfather-style bargain, an offer she cannot refuse. Actually, she is presented with a choice that expands her options as a candidate. In choosing between two methods of financing her race, she will rely on three types of predictions. First, she will attempt to predict the amount she could raise privately and compare that amount to the amount provided by the government. If she cannot independently raise the sum provided by the government, she is more likely to choose the federal grant. Second, she will predict the decisions of her opponent. An opponent's choice to raise money privately might indicate his intention to use more expensive forms of communication and encourage her to forgo public financing. Third, she will predict the nature of the race confronting her. If she is running against a well-known incumbent, she might want to raise large amounts early in the race to compete effectively. Similarly, if she expects a last-minute attack, she might not want to rely on a bureaucratic agency dispensing funds in a slow and inefficient manner.

The presidential model does not coerce compliance using threats but simply makes an offer. Many of these risks might lead a candidate to reject the benefits package. A candidate who is confident about raising funds above the ceiling level would not voluntarily cap spending, particularly if she expects a hotly contested race. Only the candidate who feels pessimistic about her abilities to raise large sums privately or wants to avoid the opportunity costs of fundraising will be attracted to public funds. If she accepts the subsidies, then her speech capabilities should only be enhanced by receipt of the grants. Most important, no harm accrues to her if she decides to exercise her constitutional right to make unlimited expenditures.¹⁰⁰ By taking the subsidies, she accepts the government's offer; she does not acquiesce to a

98. H.R. 3, 103d Cong., 1st Sess., sec. 121, § 604 (1993). The House measure resembles the presidential system in that the bill immediately allows complying candidates to receive public funds. More specifically, the program is similar in that the presidential system subsidizes presidential candidates in the primaries by matching privately raised donations, moving to full subsidization only in the general election.

99. *Id.* at sec. 101, § 503(a). The House bill includes provisions dealing with Senate elections, but the current Senate proposal only addresses Senate elections. *See supra* note 34.

100. Even if her opponent accepts the subsidies and is rendered better off, any harm to her campaign cannot be said to be the result of her exercise of speech rights. Rather, the opponent is better off as a result of his own decision to sacrifice speech rights. Clearly, the difficulty of the predictions required by such a program indicates that incorrect calculations will be made, and thus some speech will be chilled. Edward Fuhr suggests that such a system places candidates in a prisoner's dilemma, rendering the system unconstitutional. Fuhr, *supra* note 96, at 124. He argues that at the outset of a campaign candidates do not know how best to maximize speech opportunities and will thus choose incorrectly.

threat. Because the program represents an offer when fashioned in this manner and does not infringe the First Amendment, there is no need to proceed to the second analytic step of applying strict scrutiny.

B. *Departures from the Presidential System*

While the provisions of campaign reform that track the presidential system should properly survive scrutiny, closer analysis of the current legislation is required because both the House and Senate versions involve important departures from that model. First, S-3 and HR-3 condition benefits to an eligible candidate on a decision by his or her opponent to spend in excess of the limits. The more the opponent spends, the more broadcast vouchers or cash subsidies flow to the complying candidate. With the removal from S-3 of automatic public financing for complying candidates, this triggering mechanism now constitutes the only public financing in the recently approved Senate Bill. In HR-3, the triggering mechanism is accompanied by automatic subsidies for complying candidates.¹⁰¹ Second, S-3 and HR-3 require that Senate candidates who do not comply with the limits run a disclaimer on their advertisements announcing that the candidate does not abide by spending limits.¹⁰² Third, the Senate has chosen to finance the cost of S-3 by requiring the campaign of the noncomplying candidate to pay taxes on her campaign funds at the highest corporate rate.¹⁰³

All three provisions are designed to reduce the burden campaign reform that places on the taxpayer. Although the presidential system has enjoyed relative success in reducing the influence of private donors, its high costs have rendered it politically nonviable as a total solution to campaign finance reform.¹⁰⁴ Elizabeth Drew writes:

[L]eaders in the reform fight—on Capitol Hill and in outside groups—have concluded that such extensive public financing is a political no-sale, and back instead partial financing In this day of extreme skepticism of politicians, in this Era of Rush Limbaugh, members of Congress don't feel that they can explain to the public why the taxpayers should be paying for their elections, even though that would end up saving taxpayers' money.¹⁰⁵

101. The triggering provisions are discussed *infra* Part III.B.1.

102. The disclaimer provision is discussed *infra* Part III.B.2.

103. The taxing mechanism is discussed *infra* Part III.B.3.

104. Only 35 Senators voted for a substitute amendment that would have provided for 90% public financing of congressional campaigns paid for by an elimination of the tax deduction for lobbying expenses and a \$5 check-off on tax returns similar to the check-off used in presidential elections. 51 CONG. Q. 1389 (1993) (Vote no. 130).

105. Elizabeth Drew, *Watch 'Em Squirm*, N.Y. TIMES, Mar. 14, 1993, § 6 (Magazine), at 74 (pointing out that public financing would ultimately save money because wealthy contributors could not use their influence later to win tax loopholes).

As Congress struggles with the constitutional obstacles of *Buckley*, it must also satisfy taxpayer concerns. However, these efforts only work to compound the constitutional problems associated with evading *Buckley's* prohibition on mandatory limits. Under the microscope of the doctrine of unconstitutional conditions, the triggering mechanism should survive scrutiny, but, as currently drafted, the disclaimer and the taxing mechanism violate the First Amendment.

1. *Triggered Subsidies*

One of the greatest innovations of the current campaign finance reform plan is to provide contingency financing to eligible candidates when a free-spending opponent surpasses the voluntary limits. Triggered benefits induce compliance at less cost than total subsidization because the benefits are held in abeyance until one candidate surpasses the ceiling. Under HR-3, candidates for the House of Representatives would be eligible to receive "contingency money" in the form of unlimited matching funds once their opponents exceed eighty percent of the campaign spending ceiling.¹⁰⁶ Furthermore, eligible House candidates would receive matching funds if their opponents' supporters make independent expenditures above \$10,000¹⁰⁷ and triple matching funds if their opponents contribute over \$300,000 of their own money to their campaigns.¹⁰⁸ For Senate races, S-3 contemplates awards in the form of federal vouchers for mail and broadcast advertisements up to an amount equivalent to the state spending limit.¹⁰⁹ When a noncomplying opponent surpasses the ceiling, the eligible candidate wins a grant equal to one-third of the general election limit.¹¹⁰ If an opponent exceeds the limit by more than one-third but less than two-thirds, the complying candidate receives another one-third grant, bringing the total subsidy to 66% of the statutory limit.¹¹¹ If the free-spending candidate exceeds the limit by more than two-thirds, the federal subsidy would amount to an aggregate additional gift of 100% of the value of the spending limit.¹¹² Finally, if a free-spending candidate expends more than twice the limit, not only would complying candidates get subsidies worth the limit but they would also be allowed to raise additional funds equal to the spending limit.¹¹³ Conceivably, an eligible candidate could raise and

106. H.R. 3, 103d Cong., 1st Sess., sec. 121 § 601(a)(2)(B) (1993).

107. *Id.* §§ 603-04. Independent expenditures are those made by groups or individuals other than the parties seeking elective office but which have a vested interest in the outcome of the race.

108. *Id.* § 603(e)(3).

109. S. 3 as Passed, *supra* note 40, sec. 101, § 503. The state spending limit is determined by a formula dependent upon the voting age population. The maximum limit for a Senate candidate in a general election is \$5.5 million. *Id.* § 502.

110. *Id.* § 503.

111. *Id.*

112. *Id.*

113. *Id.*

spend three times the amount calculated to be a fair spending limit based on voting-age population.¹¹⁴

a. *Triggered Benefits Are Coercive*

Although triggered benefits are designed to ensure compliance with the voluntary limits at minimum cost to the government, they also accentuate the compulsion problem by directly tying the amount of benefits given to one candidate to the amount of constitutionally protected expenditures by that candidate's opponent. Given the competitive context in which elections take place, lawmakers have concluded that the prospect of assisting one's opponent will encourage candidates to abide by the statutory ceilings.¹¹⁵ Theoretically, the candidate will eschew an excess expenditure in light of the significant financial benefits that would flow to the opponent. The provision is therefore based on the premise that the candidate will forgo an expenditure she would have made had the legislation not been in place. In this way, the candidate who would otherwise exercise her First Amendment rights under *Buckley* will be deterred from exercising them to the full extent she desires.

Notwithstanding the congressional assumption that the trigger will serve as an effective deterrent, some candidates will undoubtedly spend resources regardless of the benefits that flow to their opponents. For these candidates, costs imposed by the program are worth the advantage gained by excessive campaign expenditures. Despite this self-interested calculation, a candidate deciding to make the excess expenditure is still disadvantaged by the benefits conferred on the opponent. Imagine a candidate whose spending is just below the limit when her opponent launches an attack in a television commercial. The candidate responds, but in so doing, exceeds the limit and arms the opponent with the funds to level a second attack. In such a situation, *Buckley* is clearly implicated because the triggered benefits reduce the prospects of electoral success when the right to make unlimited expenditures is exercised.¹¹⁶ Although the Constitution does not secure a right to remain competitive in an election campaign, the Constitution should be invoked to scrutinize government's efforts to punish an individual choosing to exercise a protected right.

114. In all, the eligible candidate could spend: privately raised funds up to the ceiling; public funds equal to the ceiling provided through the triggering mechanism; and additional private funds equal to the ceiling if the free-spending candidate spends more than twice the limit.

115. The legislation relies on the assumption that the set of incentives and disincentives will result in "voluntary" acceptance of the statutory ceilings.

116. A less sympathetic example gives rise to the same concern. A very wealthy candidate may refuse to limit expenditures even though this choice triggers benefits to her opponent. However, the fact that some candidates decide it is in their own interests to continue to spend without limit does not mean they are not placed in a worse-off position than before the program was established.

The dynamic created by the triggered benefits plan should be distinguished from that established by the presidential system. It is true that a presidential candidate who chooses to rely only on private fundraising is at a disadvantage compared to an opponent who is fully subsidized by the government. The subsidized candidate, for example, can devote significantly more time to contacting voters and pursuing a strategy unencumbered by fundraising demands. In that way, one might argue that the nonparticipating candidate is made worse off by the program. However, the benefits the subsidized candidate receives do not depend on the spending decisions of the noncomplying candidate but flow in the same amount regardless of the noncomplying candidate's exercise of speech rights. Whether a noncomplying presidential candidate spends \$100 or \$100 million, her opponent receives the same subsidy. In the triggered benefits regime, however, an opponent's benefits are tied directly to the level of speech of the noncomplying candidates. If the noncomplying candidate exercises her *Buckley* right to exceed the limit, the complying candidate will receive a large public subsidy. For the noncomplying candidate, her choice to exercise her *Buckley* liberties directly strengthens the opponent's political campaign and correspondingly reduces her own prospects of electoral success. Thus, triggered benefits are coercive and should be subjected to strict scrutiny.

b. *Applying Strict Scrutiny*

Although these provisions coerce compliance, they should be approved because they are narrowly tailored to a compelling government interest. Currently, no "purposes" section exists in the House and Senate versions of campaign reform legislation. However, the bill's Senate sponsor articulated several goals of this most recent reform effort: 1) eliminating the corrupting influence of excessive spending on the legislative process; 2) equalizing the influence of constituents; 3) making public office more accessible to new candidates by reducing the cost of campaigns; 4) enabling members of Congress to devote more time to problem solving and official business, rather than to the constant chase for campaign finances; and 5) reinvigorating the democratic process by making grassroots participation matter in election outcomes.¹¹⁷

117. The bill's author, Senator David Boren, articulated these interests on the day the bill was introduced. 139 CONG. REC. S224, S224-25 (daily ed. Jan. 21, 1993) (statement of Sen. Boren). The legislation passed by the 102d Congress did not specifically set forth legislative purposes. Campaign reform activist Roland Homet, Jr. suggests that a purposes section be added to the bill itself. Homet would add the purposes to (1) "strengthen and facilitate full and free campaign discussion and debate"; (2) "relieve office seekers and holders from undue fundraising distractions that impede development and pursuit of national policy objectives"; and (3) "limit corruption and undue influence, or the appearance thereof, in the financing of national campaigns." Roland S. Homet, Jr., *Illustrative Provisions of Campaign Finance Reform: Challenging Buckley v. Valeo* 6 (1992) (unpublished manuscript, on file with author) (presented

The *Buckley* Court recognized the elimination of corruption as the sole justification for campaign speech restrictions and argued that contribution limits would suffice to curb the risk of corruption. The Court held:

The major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions. The interest in alleviating the corrupting influence of large contributors is served by the Act's contribution limitations. . . . The Court of Appeals' assertion that the expenditure restrictions are necessary to reduce the incentive to circumvent direct contribution limits is not persuasive.¹¹⁸

By declaring contribution limits the solution to candidate dependence on fundraising, the Court focused only on a quid pro quo notion of corruption, i.e., the problem posed by dollars given in return for political favors.

The Court's declaration that contribution limits alone would end such abuse was, in retrospect, naive.¹¹⁹ As a result of the rising costs of campaigns, contribution limits have proven ineffective because candidates more than ever have become dependent on large contributors to remain financially competitive. Not only have costs increased dramatically, but wealthy donors have found numerous ways to circumvent the Act's limits.¹²⁰ Without some form of comprehensive spending ceilings, candidates and their contributors will always exploit the limited regulations governing contributions in order to amass huge sums. Spending limits control the overall amount of money flowing into the system, whereas contribution limits only affect the size of individual donations.

at Consultation on *Buckley v. Valeo* on Apr. 19, 1993 in Washington, D.C.).

118. *Buckley v. Valeo*, 424 U.S. 1, 79-80.

119. In *Buckley* the Court had no factual record before it for this proposition but still determined that contribution limits would suffice as a reform instrument. Seventeen years later, finance reform advocates must make their case through legislative findings and briefs before the Court to broaden the notion of corruption but also to demonstrate the strong relationship between money spent and success in winning office.

120. "Soft money" provides one common way to subvert contribution limits and has been used widely to funnel massive contributions to presidential candidates, despite the existence of contribution limits. Soft money includes funds not subject to federal limitation, such as contributions to state political parties that are particularly important to a federal candidate. These contributions often exceed \$100,000 and are designed specifically to circumvent the 1974 law. According to some observers, private money in the form of "soft money" contributions has effectively thwarted the intent of the 1974 Act. *See Drew, supra* note 105, at 33. Current campaign reform legislation attempts to deal with soft money by counting all benefits accruing to a federal candidate, whether or not derived from state party spending, against the candidate's spending limit.

The "bundling" of numerous contributions by well-connected individuals who solicit potential donors comprising a single interest group has become one of the most popular devices for funneling massive resources to a particular candidate and evading the strictures of the 1974 Act. The new reform legislation prohibits bundling by all political action committees, trade associations, lobbyists, corporate or union officers, and their employees. S. 3 as Passed. *supra* note 40, § 401(a) (amending 2 U.S.C. 441(a)(8)). These provisions will also most likely come under fire on grounds of free speech and associational rights. However, the provisions can be justified as a mechanism for ensuring the effectiveness of contribution limits.

Moreover, courts should broaden their conception of corruption to account for the erosion of public confidence in the integrity of the campaign process. Indeed, the public increasingly has become dissatisfied with the political process, concluding that the system is unresponsive to the average citizen and captured by interest groups capable of making large campaign contributions. After interviewing hundreds of citizens across the nation, one academic study concluded:

People believe two forces have corrupted democracy. The first is that lobbyists have replaced representatives as the primary political actors. The other force, seen as more pernicious, is that campaign contributions seem to determine political outcomes more than voting. No accusation cuts deeper because when money and privilege replace votes, the social contract underlying the political system is abrogated. Influenced by this widespread perception, people decide that voting doesn't really count anymore—so why bother.¹²¹

Spending limits would effectively combat this type of corruption, first, by stemming the demand for money from special interests that wield disproportionate financial clout. The perception of excessive special interest power is a major factor in the public's low confidence in the electoral system.¹²² Second, reduced spending in congressional races would help eliminate incumbents' enormous fundraising advantages and thereby provoke more challengers to enter the political process. Incumbents, particularly those with key committee posts, receive far and away the most campaign contributions, leading to a remarkably high reelection rate.¹²³ In 1992, Senate incumbents outspent challengers in twenty-six out of twenty-seven races, winning eighty-six percent of those races.¹²⁴ Similarly, 306 of 313 House incumbents outspent their challengers, winning reelection at a rate of ninety-three percent.¹²⁵ Third, spending limits would increase legislative efficiency by decreasing the amount of time dedicated by members of Congress to fundraising rather than governing.¹²⁶ Finally, the public overwhelmingly

121. David Mathews, *Foreword* to KETTERING FOUNDATION, CITIZENS AND POLITICS; A VIEW FROM MAIN STREET AMERICA at v (1991) (report prepared by the Harwood Group).

122. See Dan Balz, *Report Finds Americans Angry at Political System*, WASH. POST, June 5, 1991, at A4 (discussing report issued by Kettering Foundation asserting that citizens feel "locked out" of system controlled by monied interests and politicians).

123. In the first six months of his tenure as chairman of the Senate Finance Committee, Senator Daniel Patrick Moynihan (D-N.Y.) received almost \$100,000 in contributions from organizations that had never before given to his campaign. *Chairmanship of Key Senate Panel Is Worth Big Money*, NEWHOUSE NEWS SERV., Sept. 5, 1993, available in LEXIS, Nexis Library, Currnt File.

124. Figures provided by Common Cause, Washington, D.C. (on file with author).

125. *Id.*

126. The Court in *Buckley* recognized a similar advantage in establishing public funding for presidential candidates. The Court stated, "Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions."

supports spending limits for congressional campaigns as a device to reduce the role played by money in deciding elections.¹²⁷

In addition to assisting Congress in accomplishing its anti-corruption objectives, triggered benefits would have a minimal impact on speech rights, thus satisfying the requirement that the restrictions be narrowly tailored. Indeed, expenditure limits, when coupled with public grants, would enhance rather than inhibit public debate. The benefits accrue to the complying candidate only after the noncomplying candidate has exceeded generous limits. The ceilings allow for maximum spending of approximately \$5.5 million for certain Senate general elections¹²⁸ and \$600,000 for House elections.¹²⁹ Both of these amounts surpass the average sums presently spent in congressional elections. The speech value of expenditures beyond this point reflects diminishing returns, contributing more to distortion and drowning out of discussion than to meaningful debate.¹³⁰ While this assertion presents a clear challenge to *Buckley's* equation of money and speech, the Court should respect legislative expertise in determining the spending amounts sufficient for robust political debate.

Buckley's money-as-speech equation is a blunt instrument, vulnerable to critique and ripe for refinement. First, at high levels of expenditures, additional campaign spending often is repetitive, designed to saturate the market rather than to discuss public issues. After each election, particularly the 1988 Bush-Dukakis race, dissatisfaction with the quality of paid political speech has been rampant.¹³¹ In the 1992 election, the most satisfying discussions typically took place in far less expensive fora such as debate formats or talk shows rather than in traditional paid commercial advertising.¹³² Second, it is well established that a high percentage of money is raised not for speech purposes but rather to frighten off competition from would-be challengers.¹³³ This war-chest-building inhibits debate and effectively secures an incumbent's reelection before the filing date for candidates is even officially opened. While a war chest sends a strong signal of political power, it hardly deserves

424 U.S. at 96.

127. Celinda Lake & Steve Cobble, *Money Talks: A Survey and Focus Groups of National Opinion on Campaign Finance Reform 5* (1992) (unpublished manuscript, on file with Mellman, Lazarus, Lake, Inc., Washington, D.C.) (data reflects 86% support for spending limits).

128. S. 3 as Passed, *supra* note 40, sec. 101, § 502(b).

129. H.R. 3, 103d Cong., 1st Sess., sec. 121, § 604(a) (1993).

130. Lake & Cobble, *supra* note 127, at 5. Along with levelling the playing field among candidates, the public believes spending limits would reduce "mudslinging" and that the current electoral finance system creates campaign periods that are too long. *Id.*

131. See generally Jeffrey A. Levinson, Note, *An Informed Electorate: Requiring Broadcasters to Provide Free Airtime to Candidates for Public Office*, 72 B.U. L. REV. 143, 146-47 (1992) (citing numerous examples in 1992 presidential election of using paid campaign advertising to avoid substantive issues).

132. See Renee Loth, *Campaign Ads Lost Their Primacy Among Political Weapons*, BOSTON GLOBE, Nov. 7, 1992, at 6.

133. FRITZ & MORRIS, *supra* note 29, at 8 (noting that in 1990 unopposed House members raised and spent on average more than \$250,000 and unopposed Senators spent average of \$668,000).

protection as expressive activity. Certainly, it has nothing to do with a First Amendment understood as “a profound national commitment to the principle that debate on public issues be uninhibited, robust, and wide-open”¹³⁴ To the contrary, these war chests enable most incumbent members of Congress to “create their own state-of-the-art, permanent political machine[s].”¹³⁵ To deter competition, a candidate need not even spend the funds; even when the money is spent, it often goes to purposes largely unrelated to political speech. In 1990, for example, Senator Strom Thurmond (R-S.C.) spent \$733,000 from his campaign coffers to pay for college scholarships.¹³⁶ Third, a significant percentage of funds raised are devoted to managing the enormous bureaucracies of the modern campaign rather than to promoting speech. Nearly half of all campaign expenditures are used for “nonspeech” purposes, such as administrative functions, entertainment, and overhead.¹³⁷ The typical staff includes personnel for administration, opposition research, and data collection.¹³⁸ More and more campaign expenditures are used for sophisticated voter identification procedures and highly targeted get-out-the-vote drives.¹³⁹ Justice White recognized the bureaucratic component of political campaigns long ago in his dissent to *Buckley*.¹⁴⁰ Time has only increased the amount, as well as the percentage, of funds used to maintain these bureaucracies.¹⁴¹

Opponents of spending limits point to the fact that limits, by their nature, inhibit debate. For them, the rise in spending is a sign of a vital democracy, and campaign expenditure limits only hinder political discussion. Indeed, numerous Senate and House candidates would have been precluded from spending the sums of money spent in the 1992 elections had the bill been in

134. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). To the extent that public debate is impoverished by war chests that discourage challengers and stifle competition, it seems perverse to allow the First Amendment to protect such practices from reform. See Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407 (1986).

135. Sarah Fritz, *Where We Actually Need Real Reform: Campaign Spending*, ROLL CALL, Aug. 3, 1992, at 5.

136. FRITZ & MORRIS, *supra* note 29, at 9.

137. *Id.* at 2, 42. Detailed examination of the 1990 congressional campaigns reveals that more than half of all the money spent had almost no relationship to contacting voters. In fact, members of Congress spent almost \$4 million in 1990 simply sending gifts, such as flowers or holiday cards, to constituents. *Id.*

138. In the 1990 campaign, overhead consumed almost \$108 million or 26% of campaign expenditures for congressional candidates. *Id.* at 28.

139. *Id.* at 104. An entire industry of political consultants has developed since the 1970's, with specialties ranging from experts on management techniques to polling, fundraising, and direct mail. In the 1990 election cycle, congressional candidates spent more than \$188 million on consultants, 45% of total expenditures, over \$50 million of which was used for polling and fundraising.

140. White wrote, “[M]any expensive campaign activities . . . are . . . not themselves communicative or remotely related to speech. Furthermore, campaigns differ among themselves. Some seem to spend much less money than others and yet communicate as much as or more than those supported by enormous bureaucracies with unlimited financing.” *Buckley*, 424 U.S. at 263.

141. The Senate campaign of Bill Bradley (D-N.J.) in 1990 spent nearly \$251,000 on phone calls, \$225,986 to buy a computer and terminals, and \$171,000 for software licenses. FRITZ & MORRIS, *supra* note 29, at 30-31. The campaign spent \$263,601 on rent and utilities, and \$384,659 on office supplies and furniture. *Id.* at 36.

effect.¹⁴² However, the triggered benefits, unlike mandatory caps, enable spending to occur far in excess of the amounts set forth by Congress as sufficient for a healthy political battle. A noncomplying candidate's decision to make additional expenditures would enhance public debate, since public funds would be provided to facilitate any response by an eligible politician. In certain circumstances, the regulatory program would license expenditures at a rate of almost three times the amount to which the complying candidate agreed.¹⁴³

2. *The Disclaimer*

S-3 also requires all Senate candidates who do not comply with voluntary limits to reveal their noncompliance by disclaimers on all advertising.¹⁴⁴ The Act states:

If a broadcast, cablecast, or other communication is paid for or authorized by a candidate in the general election for the office of United States Senator who is not an eligible Senate candidate . . . such communication shall contain the following sentence: "This candidate has not agreed to voluntary campaign spending limits."¹⁴⁵

a. *The Disclaimer Is Coercive*

While a disclaimer is not a criminal fine, its purpose is to impose stigmatic harm. In this way, the provision renders the candidate making expenditures, which are constitutionally protected by *Buckley*, worse off than the candidate would have been had the program never existed. Animating the disclaimer requirement is the belief that the public will draw the negative inference from the advertisement that the candidate has violated some ethical norm, has become captive to special interests, or even worse, has engaged in conduct that violates election laws. The provision's purpose to impose stigmatic harm is apparent in light of the preexisting requirement that candidates disclose all but *de minimis* expenditures and contributions to the Federal Election Commission.¹⁴⁶ This prior disclosure defeats any right-to-know objective in the provision since it is already a matter of public record that the candidate has exceeded the ceilings. Those who defy the voluntary limits are saddled with

142. According to an extensive study by *Congressional Quarterly*, nearly one-half of all candidates for Congress spent above the limits established in the campaign reform bill. One hundred eighty candidates exceeded the \$600,000 spending ceilings that the Democratic bill would set on House candidates. Thirty-two Senate candidates exceeded the bill's state spending caps. Beth Donovan, '92 Numbers Suggest Big Changes If Campaign Finance Bill Passes, 51 CONG. Q. 436 (1993).

143. See *supra* note 114 and accompanying text.

144. S. 3 as Passed, *supra* note 40, § 104 (amending 2 U.S.C. 441(d)).

145. *Id.*

146. 2 U.S.C. §§ 431-434 (1988).

the disclaimer and rendered worse off in light of the stigma attached to the exercise of First Amendment rights.¹⁴⁷

Moreover, the disclaimer is particularly burdensome given the brief time span television advertisements afford most candidates to deliver their message. Candidates are already required to disclose in all advertisements the name of the political organization that purchased the advertising time.¹⁴⁸ The added disclaimer could take up as much as twenty percent of the commonly used fifteen-second television spot, thereby diminishing the effectiveness of the candidate's political speech. This imposition, like the stigmatic harm, is a burden that must be justified under strict-scrutiny analysis because it will coerce many candidates into accepting the limits.

b. *Applying Strict Scrutiny*

Although the disclaimer does induce compliance with the spending limits, and therefore furthers compelling governmental interests in fighting corruption, the disclaimer is not narrowly tailored to the objectives of reducing corruption or of enhancing speech. First, the disclaimer is overbroad: it attaches to all advertisements purchased by an ineligible candidate, beginning with the first dollar of the election campaign. A candidate who refuses to file a declaration with the Secretary of the Senate pledging compliance with the program would have to broadcast the disclaimer even on advertisements made with expenditures below the statutory ceiling.¹⁴⁹ Congress could have limited the disclaimer requirement to candidates who exceed the spending limits, but instead imposed this sanction for failing even to promise compliance.

Second, the provision provides no corresponding benefit to public debate. Unlike triggered benefits, which enable poorly funded candidates to get access to media sources, the main effect of the disclaimer would simply be to embarrass those candidates exercising their First Amendment rights. Rather than adding to public discussion, the disclaimer will deter political advertisements and thereby hinder public debate. Even if the commercial is aired, the disclaimer required by the provision will take up time that would otherwise have been devoted to expressing the campaign message.

Although reformers will argue that the disclaimer serves a third objective, the public's right to know, this argument is undermined by the fact that the provision does not require all candidates to disclose the choices made under

147. Because the added language directly changes the campaign message advanced by the candidate, the disclaimer will also face challenge as a content regulation, a violation of one of the most longstanding norms in First Amendment jurisprudence. See HARRY J. KALVEN JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 235 (1988). The provision is unlike disclaimers characterizing the commercial speech context because it affects the more protected sphere of political speech and is not based on the accepted deception-prevention rationale of commercial speech disclaimers.

148. 47 U.S.C. § 317 (1988).

149. S. 3 as Passed, *supra* note 40, sec. 101, § 501(b).

S-3. Instead, the provision is underinclusive, singling out the noncomplying candidate's decision not to curtail spending but neglecting to disclose the complying candidate's decision to accept public funds.¹⁵⁰ If the legislation were truly designed to further the right to know, it would require all candidates to declare their choices regarding acceptance of public funds or reliance on private fundraising.

3. *The Tax Exemption for Complying Candidates*

Along with radically scaling back the public funding included in S-3 to win Senate passage, lawmakers worked out a financing mechanism that will surely sound alarm bells in the courts.¹⁵¹ The Senate Bill removes an existing tax exemption for campaigns and thereby imposes the highest corporate tax rate on the campaign treasuries of candidates who refuse to comply with the limits.¹⁵² The funds from this tax would pay for communication vouchers and other benefits flowing to complying candidates for their television and postal advertising when they face opponents who exceed the statutory ceilings. Before this provision passed, one Senator stated:

[A]s a crown of shame to this offensive legislation, the Senate last night added an amendment which would impose a tax on candidates who exercise their first amendment right to refuse taxpayers' subsidies and to speak freely. . . . [O]ne can only imagine where such [a] legislative concept could take us in terms of taxing other speech which we found objectionable for one reason or another.¹⁵³

a. *The Exemption Policy Is Coercive*

The funding mechanism acts as a threat because it places a person choosing to spend beyond the limits in a worse position than if the program

150. By a vote of 47-45, the Senate defeated an amendment that sought to embarrass complying candidates who accepted the federally-funded vouchers for their advertisements. The amendment would have required campaign commercials paid for by vouchers to include a disclaimer stating that "the preceding political advertisement was paid for with taxpayer funds." 51 CONG. Q. 1511 (1993) (Vote no. 140).

151. The House bill does not contain a provision specifying the source of the public funding. Similarly, the legislation passed in the last Congress did not specify a funding source because lawmakers wanted to wait to see whether the plan would be vetoed before making the controversial decision of how to pay for it. Ultimately, Congress' failure to override President Bush's veto made the funding determination unnecessary.

152. S. 3 as Passed, *supra* note 40, sec. 101, § 510(a). The bill creates the Senate Election Campaign Fund to be funded by:

Amounts received in the Treasury which are equivalent to the increase in Federal revenues by reason of the repeal of the exempt function income exclusion under Section 527 of the Internal Revenue Code of 1986 . . . for the principal campaign committee, of any candidate who does not abide by the campaign expenditure limits under this title

Id. No such provision exists in the House bill.

153. 139 CONG. REC. S7408 (daily ed. June 17, 1993) (statement of Sen. McConnell).

had never been offered in the first place. The harm is direct and concrete: the tax requires the noncomplying Senate candidate to raise, on the average, almost \$2.5 million in additional funds to remain on an even playing field with the complying candidate.¹⁵⁴

The coercive nature of the tax is not changed by the fact that the charge derives from the removal of an exemption rather than the imposition of a new tax. The Court has long recognized that the denial of an existing benefit can constitute a penalty sufficient to establish an unconstitutional condition. In *Speiser*,¹⁵⁵ for example, Justice Brennan recognized that it was improper to remove a property tax exemption only for those veterans who agreed to take a loyalty oath: "To deny an exemption for claimants who engage in certain forms of speech is in effect to penalize them for such speech."¹⁵⁶

Given the tax exemption historically provided to campaigns, the exemption policy established in the reform program is better described as a penalty for noncompliance than as a bonus for compliance. If the exemption had never been provided before, an exemption for complying candidates might be justified as an award.¹⁵⁷ However, the tax exemption for political committees has long been a defining feature of election law.¹⁵⁸ Congress codified the exemption in 1974 only after the Internal Revenue Service indicated that it planned to begin treating campaign committees as taxable entities.¹⁵⁹ By not

154. If the average successful Senate campaign costs \$4.2 million, then a noncomplying candidate would have to raise more than \$6.6 million in order to meet that average after a corporate tax of thirty-four percent was imposed.

155. 357 U.S. 513 (1958).

156. *Id.* at 518; *see also* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1986) (holding that denial of tax exemption to limited number of publications constituted infringement of free speech); *Minneapolis Star & Tribune v. Minnesota Comm'r of Rev.*, 460 U.S. 575, (1983) (holding that partial tax exemption acted as penalty on certain class of newspapers in violation of First Amendment). *But cf.* *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (holding that New York City's tax exemption for religious organizations did not violate Establishment Clause because exemption only creates minimal involvement between church and state).

157. The insight that losing a benefit is more traumatic than not receiving a benefit in the first place has been noted by philosophers, psychologists, and legal commentators. *See, e.g.*, Jack L. Knetsch, *The Endowment Effect & Evidence of Nonreversible Indifference Curves*, 79 AM. ECON. REV. 1277, 1282 (1989); *Board of Educ. v. Pico*, 457 U.S. 853, 871-72 (1982) (holding that while school board did not have discretion to remove book found to be objectionable, board retained wide latitude in adding books to library). The prospective effect of the exemption also heightens the coercion problem. As candidates respond to the inducements established in the legislation, S-3 will burden an ever-diminishing number of candidates with the tax. Ideally, only a small group of hold-outs will be denied the exemption and pay the fine for refusing to cap expenditures. Where only a small number of entities are actually denied the benefit, one may more likely infer that the purpose of the exemption policy is to penalize a select few. In *Minneapolis Star & Tribune*, 460 U.S. at 591, the Court noted that the effect of the exemption was to subject only a handful of similarly situated newspapers to the tax, thereby heightening concern that the tax represented an improper penalty on protected speech. *See also* Kreimer, *supra* note 45, at 1363-71.

158. I.R.C. § 527 (1993). Section 527(e) extends limited tax-exempt status to political organizations, which include political parties, campaign committees, and political action committees involved in influencing election outcomes. I.R.C. § 527(e).

159. Laura B. Chisolm, *Sinking the Think Tanks Upstream: The Use and Misuse of Tax Exemption Law to Address the Use and Misuse of Tax-Exempt Organizations by Politicians*, 51 U. PITT. L. REV. 577, 586 n.43 (1990).

complying with the limits, the candidates paying the tax are burdened with a new financial obligation and suffer a loss.¹⁶⁰

b. *Applying Strict Scrutiny*

From a political standpoint, the formulation and passage of the noncompliance tax was a master stroke. Without this provision, no campaign reform bill would have passed the Senate, and therefore no public funding would have been established for campaigns. The campaign tax amendment gutted S-3 of funding from the general treasury and thereby garnered the support of seven Republicans necessary to end a week-long filibuster waged against the bill.¹⁶¹

Despite its political necessity and its utility in enforcing the limits established by Congress, the tax is not narrowly tailored. First, the tax does not apply solely to resources above the ceilings but also applies to funds raised below the statutory amounts, penalizing expenditures under those levels found by Congress to undermine public confidence in the electoral process. Second, the tax is not progressive but is applied at the highest corporate rate. It therefore burdens poorly funded candidates who refuse to comply for ideological reasons as much as it does wealthy candidates who, without regard to ideology, spend far in excess of the statutory limits. Finally, the Senate could have chosen a less burdensome approach such as funding the program out of general revenues or through the mechanism used in the presidential plan where taxpayers check off a small amount on their annual returns to fund the system.¹⁶²

To its credit, the Senate carefully circumscribed the use of money from the fund, ensuring that the funds raised would be used to finance the speech enhancement aspects of the bill. S-3 states that the account "shall be available only for the purposes of . . . providing benefits under this title . . . and making expenditures in connection with the administration of the Fund."¹⁶³ In this way, the tax dispenses speech benefits in the same manner as the triggered benefits, simultaneously deterring some expenditures while encouraging others. Were it not for the overbreadth problems discussed above, the tax provision could survive scrutiny as long as the Court expanded *Buckley's* notion of corruption and recognized that at astronomical levels of campaign spending, expenditures no longer have the same speech value.¹⁶⁴ In subsequent

160. See Kreimer, *supra* note 45, at 1359-63 (describing use of history as baseline to distinguish between offers and threats in certain circumstances).

161. Beth Donovan, *Senate Passes Campaign Finance by Gutting Public Funding*, 51 CONG. Q. 1533 (1993).

162. I.R.C. § 6096 (1993).

163. S. 3 as Passed, *supra* note 40, sec. 101, § 510(a)(4).

164. See *supra* Part III.B.1.b.

drafting, reform advocates should make the tax applicable only to above-ceiling expenditures and make it more progressive. Otherwise, the public funding generated from the tax will be highly vulnerable to attack on First Amendment grounds, jeopardizing a fundamental aspect of meaningful campaign reform.

IV. CONCLUSION

Given the Supreme Court's hostility to regulation of political speech, it is difficult to predict how the campaign reform legislation will fare in the legal battle that will follow its passage. Whether or not the program remains securely in the zone of constitutionality created by *Buckley* depends largely on the amount and source of public funds devoted to the program. The Court would almost certainly approve those aspects of the Bill that mimic the offer permitted in the presidential campaign finance system. However, some of the major departures from that model use coercion to induce compliance, and thereby raise serious problems under the doctrine of unconstitutional conditions.

Despite its attempt to slip by the obstacles presented by *Buckley*, Congress has crafted a proposal that can only survive if the Court moves beyond a quid pro quo concept of corruption, recognizing public confidence in democratic integrity as a compelling government interest, and retreats from its theory that all money equals speech. If the Court refines these two *Buckley* notions, it may salvage the triggering mechanism used in the plan. Even with these changes, the Court will likely hold the disclaimer unconstitutional as an overly broad coercive device and reject the noncompliance tax unless modified.

If Congress eliminates all vestiges of the presidential system in order to reduce the cost of the legislation, the Court could invalidate a reform agenda that has taken over nineteen years to piece together. At the same time, these departures from the presidential model will enable the Court to rethink key aspects of *Buckley* that have needlessly stymied reform efforts until now. No matter what the final shape of the legislation, Congress' return to the courthouse steps demonstrates lingering dissatisfaction with electoral law, a sentiment reflected also in the public at large. Ideally, the dialogue between Congress and the Court will result in a balance, which recognizes the threat of corruption posed by the skyrocketing cost of campaigns yet avoids using government benefits improperly to punish exercise of First Amendment rights.

