Democratic Visions and Third-Party Independent Expenditures: A Comparative View

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Questions about the proper role that money should play in a country's democratic process bedevil all democracies. One of the most difficult issues to be faced is the way in which spending by "third party" participants—those individuals or groups not directly contesting the election but whom nevertheless want to affect its outcome—should be regulated. To what extent should these third parties be allowed to make independent expenditures designed to influence the voters into casting their ballots one way or the other?

In this Article, the author develops two contrasting "visions" of the electoral process that may be used to illuminate the arguments in this area of law. He then applies these visions to analyze the regulatory frameworks in place in three particular countries: the United States, the United Kingdom, and Canada. Within the rules adopted by each of these countries can be seen a constant tension between each of the two visions—a tension that renders the law unstable and uncertain. While acknowledging this instability, the author concludes with some words on which of the models of regulation he considers best serves a properly functioning democratic process.

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I. INTRODUCTION

Money has long been, and indisputably remains, inextricably intertwined with politics.[1] Virtually any form of public political activity in a market economy will require some form of monetary outlay—be it buying batteries for a megaphone, paying for a leaflet to be printed, or purchasing blocks of broadcast time on a television station. However, in addition to nourishing the political process, the use of private wealth to influence public decisions may also have toxic consequences. It may enable individuals to go beyond merely participating in the public political process and allow them to subvert or incapacitate it. The most obvious example of such subversion, overt corruption of public officials, has been recognized for centuries as an evil to be avoided.[2] With the development of the notion of democratic "rule of the people, by the people, and for the people," a new concern has been added to these age-old worries: that of the potential imbalances that may be created as a result of the unequal share of wealth held by the participants in a presumptively egalitarian system of governance.

This Article examines the ways in which three countries—the United States, the United Kingdom, and Canada—have struggled to regulate one particular way in which privately controlled wealth may be used to influence the democratic election process. Primarily, it examines the set of rules each country has adopted to govern the spending of money on matters related to an election campaign by individuals or organizations that are not officially connected with any candidate or

1. ARISTOTLE, THE NICOMACHEAN ETHICS 43 (J.A.K. Thompson trans., 1953) ("It is difficult, if not impossible, to engage in noble enterprises without money to spend on them . . . .").

2. DANTE ALIGHIERI, THE DIVINE COMEDY, BOOK ONE: INFERNO 187-205 (Allen Mandelbaum trans., 1982). Dante condemned "barrators," or those guilty of taking graft in exchange for the performance of their official duties, to the Eighth Circle of Hell. In keeping with Dante's notion that the punishment should fit the crime, these souls were to be boiled in pitch for all eternity while tormented by demons called "Malebranche."

political party seeking election. This form of election spending, which goes by the rather clumsy moniker "independent third-party expenditures" perhaps most perfectly encapsulates the dilemma posed by the use of private wealth in a democratic political process. Such spending has a central part to play in a democracy. It enables an individual or a group of individuals to actively participate in the political discourse surrounding an election, helping to facilitate the transfer of information to potential voters and thereby enabling individuals to reach informed opinions on important public questions. Clearly, these activities can be a public as well as a private good. However, pervasive economic inequality raises the concern that such expenditures may give more political voice to those with wealth, endowing them with an unequal amount of power in the electoral process and systematically undermining or distorting the egalitarian democratic arrangement of the polity. Thus, what is advantageous for the wealthy may not in all cases be advantageous for the rest of society.

The United States, the United Kingdom, and Canada have each attempted to mediate, through law, the tension that results from the abovementioned concerns. It will be argued that an insight may be gained into the concrete legal rules these countries have adopted as mediating strategies if they are seen to essay from differing conceptual visions of what an election is all about in a democratic society. In other words, underlying the regulatory regime of each country, a reliance can be detected on some normative view of what elections are for, what their purpose and meaning is, and the rules that are required in order to achieve and safeguard these aspirations.[3] This Article differentiates between two such normative visions: the aggregative and the conditional.

Under the aggregative view, the primary purpose of an election is seen as neither more nor less than a totaling up of the preferences of self-interested voters in order to award political power to those candidates who command the support of the majority. By contrast, the conditional view requires that the electoral process meet a set of requirements such that the result can command the rational respect and acceptance of all participants. Each of these normative visions, it is claimed, support a set

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3. Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 444 (1989) ("[The] legal argument and judicial explanation in such fields unselfconsciously reflect underlying assumptions about actual and potential social relations, and about the institutional arrangements and forms of political life fit for those relations as they are and are capable of becoming."); *see also* James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 897 (1997).

of "argument clusters" as to what features an electoral system requires to be able to claim legitimacy as a process of creating socially binding rules. These argument clusters in turn provide the justifications for the concrete legal rules governing independent third-party expenditures in each of the three countries studied.

It is not claimed that a given country's system of laws will unequivocally manifest a commitment to one or other normative vision as governing all aspects of the regulations controlling its election process. Indeed, as will be seen, a great deal of the (ongoing) dispute exists within all three countries over how the electoral moment should be viewed. It is also the case that a particular country may adopt one view of elections with regard to the issue of how money may be used (and, in particular, how independent third parties may use their money) while subscribing to a different normative approach in regulating the other aspects of its voting process. This is to say that the purpose of the present Article is relatively modest. It does not attempt the Herculean task of developing an overall description of how each country's entire corpus of legal doctrine reveals a particular commitment to some theory of democracy. Nor does it try to synthesize a set of models that will explain every particular rule that a country may apply to its election process. Instead, the more limited purpose is to illuminate the issue of independent third-party expenditures by examining how the rules that have been applied by different countries to this kind of spending, as well as the continuing disputes those rules provoke within each country's legal system, can be made sense of by recourse to underlying and competing normative views of the role and purpose of an election within a democratic society.

The remainder of this Article is structured as follows: Parts II and III are concerned with laying out the theoretical basis for the later descriptive work. Part II draws a distinction between two normative visions of the election process and shows how these approaches underpin a set of argument clusters about how the electoral process should be concretely arranged. Part III examines how these argument clusters operate in relation to the specific issue of independent third-party expenditures on electoral messages. It is argued that depending on which normative view of the election process is adopted, a particular stance on the role and worth of independent third-party expenditures, as well as the potential dangers these pose, will prove to be more convincing.

Parts IV through VI explain how this theoretical structure has played out in practice through a descriptive analysis of the regulatory systems of three different countries. Part IV looks at how the United

States has constructed a complicated series of legal tests to judge whether third-party speech may be constitutionally regulated. It is contended that this framework has been mainly built upon an aggregative vision of the election process, allowing for only a minimal amount of governmental restraint of spending on electoral issues. Part V shows how the development of the U.K. rules on third-party expenditures has been largely based upon a conditional view of the election process, with consequently greater acceptance of tight regulations on the use of money. In Part VI, the Canadian experience is examined, and while a conditional vision appears to enjoy a measure of primacy, there remains a large amount of uncertainty as to the degree to which the use of money in the political process may be restricted.

II. TWO CONCEPTIONS OF THE ELECTORAL MOMENT

At the end of the twentieth century it seems true that virtually everybody likes elections, or at least engages in the pretense that they like them.[4] This is a simpler way of saying that there is a broad consensus that elections are a legitimate way of deciding between some set of different social goals, even if there remains some disagreement about which types of social goals are ripe for resolution in this manner. Beyond this limited agreement that elections are "a good thing" lies a great deal of division over exactly why this is so. As already noted, there may be conflicts about whether a particular issue that divides us should be settled by majority rule rather than through some other social practice.[5] Even once it is accepted that a vote is desirable as a method of resolving some divisive issue, there are still arguments as to why exactly we should feel bound by the majority's decision on this matter, particularly if this decision happens to conflict with our own personal views or beliefs about how the issue should be resolved. Additionally, there is the question of why we believe that others who may neither agree with the voting process nor its outcome, and who may not have even participated in the process at all, should be forced to comply with the majority's decision.

Disagreements over issues such as these arise because elections do not exist in a vacuum. They represent a particular institutional moment

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4. *See, e.g.*, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992) (claiming that recognition of a right to democratic government "is rapidly becoming, in our time, a normative rule of the international system"); Thomas M. Franck, *The Democratic Entitlement*, 29 U. RICH. L. REV. 1, 2 (1994).

5. Jon Elster points out that voting is but one of three possible ways available to modern societies to settle a particular dispute. The other two he identifies are arguing and bargaining. *See* Jon Elster, *Introduction*, *in* DELIBERATIVE DEMOCRACY 5-8 (Jon Elster ed., 1998).

in the process of democracy, the result of which is taken to endow some choice between competing social visions with a measure of legitimacy.[6] Trying to answer the question of why we view elections as being such a good thing requires engaging in the prior tasks of defining what we mean by "the democratic process" and of imagining the conditions that confer legitimacy on social decisions.[7] As these questions require us to adopt a contestable position on which a variety of reasonable views exist, it is hardly surprising that we find a range of disagreement over the social meaning and function of elections.[8] These disagreements are not simply of academic interest, the kind of issues restricted to faculty lounges and the occasional speculative conference paper. Adopting a stance on the meaning of democracy and the nature of the voting system required to produce legitimate and binding social decisions has practical implications for the way in which actual, real world election practices should reflect these ideals. It involves making a commitment to an interlocking set of argument clusters. These interdependent claims about the world that both support and rely on each other for their validity relate to the function of electoral speech in a democracy, the appropriate part the government should play in setting up the rules of electoral debate, and the role of voters and candidates in the democratic process. These commitments support the legal rules that are applied to regulating the activity of different actors in the election contest. Therefore, we find that any debate over how the electoral process should be constructed inevitably involves having to engage in deeper disputes over the fundamental nature and purposes of democracy.

Obviously, there are a host of issues implicated in the unavoidably brief discussion above, and it is well beyond the scope of one article to be able to do much more than flag their existence. For present purposes, this Article intends to restrict the scope of investigation to exploring the ways in which contrasting normative accounts of the institutional moment of an election inform different legal regimes regulating one way in which money is used to influence the electoral process. Most

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6. *See* C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 2 (1998) (developing this idea of elections as forming an "institutional moment"); *see also* Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789, 791 (1998); Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19; Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1805-06 (1999); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1763-66 (1999).

7. *See* Frank I. Michelman, *Brennan and Democracy: The 1996-97 Brennan Center Symposium Lecture*, 86 CAL. L. REV. 399, 419 (1998) ("Democracy is a demanding normative idea, an idea with content, however uncertain or disputable that content may be.").

8. WILLIAM E. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE 29-35 (2d ed. 1993).

crucially, these competing accounts seek in different ways to resolve the tension inherent in the twin roles of the election process, as both a struggle between competing social visions and a forum for legitimate decision-making.[9]

Elections provide a way to resolve societal disputes, albeit in a potentially temporary and reversible manner, between persons who hold mutually antagonistic and often irreconcilable opinions, beliefs, and preferences.[10] In the absence of any practicably possible consensus among individuals divided as to the particular policies, ideals, or persons by which society should be governed, the next and most preferable solution is to let the majority decide. "Rule by the many" in preference to "rule by the few" is the most basic notion of democratic governance.[11]

A commitment to majoritarian rule elevates the control of the government to the status of a prize to be struggled over in the democratic arena. Various social actors will have a strong motive to try to win over a majority to their viewpoint by whatever methods prove effective, so that their opinions, interests, desires, or beliefs will prevail in the democratic contest for public power. However, just because some methods may prove to be *successful* in winning a majority vote for a particular position does not necessarily mean their use is *legitimate*. While we believe that in a democracy the viewpoint that gains victory at the ballot-box should prevail, we do not do so simply on the basis that one side has formally received the most votes cast in an election. On such a view, voter intimidation, vote buying, pre-marked ballots, and the like would all be considered as an accepted part of the democratic process instead of an undesirable manipulation of it. Rather, we believe that majorities should achieve their victory under rules that can reasonably command the agreement and respect of those participating in the process. Along with the factual, dispute-resolving role filled by the act of voting, we also hold the idea that elections should confer validity or legitimacy on the social decision reached by the process of majority vote.[12] In other words, the procedure for making decisions (or for selecting representatives to make decisions) by majority vote must be such that it gives everyone, losers as well as winners, a reason to accept

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9. THOMAS CHRISTIANO, THE RULE OF THE MANY: FUNDAMENTAL ISSUES IN DEMOCRATIC THEORY 178-80 (1996).

10. For the ways in which "the burdens of reason" may cause disagreements to arise even between reasonable persons seeking to reach an accord with each other, see John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 235-38 (1989).

11. *See generally* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989); JACK LIVELY, DEMOCRACY 9-29 (1975).

12. *See* JURGEN HABERMAS, BETWEEN FACTS AND NORMS 83, 183-85 (William Rehg trans., 1996).

the outcome issuing from it as binding on them. Therefore, questions remain as to how the democratic struggle for public power should be structured and constrained to ensure that this presumption of legitimacy is well founded. It is possible to distinguish between two visions as to how an election process can meet these twin challenges of providing a settlement to social disputes and doing so in a way so that all participants can accept the outcome as valid.[13]

The first view is that the voting process serves as *the* defining democratic instant in which the heightened political consciousness of the voters is appealed to by all motivated enough to participate in the political system to select between differing values, policies, and claims offered by those competing for votes.[14] This theory of elections may be

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13. The two visions outlined find some resonance with—although they also differ in important ways from—the "liberal" and "republican" traditions identified by Frank Michelman *in* Michelman, *supra* note 3. *See also* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1723 (1999) ("Broadly speaking, there are two camps on the purpose of voting."); Gardner, *supra* note 3, at 902-06 (distinguishing between "protective" and "communitarian" views of democracy). *But see* Jurgen Habermas, *Three Normative Models of Democracy*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL (Seyla Benahabib ed., 1996).

14. Variants of this theory may be found in the utilitarianism of JEREMY BENTHAM, FRAGMENT ON GOVERNMENT (J.H. Burns & H.L.A. Hart eds., 1988). *See generally* JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (3d ed. 1950) (describing the elitist model of democracy); GIOVANNI SARTORI, DEMOCRATIC THEORY (1962) (describing the "democratic theory of elites"); ROBERT MICHELS, POLITICAL PARTIES (Eden & Cedar Paul trans., 1962), ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957) (giving the "economic democracy"); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962) (proposing the "logrolling" model). Although he rejects the idea that the preferences of the majority can ever be accurately reflected in the results of an election, the early works of Robert Dahl on "polyarchy" or "minorities rule" are also relevant. *See* ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY 34-62, 131-33 (1956) [hereinafter DAHL, PREFACE]; ROBERT A. DAHL, POLYARCHY PARTICIPATION AND OPPOSITION (1971); *see also* DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (1951). *See generally* PETER BACHRACH, THE THEORY SOF DEMOCRATIC ELITISM: A CRITIQUE (1967); KEITH GRAHAM, THE BATTLE OF DEMOCRACY: CONFLICT, CONSENSUS AND THE INDIVIDUAL ch.7 (1986).

For recent examples of the application of an aggregative approach to the issue of how spending money in the election process should be regulated, see Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258 (1994) [hereinafter BeVier, *Campaign Finance Reform*]; Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 VA. L. REV. 1761, 1763-65 (1999) [hereinafter BeVier, *Issue Advocacy*]; Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 122 (1995); David Cole, *First Amendment Antitrust: The End of Laissez Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 245 (1991); Joel M. Gora, Buckley v. Valeo*: A Landmark of Political Freedom*, 33 AKRON L. REV. 7 (1999); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1057-58 (1996) [hereinafter Smith, *Faulty Assumptions*]; Bradley A. Smith, *The Sirens' Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POL'Y 1, 34-35 (1997); Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45 (1997); Kathleen M. Sullivan, *Against Campaign Finance Reform*,

termed *aggregative* on the basis that it views the social purpose of an election as being principally the totaling up of the preferences of voters and the granting of governmental power to the candidate or political party supported by the greatest number of them.[15] By emphasizing the adversarial nature of the democratic process and the role elections play in settling these disputes, the aggregative view places the conflict and strife that permeates social life at the center of the political process. Politics becomes a matter of bargains struck between different interests. It is manifested in fluid relations by which participants try through appeals to both reason and emotion to convince a majority of others that their individual interests will be best served by supporting or allying themselves with a particular set of views about the world. Democracy ideally allows this unruly, contentious, and bare-knuckled politics a free reign without an eruption into open violence. It both releases and contains the passions and furies unleashed by ongoing social conflict within a framework that assures all who participate that they can have some say in what the final decision *should* be. This is regardless of whether the minority has a say in the outcome.

It is important to note that an aggregative vision does not deny that there may be some deeper values (such as maximizing utility, protecting liberty, or guaranteeing equality) served by a system of majority rule—values that in turn may be appealed to in order to legitimize this form of governance as something more than an instrumentally useful social arrangement. This approach also accepts that in order to retain this legitimacy, the majority may not deny certain individual rights to minorities.[16] However, these guarantees take the form of formal (or negative) rights preventing enforced exclusion from the political process rather than providing a substantial assurance of some measure of effective participation.[17] Allowing each individual a free vote at election

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1998 UTAH L. REV. 311 (1998) [hereinafter Sullivan, *Against Campaign Reform*]; Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 671-75 (1997) [hereinafter Sullivan, *Political Money*].

15. Joshua Cohen also makes use of the term "aggregative" to describe the conception of democracy outlined here. *See* Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, *in* DEMOCRACY AND DIFFERENCE, *supra* note 13, at 98.

16. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW chs. 1-4 (1980); Peter Railton, *Judicial Review, Elites, and Liberal Democracy*, *in* NOMOS XXV: LIBERAL DEMOCRACY 159 (J. Ronald Pennock & John W. Chapman eds., 1983); Amy Gutman, *How Liberal Is Democracy?*, *in* LIBERALISM RECONSIDERED 25-50 (Douglas MacLean & Claudia Mills eds., 1983).

17. *See* JOSEPH CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE RULE OF THE SUPREME COURT 2 (1980); Richard Davies Parker, *The Past of Constitutional Law*, 42 OHIO ST. L.J. 223, 230 (1981); Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1072-77

time and preventing restrictions on what she may say, see, or hear in the run-up to the vote is enough to fulfill the promise and potential of democracy for society and each individual voter.[18] With these minimal background conditions in place, it is then sufficient that a particular choice receives the majority of votes for that decision to be socially legitimate. If necessary, this will justify the majority in coercing the minority into abiding by it. This notion of legitimacy derives from a background assumption that, in cases of social conflict, some rule must be chosen.[19] But there is no "best" solution available to resolve the antagonism in the interests of some common good of all of society.[20]

The aggregative vision identifies the chief danger to the liberty of the individual to participate in shaping and choosing the ends of society as posed by concentrated state power. Elections can serve as a means to defuse this threat, for instituting a regular choice between different candidates for governmental office is considered the best way to control and limit the activities of those who serve as representatives. Given the assumption that democracy's primary function, as operationalized through the electoral moment, is to regulate and resolve otherwise intractable disputes amongst self-interested social actors, there is reason then to hold a deep suspicion that elected representatives will act in ways that are either outright mercenary[21] or reflective of the interests of a "faction" rather than a true majority of their constituents.[22] As David

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(1980); *see also* BeVier, *Issue Advocacy*, *supra* note 14, at 1763-65 (examining the implications of "a negative conception of liberty" for the regulation of third-party expenditures).

18. *See, e.g.*, GRAHAM, *supra* note 14, at 91 (arguing that allowing the majority to govern leads to the "minimal curtailment of autonomy"); CHARLES R. BEITZ, POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY 109-10, 133 (1989) (claiming the one person, one vote formula is sufficient to recognize each person as an equal citizen); Frank Michelman, *Political Truth and the Rule of Law*, 8 TEL AVIV UNIV. STUD. L. 281, 283 (1988) ("[T]he value to you of your political franchise—your right to vote and speak, to have your views heard and counted—is the handle it gives you on influencing the system so that it will adequately heed and protect your particular, pre-political rights and other interests.").

19. *See* THOMAS HOBBES, LEVIATHAN 227-28 (C.B. McPherson ed., 1968); JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 69-70 (C.B. McPherson ed., 1980); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 70 (John Ladd trans., 1965).

20. ELY, *supra* note 16, at 54 (claiming that "our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles"); DAHL, PREFACE, *supra* note 14, at 68-69:

> In a rough sense, the essence of all competitive politics is bribery of the electorate by politicians . . . . The farmer . . . supports a candidate committed to high support prices, the businessman . . . supports an advocate of low corporation taxes, . . . the consumer . . . votes for candidates opposed to a sales tax.

Id.

21. For a review of the literature representing campaign finance reform as "incumbency protection," see BeVier, *Campaign Finance Reform*, *supra* note 14, at 1279.

22. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 405-06, 411 (2d ed. 1977). A wide variety of literature on public choice theory, depicting the electoral and legislative process as

Hume pointed out nearly 200 years ago, these shortcomings of representative democracy make it necessary for the people to exercise a "watchful *jealousy* over the magistrates" in order "to curb the ambition of the court."[23] Elections, according to the aggregative description, are one of the chief institutional means of operationalizing this vigilance. They provide a check on the power of representatives. The ability to "throw the bums out" will in some measure ensure that the representative's actions remain in line with the interests and desires of the voting public.[24]

With its depiction of democratic politics as being a rough-and-ready competition between different actors seeking to win control of public political power, the aggregative vision supports a cluster of commitments to a "marketplace of ideas" conception of electoral speech,[25] a minimal role for the government in refereeing the electoral process,[26] and a view of citizens and legislators as holding widely divergent and basically self-interested preferences which they wish to maximize.[27] One of the chief

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one dominated by interest group bargaining, reflects this concern. See the representative collection of essays in POLITICS AND PROCESS: NEW ESSAYS IN DEMOCRATIC THOUGHT (Geoffrey Brennan & Loren E. Lomasky eds., 1989); INFORMATION AND DEMOCRATIC PROCESSES (J. Ferejohn & J. Kuklinski eds., 1991). *See also* William C. Mitchell, *Efficiency, Responsibility, and Democratic Politics*, *in* NOMOS XXV: LIBERAL DEMOCRACY, *supra* note 16, at 353-58.

23. David Hume, *Of the Liberty of the Press*, *in* ESSAYS, MORAL, POLITICAL AND LITERARY 12 (Eugene F. Miller ed., 1985).

24. SCHUMPETER, *supra* note 14, at 269.

25. The metaphor is usually attributed to the famous dissenting opinion of Justice Holmes in *Abrams v. United States*, 250 U.S. 616, 630 (1919) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."). *See also* Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., dissenting). The argument from democratic rule for a free marketplace of speech is perhaps best put by ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). Meiklejohn bases his defense on the broad concept of "self-government." However, as Frederick Schauer points out, he does so by making self-government "parasitic on his conception of democracy as the supremacy of the electorate." *See* Frederick Schauer, *Free Speech and the Argument From Democracy*, *in* NOMOS XXV: LIBERAL DEMOCRACY, *supra* note 16, at 248. Defining self-government in any other way would dilute the concept's support for a "free marketplace" of speech, allowing "restrictions that limit the volume of some to amplify the volume of others; and even invite restrictions that claim that the very contents of some speech impede rather than further democratic self-government." Charles Fried, The Oliver Wendell Holmes Devise Lecture, *Perfect Freedom, Perfect Justice*, 78 B.U. L. REV. 717, 722 (1998); *see also* RODNEY A. SMOLLA, SPEECH IN AN OPEN SOCIETY 221 (1992) (distinguishing between a "marketplace of ideas" and a "town meeting" metaphor for the political process).

26. *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 277 (1995). However, as will be argued, the aggregative view does not completely reject a role for government in regulating the electoral process—for instance, laws against bribing public officials are quite compatible with it.

27. *See* DAVID GAUTHIER, MORALS BY AGREEMENT (1986); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 11 (1997) ("We must

foundations of a marketplace of ideas approach to electoral speech lies in the view of elections as a battleground for different social interests.[28] According to this approach, placing restrictions on any one voice, or set of voices, would have two consequences. First, it would limit the amount of information available to voters, thus restricting their ability to choose the social outcome that would maximize their own preferences. Second, it would discriminate against some interests in favor of others.[29] Given the aggregative view's rejection of the notion of a "general good" for society, the concern is that such discrimination will simply be the product of one set of social interests using regulation to protect itself at the expense of others. For this reason, the government should remain largely outside of the election process, enforcing only such minimal rules as are required to ensure the result is a true reflection of the aggregate wishes of those who are entitled to vote in the election.[30]

The second vision of the institutional moment of an election accepts that a system of majority rule is the best practical way, given the intractability of political disagreement between individuals and the time constraints on real world decision-making, to make a choice between the various candidates for governmental office along with their stated policies or social goals. In contrast to the aggregative vision, this reliance on majority rule is seen as a poor and undesirable second best to the ideal of noncoerced, consensual agreement among all participants in the electoral process.[31] While it is virtually impossible to obtain such a

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always seek to understand political outcomes as a function of self-interested individual behaviors."); *see also* C.B. MCPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY 43 (1977); CHRISTIANO, *supra* note 9, at 178-80; Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, *in* DEMOCRACY AND DIFFERENCE, *supra* note 13, at 71.

28. *See* Hume, *supra* note 23. Another defense of a "free market" approach to freedom of expression—that it respects and guarantees the individual autonomy of both speakers and listeners alike—rejects Meiklejohn's privileging of political speech over other forms of expressive activity. However, it shares with Meiklejohn the idea that given the pluralism of ideas and beliefs held by individuals, there is no possible way to determine a societal "common good" that would justify limiting expressive rights. *See* Fried, *supra* note 25; Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1522-25 (1997); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 353-59 (1991).

29. Smith, *Faulty Assumptions*, *supra* note 14, at 1077-81; Sullivan, *Against Campaign Reform*, *supra* note 14, at 321-24; *see also* POST, *supra* note 26, at 185-86, 304.

30. *See generally* ELY, *supra* note 16; *see also* Sullivan, *Political Money*, *supra* note 14, at 680-82; Bradley A. Smith, *Some Problems with Taxpayer-Funded Political Campaigns*, 148 U. PA. L. REV. 591 (1999).

31. *See* JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 60-61 (G.D.H. Cole trans., 1950). *But see id.* at 153 ("[T]he votes of the greatest number always bind the rest."). John Rawls and Jurgen Habermas provide perhaps the best modern restatements of this position. *See* JOHN RAWLS, POLITICAL LIBERALISM 13, 43 (1993); John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 231 (1985); Jurgen Habermas, *Popular Sovereignty as Procedure*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND

consensus on the resolution of any single political issue, this second viewpoint seeks to create some unity of agreement on the process by which these disputes should be resolved. Under this account, even those who disagree with the specific outcome of a vote should be able to accept the result as legitimate and binding upon them because the way in which the majority decision was reached commands their rational respect and agreement. Such rational agreement, according to this model, can be achieved by channeling or constraining the hurly-burly of politics inside a framework of rules that no participant could reasonably reject as being unfair, unjust, or inequitable. The selection of a representative or policy by majority vote alone may not in itself be enough to confer validity on the decision, if the means by which the selection occurs does not correspond to some stronger ideal type of "democratic" decision-making. This vision of the electoral moment can be termed *conditional*, in that it requires that the voting process conform to some set of prior, normatively derived procedural conditions if it is to legitimate the majority's decision as a socially binding settlement of any given dispute.[32]

The conditional model may be seen to add at least one of two extra requirements to the straight majoritarianism of the aggregative model, one of which is weaker than the other.[33] The weak requirement is that the process of choosing representatives by majority vote should act to develop or educate the virtues or "moral character" of the voting public.[34] According to this *self-development* view, voting in an election

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POLITICS 57-60 (James Bohman & William Rehg eds., 1997); HABERMAS, *supra* note 12, at 33, 121 ("It is only participation in the practice of politically autonomous lawmaking that makes it possible for the addressees of law to have a correct understanding of the legal order as created by themselves."). *See generally* SIMONE CHAMBERS, REASONABLE DEMOCRACY: JURGEN HABERMAS AND THE POLITICS OF DISCOURSE 155-72 (1996).

32. *See, e.g.*, RONALD DWORKIN, LAWS EMPIRE 76-86 (1986).

33. The two demands of the conditional model laid out in the following paragraphs may be seen to stem from a similar set of concerns. *See* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 79 (1996). But combining the two into one "conditional" approach does admittedly risk blurring some important distinctions, if not outright disagreements, between the two. *See, e.g.*, Jon Elster, *The Market and the Forum, Three Varieties of Political Theory*, *in* FOUNDATIONS OF SOCIAL CHOICE THEORY 125-28 (Jon Elster & Aanund Hylland eds., 1986). I feel justified in running this risk for two reasons. First, I am distinguishing between what I have called two broad "visions" of the election process rather than providing an overall taxonomy of all the possible theories about democracy. As such, the focus in this Article is on how the conditional and the aggregational view of elections differ from one another rather than on the shades of theory that exist within each of the overall categories. Second, I am dealing with how these visions are adopted and used by legal policy-makers, not analytic philosophers. The fact is that it is often difficult to tell in practice exactly what motivates such policy-makers to take up one approach rather than another.

34. This may be characterized as a "weak" requirement in that it presents a "condition of rightness" for a democratic system rather than a "condition of legitimacy." The claim that

should inspire the activity of each citizen in ways that bring into play virtues or capacities that otherwise would not be utilized in his or her everyday life. If the election process does not stimulate this individual activity, and thereby does not serve to promote the moral self-development of the voting public, then it is failing to realize all that democracy is capable of.[35] This failure may not strictly undermine the *legitimacy* of a procedure of majoritarian decision-making. We may still think that the outcome preferred by the greatest number should still be adopted over all the alternatives even if the electoral system fails to maximize the self-development of each person, but it may create an inferior process that has less *value* or *worth* than a system that does accomplish this purpose. Promoting self-development may thus provide a reason to regulate the democratic process, provided it is done in a way that does not otherwise undermine the conditions guaranteeing majority rule.

A second and stronger demand of the conditional way of viewing the electoral moment is that the choice between the different persons, policies, or values in conflict should not only be made by the majority, but should be reached in a way that recognizes, affirms and respects the *self-government* of each voter.[36] This concern arises from the recognition that the election of representatives will result in social rules being created which will bind the actions of all citizens, even those who do not agree with the substance of a given social rule. However, it is an article of liberal faith that individuals should be bound in their actions

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democracy should act to improve or develop the moral character of those participating is not by itself strong enough to overturn the claims of a majority to rule. In other words, if a system of majority rule does not act to develop the moral potential of the citizenry, we may say only that it is not achieving all that it should, not that it is producing decisions we ought to regard as of questionable legitimacy. *See* Frank Michelman, *How Can the People Ever Make Laws?*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS, *supra* note 31, at 147-49.

35. The "self-development" strain may be traced through ARISTOTLE, THE POLITICS, BOOK III, at 101-48 (T.A. Sinclair trans., 1962); MACHIAVELLI, *Discourses on the First Ten Books of Titus Livius*, *in* THE PORTABLE MACHIAVELLI (Peter Bondanella & Mark Musa trans., 1988); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Henry Reeves trans., 1877); JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1993); CAROL E. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970); BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984); CAROL C. GOULD, RETHINKING DEMOCRACY: FREEDOM AND SOCIAL COOPERATION IN POLITICS, ECONOMY, AND SOCIETY (1988). For an overview of the development of "participatory" theory, see Jane Mansbridge, *On the Idea That Participation Makes Better Citizens*, *in* CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS (Stephen L. Elkin & Karol Edward Soltan eds., 1999). *See generally* CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY 99-101 (1996).

36. *See infra* notes 37-38 (discussing the self-government argument); *see also* Frank I. Michelman, *Foreword, Traces of Self-Government*, 100 HARV. L. REV. 4, 31 (1986); Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE (Alan Hamlin & Philip Pettit eds., 1989); ROUSSEAU, *supra* note 31.

only by those rules that they autonomously choose for themselves.[37] In order to close this gap between the necessity for social rules, as legislated by representatives elected by majority vote, and a commitment to the autonomy of each individual voter, there is created a requirement that the election process be substantively fair, just, or reasonable.[38] A failure to abide by these standards does not just make the system less valuable than one that meets them; it has implications for the *legitimacy* of the system. It implies that the process by which people come to be governed by social rules is failing at its core to recognize the inherent worth of persons as the participants.

Due to its concern about creating the conditions of equal participation necessary so that all participants can rationally accept the outcome of the electoral moment as binding on them, the conditional model requires some limits to be placed on the ability of some participants to speak.[39] This requires a more assertive role for the government as a referee of the electoral system,[40] along with a view of citizens and representatives that recognizes both their "other regarding" nature and their ability to alter their preferences as a result of reasoned deliberation and participation in a democratic discourse.[41] The argument

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37. This is, of course, the basic premise underlying Kant's insistence that moral agents abide by those universal laws that they themselves can claim to author. *See* IMMANUEL KANT, ETHICAL PHILOSOPHY: THE COMPLETE TEXTS OF GROUNDING FOR THE METAPHYSICS OF MORALS & METAPHYSICAL PRINCIPLES OF VIRTUE 38-39 (James W. Ellington trans., 1993). The same concern applies to external legal sanctions. *See* HABERMAS, *supra* note 12, at 28-34; CHAMBERS, *supra* note 31, at 1-11; Joshua Cohen, *Autonomy and Democracy: Reflections on Rousseau*, 15 PHIL. & PUB. AFF. 275, 276 (1986) ("The free person wants to affirm the framework of rules itself, they want to 'have their own will as a rule.'").

38. *See, e.g.*, Immanuel Kant, *On the Common Saying: 'This May Be True in Theory, but It Does Not Apply in Practice', in* KANT'S POLITICAL WRITINGS 85 (Hans Reiss ed., 1970) ("[E]ach individual requires to be convinced by reason that the coercion which prevails is lawful."); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 19-26 (1996); Michelman, *supra* note 7, at 402-03. The recent writings of Jurgen Habermas may be seen as primarily concerned with this problem. *See* HABERMAS, *supra* note 12, ch. 7.

39. *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 16-18 (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 98 (1993).

40. OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 35, 43 (1996); Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055, 1071-73 (1999); Neuborne, *supra* note 6, at 792-93, 797-800; Baker, *supra* note 6, at 24-28; Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 816 (1999) ("Our parliamentary model of freedom of speech should also make clear that a working democracy requires not merely negative prohibitions against government censorship, but also affirmative government action to promote free speech—to create the assembly room or town hall or public forum or other parley place where the freedom of speech can truly take place.").

41. *See* CHAMBERS, *supra* note 31, at 104-05; CHRISTIANO, *supra* note 9, at ch. 5; Benhabib, *supra* note 27, at 71-72; Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1507 (1988). *But see* Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 895 (1998) (arguing that proposed reforms of campaign finance "all violate

for limiting the ability of some participants to speak at election time stems from a claim that all speech acts occur in a context which can influence each act's effectiveness in transmitting information and influencing discourse. However attractive the idea of a marketplace of ideas may appear to be, in reality this context is susceptible to domination and distortion resulting from inequalities in the power of social actors.[42] One of the major (and least justifiable) sources of such inequality and consequent domination is the greater wealth of some participants compared with others.[43] A situation in which the wealthy enjoy a primacy with regards to expressing their interests at election time harms equality interests that are integral to a legitimate democratic process by practically excluding some citizens, or even the majority of citizens, from active and meaningful participation in the political process.[44] In order to combat this conversion of economic power into political power, the government will have to fashion rules regulating how much money may be used to buy speech time, by whom, and in what manner. Underlying these rules is a view that citizens should take part in the electoral process, not simply as passive consumers of information, but as basically equal, active, and effective participants engaging in a reasonable and deliberative dialogue with each other and the candidates seeking to represent them. Elections, therefore, must be more than just a means by which to find out who the majority would prefer to represent them. Rather, they should take the form of an institutional process through which collective decisions may be made that all members of society can rationally adopt as being their own.

This Article notes how making one normative choice over the other influences the adoption of particular rules by a country to regulate the

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one of democracy's central normative assumptions: the idea that voters are civically competent").

42. *See* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1; *see also* Frederick Schauer, *Discourse and Its Discontents*, 72 NOTRE DAME L. REV. 1309 (1997).

43. THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 58 (2d ed. 1979) ("Imperfections in group competition may create phenomena similar to the formation of cartels in the market."); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (1990); Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 398 (1988); FISS, *supra* note 40, at 39-42.

44. *See* JOHN RAWLS, A THEORY OF JUSTICE 221-28 (1971); RAWLS, *supra* note 31, at 360-61; Thomas Christiano, *The Significance of Public Deliberation*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS, *supra* note 31, at 258-62; Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1391-93 (1994); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1302 (1994) ("If elections are dominated by fund-raising, certain kinds of persons, with certain kinds of skills, priorities, attitudes, and experiences, tend to become elected representatives.").

use of money by third parties on influencing the electoral process. Of course, the legal rules that are formed, and the effect they have on institutions of participation and deliberation, will in turn impact upon our common experience (and thus understanding) of the process of democracy.[45] Therefore, something of a feedback loop will be at work in this area; our concept of democracy will to some extent come from our experience of democracy at work in our society even as the rules under which our elections occur will stem from our vision of what democracy requires. However, this does not necessarily imply that we are trapped in a relativist morass, a situation in which all we can say is that democracy means one thing given the experiences and history of one country and something different in another. By critically examining the normative underpinnings of not only our own, but of other systems of electoral regulation, we may get some insight into where we feel our system of law fails to properly instantiate our self-understandings as a nation committed to a government of the people, for the people, by the people.[46] Such a process of comparative self-examination, or "reflective equilibrium," allows for a broadening of perspective, a deepening of insight, and a greater confidence that the rules we have adopted in our country are indeed the rules we ought to have in place.

The next Parts of this Article seek to concretely examine how the normative conception of elections adopted (whether consciously or implicitly) by the various legal actors in three different countries have affected how they have chosen to regulate the issue of independent third-party expenditures. Before undertaking this investigation, it is first necessary to consider why the general issue of third-party expenditures requires any regulation at all. A brief exploration of the real or potential problems seen as being posed by this form of spending is thus in order.

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45. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644 (1998) ("The democratic politics we experience is not an autonomous realm of parties, public opinion, and elections, but a product of specific institutional structures and legal rules. Democracy is as much the creation of these structures as it is an organic expression of any preexistent 'popular will.'"); *see also* Issacharoff & Karlan, *supra* note 13, at 1734 ("[O]ur conception of what politics is shapes our views of how politics should be regulated, but how politics *has* been regulated shapes our conception of what politics can be.").

46. *See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1269-74 (1999) (discussing the role of an "expressivist" comparative constitutionalism); *see also* Gerald N. Rosenburg & John M. Williams, *Do Not Go Gently Into That Good Right: The First Amendment in the High Court of Australia*, 1997 SUP. CT. REV. 439 (critiquing the adoption by the Australian Supreme Court of an American-style "marketplace of ideas" approach to free speech as incompatible with an Australian commitment to deliberative democracy); Michelman, *supra* note 3, at 45 (uncovering a commitment to "republican democracy" implicit in United States Supreme Court constitutional law decisions).

III. THE "PROBLEM" OF INDEPENDENT THIRD-PARTY EXPENDITURES

At the risk of repetition, in a system of representative democracy, the central institutional purpose of an election is to allow a choice, by the majority of the voting public, between candidates (usually representing some political party) who seek to hold and exercise governmental power. If a political party and its candidates are successful in gaining majority support at the ballot box under a contestable set of conditions that confer legitimacy on the decision, they gain a mandate that allows them justifiably to wield public power.[47] As elections are one of the chief means of allocating control over public power, the electoral contest brings into play a myriad of interests and concerns with varying stakes in the outcome. In any developed democratic system there will exist alongside the primary participants (the candidates and their parties) a plethora of "third parties" who may wish to take some part in an election battle. Such third parties include individuals who feel particularly strongly about a single issue or candidate; grass-roots advocacy groups concerned about influencing some aspect of public policy; and large businesses, trade associations, and unions that wish to protect the economic welfare of their constituents.

One manner in which these actors may try to influence the result of the vote is by endorsing particular candidates, or by motivating their members to actively campaign in support of or in opposition to a candidate or party. Additionally, they may be able to contribute money or resources directly to the campaigns of candidates or parties that they support. Another means of influence (that with which this Article is primarily concerned) is the spending of money, independent of the primary participants, on messages designed to affect the outcome of the election. Such expenditures may have two interconnected purposes. First, they may seek to take advantage of the public's heightened attention to political matters in order to win over or shape popular opinion on a particular issue and thereby influence the candidates' positions on the point in question. Equally, they may help to elect candidates that are sympathetic to the position or policy championed by those making the expenditure or aid in the defeat of those who are hostile (or ambivalent) towards it.

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47. It is then an important further question as to how an elected public official may legitimately use that power to make decisions once elected. This is the question of the proper role of an elected representative. *See* HANNAH FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 55-59 (1967) (outlining the difference between "independence theorists" and "mandate theorists"); Stephen L. Darwall, *Equal Representation*, *in* NOMOS XXV: LIBERAL DEMOCRACY, *supra* note 16, at 51.

Even though these expenditures may be formally independent of the principal participants in the electoral race (hence their common designation as "independent third-party expenditures"), they can have a great practical impact on the fortunes of those competing for public office.[48] This spending by independent third parties has many positive aspects to it, insofar as it can help to contribute to a flourishing and robust democracy. It allows for a wider participation in the political process, helping to remove the discussion of public issues from the special purview of just a few candidates, "spin doctors," and media pundits.[49] Such spending is argued to be an exercise of the basic right to communicate one's political views at a time when most people are involved in thinking about politics. It enables individuals (whether alone or as a part of a group) to express their viewpoints and engage in trying to convince others to accept and act on them. A related good is that independent expenditures by third parties can help more information enter the public domain from a wider variety of sources, allowing voters to better understand the issues involved and thereby weigh their choices between different candidates and parties.[50] This information-supplying role helps create a more informed electorate, which in turn has been argued to lead to enhanced participation and a greater voter turnout at the polls.[51]

These arguments receive greater rhetorical force if an aggregative vision towards elections is adopted. Under such a view, to prevent a third party from spending money on influencing voters' preferences

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48. For recent examples of how independent third-party expenditures have impacted on U.S. political contests, see Richard L. Berke, *Interest Groups Prepare to Spend on Campaign Spin*, N.Y. TIMES, Jan. 11, 1998, at 18; Donna Cassata, *Independent Groups' Ads Increasingly Steer Campaigns*, C.Q. WKLY., May 2, 1998, at 1108; Ron Faucheux, *The Indirect Approach*, CAMPAIGNS & ELECTIONS, June 1998, at 18; David Rogers & Phil Kuntz, *Bush Backers Consistency Is Questioned on Ads Criticizing McCain's Record*, WALL ST. J., Mar. 7, 2000, at A4. Canada's 1988 general election also provides an example of the potential power of this kind of spending. *See* MICHAEL MANDEL, THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA 290 (1994).

49. Faucheux, *supra* note 48, at 21. For a discussion of the importance of "intermediary organizations" for the quality of democratic governance and some of the "antinomies" this raises, see Dietrich Rueschemeyer, *The Self-Organization of Society and Democratic Rule: Specifying the Relationship*, *in* PARTICIPATION AND DEMOCRACY EAST AND WEST: COMPARISONS AND INTERPRETATIONS (Deitrich Rueschemeyer et al. eds., 1998).

50. DARRELL M. WEST, AIR WARS: TELEVISION ADVERTISING IN ELECTION CAMPAIGNS 1952-1992, ch. 8 (1993).

51. *See* Ruy A. Teixeira, *Campaign Reform, Political Competition and Citizen Participation*, *in* RUY A. TEIXEIRA ET AL., RETHINKING POLITICAL REFORM: BEYOND SPENDING AND TERM LIMITS 8 (1994), *available at* http://www.dlcppi.org/texts/pflib/reform.pdf (last visited Sept. 23, 1999) ("[H]igher spending produces a more highly mobilized electorate by direct stimulation . . . and by indirect promotion of a media rich environment. . . . These higher mobilization levels, in turn, lead to higher turnout levels.").

strikes at the heart of why we recognize participation rights in the first place. After all, if democracy is all about the majority choosing between rival and conflicting policies, ideals, and persons to govern society, then an election process should allow you as a participant to convince others that they really should want the same things that you do. Restricting third-party spending not only deprives some participants of this right, it also acts to decrease the available pool of information from which voters can judge the likely consequences of their choices. Representatives may become insulated from third-party criticisms, helping to keep incumbents in power even if their legislative actions or personal behavior are not in accord with what the voters in their constituency would most prefer. Voters are thereby limited in their ability to maximize their interests or preferences in a rational manner, meaning that not only the speaker is harmed if independent third-party expenditures are restricted, but every potential voter has her interests affected. For all of these reasons an aggregative view of elections provides strong arguments against attempting to limit either the form of or amount of third-party spending. Regulations that seek such limits have the potential to undermine the legitimacy of the democratic process under this normative approach by reducing the truly "representative," in the sense of being preferred by the majority of the voters, nature of those wielding public legislative power.

Of course, to claim that an aggregative view of elections will provide greater rhetorical force to the arguments in favor of third-party spending is not to say that a conditional vision completely rejects any role for such expenditures. It means rather that under the conditional approach the arguments canvassed above will not always be accorded the same weight or rhetorical bite, and other considerations may be seen as sufficiently important to overrule them. Such considerations may include claims that instead of promoting more open debate and allowing for a greater participation in the election process, independent third-party expenditures serve to give those with wealth a disproportionate amount of influence over who exercises public power and how they exercise it compared to those without such wealth. Based on this unequal power distribution, it is argued that third-party expenditures can have a systematically distorting effect, thereby undermining the integrity of the electoral process as a whole.[52] This potential distortion may occur in a variety of inter-linked ways. One concern is that expenditures by those

52. *See supra* notes 42-44 and accompanying text; *see also* Dworkin, *supra* note 6, at 23; Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1204 (1994); Ortiz, *supra* note 41, at 900-01 ("These seemingly disparate justifications [for regulation], however, ultimately rest on one central fear: that economic inequalities might encroach on the political sphere.").

with wealth may "drown out" the voices of those unable to match their spending levels, tilting the electoral field to the advantage of the wealthy.[53] This "drown out" effect may occur through the buying up of the effective means of communication, as an election approaches. It may also operate more subtly by allowing those with wealth the opportunity to convey their ideas to the public with far greater frequency than those without wealth.[54] Arguments that such spending increases the amount of information available to voters may be countered with the argument that campaign advertising above a certain threshold obeys the law of diminishing returns. Such campaign advertising no longer serves to provide new information or to inform voters who have not previously heard the message, but acts simply to reinforce previously spoken messages. As one commentator notes, "There is only a finite number of . . . commercials one can absorb before running out of depth and breadth and diversity of expression. Far from being instructive, limitless money for endless ads has the documentable propensity of drowning discourse rather than promoting it."[55]

The ability of those with wealth to dominate political discourse in this manner not only breaches the ideal of basic equality between citizens

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53. J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1018-20 (1976); SUNSTEIN, *supra* note 39, at 99; David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 158. These potential problems caused by the effects of money in the political system are expanded on by Peter Levine: "As well as preventing dissident politicians from winning office, affecting who participates behind the scenes, and keeping certain issues out of the public debate, campaign contributions also distort the flow of information to political insiders." Peter Levine, *Expert Analysis v. Public Opinion: The Case of Campaign Finance Reform*, 17 INST. PHIL. & PUB. POL'Y 1, 5 (1997).

54. Technically this does not involve "drowning out" opposing ideas, in the same way as a complete monopolization of the means of communication would, as other viewpoints can still get some access to the public domain. But the idea here is that large amounts of spending may so stack the deck against any opposing point of view that for all intents and purposes those ideas may as well not have been suggested in the first place. The argument proceeds something as follows: In the modern world there are a multitude of information sources and points of view, with only a limited amount of time available for each person to receive and digest the arguments on both sides of a particular subject. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 201-02 (1982). As such, if one side of the argument can put its case before the public with greater frequency than any of the others, it gains a greater chance of being noticed and absorbed by a larger amount of people, thereby influencing how their opinions on the matter are formed. *See* THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL ch. 5 (1989); Ortiz, *supra* note 41, at 903. Public opinion formation may thus be something of a zero-sum game, whereby any time spent hearing and considering one side of the argument comes at the cost of potential time spent hearing and considering the other sides to it. So where one side has the capacity to speak much more than any others, this may dissuade opponents from even trying to put forward their points of view as they may realize they have no effective chance of influencing the public debate. As the field has become so tilted in favor of some points of view, opposing views are effectively silenced.

55. *See* Roland S. Homet, Jr., *Fact Finding in First Amendment Litigation: The Case of Campaign Finance Reform*, 21 OKLA. CITY U. L. REV. 97, 100 (1996).

in the electoral process—it may also have a negative effect on public participation in the process. As electoral contests become more money-driven, it is argued that ordinary voters will feel less able to meaningfully take part in the process, leading them to become disenchanted, disengaged, and apathetic about the political life of their community.[56]

Aside from the general concern about the ability of independent third parties to use their wealth to dominate the electoral process, there are additional concerns raised by the specific effects these expenditures may have on the electoral discourse. Because the third party making an expenditure may have a very narrow goal it wishes to accomplish, its spending will often concentrate on a single issue. Concentration on a single issue may be at the cost of other issues on which the candidates for office may wish to focus. Potentially, this may turn the election campaign into a referendum on a small range of issues that have been selected and promoted by organizations with little or no connection to the place of the election.[57] Consequently, rather than expanding the range of issues raised or voices involved in the election campaign, third-party expenditures may actually lead to a narrowing of the electoral discourse.[58] In addition, third-party expenditures (at least in the United States) have tended to be more negative in tone than those run by candidates or political parties.[59] This tendency towards increasingly negative campaigning has been criticized for undermining the civility of political discourse, detracting from the type of serious debate of issues

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56. See the various polls and studies cited in the Public Campaign booklet, PACS, PARTIES AND POTATO CHIPS: MYTHS AND MISCONCEPTIONS ABOUT REFORMING THE CAMPAIGN FINANCE SYSTEM 5-6 (1998); *see also* Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 3 nn.3-4 (1996). A 1999 opinion survey by The Pew Research Center for the People and The Press found that seventy-four percent of voters felt that large political donors had "too much" influence over which candidates become presidential nominees while sixty-two percent felt the average voter had "too little" influence; Pew Research Center, *Too Much Money, Too Much Media Say Voters*, *at* http://www.people-press.org/sept99que.htm (last visited Sept. 22 1999). Of course, it would be wrong to claim that perceived problems with the way election campaigns are financed are the only reason that public distrust of government has increased. *See generally* WHY PEOPLE DON'T TRUST GOVERNMENT (Joseph S. Nye et al. eds., 1997).

57. *See* Alan Greenblatt, *Issue Ads Often More Burden Than Blessing for Candidates*, C.Q. WKLY., Feb. 14, 1998, at 354-55.

58. *See* Rosenburg & Williams, *supra* note 46, at 461-64.

59. *See* Deborah Beck et al., *Issue Advocacy Advertising During the 1996 Campaign: A Catalog*, ANNENBERG PUB. POL'Y CTR., Rep. No. 16, at 10, *available at* http://appcpenn.org/APPC/rep16.pdf (last visited Mar. 9, 2000) ("Compared to other discursive forms, including presidential candidate ads, debates, free time speeches, and news coverage of the campaign . . . issue advertisements aired in 1996 were the highest in pure attack."). This may be because voter studies have shown negative ads run by independent organizations are both more effective and less likely to "boomerang" on those running the ads than are ads run by candidates or parties. *See* KAREN S. JOHNSON-CARTEE & GARY A. COPELAND, NEGATIVE POLITICAL ADVERTISING: COMING OF AGE 13-14 (1991).

required for proper decision-making, and dissuading qualified candidates from running for political office.[60] If third-party spending is a leading cause of this increasingly negative tenor of campaign discourse, a conditional model of elections may view this as a compelling reason to restrict or regulate third-party spenders.[61]

As is clear from the discussion above, a tension may exist between the positive aspects of allowing independent third-party expenditures and the potentially distorting effects this type of spending may cause in the democratic system as a whole. However, it is important to note that we are not faced with a debate over whether third parties should be able to participate in the election process at all. No one seriously argues that only candidates or political parties should be involved in discussing all the various matters germane to a particular election campaign. Equally, no one argues that third parties should be free to use their money in any way they choose in an election campaign, even to buy votes or bribe candidates. It is also an oversimplification to equate all arguments for deregulating third-party expenditures with an aggregative vision and all arguments for regulation with the conditional approach. As will be seen, there are reasons that can be advanced even under an aggregative view of elections to limit certain types of third-party spending. On the other hand, a conditional view may, in certain circumstances, argue for the lifting of restraints on third-party spending. Particular to each vision is the type and degree of regulation, and the reasons for regulation that each supports. We can therefore see in this area a dispute over the *extent* to which third parties should be able to engage in independent expenditures, as well as the *manner* and towards what *ends*. Even where a country's policy makers commit to a normative vision of elections, there may be ongoing arguments as to which legal rules are required to meet the aspirations the vision represents, alongside any continuing disputes as to whether the vision is the correct one to be adopted in the first place. The upshot of this debate is that each country's law regarding this area is fluid, open to dispute, and often outright contradictory.

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60. JOHNSON-CARTEE & COPELAND, *supra* note 59, ch. 8; VICTOR KAMBER, POISON POLITICS: ARE NEGATIVE CAMPAIGNS DESTROYING DEMOCRACY? (1997); STEPHEN ANSOLABEHERE, GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE (1996). On why negative advertising may be particularly effective in a political campaign setting, see KERWIN C. SWINT, POLITICAL CONSULTANTS AND NEGATIVE CAMPAIGNING: THE SECRETS OF THE PROS (1998); MARTIN ROSENBAUM, FROM SOAPBOX TO SOUNDBITE: PARTY POLITICAL CAMPAIGNING IN BRITAIN SINCE 1945, at 38 (1997). *See generally* POLITICAL ADVERTISING IN WESTERN DEMOCRACIES: PARTIES AND CANDIDATES ON TELEVISION (Lynda Lee Kaid & Christina Holtz-Bacha eds., 1995).

61. *See* Rosenburg & Williams, *supra* note 46, at 464-75; Benjamin R. Barber, *The Discourse of Civility*, *in* CITIZEN COMPETENCE 39-47 (Stephen L. Elkin & Karol Edward Soltan eds., 1999).

IV. INDEPENDENT THIRD-PARTY EXPENDITURES IN THE UNITED STATES

Independent third-party expenditures have become one of the great current bugbears of election campaign finance regulation in the United States.[62] Those who decry the influence of wealth on the American electoral process argue that the ability of wealthy individuals and groups to make such expenditures should be (to some degree) curtailed.[63] Such arguments usually reflect a conditional vision of the election process, drawing on concerns about equalizing the ability of citizens to participate in the process by reducing the influence of "wealthy special interests with a direct stake in government decisions."[64] However, these arguments stand in opposition to a body of judicial decisions that extend the First Amendment's protective umbrella over many forms of spending intended to influence the electoral process. U.S. courts have espoused a particular conception of electoral speech and its relationship to representative democracy, one that draws on an aggregative vision toward the electoral moment. A consequence of adopting this approach has been that the courts have sharply curtailed the ability of government to regulate the activities of participants in the competition for public power.

This Part begins by examining the basic constitutional framework for this area of law as laid down in the Supreme Court's keystone decision of *Buckley v. Valeo*.[65] It then considers how this framework has been applied in subsequent decisions to the specific case of third-party spending on electoral matters. Throughout this Part, arguments will reoccur over whether a legitimate election process requires robust competition between social actors left free to influence the political system to whatever degree they choose, or whether some greater measure of regulation is required to prevent the voting system from somehow being "corrupted" by private wealth. The tension between these concerns reflects a continuing dispute as to what elections are about and as to the normative vision of the process that should be

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62. *See generally supra* note 48; Robert K. Goidel, Donald A. Gross, & Todd G. Shields, *Money Matters: Consequences of Campaign Finance Reform*, *in* U.S. HOUSE ELECTIONS 149-52 (1999). For the range and amounts of third-party involvement in making independent expenditures in recent U.S. election campaigns, see Lorie Slass, *Spending on Issue Acts*, *in* ISSUE ADVERTISING IN THE 1999-2000 ELECTION CYCLE, ANNENBURG PUB. POL'Y CTR. 3-11 (2001), *available at* http://accpenn.org/issueads/1999-2000issueadvocacy.pdf (last visited Mar. 14, 2001); Jeffrey D. Stanger & Douglas G. Rivlin, *Issue Advocacy Advertising During the 1997-1998 Election Cycle*, ANNENBERG PUB. POL'Y. CTR., at 4 (1998), *available at* http://appcpenn.org/issueads/analysis .htm (last visited May 25, 1999); Beck et al., *supra* note 59.

63. *See, e.g.*, MONEY AND POLITICS: FINANCING OUR ELECTIONS DEMOCRATICALLY (David Donnelly et al. eds., 1999).

64. *Id.* at 5.

65. 424 U.S. 1 (1974).

adopted as a basis for the rules regulating third-party expenditures. Current doctrine demonstrates a commitment to an aggregative way of viewing the electoral process, in which the government has only a limited role in regulating third-party electoral speech to prevent the appearance, or reality, of *quid pro quo* corruption. In opposition to this dominant judicial approach, those motivated by a more conditional vision seek to widen the meaning the courts have given to "corruption" in order to allow government a greater role in protecting the "integrity" of the electoral process. These arguments come to a head most strongly in the case of the "American Exception" of corporation and union spending, which is considered at the conclusion of this part.

A. The Buckley *Framework: Equality vs. Corruption*

There have been a series of efforts made throughout this century to deal with the issue of money and politics in the United States.[66] However, it was not until the enactment of the Federal Elections Campaign Act (FECA), first passed in 1971 and subsequently almost completely overhauled in 1974,[67] that anything like a comprehensive system of controls on the use of money in the electoral process was put in place. The FECA measures were revolutionary in aspiration, in particular its 1974 amendments. Collectively, they introduced a system of regulation containing a strengthened requirement of public disclosure of contributions to candidates and political parties; limitations on contributions to and expenditures by candidates for federal office and the political parties they represent; restrictions to independent spending on election related issues; and the creation a public financing option for presidential campaigns along with a new enforcement agency, the Federal Election Commission (FEC), to oversee these new rules. It is widely agreed that the most important factor behind the creation of the FECA rules was the Watergate scandal and the resulting desire on the part of both the public and their elected representatives to "clean up" the

66. *See generally* GEORGE THAYER, WHO SHAKES THE MONEY TREE? AMERICAN CAMPAIGN PRACTICES FROM 1789 TO THE PRESENT (1974); ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW (1988); HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM (4th ed. 1992); Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, *in* CAMPAIGN FINANCE REFORM: A SOURCEBOOK (Anthony Corrado et al. eds., 1997); Goidel, Gross, & Shields, *supra* note 62, at 15-35.

67. 2 U.S.C. § 431 (1974); *see* Frank J. Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1348 (1994).

political system by reducing the power of the wealthy to affect the electoral process.[68]

Exactly what impact the FECA regime, as intended by the Congress, would have had on the U.S. political process is a matter for speculation, since before the effects of the 1974 legislation were ever tested, the Supreme Court acted to declare many of these measures unconstitutional.[69] If Watergate awakened the public and Congress to the need for change, the Court's per curium decision in *Buckley v. Valeo*[70] set up limits on reform against which all future alterations of the system would be measured.[71] Behind the Court's imposition of these restraints lies the adoption of an aggregative vision towards elections.[72] The *Buckley* Court accepted the notion that spending money on political expression was so closely related to and necessary for "speech" that it

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68. ALEXANDER, *supra* note 66, at 32-38; FRANK J. SORAUF, MONEY IN AMERICAN ELECTIONS 36 (1987); Corrado, *supra* note 66, at 32. For the role of political scandal in creating the momentum for change in a country's system of campaign finance regulation, see Robert E. Mutch, *The Evolution of Campaign Finance Regulation in the United States and Canada*, *in* COMPARATIVE ISSUES IN PARTY AND ELECTION FINANCE (F. Leslie Seidle ed., 1991).

69. The process by which this review was undertaken has been scathingly described as follows:

> Here is a recipe for judicial disaster: Take a very complicated, highly nuanced area in which Congress has scarcely ever legislated. Be sure it is a field involving critically important issues—like the very health of our democracy. Impose upon it a complex tangle of regulations infused with ambiguity. Authorize an expedited review. Dump the whole mess on the courts just as a critical deadline for resolution of its validity approaches. Make sure there is no time to develop a factual record. Make sure there is no time to assess the facts through the time-tested adversarial devices of discovery, deposition, expert testimony, cross-examination, and full briefing. . . . And whatever you do, don't leave time for the courts to think hard about how their resolution of the law will dominate the field for the next generation.

E. JOSHUA ROSENKRANZ, BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM 25-26 (1998).

70. *Buckley*, 424 U.S. at 1.

71. One prominent commentator noted: "The per curium opinion [in *Buckley*] resulted in the distortion of Congress' intent and has imposed a campaign finance system on the nation that no Congress would have ever enacted." Burt Neuborne, *One Dollar, One Vote?: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L.J. 1, 39 (1997). However, a majority of the Supreme Court has very recently reaffirmed the basic structure of its *Buckley* decision in *Nixon v. Shrink Missouri PAC*, 120 S. Ct. 897 (2000).

72. BeVier, *Issue Advocacy*, *supra* note 14, at 1774:

> [*Buckley*] embod[ies] a systematic concern to implement a negative conception of political freedom, a conception that derives its instrumental justification in part from straightforward mistrust of the motives of elected officials . . . and in part from skepticism about the competence of even the best-motivated politicians to design and craft legal rules that would bring into being an electoral process in which the collective will with respect to who wins office would, without a multiplicity of unintended, perverse consequences, be reliably generated by rational deliberation among political equals in disinterested pursuit of the public interest.

secured protection under the First Amendment.[73] Any limitation on campaign spending was thus to be viewed as an infringement of expressive rights which could only be constitutionally justified by showing a governmental interest sufficient to override the First Amendment rights of the spender/speaker. Furthermore, as "[t]he Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities,"[74] the Court demanded that this interest be of an especially compelling nature.

Of course, the recognition of political spending as a form of "speech" that deserves some sort of protection is open to a variety of interpretations. Both the aggregative and conditional approaches to elections can accommodate the fact that virtually any means of communicating one's message to the public in today's world will require some expenditure of money. As a result, both approaches support some form of rights protection for political spending.[75] It is in the Supreme Court's treatment of the potential justifications for restricting such spending/speech rights that its underlying commitment to an aggregative vision is made clear. The *Buckley* Court considered three possible governmental interests that could serve as a reason for limiting the spending of participants in the electoral process: preventing corruption, equalizing influence, and reducing "wasteful" campaign spending. A conditional view of the electoral moment could support a finding that all three of these interests have at least the *potential* to provide convincing reasons to justify some measure of governmental regulation. But the *Buckley* Court completely rejected the latter two governmental claims as justifying limits on the use of money in the electoral process. Under the First Amendment, the Court held Congress could not create an equal process of electoral competition by limiting the voices of some participants in order to promote the voices of others.[76] Equally quick work was made of the waste reduction argument as the Court insisted that "the people" rather than the government should be allowed to "retain

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73. *Buckley*, 424 U.S. at 19. For a critique of the court's application of free speech doctrine to political spending, see Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAN. L. REV. 1234 (2000).

74. *See Buckley*, 424 U.S. at 14. "[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the campaigns for political office." *Id.* at 15 (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)); *see also* Buckley v. Am. Constitutional Law Found., Inc., 119 S. Ct. 636, 639-40 (1999).

75. *See* David Schultz, *Revisiting* Buckley v. Valeo*: Eviscerating the Line Between Candidate Contributions and Independent Expenditures*, 14 J. LAW & POL. 33, 76-80 (1998); Alan B. Morrison, *Watch What You Wish For: The Perils of Reversing* Buckley v. Valeo, 36 AM. PROSPECT 38-44 (1998).

76. *Buckley*, 424 U.S. at 49.

control over the quantity and range of debate on public issues in a political campaign."[77]

Of the three proposed rationales, only the prevention of "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office" was considered by the Court to be a "compelling state interest" strong enough to justify some expressive burdens.[78] As shall be seen, exactly which sort of interests are encompassed by this rationale still remains a matter of great debate.[79] The *Buckley* Court clearly had in mind some danger aside from outright *quid pro quo* bribery, already illegal under criminal law. Indeed, it expressly accepted this by recognizing that, "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."[80] But rather than allowing Congress wide latitude in regulating the use of money in order to combat the alleged appearance of corruption[81]—through accepting that large-scale spending in itself could contribute to a public perception of a process that had become corrupt—the *Buckley* opinion gave the rationale a relatively narrow treatment. It

77. *Id.* at 57.

78. *Id.* at 25-27; *see also* FEC v. NCPAC, 470 U.S. 480, 496-97 (1990) ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."); Nixon v. Shrink Mo. PAC, 120 S. Ct. 897, 904-06 (2000).

79. Burt Neuborne identifies four possible meanings the Court could be expressing by this extended definition of "corruption." *See* Neuborne, *supra* note 71, at 8. *Compare* Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127 (1997), *and* David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 REV. LITIG. 85 (1999), *with* Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1082 (1985), *and* Paul S. Edwards, *Defining Political Corruption: The Supreme Court's Role*, 10 BYU J. PUB. L. 1, 3 (1996). Justice Thomas, in his dissent in *Nixon v. Shrink Missouri PAC*, castigates the majority of the court for "separat[ing] 'corruption' from its quid pro quo roots and giv[ing] it a new, far-reaching (and speech-suppressing) definition." 120 S. Ct. at 934.

80. *Buckley*, 424 U.S. at 27-28.

81. As Justice White consistently argued, favoring a lower level of judicial scrutiny for congressional decisions to regulate campaign spending. *Compare id.* at 257 (White, J., concurring in part and dissenting in part), First Nat'l Bank v. Bellotti, 435 U.S. 765, 802 (1978) (White, J., dissenting), Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 303 (1981) (White, J., dissenting), *and NCPAC*, 470 U.S. at 502 (White, J., dissenting), *with* the majority per curium opinion rejecting such an approach in *Buckley*, 424 U.S. at 15-17. *But see Nixon*, 120 S. Ct. at 913 (Breyer, J., concurring) ("I agree that the legislature understands the problem—the threat to electoral integrity, the need for democratization—better than do we. We should defer to its political judgment that unlimited spending threatens the integrity of the electoral process.").

held that the making of expenditures by candidates,[82] as well as by independent third parties,[83] did not in itself present any real danger of corruption. As a consequence, it struck down all the FECA limits on campaign spending (as opposed to campaign contributions) as imposing an unconstitutional burden on free expression.[84]

The narrow reading given to the corruption rationale in *Buckley* appears to come from two sources. First, there was no factual record in 1976 to provide evidence that large-scale spending (as opposed to contributions) was causing an "appearance of corruption" in the electoral system.[85] Second, beyond this lack of empirical evidence lies the Court's background reliance on a vision of elections, which sees aggregation of participants' preferences as the primary purpose of the voting process. This reliance manifests itself in the Court's concern that interference with spending by participants in the political process will undercut the representative nature of the election process.[86] Placing limits on contributions does not implicate the system's representative nature as greatly because:

> The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.[87]

By contrast, placing limitations on expenditures goes to the heart of what the Court sees as the point of the electoral moment—the use of one's own resources (however unequally distributed) to express one's own

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82. *Buckley*, 424 U.S. at 56-57.

83. *Id.* at 46 ("[Independent expenditures] do . . . not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."); *see also NCPAC*, 470 U.S. at 497-98.

84. The anticorruption interest was held to justify the public disclosure of and limitations on contributions to candidates, political parties, and Political Action Committees for use in a federal election campaign but not the limitation of any expenditures by participants. *See Buckley*, 424 U.S. at 143; *see also* Cal. Med. Ass'n v. FEC, 453 U.S. 182, 197 (1981); *Nixon*, 120 S. Ct. at 897; N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8 (1st Cir. 1996). The only expenditure limits upheld were where a candidate has voluntarily adopted them in exchange for receiving public funding. *See Buckley*, 424 U.S. at 1.

85. Schultz, *supra* note 79, at 99-100.

86. *Buckley*, 424 U.S. at 14-15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.").

87. *Id.* at 21-22, 28-29 ("Significantly, the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.").

interests and preferences in an effort to win over others.[88] Interference with this process is an abridgment of the participant's basic liberty rights. In the Court's own colorful words, "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."[89] Not only are the liberties of those wishing to spend implicated, but voters, too, are perceived as being primarily concerned with receiving and assessing information from a variety of sources before casting their vote.[90] By equating the expenditure of money with the contribution of discourse to a free marketplace of ideas[91] which was perceived as being necessary for the overall legitimacy of the election process, the Court found that the mere spending of money on speech could not result in "corruption," occurring, no matter how unequal the consequences of that spending/speaking may be.[92]

The core of the *Buckley* decision therefore lies in its distinction between the legitimate governmental interest of preventing corruption and the illegitimate interest of promoting equality in the political process by placing limits on the scope of participation. The distinction has remained the courts' primary way of examining the constitutionality of regulatory actions in this area.[93] Consequently, arguments for regulatory measures to reduce the role money plays in the political process of the United States have tended to center around claims that the current

88. *Id.* at 49 ("The First Amendment's protection against government abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."); *id.* at 52 ("The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates.").

89. *Id.* at 19 n.18.

90. *Id.* at 52-53 ("Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate them on election day.").

91. As one recent commentator has pointed out (citing *Buckley* as an example), this move indicates "[t]he Justices are beginning to detach the First Amendment from democracy and to graft it onto property, moving from free speech to free markets. . . . On this view . . . free speech is not, well, free." *See* Amar, *supra* note 40, at 813 (1999); *see also* SMOLLA, *supra* note 25, at 238-39.

92. *See Buckley*, 424 U.S. at 49, 56-57.

93. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978) (striking down limits on corporate expenditures on referendum issues as "[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue"); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 299-300 (1981) (striking down limits on individual contributions on ballot issues because there was no candidate or public official involved and hence no danger of corruption); Colo. Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996) (striking down limits on "independent" spending by political parties on the grounds that it poses no threat of corrupting any particular candidate for election); Nixon v. Shrink Mo. PAC, 120 S. Ct. 897 (2000) (upholding contribution limits on the grounds that they diminish the risk of corruption).

practices of electoral fundraising and spending are having a "corrupting" effect.[94] The argument for widening the meaning of corruption is as follows: corruption is seen as undesirable because it turns what is a public good—elected representatives deciding issues on the basis of what is best for their constituency, the public, or the nation—into a private enterprise.[95] Making decisions based on contributions, rather than acting "on behalf of policies and persons that [you] have defended or are prepared to defend in a public forum,"[96] is therefore a form of theft from the public by the representative and the contributor. There is no difference whether this contribution takes the form of a direct bribe or reliance on the wealth of a few constituents to be reelected. The concern about corruption necessarily means the Court should be concerned about *any* undue influence stemming from a representative's dependence on private sources of wealth.[97]

Such an approach to the issue of what counts as corruption stems from a conditional vision of elections: using the threat of a legislator's unequal responsiveness to different citizens once in office to justify wide restrictions on the use of money in election campaigns.[98] Reform advocates call for a widening of the concept of corruption to allow considerations such as guaranteeing equality in the influence over policy

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94. Typical of this approach are the claims of the Committee for Economic Development, a group of business executives who have endorsed a ban on "soft money" contributions to political parties: "The suspicion of corruption deepens public cynicism and diminishes public confidence in Government. More important, these activities raise the likelihood of actual corruption." Don Van Natta, Jr., *Defying Senator, Executives Press Donation Rules Change*, N.Y. TIMES, Aug. 1, 1999, at A1; *see also* Issacharoff & Karlan, *supra* note 13, at 1719 ("But it may well be that even in the absence of the Buckley imperative, arguments for campaign finance reform would use images of corruption because of their rhetorical power.") (citation omitted).

95. FEC v. NCPAC, 470 U.S. 480, 497 (1985) ("Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."); *see also* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1712-13 (1993); Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455, 1466-67 (1994); Burke, *supra* note 79, at 140-41.

96. DENNIS F. THOMPSON, ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION 114 (1995).

97. Or, as Burt Neuborne puts the question, "If even a legitimate flow of contributions has the potential to affect the behavior of the recipient, is such a process corrupt?" Neuborne, *supra* note 71, at 7. This has been answered in the affirmative by a number of commentators. *See* Fred Wertheimer & Susan W. Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126 (1994); Marty Jezer & Ellen Miller, *Money Politics: Campaign Finance and the Subversion of American Democracy*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467 (1994); Daniel H. Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 335 (1989); AMITAI ETZIONI, CAPITAL CORRUPTION: THE NEW ATTACK ON AMERICAN DEMOCRACY (1984); JOHN T. NOONAN, BRIBES 621-51 (1984).

98. *See* Sullivan, *Political Money*, *supra* note 14, at 680-81; ROSENKRANZ, *supra* note 69, at 72.

making, thus allowing greater participation by citizens in the electoral process.[99] One form of this argument is that the amount of spending in election campaigns is leading to a "distortion" of the political process in the United States.[100] Another line of argument, that seems identical in all but name, is that unchecked expenditures are contributing to the kind of "appearance of corruption" in the political process that the Court in *Buckley* identified as forming a legitimate governmental rationale for regulation.[101] This appearance of corruption is claimed to cause a host of other ills in the political system because of the public's disenchantment with the effect of large scale spending on their electoral processes.[102] While these arguments have so far failed to move the courts in all but a very few isolated cases—most significantly in the case of the ban on corporate and union spending—they do show a continuing controversy over the nature and meaning of corruption in the U.S. electoral process.[103]

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99. *See* Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 325-30 (1993); JAMIN RASKIN & JOHN BONIFAZ, THE WEALTH PRIMARY: CAMPAIGN FUNDRAISING AND THE CONSTITUTION (1994); Burke, *supra* note 79, at 131; Schultz, *supra* note 75, at 101-03. Another line of argument is that completely equalizing the ability of the public to make contributions to their representatives would entirely remove the problem of "corruption." *See* Hasen, *supra* note 56, at 16-17; David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1371-80 (1994); Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, 13 AM. PROSPECT (1993). *But see* Daniel Hays Lowenstein, *Campaign Contributions and Corruption: Comments on Strauss and Cain*, 1995 U. CHI. LEGAL F. 163, 165-74 (1995); BeVier, *Campaign Finance Reform*, *supra* note 14, at 1269-76.

100. In *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 660 (1990), the Supreme Court adopted this line of reasoning when it identified election spending by corporations as producing "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *See infra* Part IV.C.

101. ROSENKRANZ, *supra* note 69; Schultz, *supra* note 79, at 116.

102. For instance, the defendants in *Kruse v. City of Cincinnati*, 142 F.3d 907, 911 (6th Cir. 1998), sought (unsuccessfully) to defend spending limits imposed on candidates in city council elections on the basis of survey evidence showing

> an overwhelming majority of residents believe that large contributors wield undue influence on the political system as a whole; that ordinary voters are unable to participate on equal footing in the process; that wealthy candidates unfairly drown out candidates with fewer resources; that the high costs of elections discourage qualified individuals from running for office, which deprives voters of a full choice of candidates; and that overall, money is undermining the fairness and integrity of the political system and causing them to lose faith in the democratic process.

See also John C. Bonifaz et al., *Challenging* Buckley v. Valeo*: A Legal Strategy*, 33 AKRON L. REV. 39 (1999).

103. For a discussion of the courts' approach to corporate and union spending, see *infra* Part IV.C. The Supreme Court's most recent pronouncement on the constitutionality of regulating campaign finance demonstrates that these issues are far from settled. *See* Nixon v. Shrink Mo. PAC, 120 S. Ct. at 910-12 (Stevens, J., concurring); *id.* at 916 (Kennedy, J.,

The remainder of this Part is concerned with exploring how the *Buckley* framework has been applied to third-party expenditures. It is contended that, by interpreting and applying the *Buckley* rules, the U.S. system of regulating third-party expenditures has been shaped primarily by a background commitment to an aggregative vision of elections. The majority of judicial decisions regarding whether particular regulatory measures are constitutionally permissible can best be understood through the notion of a pluralistic, divided electorate in which elections principally exist as a means of totaling the various self-interested preferences expressed by voters. Consequently, the courts have taken an extremely cautious approach towards regulations that impede the spending of money by independent third parties, apparently raising an insurmountable bar to many forms of campaign finance regulation.[104]

Or perhaps not. For paralleling this dominant doctrine is a set of claims that the electoral system has become corrupted by the increasingly large amounts raised and spent by participants.[105] Reflecting the influence of a more conditional model, these claims call for greater regulation of third-party spending in order to safeguard the equality of participants and protect the ability of ordinary voters to play some significant part in the election process. Without such regulation, the conditions under which the electoral moment occurs are distorted, the value or validity of the democratic process becomes compromised, and the basis for each individual's rational respect for the outcomes it produces is undercut. In some (admittedly few) cases, the courts have apparently agreed with these claims. The result of the tension between these two visions is the creation of a body of law that is both confusing to understand and deeply conflicted.

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dissenting) ("For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising."); *id.* at 918 (Thomas, J., dissenting) ("What remains of *Buckley* fails to provide an adequate justification for limiting individual contributions to political candidates.").

104. Daniel R. Ortiz, *The First Amendment at Work: Constitutional Restrictions on Campaign Finance Regulation*, *in* CAMPAIGN FINANCE REFORM: A SOURCEBOOK, *supra* note 66, at 64.

105. *See, e.g.*, the response of Common Cause acting president Donald J. Simon to the news that Republican President-elect George W. Bush was refusing to match public funds (and the spending limits that accompany them) for the primaries for the 2000 Presidential race. "Governor Bush's decision signals that the 2000 presidential election may be the most expensive ever. The fund-raising—and potential corruption—will be out of control." Michael Kranish, *Bush Spending Move Jolts GOP Candidates*, BOSTON GLOBE, July 17, 1999, at A3.

B. Buckley*'s Doctrine Applied: Independent Third-Party Expenditures*

In the United States, there are two main forms of expenditures that are nominally independent of any particular candidate and are funded in ways that circumvent the remaining FECA restrictions on contributions to candidates and parties. The first is the use of "soft money": donations raised outside of the FECA regulations by political parties and used to fund "issue ads" that, while technically not advocating the election or defeat of a particular person, are clearly intended to promote the party's candidates.[106] In addition to this type of spending there are expenditures made by third parties who are ostensibly not connected to any candidate or political party.[107] Along with individuals and lobbying or "interest" groups, this set of political actors includes corporations and unions who are otherwise banned from directly participating in the election process. Although third-party electoral activity is the direct subject of this part, it is worth noting that many of the same problems that arise in discussing the regulation of independent third-party expenditures are also present in the case of political party "issue ads."[108]

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106. For a summary of the issues surrounding "soft money," *see* Note, *Soft Money: The Current Rules and the Case for Reform*, 111 HARV. L. REV. 1323 (1998); Anthony Corrado, *Party Soft Money*, *in* CAMPAIGN FINANCE REFORM, *supra* note 66, at 165.

107. *See generally supra* notes 48, 59, 62; *see also* Jim Drinkard, *'Issue-advocacy' Groups: The New Electoral Power*, USA TODAY, Mar. 9, 1998, at 13A; Norman Ornstein, *More Than Ever, Cash, Ads Win Elections*, USA TODAY, Oct. 29, 1998, at 15A. The Annenburg Public Policy Center also maintains an online tracking study of issue advocacy advertising at http://appcpenn.org/issueads (last visited Mar. 15, 2001). Their estimate of the total amount spent in the 1999-2000 election cycle is $509 million.

108. The FEC has traditionally treated spending by a candidate's political party as being more open to regulation than that of independent third parties on the assumption there will be some form of "coordination" involved. *But see* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996). Thus any advertisement paid for by a political party that contains an "electioneering message" had been considered to be subject to the FECA expenditure limits for political parties on behalf of a candidate. *See* Advisory Opinion 1984-15 (May 31, 1984), *in* FEDERAL ELECTION CAMPAIGN FINANCE GUIDE § 5766 (CCH eds., 1976-1990); Advisory Opinion 1984-14 (May 24, 1985), *in* FEDERAL ELECTION CAMPAIGN FINANCE GUIDE § 5819 (CCH Bus. L. eds., 1976-1990) (citing United States v. United Auto Workers, 352 U.S. 567, 587 (1957)). Using this approach the FEC Audit Division in December of 1998 recommended that both the Dole and Clinton campaigns of 1996 repay portions of the federal public-funding money they received on the basis that advertisements run by the national committees of their respective parties contained "electioneering messages" supporting their candidate. As such, the Audit Division found that the party spending on these ads constituted either an illegal "in kind contribution" to the candidate or a coordinated party expenditure made in breach of the FECA limits. However, by a unanimous vote the FEC commissioners refused to accept this recommendation, arguing instead that the political parties should be subject to the same standards as other participants in the political process. For an account of the FEC's decision, see Eliza Newlin Carney, *No Cop on the Beat*, 31 NAT. J. 176 (1999); Jill Abramson, *Election Panel Refuses to Order Repayments by Clinton and Dole*, N.Y. TIMES, Dec. 11, 1998, at A1; *see also* Statement of Reasons of Vice Chairman Wold and Commissioners Elliot, Mason and Sandstrom, June 24, 1999 (copy on file with author). This

In dealing with independent third-party expenditures, the courts have found themselves subject to conflicting interests. On the one hand, this type of expenditure would appear to be the *sine qua non* of political expression, which is "at the core of our electoral process and of First Amendment freedoms."[109] However, they also have the potential to render futile all other FECA regulatory measures by providing a loophole for those who wish to influence an election to spend without restriction, thereby creating a means by which corruption may occur, or appear to occur, in the electoral system. The law, as it currently stands, reflects the ways in which the courts have tried to reach some sort of compromise between these two concerns. Striking this balance has involved the courts in an ongoing struggle to fit electoral speech into a complicated and unstable framework built around two sets of polar concepts: "express advocacy" and "issue advocacy," along with "coordinated" and "independent" expenditures. The next two subparts investigate how the courts have created this Gordian knot through their interpretation of the FECA legislation and their adoption of a First Amendment approach to electoral speech that disfavors all but the most minimal governmental intrusion. How this framework has been applied to regulate and limit third-party expenditures is then considered. Finally, this Part asks whether the courts have been fully coherent in their attempts to satisfy both their concerns that third parties should be allowed full and free access to the election process and that the government should be allowed to undertake measures aimed at preventing corruption of the process—especially when the courts have been prepared to tolerate an exception when it comes to corporate and union participation in the election process.

1. Express Advocacy vs. Issue Advocacy

The first pair of abstractions constructed by the courts is the jumbled and often murky distinction between "express advocacy" and "issue advocacy," which has been called "the single knottiest legal issue

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decision basically removes the administrative distinction between political parties and third parties when it comes to limits on independently made expenditures on issue advocacy, although political parties still remain subject to limits on the sources of the money they may use to pay for this type of spending. *See* 11 C.F.R. § 106.5: A.O. 1995-25, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 6162 (Aug. 24, 1995); *see also* Republican Nat'l Comm. v. FEC, 172 F.3d 920 (D.C. Cir. 1998) (refusing a summary judgment finding that these restrictions are a breach of the First Amendment).

109. *See* William v. Rhodes, 393 U.S. 23, 32 (1968); *see also* Buckley v. Valeo, 424 U.S. 1, 41 (1976); FEC v. NCPAC, 470 U.S. 480, 493 (1985).

in campaign finance reform."[110] It should be noted at the outset that the difference is of practical importance because expenditures made on express advocacy are subject to more regulation than those made on mere issue advocacy. Behind this division lies the courts' view that, because express advocacy messages are more closely and directly related to the election of a candidate, they consequently pose a higher risk of corrupting that candidate. The second set of concepts seeks to define what counts as an expenditure that has been "coordinated" between a candidate and a third party. Once again, speech may be more heavily regulated if it is paid for through a coordinated expenditure than if the spending is made "independently" because coordinated expenditures create a greater risk of corruption.

The division between express advocacy and issue advocacy appears nowhere in the language of the statutory framework governing campaign finance regulation. Instead, it has arisen as a result of the Supreme Court's desire—stemming from its overall aggregative vision of elections—to define narrowly the 1974 FECA restrictions on independent third-party expenditures. The Court's narrow definition came in response to the challenge that the restrictions on third-party spending were both unconstitutionally vague and unconstitutionally overbroad.[111] A "void for vagueness" challenge asserts that unless people know exactly what sort of speech for which they may be criminally punished, they will be loathe to risk speaking at all, resulting in an unconstitutional "chill" on the exercise of their free speech rights.[112] The overbreadth doctrine holds that a regulation, however

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110. E. Joshua Rosenkranz of the Brennan Center for Justice, *quoted in* Robert Dreyfuss, *Harder Than Soft Money*, 36 AM. PROSPECT 32, 35 (1998).

111. *See* Glenn J. Moramarco, *Regulating Electioneering: Distinguishing Between "Express Advocacy" and "Issue Advocacy"*, Brennan Center for Justice at N.Y.U. Sch. of Law Campaign Fin. Reform Series 5 (1998) [hereinafter Moramarco, *Regulating Electioneering*]; Glenn J. Moramarco, *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering*, 49 CATH. U. L. REV. 107, 113-15 (1999).

112. *Buckley*, 424 U.S at 42. A law is void on its face if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926), *discussed in* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-31, at 1033 (2d ed. 1988). According to Tribe, vagueness results when a legislature states its provisions "in terms so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork." TRIBE, *supra*, at 1033. *Thomas v. Collins*, 323 U.S. 516, 535 (1945), gives a good description of the courts' fears that vague statutes regulating political advertising may impermissibly chill protected speech:

> [N]o speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation . . . [A muddled distinction] puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inferences may be drawn to his intent and meaning. Such a distinction offers no security for free

precisely drawn, may prove to be unconstitutional if its ambit covers too much protected speech.[113] The *Buckley* Court upheld both these challenges to the original FECA restrictions on third-party expenditures on the grounds that, without a narrow reading of the kinds of speech covered by the regulation, speakers would "hedge and trim" their language.[114] According to the aggregative vision driving the *Buckley* decision, these effects threaten to crimp the free and competitive marketplace of speech that a legitimate election process requires. To avoid this result, the Court unilaterally altered the statutory framework to allow it to pass constitutional muster.

Originally, FECA's section 608(e)(1) banned any person from making any expenditure over $1,000 "relative to" a clearly defined candidate. The Court read this "to apply only to expenditures for communications that in *express terms advocate* the election or defeat of a clearly identified candidate for federal office."[115] Then, in a footnote that has since become the focus of much controversy, the Court narrowed this definition even further to cover only "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"[116] A similar approach was taken to the scrutiny of section 434(e), which required every person who makes contributions or expenditures over $100 (since increased to $250) to a party or candidate in connection with a federal election to file a disclosure statement with the Federal Election Commission. The FECA defined "contribution" and "expenditure" as providing money or other valuable assets "for the purpose of . . . influencing . . . [an] election."[117] Here, the Court again gave the phrase a narrow interpretation to avoid vagueness or overbreadth. It held that the phrase covered only "that spending that is unambiguously related to the campaign of a particular federal candidate."[118] Once again this referenced the list of phrases contained in footnote fifty-two.[119] The

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> discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

See also Buckley, 424 U.S. at 43; Faucher v. FEC, 928 F.2d 468, 471-72 (1st Cir.), *cert. denied*, 502 U.S. 820 (1991).

113. *Buckley*, 424 U.S. at 44; *see also* Broadrick v. Oklahoma, 413 U.S. 601 (1973); New York v. Ferber, 458 U.S. 747, 770-71 (1982); Regan v. Time Inc., 468 U.S. 641, 651-52 (1984). But Tribe states that unless a law's "deterrence of protected activities is substantial," it should not be voided on its face for overbreadth. TRIBE, *supra* note 112, at 1024.

114. *Thomas*, 323 U.S. at 516; *Buckley*, 42 U.S. at 43.

115. *Buckley*, 42 U.S. at 44 (emphasis added).

116. *Id.* at 44 n.52.

117. Federal Elections Campaign Act, 2 U.S.C. § 431(e) & (f) (1971) [hereinafter FECA].

118. *Buckley*, 424 U.S. at 80.

119. *See supra* note 116 and accompanying text.

Court's rationale for this move was to provide a bright line test that included only speech creating the greatest risk of corruption (avoiding the overbreadth concerns) and that would allow speakers to know if their expenditures would be covered by the FECA framework.

In the aftermath of *Buckley*, it is widely accepted that any statement made in relation to a candidate for federal office containing one of the "magic words" listed in footnote fifty-two will be deemed to be express advocacy. However, what has been left unresolved is whether this catalogue is exhaustive or merely exemplificatory. As the Court noted,[120] and as experience since *Buckley*'s time has shown, it is extraordinarily easy for a third party to spend money on expressive activity that does not use one of the eight phrases listed, but has as its clear message support for the election or defeat of a candidate. This is the only occasion upon which the Supreme Court has directly considered the issue of third-party expenditures post-*Buckley*, and again recognized the potential fluidity of language and expressive meaning. In *FEC v. Massachusetts Citizens for Life, Inc. (MCFL*),[121] in the course of its decision, the Court had to establish whether publishing a newsletter urging voters "to vote for 'pro life' candidates" and providing the names and photographs of candidates conforming to that description was a form of express advocacy. The Court held it was, on the grounds that although "this message is marginally less direct than 'Vote for Smith' [this] does not change its essential nature. The [newsletter] goes beyond issue discussion to express electoral advocacy."[122] Arguably this decision slightly broadened the magic words test in *Buckley* by allowing language that is "in effect" an explicit directive to be treated as express advocacy.[123]

MCFL hinted at a continuing uncertainty over how widely the *Buckley* test may be extended. In light of this uncertainty, there have been recurring attempts to apply a tighter test in determining if a statement is a form of "express advocacy" so as to catch more election-related speech, and thereby close a potentially "corrupting" loophole. As well, a series of conflicting decisions by different circuits of the courts of appeal have only deepened the overall confusion. Of these inconsistent

120. *Buckley*, 424 U.S. at 46.

121. 479 U.S. 238 (1986).

122. *Id.* at 249.

123. *Id.*; Trevor Potter, *Issue Advocacy and Express Advocacy*, *in* CAMPAIGN FINANCE REFORM, *supra* note 66, at 230. *But see* FEC v. Christian Action Network, 110 F.3d 1049, 1052 (4th Cir. 1997) ("That the Court in *Buckley* and *MCFL* unambiguously limited the Federal Election Commission's regulatory authority over corporate expenditures to those for communications that use explicit words of advocacy has been uniformly recognized by the lower courts.").

pronouncements, it is the Ninth Circuit's ruling in *FEC v. Furgatch*[124] that has extended the *Buckley* test the widest. At issue in the case was a newspaper advertisement attacking President Carter that had been independently placed and paid for by an individual, but had not been disclosed as an election expense to the FEC. The advertisement concluded with this exhortation: "It is an attempt to hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT!"[125] Even though the advertisement avoided the use of all the magic words listed in *Buckley*, the court held it still constituted express advocacy, and was therefore an election expense subject to the FECA's disclosure regime. In reaching this finding, the court argued that the correct test to apply in determining whether an electoral message constituted express advocacy was if "when read as a whole, and with limited reference to external events, [it could] be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate."[126] This test, the court argued, would "prevent speech that is clearly intended to affect the outcome of a federal election from escaping, either fortuitously or by design, the coverage of the Act."[127]

Furgatch differed from the magic words test in significant ways,[128] a divergence explained by the Ninth Circuit's commitment to a more conditional vision of elections than that which was relied upon in *Buckley*. The decision rejected the notion that *Buckley*'s list of phrases constituted an exhaustive criteria of express advocacy, because such a closed test "would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election

124. 807 F.2d 857 (9th Cir. 1987).

125. *Id.* at 864.

126. *Id.* The court then went on to break this standard down into three main components; (1) "speech is 'express' for present purposes if its message is . . . suggestive of only one possible meaning"; (2) "speech may only be termed 'advocacy' if it presents a clear plea for action;" (3) "speech cannot be 'express advocacy of the election or defeat of a clearly identified candidate' when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action." *Id.* at 864.

127. *Id.* at 862.

128. Trevor Potter points out the Ninth Circuit was willing to find express advocacy in implied electoral meanings, it allowed the electoral context and not just the text of the message to be considered, it found express advocacy without an explicit electoral plea, and it distinguished between attacks on candidates involving personal issues (which could be regulated) and "issue oriented speech" (which could not). *See* Potter, *supra* note 123, at 232. What the Supreme Court would have thought of this is a moot point, as it denied a petition to review the decision. *Furgatch*, 807 F.2d at 857.

Campaign Act."[129] In its effort to protect the purposes underlying the FECA's enactment, the court implicitly acknowledged Congress' role in defining and maintaining the conditions under which a valid electoral process may occur:

> The vision of a free and open marketplace of ideas is based on the assumption that the people should be exposed to speech on all sides, so that they may freely evaluate and choose from among competing points of view. . . . The allowance of free expression loses considerable value if expression is only partial. Therefore, disclosure requirements, which may at times inhibit the free speech that is so dearly protected by the First Amendment, are indispensable to the proper and effective exercise of First Amendment rights.[130]

The court thus concluded that requiring the disclosure of the identity of those paying for a wider range of electoral speech—even though this may potentially result in less of this kind of speech occurring—was justified to protect and foster a free speech environment that would allow all participants to more fully take part in the electoral process in an engaged, informed, and equal manner.

Even though *Furgatch* represented the opinion of only one circuit, its test was incorporated by the FEC into new regulations defining the forms of election-related expression interpreted as express advocacy.[131] Almost immediately, these regulations ran into constitutional trouble. In a series of cases, other circuits have rejected the *Furgatch* approach and strongly reaffirmed a narrow interpretation of the strict *Buckley* test.[132]

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129. *Furgatch*, 807 F.2d at 863; *see also* FEC v. NOW, 713 F. Supp. 428, 434-35 (D.D.C. 1989) (adopting *Furgatch* approach); Crumpton v. Keisling, 160 Or. App. 406, 418, 982 P.2d 3, 10 (Or. App. 1999) ("[T]he narrow 'magic words' approach . . . is not very satisfying as to either the realities of what an advertisement or flyer actually communicates or the purpose of the election laws."); Elections Bd. Wis. v. Wis. Mfrs. & Com., 597 N.W.2d 721, 730-31 (1999) ("Consistent with the well-established rule that we should avoid absurd results when interpreting a statute we hold that no particular "magic words" are necessary for a communication to constitute express advocacy.") (citation omitted).

130. *Furgatch*, 807 F.2d at 862. The court then continues: "The other major purpose of the disclosure provision is to deter or expose corruption, and therefore to minimize the influence that unaccountable interest groups and individuals can have on elected federal officials." *Id.*

131. 60 Fed. Reg. 35304-305 (July 6, 1995) (to be codified at 11 C.F.R. § 100.22) ("Expressly Advocating (2 U.S.C. § 431[17])").

132. *See* FEC v. Cent. Long Island Tax Reform Immediately Comm., 616 F.2d 45 (2d Cir. 1980); Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991); FEC v. Christian Action Network, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd mem.*, 92 F.3d 1178 (4th Cir. 1996); Me. Right to Life Comm. v. FEC, 914 F. Supp. 8 (D. Me.), *aff'd*, 98 F.3d 1 (1st Cir. 1996); Ark. Right to Life State Political Action Comm. v. Butler, 983 F. Supp. 1209 (W.D. Ark. 1997); Vt. Right to Life Comm. v. Sorrell, 19 F. Supp. 2d 204 (D. Vt. 1998); Right to Life of Dutchess County v. FEC, 6 F. Supp. 2d 248 (S.D.N.Y. 1998); N.C. Right to Life v. Bartlett, 168 F.3d 705 (4th Cir. 1999); Brownsburg Area Patrons Affecting Change v. Baldwin, 714 N.E.2d 135 (Ind. 1999). *But see Crumpton*, 982 P.2d at 3 (holding that the *Furgatch* test applies to disclosure requirements where civil as opposed to criminal sanctions apply).

Foremost amongst these are decisions by the First,[133] Second,[134] Fourth,[135] Eighth,[136] Tenth,[137] and Eleventh[138] Circuits ruling that the express advocacy test may be seen in the case of *FEC v. Christian Action Network*.[139] Here, the Fourth Circuit reviewed the FEC claim that an advertisement run by the Christian Action Network before the 1992 Presidential election expressly advocated the defeat of then-Governor Clinton, and thereby breached the ban on corporate expenditures on electoral matters. The advertisement itself involved a mixture of a darkened black-and-white picture of Clinton, sinister low pitched music, a narrator discussing Clinton and Gore's alleged "agenda for homosexuals," shots of marchers campaigning for homosexual rights, superimposed texts paraphrasing their positions, along with an overdubbed narration asking "is this your vision for a better America?" It concluded with a shot of an American flag and the words "for more information on traditional family values, contact the Christian Action Network." The FEC claimed that the advertisement could have no other reasonable interpretation than to advocate Clinton's defeat in the election "because, considered as a whole with the imagery, music, film footage, and voice intonations, the advertisements' nonprescriptive language unmistakably conveyed a message expressly advocating the defeat of Governor Clinton."[140] However, the court refused to accept this standard as

> the Supreme Court has unambiguously held that the First Amendment forbids the regulation of our political speech under such indeterminate standards. . . . To allow the government's power to be brought to bear on less, would effectively be to dispossess . . . citizens of their fundamental right to engage in the very kind of

133. *Faucher*, 928 F.2d at 468; *Me. Right to Life Comm.*, 914 F. Supp. at 8.

134. *Cent. Long Island*, 616 F.2d at 53 ("Contrary to the position of the FEC, the words 'expressly advocating' means exactly what they say . . . . The FEC would apparently have us read 'expressly advocating the election or defeat' to mean for the purpose, express or implied, of encouraging election or defeat. This would, by statutory interpretation, nullify the change in the statute ordered by *Buckley* . . . .").

135. *Christian Action Network*, 92 F.3d at 1178; *see also* FEC v. Christian Action Network, 110 F.3d 1049, 1064 (4th Cir. 1997) (awarding costs against the FEC for bringing the action and ruling "[t]here is no doubt that the Commission understood that its position that no words of advocacy are required in order to support its jurisdiction runs directly counter to Supreme Court precedent"); *Bartlett*, 168 F.3d at 713.

136. Iowa Right to Life Comm. v. Williams, 187 F.3d 963, 969-70 (8th Cir. 1999) ("While *Buckley* did not provide an exclusive list, there is no doubt that the communication must contain express language of advocacy with an exhortation to elect or defeat a candidate.").

137. Citizens for Responsible Gov't PAC v. Davidson, 236 F.3d 1174 (10th Cir. 2000).

138. Fla. Right to Life v. Lamar, 238 F.3d 1288 (11th Cir. 2001).

139. 110 F.3d at 1049.

140. *Id.* at 1056.

> political issue advocacy the First Amendment was intended to protect—as this case well confirms.[141]

The *Christian Action Network* decision shows how reluctant the courts have been to enter into an examination of the context of electoral speech and engage in delicate line-drawing between protected speech and regulated expression characterized by other areas of First Amendment jurisprudence.[142] Behind this judicial reluctance lies a view of elections that emphasizes the courts' role in allowing voters to openly express their preferences to elect representatives, who in turn are assumed to wield public power in accord with this majority's will. As elections represent the foundational act for a particular government—the test and token of their popular support—the government must minimize its presence in the process by which voters consider to whom to give their support. Rather, the electoral process should be formally open to all speech in order to give voters the opportunity to receive all the possible information in making their selection. Approaching the question of which rules are required to legitimate the electoral moment explains the courts' principal concern in judging the constitutionality of regulation of third-party speech: the avoidance of vagueness, the avoidance of overbreadth, and the avoidance of probing the intentions of the speaker or sponsor of a message.[143]

The result is that the magic words test has become the dominant doctrinal approach accepted by the courts, despite the minimal scope for regulation it leaves, the ease with which it may be evaded, and the impact this has on the purposes of the FECA legislation. For example, when the 1995 FEC regulations were directly challenged in *Maine Right to Life Committee v. FEC*, the trial judge had a great deal of sympathy for the FEC's position, accepting that the rules were a "very reasonable attempt" to regulate express advocacy.[144] However, the regulations were still struck down on the grounds that

> [w]hat the Supreme Court did was draw a bright line that may err on the side of permitting things that effect the election process, but at all costs avoids restricting, in any way, discussion of public issues. The Court

141. *Id.* at 1064.

142. Moramarco, *Regulating Electioneering*, *supra* note 111, at 11. Moramarco goes on to point out that "[i]n no [other] area of First Amendment jurisprudence has the Court mandated a wooden, mechanical test that ignores context and purpose."

143. Briffault, *supra* note 6, at 1777-78.

144. 914 F. Supp. 8, 11 (D. Me. 1996) (Hornby, J.).

> seems to have been quite serious in limiting FEC enforcement to express advocacy, with examples of words that directly fit that term.[145]

For all this, however, the continuing state of conflict in the law in this area—underpinned by an ongoing disagreement about the normative model of elections that should be adopted—does not allow for any clear and certain conclusion on what counts as "express advocacy."[146] Ultimately, if a message contains one of the magic words listed in *Buckley*, it will be considered express advocacy. If the message can be reasonably interpreted as not dealing exclusively with the election or defeat of a candidate, but with wider issues, or can be reasonably interpreted as calling for some form of action other than voting for or against a candidate, then it likely will be considered issue advocacy. Any other message (which includes a great many paid for by third parties) falls into the area of uncertainty generated by the conflicting circuit court decisions. Until Congress or the Supreme Court takes the opportunity to bring some order into this area, then the confusion will likely remain.

2. Coordinated vs. Independent Expenditures

The problems that exist regarding the distinction between express advocacy and issue advocacy is replicated in the division drawn between "coordinated" and "independent" expenditures. *Buckley* distinguished between these two kinds of spending when it struck down the FECA limits on individual expenditures as being an unconstitutional restriction on free speech. Responding to the concern that overturning the FECA's cap on individual expenditures would create a route for the evasion of limits on contributions to a candidate, the Court proclaimed that "controlled or coordinated expenditures are treated as contributions, rather than expenditures under the Act . . . to prevent attempts to circumvent the Act through prearranged or coordinated expenditures

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145. *Id.* at 12; *see also* Right to Life of Dutchess County v. FEC, 6 F. Supp. 2d 248, 253-54 (S.D.N.Y. 1998); Iowa Right to Life Comm. v. Williams, 187 F.3d 963, 969-70 (8th Cir. 1999); Faucher v. FEC, 928 F.2d 468, 472 (1st Cir. 1991) ("In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*.").

146. *Compare* Crumpton v. Keisling, 160 Or. App. 406, 982 P.2d 3 (Or. App. 1999) (applying the *Furgatch* test to Oregon's state election law), *with Right to Life of Dutchess County*, 6 F. Supp. 2d at 248 (striking down the FEC's attempt to apply the *Furgatch* test to corporate election expenditures); *see also* FEC v. Christian Coalition, 52 F. Supp. 2d 45, 61-62 (D.D.C. 1999) (attempting a "synthesis" between the magic words and the *Furgatch* tests); Elections Bd. Wis. v. Wis. Mfrs. & Com., 597 N.W.2d 721, 735-36 (Wis. 1999) (inviting the Wisconsin legislature or elections board to draft a definition of express advocacy that includes some reference to the contextual factors of a political communication); Wis. Right to Life v. Paradise, 138 F.3d 1183, 1186 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 172 (1998).

amounting to disguised contributions."[147] By placing coordinated expenditures into the contribution basket, the Court sensibly noted that candidates could otherwise escape all of the FECA's contribution limits by simply asking their supporters to pay directly for aspects of their campaign, rather than donate money directly to them. Even under the aggregative model of elections adopted by the Court, such coordinated spending could be recognized as creating as real a potential for corruption as do direct contributions to a candidate.

When it came to expenditures made independently of a candidate, however, the Court found less compelling grounds for regulation existed, as "[t]he absence of pre-arrangement and coordination of an expenditure with a candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[148] It has been strongly argued that the Court was too optimistic in this conclusion.[149] If an individual or group spends a large sum in support of a candidate, the fact that this action was not explicitly discussed with the candidate beforehand may do little to change a candidate's feelings of gratitude and possible indebtedness. Also, expenditures made independently of a candidate may be supplemented with direct contributions to the candidate's campaign, thereby increasing the potential feeling of indebtedness towards the source of the spending.[150] Regardless of this criticism, the essential division has remained in place.[151] Expenditures that are coordinated with

147. Buckley v. Valeo, 424 U.S. 1, 46-47 (1976); *see also* FEC v. Mass. Citizens for Life (MCFL), 479 U.S. 238, 248 (1986).

148. *Buckley*, 424 U.S. at 47.

149. *Id.* at 100 (White, J., concurring in part and dissenting in part); Dreyfuss, *supra* note 110, at 33-34; ROSENKRANZ, *supra* note 69, at 55-60; Schultz, *supra* note 75, at 88-90. *But see* Richard L. Berke, *G.O.P. Fears Outside 'Help' May Backfire*, N.Y. TIMES, Mar. 25, 1998, at A19; Greenblatt, *supra* note 57, at 354-55; Jackie Koszczuk, *Group Aims Its Ads—Even if It Means Stealing Its Candidates' Show*, C.Q. WKLY., May 2, 1998, at 1110; Ruth Marcus, *Outside Money Wasn't Everything; 'Issue Ad' Strategy a Letdown for GOP*, WASH. POST, Nov. 5, 1998, at A39.

150. Greenblatt, *supra* note 57, at 355 ("Issue advocates may . . . supplement their own campaigns with limited direct contributions to candidates. But most important, they must convince the winning candidate that their issue (and their ads) helped secure victory. That is how the issue will secure a place of prominence on the congressional docket.").

151. *Compare* FEC v. NCPAC, 470 U.S. 480, 493 (1985) (arguing independent expenditures "produce speech at the core of the First Amendment"), *with MCFL*, 479 U.S. at 248 (discussing issue advocacy "made on behalf of" a candidate can be regulated under the First Amendment.); *see also* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 617 (1996) (plurality) ("[T]he constitutionally significant fact . . . is the lack of coordination between the candidate and the source of the expenditure"); Iowa Right to Life Comm. v. Williams, 187 F.3d 963, 968 (8th Cir. 1999).

a candidate are treated as a contribution and are thus subject to tighter restrictions than those made independently of any candidate.[152]

The type of arrangement or contact between a candidate and a third party required for an expenditure to be considered "coordinated" originally was laid down by FEC regulation. That definition encompassed any expenditure on a communication that involves "any arrangement, coordination or direction by the candidate or his agent prior to the publication, distribution, display, or broadcast of the communication."[153] The FEC regulations stated that third-party expenditures made after receiving information provided by a candidate's committee "with a view toward having an expenditure made,"[154] or made by a person who was also involved in a candidate's election committee,[155] would be presumed to be coordinated. The argument for this prophylactic or "insider trading" rule on what types of contact constitutes a coordination of expenditures arose out of *Buckley*.[156] If the candidate, or someone so involved in the candidate's campaign so as to be nearly identical, was involved in planning the spending of money to aid the candidate's campaign, then it will certainly be of benefit to her and raise a concomitant risk of corruption.[157]

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152. *See Colo. Republican*, 518 U.S. at 617 (finding that the absence of coordination with any candidate meant a political party could spend unlimited amounts on express advocacy advertisements attacking the opposing party's candidate).

153. 11 C.F.R. § 109.1(b)(4)(i) (1999). These regulations build on the FECA definition of what constitutes an "independent expenditure." *See* 2 U.S.C. § 431(17). *See generally* Scott E. Thomas & Jeffrey H. Bowman, *Co-ordinated Expenditure Limits: Can They Be Saved?* 49 CATH. U. L. REV. 133, 134-39 (1999).

154. 11 C.F.R. § 109.1(b)(4)(i)(A) (1999).

155. *Id.* § 109.1(b)(4)(i)(B).

156. *Supra* note 147 and accompanying text.

157. Richard Briffault, Vice-Dean of Columbia Law School, recently made this point in testimony before the House Judiciary Committee Subcommittee on the Constitution:

> Coordination provides an objective indication that the message is election-related. . . . [A] coordinated communication, even one that avoids literal words of advocacy, can be quite valuable to the candidate and can be the basis for an improper commitment. As a constitutional matter, coordinated communications, like communications from the candidate's own campaign, can be treated as express advocacy regardless of their content.

Later in his testimony he reiterated that:

> If there is tacit or informal coordination between a candidate and an independent individual or group, the spending is no longer 'independent' but ought to be treated as a contribution. Neither the Supreme Court nor Congress has articulated a test for determining when expenditures are independent. Congress can, and should, do so.

Richard Briffault, *Restrictions on Political Speech*, Testimony of Richard Briffault Columbia Law School Before the House Judiciary Committee Subcommittee on the Constitution, May 5, 1999, *available at* 1999 WL 16947307.

In turn, the practical difficulties of investigating the internal workings of a candidate's campaign—working out how much "planning" has occurred between the campaign and the third party wanting to spend in support of it—required that a strict separation be maintained between the two.

However, judicial scrutiny recently has forced the FEC to amend this regulation. The federal courts have indicated they consider an overly broad definition of coordination to be an abridgment of the First Amendment rights of those wishing to make expenditures on electoral speech. In *Clifton v. FEC*,[158] the FEC's restrictions on orally contacting candidates[159] to obtain information on their positions for publication in an issue-oriented voter guide were challenged as an unjustified burden on speech. The FEC's voter guide regulations deemed spending made after such contacts to be a coordinated expenditure and thus an in kind contribution to the candidate. However, the trial court rejected this interpretation, distinguishing between mere "contact" between an issue-advocacy sponsor and a candidate (which the Court ruled cannot be regulated) from issue advocacy "coordinated" with or authorized by a candidate (which it suggested could be).[160] The trial judge held:

> *Buckley* talked only about prohibiting expenditures "authorized or requested by the candidate," interpreted at its broadest as "all expenditures place in cooperation with or with the consent of a candidate." The FEC has gone far beyond cooperation or consent in these prohibitions of all contact and consultation in the preparation of voter guides . . . .[161]

On appeal, the First Circuit held that "[t]hese publications are the [plaintiff's] direct issue advocacy, not the candidate's. Nor is it the mere third-party bill paying for a candidate's media advertisements or a volunteer's incidental expenses that *Buckley* was talking about when it treated coordinated spending as a contribution under different statutory language."[162]

Again, both the district and circuit courts were moved to give the notion of coordination a narrowed reading based upon a background acceptance of an aggregative view of elections. These courts defined the issue in terms of the speech rights of those wishing to publish voter

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158. 927 F. Supp. 493 (D. Me. 1996), *modified and remanded*, 114 F.3d 1309 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1036 (1998).

159. However, questions that were to be included in the guide could be put to the candidate in writing, and the candidate could give written responses. *See* 11 C.F.R. § 114.4(c)(4)-(5).

160. Potter, *supra* note 123, at 237.

161. *Clifton*, 927 F. Supp. at 499 (per Hornby, D.J.) (citations omitted).

162. *Clifton*, 114 F.3d at 1314 (citations omitted); *see also* United States v. Goland, 959 F.2d 1449, 1452 (9th Cir. 1992).

guides to make their opinions—and those of the candidates running for office—known to the electorate.[163] Intervening in this exercise brings the government into the heart of the electoral process, a territory it may trespass on under only the most pressing of circumstances. In *Clifton*, not even the concern that oral communications between candidates and those preparing voter guides might result in palpable *quid pro quo* arrangements being formed sufficed to meet this burden, since

> [w]e think that this is patently offensive to the First Amendment in a different aspect: it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office. . . . [I]t is beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues. . . . It is no business of executive branch agencies to dictate the form in which free citizens can confer with their legislative representatives.[164]

In contrast, the lone dissent on the First Circuit bench would have upheld the regulations on grounds derived from a more conditional reading of the electoral process:

> At this stage of American history, it should be clear to every observer that the disproportionate influence of big money is thwarting our freedom to choose those who govern us. This sad truth becomes more apparent with every election. If preventing this is not a compelling governmental interest, I do not know what is.[165]

Relying heavily on the Supreme Court's decision in *Austin v. Michigan Chamber of Commerce*,[166] the dissent found the danger of "distortion" to the electoral process justified the FEC's imposition of a prophylactic ban on all but written communications.[167]

The approach of the majority in *Clifton* was then adopted and extended in an important recent decision handed down by the

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163. *Clifton*, 114 F.3d at 1314 ("Here, both the disbursements and the speech are direct political speech by [the plaintiff], not by the candidate. They are thus at the heart of the Court's First Amendment concerns.").

164. *Id.*; *see also* Iowa Right to Life Comm. v. Williams, 187 F.3d 963, 967-68 (8th Cir. 1999) (upholding preliminary injunction against a requirement that candidates either "disavow" any independent expenditures made on their behalf or else have them presumed to be coordinated with the candidate).

165. *Clifton*, 114 F.3d at 1317 (per Bownes, Senior Circuit Judge, dissenting.); *see also id.* at 1319 n.6.

166. 494 U.S. 652 (1991).

167. *Clifton*, 114 F.3d at 1329 ("The majority protects the freedom of corporations to meet face-to-face with a candidate, in order to secretly plan the content and presentation of voter guides that the corporation will distribute to the public. I believe this concern should be secondary to protecting the integrity of our electoral process.").

Washington, D.C. District Court. This case, *FEC v. Christian Coalition*,[168] represents the most complete attempt by a federal court to define exactly what degree of "coordination" is needed to turn a third party's expenditures into de facto contributions. In her findings, the trial judge rejected almost all of the FEC's claims that the Christian Coalition had made illegal "in kind" contributions in breach of the ban on corporate involvement in the electoral process by issuing voter guides and running "Get Out The Vote" drives in coordination with committees of various candidates and the Republican National Senatorial Committee.[169] The FEC alleged these expenditures were "coordinated" on the basis that the Christian Coalition had been privy to nonpublic information about the various campaigns, had informed the different campaigns of its intention to issue the guides or run the vote drives prior to actually doing so, and, in some cases, the same personnel had been involved in both the Coalition's efforts and the candidate's campaign. In addition to holding in the immediate case that these relationships failed to reach the level of coordination needed to turn the expenditures into campaign contributions, the Court also sought to lay out for the first time exactly what sort of accord between a candidate and a third party would be sufficient to have this effect.

It began by rebuffing both the Christian Coalition's claim that only statements containing express advocacy can be "coordinated" and that the FEC's counter-claim that almost any form of consultation between a potential spender and a federal candidate's campaign was sufficient to create coordination. The Coalition's assertion was seen as being too narrow; adopting it would "open the door to unrestricted corporate or union underwriting of numerous campaign-related communications that do not expressly advocate a candidate's election or defeat,"[170] thereby

168. 52 F. Supp. 2d 45 (D.D.C. 1999). Since the *Christian Coalition* decision was handed down, two other federal district courts have had cause to address the issue of coordination. *See* FEC v. Public Citizen, Inc., 64 F. Supp. 2d 1327, 1335 (N.D. Ga. 1999) ("Coordination . . . implies 'some measure of collaboration beyond a mere enquiry as to the position taken by a candidate on an issue.'" (citing *Clifton*, 114 F.3d at 1311)); FEC v. Freedom Heritage Forum, No. 3:98-CV-549, at 3 (W.D. Ky. Sept. 29, 1999) (rejecting the argument that "actual coordination of a specific disbursement must be shown in order for a disbursement to be characterized as a coordinated expenditure" but holding that on the facts the FEC had not proved coordination had occurred).

169. Only one of the various allegations that the Christian Coalition had made contributions to candidates for federal election was upheld—it involved the provision of a donor list to the campaign committee of Oliver North in his 1992 run for the U.S. Senate. *Christian Coalition*, 52 F. Supp. 2d. at 96. This in itself did not raise the issue of coordination; it was rather held to be a direct and illegal contribution of something of value by a corporation to a candidate's campaign.

170. *Id.* at 88; *see also* Orloski v. FEC, 795 F.2d 156, 167 (D.C. Cir. 1986).

"frustrat[ing] both the anticorruption and disclosure goals of the Act."[171] By comparison, the FEC's "'insider trading' or conspiracy" approach was rejected on the grounds that it was too broadly drawn, combating the risk of corruption "by heavily burdening the common, probably necessary, communications between candidates and constituencies during an election campaign."[172] Also, as expressive coordinated expenditures "contain the political speech of the spender," the Court found that "the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate."[173]

Turning away from the claims of both parties to the case, the Court laid out its own "narrowly tailored" definition designed to balance the expressive rights of third parties with the government's interest in preventing the development of potentially corrupting relationships. Consequently, the degree of coordination between a third party and a candidate demanded by the Court requires either demonstrating that an expenditure was made at the request or the suggestion of a candidate, or showing that

> the candidate or agent can exercise control over, or [that] there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g. number of copies of printed materials or frequency of media spots).[174]

Applying this strong standard to the challenged activities by the Christian Coalition, the Court found that in all cases the relationship between the Coalition and various candidates fell short of the level of coordination required to turn the expenditures into contributions. The Court stated, "The primary reason no coordination existed was that campaign staff, armed with foreknowledge of the Coalition's plans, chose not to respond to the Coalition's implicit offer to discuss or negotiate those plans."[175] Thus, in the district court's eyes, as long as a candidate's campaign does not attempt to enter into a two-way dialogue with a third party over the form or content of its intended expenditures, the candidate may allow virtually unlimited access to her campaign's tactics, needs, and planned

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171. *Christian Coalition*, 52 F. Supp. 2d. at 88.

172. *Id.* at 90.

173. *Id.* at 91; *see also Public Citizen*, 64 F. Supp. 2d at 1335.

174. *Christian Coalition*, 52 F. Supp. 2d at 92. The Court then went on to state that "[s]ubstantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners."

175. *Id.* at 93.

activities without impugning the independence of any future spending by that third party.[176]

As with the majority opinion of the First Circuit in the *Clifton* decision, the test for coordination laid out in the *Christian Coalition* judgment is driven by concerns derived from an aggregative view of the electoral process. Even though the *Buckley* plurality had recognized that coordinated expenditures pose a risk of corruption substantial enough to justify treating them as contributions, it also laid out a picture of elections in which a variety of interests jostle amongst each other for power, seeking to form alliances to gain a measure of control over how this will be exercised.[177] Central to the notion of representation in this aggregative model is the requirement that there must be the opportunity for those who would support a particular candidate to engage in an inquiry or interrogation of that candidate with respect to positions on particular issues.[178] Without the ability to hold such an inquisition, it will more difficult for active supporters and voters alike to determine which candidates hold stances that really accord with their preferences, hampering the process of apportioning power to the majority through the electoral arena. Even though the *Christian Coalition* judgment recognized that "such conversations . . . involve considerable incentives to engage in corrupt practices," it gave great latitude for their occurrence so long as they did not "go well beyond inquiry into negotiation."[179]

Some questions still remain open in the wake of the *Clifton* and *Christian Coalition* decisions. First, in both of these cases the expenditures at issue were made by corporations, which are as a general matter banned from having any direct involvement in the electoral process. The court in *Christian Coalition* explicitly noted that where an individual is the source of an expressive coordinated expenditure, the "interest balancing process may well yield different results."[180] Given that the expressive rights of individuals in the electoral process have been granted greater constitutional protection than those of corporations, the

176. Even more broadly, the court suggested that a candidate could openly fundraise for a third party in the full knowledge that the money so raised would be spent on some activity supporting her candidacy without thereby "coordinating" those future expenditures. *See id.*

177. *Id.* at 91 ("This Court is bound by both the result and the reasoning of *Buckley*, even when they point in different directions.").

178. *Id.* at 90; Buckley v. Valeo, 424 U.S. 1, 249 (1976) ("Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions.").

179. *Christian Coalition*, 52 F. Supp. 2d at 93 ("Realistically, it may well be difficult for the FEC to prove the existence of such negotiation—which is why it argues that it needs a prophylactic rule, but any less restrictive interpretation of coordination would impermissibly chill protected expression.").

180. *Christian Coalition*, 52 F. Supp. 2d at 91.

court can only be implying that the rules on individual expenditure coordination will be looser yet.

Additionally, the electoral messages involved in both *Clifton* and *Christian Coalition* were "issue advocacy," in that they made no use of *Buckley*'s magic words—although they were clearly designed to affect the way people would vote at the polls. As yet unanswered is whether the courts would allow a tighter standard to be applied to determine whether an express advocacy message paid for by a third party has been coordinated with a candidate. If, as *Buckley* and *MCFL* have held, messages of express advocacy pose an increased risk of creating at least the appearance of *quid pro quo* corruption, thereby justifying the tighter regulation of such spending, then a wider range of contact between those paying for such messages and the candidate benefiting from them should be suspect. Equally, where a message has no electioneering content, but is *purely* issue oriented—where a charitable group liaises with a political figure well in advance of any election to lend her name and support to a campaign to promote, say, adult literacy—then there seems to be no potential risk of corruption occurring and therefore no possible justification under *Buckley* for regulating the spending. In other words, the degree of contact and collusion required to show the "coordination" with a candidate of a third-party expenditure may well still depend upon the form that the message being paid for takes.

In an effort to provide some answer to questions such as these, the F.E.C. has recently introduced a new set of regulations to govern the degree of contact with a candidate's campaign that is required to turn a given expenditure into a "Coordinated General Public Political Communication," and thus into a contribution to the candidate under the FECA.[181] In introducing these rules, the F.E.C. has noted that they "generally follow[] the language of the *Christian Coalition* decision" as "the Commission believes the court correctly concluded that a high standard is required to safeguard protected core First Amendment rights."[182] Criticism has been leveled at these proposed regulations from the perspective of both the aggregative and the conditional vision. Charity organizations and other third parties, reflecting concerns derived from the aggregative vision, claim that the regulations may act to limit their ability to contact and lobby candidates in the prelude to an election, a time "when they are eager to demonstrate their responsiveness to

181. 11 C.F.R. § 100.23 (2000).

182. Notice 2000-21, General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 FED. REGS. 76138, 76142 (Dec. 6, 2000).

public concerns."[183] By contrast, "good government" groups draw on concerns typical of the conditional vision when they warn that the rules are "too narrow to capture commonplace forms of coordination and therefore open . . . a dangerous loophole in the federal campaign financing system."[184] Arguments between these two positions look likely to continue, as they McCain-Feingold reform legislation to be debated by the Senate contains its own separate definition of what constitutes the "coordination" of some third-party expenditure.[185]

3. Restrictions on Third-Party Expenditures

Since the basic terms of art used in this area have been defined, it remains to be seen how these two pairs of concepts are combined when it comes to regulating third-party expenditures in the election process. Before doing so, it should be noted that these rules apply to all third-party participants in the election process, except for corporations and unions. These two types of organizations are subject to a different set of rules, forming an "American Exception" which will be discussed. For all other participants the relationship between the two sets of concepts may be demonstrated on a 2 x 2 chart as follows:

	Coordinated	Independent
Express Advocacy	(i) "Contribution"	(ii) "Expenditure"
Issue Advocacy	(iii) Still Uncertain	(iv) Unregulated

(i) *Coordinated Express Advocacy*: Any message made by a third party containing a statement of express advocacy, which has also been coordinated with a candidate, will be treated as an "in kind contribution" to that candidate. However, the degree of contact or communication between a candidate and a third party required to establish coordination with respect to express advocacy statements still remains a somewhat open question. Contributions are in turn subject to the FECA limits upheld in *Buckley*. These limits restrict individuals to giving $1,000 to a

183. *See Comment on Proposed Rulemaking by the Alliance for Justice* 2, Jan. 24, 2000, http://www.fec.gov/pdf/alliancecoord.pdf (last visited Nov. 13, 2000).

184. *See Comment on Proposed Rulemaking by the Brennan Center for Justice* 2, Jan. 24, 2000, http://www.fec.gov/pdf/brennancoord.pdf (last visited Nov. 13, 2000).

185. Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong., § 214. Legislation containing the same package of reform measures has also been introduced in the House, *see* Bipartisan Campaign Finance Reform Act of 2001, H.R. 380, 107th Cong.; *see also* Briffault, *supra* note 6 ("Neither the Supreme Court nor Congress has articulated a test for determining when expenditures are independent. Congress can, and should, do so.").

given candidate per election,[186] and Political Action Committees (PACs) to $5,000 per election.[187]

(ii) *Independent Express Advocacy*: A message containing a statement of express advocacy that is paid for by a third party, either an individual or a PAC,[188] without any prior contact rising to the level of "coordination" being made with any candidate, is treated as an "expenditure" under the FECA. It is therefore not subject to any spending restrictions, but all such expenditures above $250 must still be disclosed to the FEC.[189]

(iii) *Coordinated Issue Advocacy*: Issue advocacy that is made in conjunction with a candidate is presently the grayest of gray areas. Under the new regulation adopted by the FEC,[190] as long as the message has some sort of election-related content and is made after some form of two-way negotiation or dialogue between the candidate and the third party making the expenditure, it should be viewed as an in kind contribution and is subject to the limits contained in the FECA. However, where there is only "contact" rather than "coordination" with a candidate, or where the message contains no electioneering content, but is purely issue-oriented, then it would appear that the expenditure will fall completely outside of the ambit of the FECA regulations.

(iv) *Independent Issue Advocacy*: Finally, expenditures containing issue advocacy that are independently made by a third party fall completely outside the FECA framework and are subject to no restrictions at all.

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186. 2 U.S.C. § 608(b).

187. The term "Political Action Committee" actually appears nowhere in the FECA. The PACs of everyday discourse are really "political committees." *See* 2 U.S.C. § 431(4) (qualifying as "multicandidate committees"); *see also* 11 C.F.R. § 100.5(e)(3).

188. *See* FEC v. NCPAC, 470 U.S. 480 (1985).

189. In *Buckley*, the Supreme Court gave section 608(e)(1) of the FECA (limiting any expenditure made "relative to a clearly identified candidate" to $1,000) a narrow reading in order to save it from a "vagueness" and "overbreadth" constitutional challenge. *See supra* notes 115-116 and accompanying text. The Court then confronted the argument that a limit on independent expenditures would act as a "loophole closing" measure designed to prevent individuals from skirting the contribution limits. Ironically, the Court held that because the phrase "relative to a clearly identified candidate" had been read so narrowly that it could be easily circumvented, it now failed to serve this purpose. Buckley v. Valeo, 424 U.S. 1, 46 (1976). However, the Supreme Court did still uphold the requirement that all expenditures over $200 that expressly advocate the election or defeat of a candidate must be disclosed to the FEC. *Id.* at 80.

190. *See supra* note 181.

C. The American Exception: Bans on Corporation and Union Expenditures

As has been previously noted, corporations and unions have for a considerable period of time been subject to special treatment with respect to the extent they involve themselves in a federal election. For most of this century, corporations and national banks have been prohibited from making any contributions or expenditures in connection with a federal election, with the same prohibition being extended to unions during World War Two.[191] While the original reason for enacting this rule has its roots in ancient political scandal,[192] its continued existence—in an attenuated form—is owed to the competing pull that exists between the aggregative and conditional views of elections. Simply put, justifications for the continuation of the ban do not fit with the aggregative vision towards elections that underpins many of the other legal rules in this area.[193] Yet, from the Supreme Court on down, it has been accepted as a constitutionally permissible regulatory measure. The courts have accepted this measure because they have relied on a more conditional vision of the election process than they have been prepared to adopt with regards to reviewing other regulations on third-party expenditures. Simply put, they have accepted that the combination of large-scale corporate or union wealth with concerns that this may be used to make expenditures that "distort" the electoral process justifies the governmental prohibition of such spending.[194] However, the variance between this rationale and the more aggregative considerations that inform the courts' world view with regards to other forms of electoral speech means that there has been a continual pressure to encroach on the range of corporate and union activities covered by the overall ban.

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191. The prohibition on corporate involvement in the election process dates back to the Tilman Act, 34 Stat. 864 (1907). Union involvement was first outlawed by the War Disputes Act, ch. 144, § 9, 57 Stat. 163, 167 (1943). These bans have been carried over into the FECA, 2 U.S.C. § 441(b). For cases regarding the ban on union spending, see United States v. CIO, 335 U.S. 106 (1948); United States v. United Auto Workers, 352 U.S. 567 (1957); Pipefitters Local 562 v. United States, 407 U.S. 385 (1972). For corporate spending, see FEC v. Nat'l Right to Work Comm. (NEWC), 459 U.S. 197 (1982); FEC v. Mass. Citizens for Life (MCFL), 479 U.S. 238 (1986); Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990).

192. Specifically, the original reasons involved revelations that several large corporations had made secret donations to President Theodore Roosevelt's 1904 campaign. *See generally* Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1245-48 (1999).

193. *See MCFL*, 479 U.S. at 257, 259; *Austin*, 435 U.S. at 660; Winkler, *supra* note 192, at 1250 ("So long as *Buckley* remains good law, equality-based election laws regulating the corporation, such as the corporate contribution ban and the initiative process, will exist in tension with controlling constitutional doctrine."); Briffault, *supra* note 6, at 1775-76; Milton C. Regan, Jr., *Corporate Speech and Civic Virtue*, *in* DEBATING DEMOCRACY'S DISCONTENT 290 (Anita L. Allen & Milton C. Regan, Jr. eds., 1998).

194. *Austin*, 435 U.S. at 660.

There have actually been a variety of reasons suggested by the Supreme Court justifying the ban on corporate and union involvement in elections, none of which appears to be very satisfactory. The first reason given is prophylactic: to prevent candidates from becoming reliant upon the large sums of money that these organizations can accumulate with the assistance of special privileges granted to them by the state.[195] Allowing corporations or unions to participate in the election process would, it is argued, raise grave dangers of a feeling of indebtedness and obligation on the part of those receiving the money or assistance provided. As many of the laws that legislators consider will include matters that impact interests of corporations and unions, it is thought better to completely isolate candidates from the possibility of such monetary dependence. Further, as the state creates and sanctions the very existence of these groups, the state may limit the way in which they may use the wealth they accumulate.[196] Taken together, these reasons justify the total ban on corporations and unions contributing any money directly from their treasury funds to the campaign coffers of a candidate for election.

However, this reason does not in itself seem sufficient to justify a complete ban on corporate and union spending in light of the court's approach to other sources of third-party expenditures. A wealthy individual who has gained a personal fortune through the actions of corporations which he owns or in which he invests is not (and currently could not constitutionally be) banned from using that wealth to affect the electoral process. In addition, myriad other laws help individuals to accumulate sizable personal fortunes; Ross Perot, Steve Forbes, and Al Checci all had the assistance of the state in accumulating the wealth that they subsequently used to bankroll their electoral campaigns.[197] Their interests may be as deeply affected by governmental activity as those of any corporation or union. Yet, while there are restrictions on how much a wealthy individual may give directly to other candidates, a complete ban on individuals making contributions to candidates would be clearly

195. The Court's concern has been expressed as follows: "[S]ubstantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions." *NRWC*, 459 U.S. at 207; *see also* FEC v. NCPAC, 470 U.S. 480, 501 (1990); *United Auto Workers*, 352 U.S. at 579.

196. This, at any rate, seems to be the view of Chief Justice William H. Rehnquist. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting) (quoting Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 517, 636 (1819)).

197. *See Austin*, 494 U.S. at 680 (Scalia, J., dissenting).

unconstitutional.[198] Further, the FECA bans direct expenditures made by corporations and unions on statements containing express advocacy, even if paid for independently of any candidate.[199] No such restrictions apply to wealthy individuals whether or not their wealth derives from the activities of corporations or from some other state-conferred legal status.

The mere fact that corporations or unions can gather together large amounts of wealth cannot in itself justify the differential treatment accorded corporations and unions. Nor can the "unique state-conferred corporate structure" alone account for the restriction.[200] As such, there must be some additional justification for the ban. A hint of this ancillary rationale may be seen whenever the courts invoke the potential *illegitimacy* of corporate or union spending on electoral matters. This illegitimacy may partially derive from the perception that the interests of corporations or unions are overly narrow or "economic" in nature.[201] More commonly the courts have accepted the argument that the spending carried out by these organizations may not accurately reflect the views of its members,[202] its shareholders,[203] or the public in general.[204]

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198. *NCPAC*, 470 U.S. at 495 ("[C]ontributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money."); Nixon v. Shrink Mo. PAC, 120 S. Ct. 897 (2000) ("We asked, in [*Buckley*], whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless."); *see also* Russell v. Burris, 146 F.3d 563 (8th Cir. 1998).

199. *See* 2 U.S.C. § 441(b).

200. *See Austin*, 494 U.S. at 660.

201. FEC v. Mass. Citizens for Life (MCFL), 479 U.S. 238, 258 (1986) ("[Corporate resources] reflect instead the economically motivated decisions of investors and customers."); *see also* John Ladd, *Morality and the Idea of Rationality in Formal Organizations*, 54 MONIST 488 (1970); Charles R. O'Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After* First National Bank of Boston v. Bellotti, 67 GEO. L.J. 1347, 1369 (1979); THOMAS DONALDSON, CORPORATIONS AND MORALITY 16 (1982); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's "The Value of Free Speech,"* 130 U. PA. L. REV. 646, 653 (1982); Lawrence E. Mitchell, *Groundwork of the Metaphysics of Corporate Law*, 50 WASH. & LEE L. REV. 1477, 1481 (1993); Regan, *supra* note 193, at 293-96.

202. *See* United States v. CIO, 335 U.S. at 113; *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231-34 (1977); Communications Workers of Am. v. Beck, 487 U.S. 735 (1988); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 521-22 (1991) (holding that nonunion employees compelled to pay union fees as a condition of employment could not be forced to fund political spending).

203. *See* FEC v. Nat'l Right to Work Comm. (NRWC), 459 U.S. 197, 208 (1982). *But see Bellotti*, 435 U.S. at 793-94.

204. *Austin*, 424 U.S. at 660 (pointing out that corporate spending may not "reflect actual public support for the political ideas espoused by corporations"); *MCFL*, 479 U.S. at 258 ("The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporations political ideas. . . . The availability of these resources make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas."); *see also* LARRY MAY, THE MORALITY OF GROUPS 150-51 (1987); Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by*

These two concerns connect together and reinforce each other. The potential effect on the electoral process of corporation or union spending (the "political warchest" concern) is made particularly relevant by the fear that these organizations lack legitimacy in contributing to the public discourse due to their narrow economic focus, their lack of accountability to their members or shareholders, and their separation from the "actual public support" for their message. Congress responded to these fears by trying to prevent suspect sources of campaign wealth from influencing the electoral process, and the courts have for their part upheld the constitutionality of these measures. However, these concerns spring from a much more conditional vision of the election process than has been adopted in the *Buckley* decision and its progeny. In *Buckley*, the Supreme Court's per curiam decision was predicated on the idea that Congress could not distinguish between "legitimate" and "illegitimate" spending by electoral participants except as necessary to prevent a relatively narrowly defined range of corruption from occurring.[205] The government's role was deliberately minimized to allow as much speech as possible into the electoral arena, where the voters could make the determination whether the source of speech and the message it contains is legitimate or not.[206]

In upholding Congress' right to prevent direct corporate or union participation in elections, the courts are allowing government to make just such a determination. Although still using the language of "preventing corruption," the courts agree that corporate and union electoral speech will always be illegitimate due to the unequal power they can wield in the voting process and the way this power may be used to "distort" the context in which electoral speech occurs. Such distortion can be seen as undercutting the conditions for voters' self-development through sidelining or marginalizing their ability to meaningfully participate in the political system. Furthermore, it may be seen to reduce the capacity for individual self-government by infringing upon the space

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Organizations, Communities, and the State, 79 CAL. L. REV. 1229, 1244-47 (1991); Nicole Bremner Casarez, *Corruption, Corrosion, and Corporate Political Speech*, 70 NEB. L. REV. 689, 722 (1991); Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133 (1998).

205. Justice Scalia in his dissent in *Austin* states, "The Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe. I dissent because that principle is contrary to our case law and incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of political debate." *Austin*, 494 U.S. at 679-80; *see also* BeVier, *Issue Advocacy*, *supra* note 14, at 1774.

206. Justice Scalia gives a crystal-clear affirmation of this approach: "The advocacy of such entities that have 'amassed great wealth' will be effective only to the extent that it brings to the people's attention ideas which, despite the invariably self-interested and probably uncongenial source, strike them as true." *Austin*, 494 U.S. at 684.

in which individuals can debate with each other and deliberate on the best solution to any given policy dispute in an equal and engaged manner. In either case, corporate and union spending represents a kind of usurpation of the role of the citizen in the electoral system. The government, according to the majority decision in *Austin*, is justified in banning such activity to ensure that the conditions needed for a fully justifiable and acceptable electoral system are not undermined.[207]

But if the government (and the courts) are truly concerned with creating an undistorted electoral process, it seems hard to see in theory why the effort to achieve this should be restricted simply to banning corporate and union spending.[208] After all, a wealthy individual or group of individuals spending a large amount of money on promoting their views may result in as "distorting" an effect on the election process as does corporate or union spending.[209] All that seems different here—in terms of the potential impact of the spending on the electoral system—is that the money belongs to the individuals concerned, whereas corporate or union money belongs to the members or shareholders. If this is the only issue of difference, then the courts could simply demand a less intrusive remedy, such as requiring corporations or unions to get a vote of approval before making political expenditures, or requiring a pro rata refund to members or shareholders who are unhappy with the spending.[210]

Due to the incompatible normative basis for the ban on corporate and union spending, as compared with the constitutionally guaranteed freedom for other electoral participants to make electoral expenditures, there has been a gradual evisceration of the proscription. Arguments based on an aggregative vision of the electoral moment have convinced

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207. Regan, *supra* note 193, at 297 ("The exclusion of these actors from the political arena represents an effort to preserve a distinct sphere of political deliberation and debate.").

208. Once again, Justice Scalia makes this point in Orwellian fashion in the opening sentence of his *Austin* dissent. *See Austin*, 494 U.S. at 679; *see also* Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1349 (1987).

209. As Justice Scalia noted, it seems hard to know where exactly the line is between the legitimate use of money to promote one's own political opinions or to support another who agrees with them and the kind of "corrosive and distorting effects" decried by the *Austin* Court. "Under this mode of analysis, virtually anything the Court deems politically undesirable can be turned into political corruption—by simply describing its effects as politically 'corrosive,' which is close enough to 'corruptive' to qualify . . . ." *Austin*, 494 U.S. at 684; *see also* Nixon v. Shrink Mo. PAC, 120 S. Ct. 897 (Thomas, J., dissenting) ("The majority today . . . separates 'corruption' from its quid pro quo roots and gives it a new, far-reaching (and speech-suppressing) definition, something like '[t]he perversion of anything from an original state of purity.'" (citation omitted)).

210. *See, e.g.*, *supra* note 201; *see also* Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAP. U. L. REV. 381, 406-13 (1992).

the courts that a variety of exceptions to the rule excluding corporations and unions from the election process should be allowed.[211] In practice, while the wording of the prohibition on corporate and union spending is tight,[212] these actors have found an assortment of ways to become players in the electoral process.[213] One way this has occurred has been by the Supreme Court exempting from the ban on corporate activities those nonprofit, "ideological" associations that have as their main purpose the promotion of political ideas.[214] More crucially, corporations and unions wishing to make direct expenditures on electoral matters have been permitted to do so by the Supreme Court's insistence that the kinds of speech they may engage in can only be restricted on a narrowed reading of the "preventing corruption" rationale. For instance, the Court has held that since spending in opposition to a ballot initiative poses no risk of corrupting any candidate for office, corporations cannot be banned from making contributions or expenditures in regard to these forms of votes.[215]

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211. The overall constitutionality of the rule itself was upheld by the Third Circuit in *Mariani v. United States*, 212 F.3d 761 (3d Cir. 2000).

212. Section 441b(a) bans corporations, unions, and national banks from making any "contribution or expenditure in connection with any election" at the federal level.

213. While these organizations may not make contributions to candidates directly from their treasuries, they may set up PACs (technically known as "separate segregated funds") from which to make contributions. The cost of running and administering these funds may be paid for directly from these organizations' treasuries. Additionally these organizations may communicate directly with their members or employees and urge them to support a particular candidate or party. Corporate executives may also actively fundraise for candidates, and may "bundle" individual contributions together to present to candidates, while union members may supply voluntary labor for parties or candidates. Both corporations and unions may also make unlimited "soft money" contributions to political parties, who may then use that money to run "issue ads" in support of particular candidates. All of these factors mean that both corporations and unions are major players on the political field even with a ban on their directly contributing to the participants in the electoral race.

214. FEC v. Mass. Citizens for Life (MCFL), 479 U.S. 238, 259 (1986); *see also* FEC v. Survival Educ. Fund, 65 F.3d 285 (2d Cir. 1995). The FEC regulations on which organizations qualify as such groups are contained at 11 C.F.R. § 114.10. *But see* Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994).

215. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). Whether *Bellotti* and *Austin* can be meaningfully reconciled is an interesting question. *Bellotti* specifically rejected the notion that "speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation." *Bellotti*, 435 U.S. at 784. As individuals have the right to spend without restriction on opposing ballot initiatives, then if a corporation wishes to do likewise there has to be some reason shown (such as an added risk of corruption) for why their speech should be treated differently. *Austin*, however, upheld a ban on independent corporate spending that advocated the election of a candidate precisely because "the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures." *Austin*, 494 U.S. at 660. So, even though individuals have a right to spend without limit on independent express advocacy of a candidate's election, the very fact that it was a corporation wishing to do so permitted restriction of their speech. The two decisions thus apparently demonstrate diametrically opposing views of the constitutional status of corporate speech. *See also* Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An*

Even though the Court has allowed the ban on corporate and union expenditures on federal elections to remain because of a desire to prevent the distortion of the electoral process, the types of electoral processes it has allowed this ban to apply to still depends on the narrower, *quid pro quo* reading of corruption based on an aggregative view of elections.

Additionally, by interpreting the FECA ban on corporate "contributions" to cover only direct donations and those expenditures coordinated with a candidate, and the ban on "expenditures" to refer only to the express advocacy of the election or defeat of a candidate, the courts have left the field open to both unions and corporations to engage in unregulated independent spending on issue advocacy.[216] The results of this became clear in the 1996 congressional elections when the AFL-CIO began a $35 million television advertising campaign aimed specifically at unseating Republican incumbents in dozens of congressional districts. These ads were paid for out of union treasury funds, but because they did not expressly advocate the defeat of any member of Congress, they fell outside the ban on union expenditures in connection with an election.[217] Corporations have responded to this spending blitz with expenditures of their own,[218] raising the specter of an all-out advertising war in future elections paid for directly by corporations and unions and aimed at securing the election or defeat of particular candidates.

The American Exception of banning corporate and union spending on the electoral process can be best made sense of by reference to a more conditional way of envisioning elections than has otherwise been adopted by the courts. The prohibition is predicated on a view that the effectiveness and value of electoral speech depends on the context in which it occurs, a context that is susceptible to domination and distortion resulting from inequalities in the power of social actors. Corporations and unions not only have the potential to wield significant power through their ability to amass large treasuries of money, but they also do so in ways that cast doubt upon the legitimacy—under a conditional vision of the purpose of the electoral moment—of their participation in the

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Approach to Regulation of Corporate Political Expenditures, 32 WM. & MARY L. REV. 587, 613 (1991); Gerald G. Ashdown, *Controlling Campaign Spending and the "New Corruption" Waiting for the Court*, 44 VAND. L. REV. 767, 780 (1991); Winkler, *supra* note 192.

216. *See* Va. Soc'y for Human Life v. FEC, 83 F. Supp. 2d 668, 677 (E.D. Va. 2000) (enjoining the FEC from enforcing its subjective express advocacy regulations against "any . . . party in the United States of America").

217. Trevor Potter, *Where Are We Now? The Current State of Campaign Finance Law*, *in* CAMPAIGN FIN. REFORM, *supra* note 66, at 17-18.

218. While the AFL-CIO spending got the most attention in the 1996 elections, it is estimated that in the 1995-1996 election cycle, business actually outspent labor by an 11-1 ratio. *See* Cassata, *supra* note 48, at 1113.

electoral system. This doubt justifies Congress in seeking to restrict their involvement in the electoral playing field to protect the overall integrity, equality, and fairness of the voting process. In upholding Congress' actions as constitutionally permissible, the Supreme Court has apparently departed from its decisions with regards to other legislative attempts to safeguard the "purity" of the electoral process—decisions which have represented a more aggregative vision of the electoral moment. Therefore, the discrepancy between the Court's approach to limits on corporate and union spending and restrictions on spending by other participants in the electoral process most clearly reveals the continuing tension within the U.S. system caused by the competing normative claims of the conditional and aggregative way of thinking about elections. It has also placed corporations and unions in an anomalous position compared to other electoral participants. As a result, there has been a constant pressure for the courts to expand the rights of corporations and unions to participate in the electoral process—a pressure that has resulted in the gradual erosion of legal constraints on their ability to influence the vote.

V. THIRD-PARTY EXPENDITURES IN THE UNITED KINGDOM

If the United States represents a regulatory system primarily informed by an aggregative view of elections, the United Kingdom falls at the opposite end of the spectrum. Its system of restraining independent third-party expenditures mainly reflects a set of concerns derived from a conditional vision of the election process. Historically, however, this commitment has been imperfectly realized. Tight control has been maintained over third-party expenditures on local candidate races in the interests of ensuring some measure of equality in the contest. At the national level, a complete ban on the use of television and radio for political advertising has been justified on the basis that it prevents those with wealth from gaining an unfair advantage during the run up to the ballot. Outside of these regulatory measures, the British system has exhibited a relaxed attitude towards the use of money by both political parties and third parties at the national level—an approach that reflects the influence of a more aggregative orientation toward the electoral moment. This duality resulted in a rather paradoxical system of regulation of third-party expenditures in which spending on local campaigns has been significantly restricted while nationwide spending was left untouched.

The incongruity of this situation will be somewhat resolved by the passage into law of a series of recommendations contained in a recent,

wide-ranging report by the Committee of Standards in Public Life, also known as the Neill Committee. Underpinning the Neill Committee's deliberations is a conditional vision of the electoral moment, a view that in turn informs the arguments used to justify the introduction of significant new restrictions on third-party expenditures. Before turning to these innovations, this Part first outlines the historical development of the system of third-party regulation in the United Kingdom, then proceeds to examine how action by both domestic courts and the European Court of Human Rights has affected this system. The Neill Committee's report is considered, before concluding with a consideration of the recent legislative changes enacted by the U.K. Parliament on the basis of the report's recommendations.

A. The Underpinnings of the U.K. System of Campaign Finance Regulation

The U.K. system of campaign finance regulation recently has undergone a much-needed overhaul. While restrictions on the use of money in electoral campaigns date back to the Parliamentary Elections (Corrupt and Illegal Practices) Act of 1883, these had been allowed to fall behind the pace of change in British political practices. The consequence was a series of calls for updating the regulatory framework—calls buttressed by a series of political scandals creating a widespread public concern over "sleaze" in government. To allay this anxiety, in 1997 the newly elected Labour Government asked the Committee on Standards in Public Life, known as the Neill Committee after its chairman Lord Neill of Bladen, to recommend changes to the rules governing the funding of political parties. The Neill Committee responded with over 100 suggestions for reforms—including several proposals that altered the rules governing independent third-party expenditures.[219] On the basis of this report, the legislation governing the use of money in the electoral process has been significantly changed.[220] However, despite the recent upheaval in the law, there remains an underlying continuity in the premises justifying the need for such rules. Thus, in order to understand the recommended changes to the U.K.

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219. FIFTH REPORT OF THE COMMITTEE ON STANDARDS IN PUBLIC LIFE, THE FUNDING OF POLITICAL PARTIES IN THE UNITED KINGDOM: VOL. 1 (Oct. 1998) [hereinafter NEILL REPORT]. For an excellent overview of the process leading up to the Neill Committee's report, see Lisa E. Klein, *On the Brink of Reform: Political Party Funding in Britain*, 31 CASE W. RES. J. INT'L L. 1 (1999).

220. *Political Parties, Elections and Referendums Act of 2000*, HL Bill 48 (passed by House of Commons, Mar. 16, 2000), *available at* http://www.hmso.gov/uk/acts/acts2000/20000041.htm (last visited Mar. 14, 2001).

system of regulation and the shape this system will have as a result of these alterations, it is necessary to first look at the shape of the regulatory structure prior to the passage of the new legislation.

Apart from some new provisions brought in to deal with developments such as television broadcasting,[221] the rules governing the use of money in the electoral process had, until recently, remained relatively unchanged since first introduced over a century ago. As a result, the regulatory framework—which until the passage of the Political Parties Election and Referendum Act of 2000 was contained in the Representation of the People Act of 1983 (RPA)—continued to reflect the concerns of reformers from the last century even as a new reality of modern party politics has developed.[222] This regulatory schema continued to target concerns about vote-buying by individual candidates that, while real at the time of the original legislation,[223] have become less pressing today. Two now-outdated assumptions underpinned the regulatory framework: that the primary campaigner in any electoral contest is the individual candidate rather than a political party, and accordingly that regulation by law should be aimed at the

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221. British law includes a complete ban on the use of television or radio for making political advertisements. *See* Broadcasting Act, 1990, c.42, sched. 8(2)(a) (Eng.). The only exception is a limited grant of free broadcasting time to qualifying political parties at election time. The definition of a political advertisement is very wide, covering "any advertisement which is directed towards any political end." *See* Regina v. Radio Auth., [1997] E.M.L.R. 201 (Eng. C.A.) (refusing to review a decision by the Radio Authority preventing Amnesty International from placing advertisements relating to the genocide in Rwanda on the radio as they were of a "political nature"). This rule has been criticized. Eric Barendt claims "It is indeed arguable that a total prohibition on political advertising, as imposed in Britain, is contrary to freedom of speech and broadcasting. Generally political speech is more fully protected than commercial speech, so if broadcasters are legally free to show advertisements for goods and services, it is hard to see why they should not be able to show advertisements for political parties and pressure groups." ERIC BARENDT, BROADCASTING LAW: A COMPARATIVE STUDY 170 (1995); *see also* G.W. Hogan, *Federal Republic of Germany, Ireland, and the United Kingdom: Three European Approaches to Political Campaign Regulation*, 21 CAP. U. L. REV. 501, 507 (1992).

222. The British system of campaign finance regulation has been described as "in large part a reenactment of legislation designed to rectify the grosser abuses of Victorian electioneering." H.F. RAWLINGS, LAW AND THE ELECTORAL PROCESS 133 (1988); *see also* R.J. Johnston & C.J. Pattie, *Great Britain: Twentieth Century Parties Operating Under Nineteenth Century Regulations*, *in* CAMPAIGN AND PARTY FINANCE IN NORTH AMERICA AND WESTERN EUROPE 129-30 (Arthur B. Gunlicks ed., 1993).

223. *See generally* C. O'LEARY, THE ELIMINATION OF CORRUPT PRACTICES IN BRITISH ELECTIONS 1868-1911 (1962); MICHAEL PINTO-DUSCHINSKY, BRITISH POLITICAL FINANCE 1830-1980, at 26 (1981); Ashley C. Wall, *The Money of Politics: Financing American and British Elections*, 5 TUL. J. INT'L & COMP. L. 489, 501-08 (1997). In the 1880s, the Conservative Party spent on average £2,000—£3,000 (equivalent to well over £100,000 today) in each constituency. PETER MADGWICK & DIANA WOODHOUSE, THE LAW AND POLITICS OF THE CONSTITUTION 201 (1995).

constituency rather than the national level.[224] Individual candidates were therefore restricted in what they could spend on competing in their constituencies, and had to appoint an election agent to account for all campaign expenditures and donations.[225] While it is widely acknowledged that creative accounting and other semi-legal practices were sometimes used to disguise a candidate's true election expenses, the limits appear to have been adhered to relatively closely.[226] By contrast, there were no explicit limits placed upon national political party spending, nor has there been any requirement for parties to disclose the sources and amount of their funding. Political parties were thus allowed to continue to operate under the fiction that they were merely unincorporated associations of like-minded members acting in support of individual candidates.

While this candidate-focused scheme long formed the basis of the *RPA*'s regulatory structure, the justification for its expenditure restrictions has widened from simply preventing corrupt practices to limiting the power of the wealthy to purchase seats in Parliament by excessive, but otherwise lawful, expenditures.[227] Indeed, even at the time of the passage of the original reforms, these were intended to accomplish more than just stopping *quid pro quo* bribery from occurring. As the Earl of Northbrook explained in the parliamentary debates surrounding the original legislation:

> Not only could it be said that corrupt practices had increased, but the expenditure incurred at the last election was excessive. The expenditure was not only detrimental to the public interest by deterring persons who would have been excellent representatives of constituencies in the House of Commons from standing for election, but it also had the effect of

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224. Hogan, *supra* note 221, at 523 (reflecting "the rather quaint Victorian concept of the House of Commons as 'geographical representation of the Kingdom' and 'congress of constituencies'") (citations omitted); *see also* R v. Tronoh Mines, Ltd., [1952] 1 All E.R. 697, at 700 (referring to "a panoply of elections commonly known as a general election").

225. Representation of the People Act, 1983, c.2, §§ 72-75 (Eng.) [hereinafter RPA]. The amount a candidate may spend is determined by a formula based on the type of electorate involved and the number of voters in it. At the last election the average limit was £8,300.

226. *See* DAVID BUTLER & DENNIS KAVANAGH, THE BRITISH GENERAL ELECTION OF 1997, at 233 (1997) [hereinafter BUTLER & KAVANAGH, THE BRITISH GENERAL ELECTION OF 1997]; DAVID BUTLER & DENNIS KAVANAGH, THE BRITISH GENERAL ELECTION OF 1992, at 244 (1992). Keith Ewing claims overspending "does appear to have gone on, though the evidence suggests this was especially marked before 1969, since when the limits have been regularly increased, in response to inflation." KEITH EWING, THE FUNDING OF POLITICAL PARTIES IN BRITAIN 78 (1987).

227. RAWLINGS, *supra* note 222, at 137. The Hansard Society Commission on Election Campaigns claims that in these terms the system "has been a spectacular success: candidates are able to stand and campaign for election without the need for substantial financial resources." *Agenda for Change: The Report of the Hansard Society Commission on Election Campaigns* 35 (1991) [hereinafter *Agenda for Change*].

> accustoming those engaged in elections to consider that an election was simply an affair of money, and thus leading to corrupt practices.[228]

The British system of regulation thereby reveals a historical commitment to a conditional view of the electoral process in which some measure of equality of resources between candidates for public office is considered both desirable and necessary for the legitimate operation of democracy. The force of the schema was long undercut, however, by the outdated emphasis on the regulation of spending by individual candidates in their electorates while leaving national party expenditures and activities almost completely untouched.

The regulation of third-party expenditures has mirrored the constituency/nationwide dichotomy. There were restrictions in the RPA on third-party expenditures with regard to local constituency campaigns, but there was no express legislative attempt to limit what may be spent on a nationwide election campaign.[229] In part, the RPA framework bore the imprimatur of the time of its creation: in the 1880s there was no perceived need to explicitly restrict these forms of third-party expenditures as no real nationwide media existed. Conversely, there were real concerns about "outside influences" intervening in local campaigns, leading to the explicit restriction of third-party spending related to individual constituency races.[230] Legislative silence has been reinforced by the courts, who narrowly read the limits on third-party expenditures at a constituency level to exclude "general political propaganda, even though that general political propaganda does incidentally assist a particular candidate among others."[231] In so doing, the courts have adopted a more aggregative approach to the electoral moment, giving individuals or groups free reign to use their own resources at the national level to influence the voting process. Parliament, in turn, has implicitly adopted this model through its failure to remedy the loophole opened by the courts—perhaps because third-party expenditures have not become that great an issue in British

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228. *Hansard* (HL) 16 Aug. 1883, col. 697, *cited in* NEILL REPORT, *supra* note 219, at 110. The Marquis of Salisbury responded to this as follows: "The motive of the Government was very obvious and the noble Earl has stated it with fairness and candour; the object was not so much to prevent corrupt practices as to diminish the vast expenses attending elections." *Id.* col. 706.

229. Although, it should be emphasized, there exists a ban on using the electronic broadcast media for political advertising. *See supra* note 221.

230. *See* MARTIN LINTON, MONEY AND VOTES 7 (1994); *see also* EWING, *supra* note 226, at 80-81; Klein, *supra* note 219, at 18.

231. R v. Tronoh Mines, Ltd., [1952] 1 All. E.R. 697, at 700; *see infra* notes 246-248 and accompanying text.

politics,[232] but also because the freedom to spend has been a part of a broader individual right to intervene in the political process at a national level.[233]

The British system thus long continued to treat the election contest as a collection of local races between Victorian-era gentlemen, even as it developed into a nationwide campaign waged by highly organized political parties supported or opposed by often well-financed independent pressure groups. Not surprisingly, problems with this system began to emerge in recent years, and numerous reforms were suggested.[234] In particular, the lack of transparency in the political process led to the description of the financing of political parties as being "tainted by a non-criminal corruption."[235] A series of recent "sleaze" scandals involving the acceptance of tarnished money by both individual members of Parliament and political parties brought these issues to the fore, leading to the establishment of the Neill Committee with the responsibility to oversee this area.[236] In 1997, the Labour government requested that the Neill Committee conduct a thorough investigation of the issue of political funding and recommend changes to the law.[237] In the wake of the Committee's two-volume report, the British Parliament

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232. Butler and Kavanagh report that only one "pressure group" spent over £1,000,000 on the 1997 election, while two other groups spent over £800,000. *See* BUTLER & KAVANAGH, THE BRITISH GENERAL ELECTION OF 1997, *supra* note 226, at 242.

233. Regarding expenditures at a national level, there have historically been no restrictions on how much a political party may spend, no limits on how much may be given to a political party, no prohibitions on who may give to a political party, and not even any requirements to disclose the amounts given to a political party. *See* House of Commons Home Affairs Select Committee, *Report on Funding of Political Parties*, HC 301, 1993-94, *cited in* NEILL REPORT, *supra* note 219 (rejecting the mandatory disclosure of donations to political parties as an unjustified breach of the donor's privacy).

234. *See* REPORT OF THE COMMITTEE ON FINANCIAL AID TO POLITICAL PARTIES (1976) [hereinafter *The Houghton Report*] (recommending the introduction of public grants to political parties and limited reimbursement of campaign costs); THE REPORT OF THE HANSARD SOCIETY COMMISSION ON ELECTORAL REFORM (June 1976) (recommending disclosure rules and a limit to party campaign expenditures); PAYING FOR POLITICS: THE REPORT OF THE COMMISSION ON THE FINANCING OF POLITICAL PARTIES (1981) (recommending public funding for political parties); *Agenda for Change*, *supra* note 227 (recommending disclosure rules for parties but not expenditure limits); LINTON, *supra* note 230 (recommending limits on national party expenditures).

235. MADGWICK & WOODHOUSE, *supra* note 223, at 211.

236. *See generally* SLEAZE: POLITICIANS, PRIVATE INTERESTS AND PUBLIC REACTION (F.F. Ridley & Alan Doig eds., 1995); Klein, *supra* note 219, at 4-7.

237. The request was made after it was revealed that the head of the British Motor Racing Association, who donated over £1 million to the Labour Party, had won a subsequent concession from the Labour government allowing continued tobacco sponsorship of Formula One races, "raising the suggestion of an informal *quid pro quo* with the Government." *See Political Donations Taint Blair and His Image of 'New Labour'*, NY TIMES, Nov. 14, 1997, at A7; *see also Labor Party to Return a Contribution*, BOSTON GLOBE, Nov. 12, 1997, at A6.

has passed new legislation to enact the report's recommendations.[238] The changes to the law regulating third-party expenditures are significant, but they are intended to extend the current previous legal framework rather than completely revamp the area. As such, we may thereby see the new regime to be a reaffirmation and updating of an underlying continuity in the view of the conditions under which legitimate elections should be held, rather than a revolutionary break from the past. This is seen by an examination of the law as it has been applied, followed by a consideration of how the Neill Report recommendations—as recently legislated into force—will alter it.

B. Current Restrictions on Third-Party Expenditures

As noted above, the distinction between local constituency and nationwide election campaigns has long been central to the U.K. system of campaign finance regulation, and the case of third-party expenditures was no different. The RPA contained a blanket prohibition on any person spending any money in excess of £5 on "expenses" made "with a view to promoting or procuring the election" of a particular candidate without first obtaining the express permission of that candidate's agent.[239] This ban applied not simply to expressions made within a particular period, but rather to all expenditures made at any time that are intended to have the effect of promoting the election of a particular candidate.[240] Anyone who made such an expenditure, or aided, abetted, or counseled the making of such, could be charged with engaging in a "corrupt practice" under the RPA.[241] If the expense was authorized by a candidate's agent, then it had to be accounted for as an election expense against the total maximum expenditure allowed for that candidate. The motivation behind these rules stemmed from a conditional view of the election process. They were meant to strengthen the spending limits imposed on candidates by preventing supporters from spending—independently of

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238. *See Political Parties, Elections and Referendums Bill*, *supra* note 220.

239. RPA § 75 (banning the incurring of unauthorized expenses over £5 by third parties):

> [W]ith a view to promoting or procuring the election of a candidate . . . on account:
> (a) of holding public meetings or organizing any public display; or
> (b) of issuing advertisements, circulars or publications; or
> (c) of otherwise presenting to the electors the candidate or his views or the extent or nature of his backing or disparaging another candidate . . . ."

240. The House of Lords has held that all that is required to establish the requisite intention is that "[the spender's] desire to promote or procure the election of a candidate was one of the reasons which played a part in inducing him to incur the expense." DPP v. Luft, [1977] A.C. 962, 983.

241. RPA § 75(5). A corrupt practice is punishable by as much as one year in jail. RPA § 168(1)(b).

her or not—on behalf of a candidate. Also, it restricted third-party spending to a level that every citizen could afford, ensuring that all may be involved in the election campaign on an equal footing. By consciously aiming to ensure some form of a level playing field for electoral participants, citizens and candidates alike, the system was claimed to protect the scope of individual participation in an electoral process that treats everyone in a fundamentally fair manner.

However, as candidates are themselves restricted to a relatively low spending limit (around £8,300 at the last election), they were often disinclined to use any of this by adopting the expenditures of a third party as their own. Due to the candidates' reluctance, and the fact that the £5 limit is so low, the effect was to exclude virtually all third-party electoral messages that promote a particular candidate by name or clear reference. Furthermore, the prohibition on unauthorized expenditures in support of a candidate became so broadly interpreted as to prohibit almost all forms of commentary on the candidates for election. In *DPP v. Luft*,[242] the House of Lords ruled that the distribution of pamphlets calling on people not to vote for National Front candidates in certain named constituencies inevitably had the effect of promoting the election of other candidates standing in those electorates. This finding was made despite the fact that each electorate had several other contestants running in it, the leaflets did not call for a vote for any other candidate, and indeed did not call for people to vote at all. Lord Diplock, who delivered the Court's unanimous ruling, reasoned thus:

> [I]n anyone sophisticated enough politically to want to intermeddle in a parliamentary election at all, an intention to prevent the election of one candidate will involve also an intention to improve the chances of success of the remaining candidate if there is only one, or of one or other of the remaining candidates if there are more than one, although the person so intending may be indifferent as to which of them will be successful.[243]

Additionally, the court rejected any claim that the limit on third-party expenditures should only apply to messages directly attacking the character or conduct of the candidate, and not to comments on the political views she espouses. Because "[a] person may be disparaged by attacks upon the political views he holds as well as by attacks upon his personal conduct," the £5 limit applied to all unauthorized expenditures relating to an identifiable candidate or constituency.

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242. *Luft*, [1977] A.C. at 962; *see also* The King v. Hailwood, 2 K.B. 277 (Eng. C.A. 1928).

243. *Luft*, [1977] A.C. at 983-84.

It is possible to discern a conditional vision at work here, even if it seems to have been applied overenthusiastically. For the *Luft* Court, if the intent of spending is to influence the electors in a specific constituency, then it is legitimate to limit it to protect the goals—equality of participation and basic fairness—of the overall system of regulation. The court used this presumption to answer in the affirmative the question of whether the RPA's section 75 limits on "promot[ing] or procur[ing] the election" of a candidate also included opposing one of her rivals. Contrasting sharply with this approach to local constituency spending has been the judicially-created lack of restrictions on the amount of money a third party may spend at a national level.[244] Originally, it had been assumed that the limits imposed in the original 1883 legislation served to cover not just local campaign expenditures, but all expenditures aimed at electing parliamentary candidates.[245] However, in *R. v. Tronoh Mines*[246] this assumption was overturned. The case centered on whether a nationally published newspaper advertisement—not authorized by any individual candidate's agent and costing well in excess of the amount allowed for by the legislation—condemning the then-Labour government's policies and urging the election of "a new and strong government" fell foul of the forerunner to the RPA's limit on unauthorized campaign expenditures. The court held it did not, excluding from the legislatively imposed spending limits any third-party expenditures on generalized propaganda in support of or in opposition to a particular political party, even where this form of spending should incidentally happen to help or hinder a particular candidate.[247]

The *Tronoh Mines* decision effectively removed any limits on how much third parties may spend on attacking or praising any particular political party, thereby "[laying] open the way for extensive intervention by outside elements with vested interests to protect, whose only constraint is the size of their financial resources, and who can engage in advertising both before and during the campaign."[248] What led the court to reach the conclusion that such spending was permissible, despite the fact that this decision overturned a long-held presumption to the contrary

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244. *But see supra* note 221 (discussing the ban on using the broadcast media for political advertising).

245. NEILL REPORT, *supra* note 219, at 114, ¶¶ 10.17, 10.19; ROBERT BLACKBURN, THE ELECTORAL SYSTEM IN BRITAIN 285 (1995).

246. [1952] 1 All E.R. 697.

247. *See id.* at 699-700; *see also* Grieve v. Douglas-Home, 1965 S.L.T. 186 (holding that the appearance of a candidate in a nationwide party political broadcast does not constitute an election expense if the intention is to promote the national party's interests rather than the individual's candidacy).

248. RAWLINGS, *supra* note 222, at 135.

and would allow an end-run around the limits on spending in particular constituencies? Although the court treated the case primarily as an exercise in statutory interpretation, it would appear that a more aggregational vision of elections lay behind the final decision. The *Tronoh Mines* decision came at a time when election campaigns were becoming nationwide affairs: the national political parties had become more important than individual candidates, and the impact of television and radio—to which the political parties had a monopoly of access—were just beginning to be felt. Additionally, the immediate target of the advertisement in the *Tronoh Mines* case was the "socialist government's" proposal to impose controls on the dividend payments of companies. In this context, the court's decision can be seen to reflect the fear that unless third parties were allowed to assert themselves on the national electoral stage, their interests and views would be overlooked by the electorate, leaving them helpless against the marauding depredations of an increasingly active central government.

Whatever the motivation for the *Tronoh Mines* decision, in practice it meant that had the defendants in the *Luft* case produced leaflets generally calling for people to withhold their vote from the National Front without mentioning any specific electorate, the expenditure would have been quite legal.[249] Because the leaflets mentioned individual constituencies, they fell afoul of the campaign restrictions. In the context of a Parliamentary system where the party affiliation of a candidate is of central importance to their chances of election, it seems hard to see the logic, let alone the justice, in this distinction.[250] Yet, until very recently, this polarity formed the basic foundation of the laws regulating third-party expenditures. Spending money in support of or opposition to a particular issue or party was completely unregulated unless the electoral message specifically mentioned a particular individual candidate or electorate, in which case it was so severely restricted as to be nearly completely banned.

This position began to unravel under scrutiny from the European Court of Human Rights (ECHR), and has now been substantially altered with the passage of the new Political Parties, Elections and Referendums Act of 2000 putting into law the findings of the Neill Report. The first element to fall was the effective ban on third-party spending as regards candidates. In the run-up to the 1992 general election, the Society for the Protection of the Unborn Child (SPUC) distributed leaflets in various

249. *But see* Meek v. Lothian Reg'l Council, 1983 S.L.T. 494 (holding that "local political propaganda" that does not mention a candidate or constituency fell within the section 75 limits).

250. RAWLINGS, *supra* note 222, at 188; Hogan, *supra* note 221, at 526.

constituencies comparing the different candidates' records on abortion.[251] Following the vote, the society's executive director was prosecuted under section 75 of the RPA for aiding in the distribution of the leaflets in a particular constituency without the express permission of an agent of any candidate. In response, the defendant brought a case before the ECHR[252] alleging that the section 75 limits were a breach of her right to free expression under article 10 of the European Convention on Human Rights.[253] The claim required the court to consider whether section 75 of the RPA acted as a restriction on freedom of expression which could not be justified by reference to a legitimate governmental aim and which could not be shown to be "necessary in a democratic society" under article 10(2).[254]

The majority of the court quite easily found "that the prohibition contained in section 75 amounted to a restriction on freedom of expression."[255] However, each of the judges also affirmed that restricting the expenditures of third parties with the goal of securing equality between election contestants formed a "legitimate aim of protecting the rights of others"—in this case the candidates for election and the voters

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251. In total, SPUC circulated 1.5 million leaflets, including 25,000 in the constituency of Halifax (for which the executive director was prosecuted). The leaflet in part read "[w]e are not telling you how to vote, but it is essential for you to check on candidates' voting intentions on abortion and on the use of the human embryo as a guinea pig." It was argued that this exhortation, combined with evaluations of each candidate's stance on the abortion issue, was designed to promote those candidates with an antiabortion position. Whether the English courts would have found that this did constitute an expense made "with a view to promoting or procuring the election of a candidate at an election" (RPA § 75(1)) is a moot point, as the charges were dismissed on the grounds they had not been brought within the one-year time frame stipulated in § 176 of the RPA. However, Mrs. Bowman had previously been convicted in 1979 and 1982 for distributing similar leaflets at election time.

252. Bowman v. United Kingdom, 26 Eur. Comm'n H.R. 175 (1998).

253. While there is no constitutional right to free expression recognized by the British courts, it is a signatory to the European Convention and is bound by decisions by the ECHR. Article 10 of the European Convention states:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority . . . .
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

254. On the ECHR's general approach to deciding such questions, see Paul Mahoney, *Principles of Judicial Review as Developed By the European Court of Human Rights: Their Relevance in a National Context*, *in* THE HUMAN RIGHTS ACT 1998: WHAT IT MEANS 65-86 (Lammy Betten ed., 1999).

255. *Bowman*, 26 Eur. Comm'n H.R. at 186.

in the whole of the United Kingdom.[256] Here, the court referred to the free election principle enshrined in article 3 of the First Protocol to the Convention,[257] noting that "in certain circumstances the two rights may come into conflict and it may be considered necessary, in the period preceding or during an election, to place restrictions, of a type which would not usually be acceptable, on freedom of expression."[258]

Furthermore, the court recognized that each country has a "margin of appreciation" in setting the rules governing the conduct of their own elections which the court would respect.[259] As such, the question for the court came down to whether the restriction on freedom of expression adopted by the United Kingdom was one which was "necessary in a democratic society." The majority of the court concluded that it was not, finding that the low amount allowed to be spent under section 75 acted in practice as "a total barrier to . . . publishing information with a view to influencing the voters of Halifax in favor of an antiabortion candidate."[260] Even though the spending cap was intended to serve the legitimate end of guaranteeing political equality, it did so through a means disproportionate to that objective.[261] In reaching this conclusion, the majority pointed to the fact that the press remained free to support or oppose any particular candidate,[262] and that national political parties and their supporters remained free to spend as much as they liked at a national or regional level.[263] However, because of the virtual ban on

256. *Id.* at 187; *id.* at 193 (giving the Joint Concurring Opinion of Judges Pettiti, Lopes Rocha and Casedevall); *id.* at 194 (giving Partly Dissenting Opinion of Judge Valticos); *id*. at 195 (giving the Joint Partly Dissenting Opinion of Judges Loizou, Baka, and Jambrek) ("There can be no doubt that limits on election campaign spending maintain equality of arms as between candidates, a most important principle in democratic societies and in the electoral process"); *id*. at 199-200 (giving the Partly Dissenting Opinion of Judge Sir John Freeland, joined by Judge Levits).

257. *Id.* at 188. Article 3 of the First Protocol reads, "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." *Id.*

258. *Id.* at 188-89.

259. *Id.* (citing Mathieu-Mohin et Clerfayt v. Belgium, 113 Eur. Ct. H.R. (series A) (1987)).

260. *Id.* at 189-90. In addition three other judges concurred in the majority decision while holding that the SPUC leaflet was not intended to promote the election of any candidate but merely to inform voters of the probable voting intentions of the candidates in regards to the abortion issue. *See id*. at 193 (giving the Joint Concurring Opinion of Judges Pettit, Lopes Rocha and Casadevall).

261. *Id.* at 189.

262. *See* RPA § 75(1)(c)(i).

263. *Bowman*, 26 Eur. Comm'n H.R. at 189-90. This argument seems rather peculiar as it would justify the virtual ban on third-party expenditures if all other actors in the electoral process were subject to equally strict regulation. Perhaps what the judges meant was that as the British system of regulation leaves it open for these actors to participate without any restrictions it is unfair to single out third-party expenditures for a complete ban. This may be because there is no

third-party spending, SPUC was left without any practical means of communicating to the voters its opinion about individual candidates at a time when the electorate's mind was most focused on choosing its next representative.[264] In these circumstances, the court held, the extent of this restriction breached article 10's guarantee of the right to freedom of expression.

While the *Bowman* judgment had the effect of overturning the £5 limit on unauthorized third-party expenditures promoting a candidate, the principle of restricting third-party expenditures in order to allow for a measure of equality between candidates survived intact.[265] In this respect, the ECHR's decision still reflected an underlying conditional vision of the election process. It interpreted the article 3 right to vote "under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature" as justifying a governmental decision to restrict spending/speech by some participants in the electoral process. The court clearly rejects the idea that the only set of conditions that can guarantee free and fair elections is a "marketplace of ideas" allowing unlimited speech by all who are motivated enough to participate. Instead, the aims of fostering equality between the contestants and broad participation by citizens in the campaign process—aside from any concerns about outright *quid pro quo* corruption—are legitimate and worthy collective concerns that government may address by restricting the ability of some participants to engage in the electoral process to the degree they might otherwise wish to.

What the *Bowman* judgment did not address was exactly what spending limit would suffice to overcome the "disproportionality" problem identified by the majority. Recognizing this problem, the court demonstrates that a system of regulating election expenditures based on conditional considerations may still accord rights protections to third-party speakers. Participation rights are an important component of a conditional vision. Indeed, the whole premise of the model relies on the active, informed, and self-directed involvement of citizens in the joint process of creating societal rules. However, the "joint process" aspect of the conditional approach recognizes that these individual rights of participation exist in a relational framework with the rights of others. Therefore, it will be permissible under the conditional approach to limit rights of political participation to the extent necessary to protect the equal

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practical reason for such a ban (i.e., it performs no "loophole closing" function) or because it inequitably and illegitimately discriminates between different voices in the electoral process.

264. *Id.* at 189.

265. *See id.*; *id.* at 199-200 (giving the Partly Dissenting Opinion of Sir John Freeland).

rights of others to participate. In *Bowman* the majority of the Court found £5 to be too low a spending limit even given its recognition of the desirability of protecting equality in the electoral process, but it then gave no indication of what would constitute an acceptable expenditure cap. In addition, the problem of unlimited third-party expenditures at a national level, and the more aggregative view of elections that these rules represent, remained untouched. The Neill Committee has taken up these two issues in its comprehensive review of the funding of political parties in Britain.

C. The Neill Committee's Proposed Reforms and the Legislative Response

While the Neill Committee was given wide-ranging authority to review all the issues involved in the funding of political parties and to make broad recommendations for policy change, it retained no legally final decision-making power. However, due to its nonpartisan composition, its recommendations were somewhat immunized from accusations of bias, and as the roots of its task lay in a general public desire for change, its findings carried a mantle of moral legitimacy and urgency.[266] Certainly the British government appears to have felt constrained to follow the Committee's suggestions for reform wholesale; it has since adopted virtually all of the Neill Committee's recommendations into legislation.[267] Because of this, we might almost view the Neill Committee's report as being a de facto legislative act, requiring only Parliament's formal endorsement to enact it into final law.

Underpinning the Neill Committee's considerations and recommendations are a distinctive stance on six public policy questions which the Committee regarded as central to its discussion of political party funding.[268] The manner in which the Neill Committee posed and answered these questions reveals a strong background commitment to a

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266. "What makes this body palatable is that it is so very British. It stands outside Parliament, but contains a member of each main party. It is independent, but has no teeth of its own." *A Very British Sleazebuster*, ECONOMIST, 57, June 5, 1999, *available at* 1999 WL 7363401.

267. *See infra* notes 292-299 and accompanying text.

268. NEILL REPORT, *supra* note 219, at 26-28, ¶¶ 2.14-2.27. The six questions may be summarized as dealing with:

(i) corruption or the reasonable supposition of corruption (¶¶ 2.15-2.16);
(ii) fairness between the political parties (¶¶ 2.17-2.21);
(iii) over-spending by participants in the process (¶ 2.22);
(iv) the civic-engagement of voters and citizens (¶ 2.23);
(v) the effectiveness of political parties in carrying out their role in democratic society (¶ 2.24);
(vi) liberty from state intervention in the electoral process (¶¶ 2.25-2.27).

conditional view of elections. In particular, the Neill Report expressed its approval of ensuring some measure of "fairness" between rival political parties in making expenditures in the electoral process.[269] These fairness issues were carefully distinguished from the need to prevent outright misconduct or corruption on the part of elected representatives. Rather, they were more closely tied to the fear that an "unfair" funding system may "offend [] voters and thereby alienate them from the political process."[270] This in turn could undermine the desirable goal of encouraging the maximum participation of citizens in the political process.

Participation was presented in terms of a strong normative view of "civic engagement," of bringing "ordinary citizens into decision-making positions at all levels of government, local as well as national, and also . . . engaging very large numbers of people—as campaigners, activists, fundraisers and participants in public debate—in the whole democratic process."[271] Finally, the difficulty of realizing these various ends while protecting the freedom of individuals to spend money as they wish on the electoral process was considered. The Committee expressly recognized that a balancing would be required, in which "freedom should prevail save where we identify an overriding public interest calling for some limitation."[272]

Against the background of these considerations, the Neill Committee continued to confront concretely the problem of third-party expenditures in conjunction with the broader question of limits on expenditures by candidates in constituency races and political parties. It recommended that the existing spending limits on candidates should be retained,[273] and it further endorsed the idea of a national spending limit to be imposed on political parties in future elections.[274] Following this discussion, the committee then turned to the implications of the *Bowman* decision to set a nationwide spending limit on political parties as "it would clearly be an exercise in futility for us to recommend a legislative innovation which we anticipated would be set aside on the first legal

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269. *See id.* at 27, ¶ 2.21 ("While holding to the view that the creation of a level playing field is an unattainable aspiration, we do consider that fairness has a real place to play in the overhaul of the country's electoral and constitutional arrangements.").

270. *Id.* ¶ 2.22 (discussing the question of "over-spending" on election campaigns).

271. *Id.* ¶ 2.23.

272. *Id.* at 28, ¶ 2.27.

273. *Id.* at 111, ¶ 10.7. *But see* 112, recommendation 45 (arguing for an increase in the spending limit for by-elections).

274. *Id.* at 116-26, especially recommendations 47 (endorsing a national limit), 49 (suggesting a figure of £20 million), and 51 (arguing that the limits should "be set in terms of the purposes for which the expenditure is incurred rather than in terms of any specified time period.").

challenge."[275] While examining the European Court of Human Rights' reasoning, the Neill Committee recognized that the decision meant it would be necessary to amend the £5 limit in section 75 of the RPA. After noting that "[i]n the end a judgment has to be made as to what is a reasonable limit to impose on a third party,"[276] and recognizing that any limit would only apply to "activities which are intended to promote or prejudice the electoral prospects of 'particular candidates in a particular constituency,'"[277] the Committee recommended the section 75 limit be raised to a figure of £500.[278] This amount, according to the Committee, would prove enough to pay for the "production and distribution of a leaflet throughout a constituency or the publication of an advertisement in a local newspaper."[279]

At no point in its considerations did the Neill Committee overtly question whether limiting the ability of third parties to make expenditures on local constituency races was a desirable policy. It seems to have simply assumed that this was so, given its previously stated commitment to a degree of "fairness" in the electoral process.[280] Similarly, once the Committee had decided that there should be a nationwide limit on political party spending (and that the *Bowman* decision permitted this),[281] it bluntly asserted that some national limits on

275. *Id.* at 130, ¶ 10.66.

276. *Id.* at 129, ¶ 10.63.

277. *Id.* This excludes "[l]eaflets designed merely to bring factual information to the attention of voters or to assist a national campaign without referring to particular candidates."

278. *Id.* at 130, recommendation 54.

279. *Id.* at 129, ¶ 10.64. Whether the Committee is correct in this assertion is questionable as they pointed to no evidence that the amount they recommend would be in fact sufficient for these purposes. However, the Committee had already pointed out that a limit of £1,000 ran the risk of swamping the £8,300 spending cap on individual candidates. *Id.* at 129, ¶ 10.62. It had also considered and rejected as being "a very small sum of money" a figure of £100 (the amount that the Government had recently legislated as the limit on third-party expenditures for elections to the Northern Ireland Assembly). *Id.* at 129, ¶ 10.61. Given this, the £500 suggestion may have been a Solomonic compromise rather than a limit based on a concrete assessment of the actual practical needs of third parties.

280. One reason the Committee did canvas for retaining the limit on third-party expenditures at a local constituency level was the risk that without such limits a candidate would have to "devote part of his or her limited resources to rebutting the attacks made by third parties." *Id.* at 129, ¶ 10.62. As the Committee had already upheld the desirability of local candidate spending limits (and indeed had found "they were supported by all the main political parties and by all the individuals and organizations whose evidence bore on the topic," protecting these provided an instrumental reason for limiting third-party expenditures.) *Id.* at 111, ¶ 10.7. However, this reason does not in itself explain why the desirability of protecting such limits outweighs the speech rights of third parties—such an explanation can only be made with reference to the Neill Committee's desire to establish a measure of equality between electoral participants.

281. The Committee concluded the *Bowman* decision meant "the State may legitimately take the view that it needs to protect voters (and thus to protect them in respect of their voting

third-party expenditures "are obviously needed and obviously need to be enforced."[282] Without such restrictions, the Committee claimed, the national limits on political parties could be evaded either by the parties themselves setting up "front organizations" to spend on their behalf or by genuinely independent third parties engaging in "large-scale propaganda" aimed at securing the election or defeat of a party.[283] To prevent these loopholes from eviscerating the rest of the regulations recommended by the Committee, it reached the "straightforward" conclusion that "[a]ny individual or organization that incurs election expenses should be subject to an expenditure limit."[284] In order to operationalize this proposal, the Neill Committee made four concrete legislative suggestions.

First, any individual or organization other than a political party that planned to incur "election expenses" of £25,000 or more to have to register with the Election Commission before making such expenditures.[285] Furthermore, any registered third party would be required to set up a separate election fund which would be subject to the same disclosure and fund raising restrictions as are political parties.[286] A nationwide spending limit equivalent to five percent of that allowed for national political parties would be imposed on registered third parties.[287] Perhaps most interesting was the Neill Committee's definition of the "election expenses" to be covered under this framework. Citing various examples of political advertisements run by third parties in past elections, some of which did not even mention a political party and even expressly proclaimed "[t]his advertisement is not trying to sway votes in any political election,"[288] the Committee concluded that these should still fall under the rubric of "election expenses." The following conclusion was reached:

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rights) from being subjected to overwhelming election propaganda by a party which has greatly superior financial resources." *Id.* at 130, ¶ 10.69 (citing *Bowman*, 25 Eur. Comm'n H.R. at 187).

282. *Id.* at 131, ¶ 10.72.

283. *See id.* In raising these concerns the Committee pointed to the "American experience" with campaign finance regulation, as well as to previous examples of third-party interventions in British elections and to the concerns of the political parties. *Id.* at 131, ¶ 10.73; *id.* at 131-32, ¶ 10.74.

284. *Id.* at 132, ¶ 10.76.

285. *Id.* at 132, recommendation 55.

286. *Id.* at 134, recommendation 57. This would require disclosure of any donation greater than £5,000 and a ban on accepting money from other than a "permissible source." *See id.* at 74, recommendation 26 (effectively barring contributions from foreign sources).

287. *Id.* at 134, recommendation 58.

288. *Id.* at 132, ¶ 10.78 (citing D. BUTLER & R. ROSE, THE BRITISH GENERAL ELECTION OF 1959, at 248-49 (1960)).

> It is clear to us that advertising of this kind . . . has as one of its objects or one of its foreseeable effects, though not necessarily the only one, promoting the electoral prospects of one or more political parties and damaging the electoral prospects of one or more others. It is simply naive to imagine that organizations that send out explicitly political messages in the midst of election campaigns, or shortly in advance of them, are engaged innocently in generalized, nonpartisan promotional propaganda.[289]

The Neill Committee's fear was that such expenditures could be used as an end-run around other spending limits on an election campaign. In order to prevent such an outcome, the Neill Committee called for a very wide definition of "election expenses" based on the intent or foreseeable consequence of making it rather than on whether it explicitly mentions a political party.[290] It then assigned responsibility to the future Election Commission for working out how exactly such a test could be formulated and applied, with the courts to have the final say.

In response to these recommendations, the British Parliament recently enacted the Political Parties, Elections and Referendum Act of 2000.[291] This legislation follows the spirit of the Neill Committee's suggestion, even where it differs in some particulars. Initially, the government proposes requiring all third parties planning to incur election expenditures in excess of £10,000 (or £5000 in Scotland, Wales, or Northern Ireland) to file a notification with the Election Commission before doing so.[292] While there will be no requirement for a third party to establish a separate election fund to make such expenditures, they will be prohibited from accepting funds not coming from a "permissible source."[293] Following the election, they will have to make a public return of all spending made and donations over £5000 received.[294] Third parties will be required to abide by an overall spending limit set at five percent of the maximum limit for any political party, divided amongst the four parts of the United Kingdom.[295] This limit will apply to any

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289. *Id.* at 133, ¶ 10.79. It should also be noted that the language in this paragraph mirrors that of the Luft decision. *See supra* note 243 and accompanying text.

290. *Id.* at 133, recommendation 56 ("'Election expenses' should be taken to include expenses that are clearly intended to promote or have the foreseeable effect of promoting some parties or to disparage other parties irrespective of whether such parties are mentioned by name in the individual's or organization's advertising or other promotional material.").

291. *See Political Parties, Elections And Referendums Bill*, *supra* note 220, §§ 80-100.

292. *Id.* § 88(3), 94(5). After filing such notification the third party becomes a "Recognized Third Party."

293. *Id.* sched. 11, ¶ 6(1). For what counts as a "permissible source," see *id.* § 54(2) (essentially outlawing funding by non-U.K. residents).

294. *Id.* sched. 11, ¶¶ 9-11; *id.* § 96.

295. *Id.* § 94, sched. 9, ¶ 3(2) (amounting to some £793,500 in England, £108,000 in Scotland, £60,000 in Wales, and £27,000 in Northern Ireland).

"controlled expenditures," defined widely to cover any expenditure made on any "election material which is made available to the public at large."[296] Where the legislation differs most significantly from the Neill Committee's recommendations is in placing a time limit of one year in advance of an election on these expenditure controls.[297] Consequently, third parties will be restricted in their spending only in the twelve months preceding the election with expenditures made outside of this period falling beyond the reach of the proposed new regulatory structure.[298]

It is difficult to predict exactly what final regulatory results will emerge from this new legislative framework, as amended by advice notices from the Election Commission, and potential judicial scrutiny by both the domestic British courts and the European Court of Human Rights. Some likely future issues of contention can already be identified. Clearly the approach proposed by the Neill Committee—and adopted by Parliament—to determine if any independent third-party spending on a particular message counts as a "campaign expenditure" will have to look closely at the message's purpose, content, and timing. The difficulty with any "purpose or foreseeable effect" test is extending its scope too far into the discussion of public issues may stifle genuine debate about or criticism of the government or its policies. Not extending it far enough, however, risks allowing a third party to make expenditures in excess of the spending cap on speech which, while addressing issues of public policy, actually affects the election. The pamphlet at the heart of the

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296. *Id.* § 85(2). The definition goes on to include within its ambit expenditures designed to promote "one or more registered parties who advocate (or do not advocate) particular policies." *Id.* § 85(3)(a)(ii). Or for "candidates who hold (or do not hold) particular opinions or advocate (or do not advocate) particular policies." *Id.* § 85(3)(a)(iii). This definition is still met "even though [the election material] can reasonably be regarded as intended to achieve any other purpose as well." *See id.* § 85(3); *Explanatory Notes to HL Bill 48*, ¶ 167 (copy on file with author) ("The test is whether the material can reasonably be regarded as intended to benefit a particular party's electoral prospects. The cost of a poster campaign advocating a particular policy without explicitly supporting or attacking a named political party might nevertheless fall to be regarded as 'controlled expenditure' if the policy in question was closely identified with a particular political party or group of candidates.").

297. *See The Government's Proposals for Legislation in Response to the Fifth Report of the Committee on Standards in Public Life*, July 1999 [hereinafter *The Government's Proposals*] (copy on file with author), at 38, ¶ 7.9; *id.* at 39, ¶ 7.12; *id.* at 42, ¶ 7.26.

298. *Political Parties, Elections and Referendums Act of 2000*, *supra* note 220, sched. 10, ¶ 3(3). Although the definition of "election expenditure" is made "by reference to the date on which the benefits of the expenditure were received and not to the date the expenses were incurred. As a result, the cost, for example, of billboard advertisements displayed during an election period would count towards the expenditure limit irrespective of whether the advertisements were paid for before or after the start of that period." *The Government's Proposals*, *supra* note 297, at 38, ¶ 7.11; *Political Parties, Elections and Referendums Act of 2000*, *supra* note 220, § 94(8)(b).

Bowman case provides an example of this problem.[299] Its language and content certainly could have been foreseen to influence the way some citizens would have cast their votes. Yet in the eyes of three judges on the European Court of Human Rights, it merely served to provide information to the voters in the local electorate. For these judges, the leaflet was not produced with "a view to promoting or procuring the election of any candidate," and thus fell completely outside of the regulatory schema.[300]

Given the British system's general commitment to a conditional vision of the election process, we can still identify some tensions produced by the claims of the aggregational view. On the one hand, the conditional approach calls for protecting the voting process from the influence of unequal holdings of wealth in order to safeguard the conditions for civic participation and self-rule. However, democracy (under any normative definition) also requires a commitment to genuine and free debate about public issues, so that individuals may form and share opinions about the government, the policy courses it is pursuing, and any alternative policy proposals. The notion that the government can regulate every aspect of this process of public opinion formation on the basis that there may be some possible later impact at the electoral moment seems an ominously Orwellian one. It is at this point that the aggregational vision—with its appeal to the rough-and-tumble of an unconstrained marketplace of ideas free from direct governmental regulation—finds its purchase. Coming to a point of compromise between these two concerns will involve making constantly contestable choices regarding the relative importance of the particular values at stake. It may be anticipated that the compromises chosen in the British system will in turn be the subject of public debate and challenge. Arguments over the correct approach to, and rules for, the electoral system will likely continue through arguments in the legislature that the limits on third-party expenditures should be loosened, through submissions to the new Election Commission as to how the limits should be enforced, and through challenges to the limits before the courts on the basis that they infringe on free speech rights.[301]

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299. *See supra* note 251.

300. *See supra* note 260.

301. However, fears of large scale spending may be overblown as the use of television or radio for political advertising remains off limits, providing a significant cap on both the amounts of and effectiveness of third-party expenditures. Of course, whether such a ban is in itself justifiable raises another set of issues. *See supra* note 221.

VI. THIRD-PARTY EXPENDITURES IN CANADA

Of the three countries surveyed, the Canadian experience most directly manifests the tensions inherent in trying to develop a structure of regulation for third-party expenditures. Some of the problems to be seen in Canada will be familiar from previous Parts of this Article, such as creating a satisfactory conceptual distinction between advocacy speech and a broader issue-based discussion of general political matters. Other controversies have arisen through the imposition of the "rights-based" framework contained in the Canadian Charter of Rights and Freedoms[302] (Charter) on top of an already existing system of regulation. Seeking to give content to the guaranteed right to free expression in the context of third-party involvement in a "free and fair" election process, the Canadian courts have struggled to define a coherent approach to the issues involved. This struggle is manifested in contrasting decisions by the courts of the province of Alberta and the Supreme Court of Canada. The former issued holdings informed by an aggregative vision of the election process, with expressive rights in the electoral context interpreted as demanding minimal governmental restraints on speech to allow individuals or groups to involve themselves as fully as they choose. By contrast, the Supreme Court adopted a more conditional view of elections by accepting the argument that a democratic system may require limits on some participants' speech to insure that a measure of equality of access and participation is maintained. It may be questioned whether this approach is fully coherent, given the potentially contradictory approach taken by the Court in a subsequent decision in another election-related case, as well as a recent lower court decision striking down spending limits in the province of British Columbia.

A. Historical and Legislative Background

Canadian attempts to regulate money in politics date back to the Pacific Railroad scandal of the 1880s.[303] These early regulatory measures were limited; they placed no restraints on party fundraising or expenditures nor did they control third-party expenditures. Indeed, these attempts amounted to little more than a requirement that individual candidates disclose all donations made to them. By the early 1970s, the

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302. Canadian Charter of Rights and Freedoms Act, 1982 ch. 11 (Can.) [hereinafter Charter].

303. For the history of the development of campaign finance regulation in Canada, see KEITH EWING, MONEY, POLITICS AND LAW ch. 3 (1992); Mutch, *supra* note 68; Allison R. Quinn, *National Campaign Finance Laws in Canada, Japan and the United States*, 20 SUFFOLK TRANSNAT'L L. REV. 193, 196-201 (1997).

schema had become widely perceived as redundant due to changes in the style of campaigning by candidates and parties, and this obsolescence combined with the influence of scandal ushered in a virtual rewriting of the campaign finance system.[304] Reforms to the regulatory framework were put in place by the Canada Elections Act (1974).[305] This legislation contained an array of new measures, and, although recently replaced the new Canada Elections Act of 2000,[306] these measures continue to provide the background framework for the regulation of contributions to and expenditures by candidates, political parties, and third parties.

The candidate-focused framework of earlier legislation was replaced with a disclosure regime and system of expenditure limits that covered both candidates and political parties to cap the rising costs of campaigning and assuage the fear that this was allowing wealthier parties to dominate the electoral system. Public funding measures, in the form of reimbursements of election expenses and tax rebates for individual donations, were brought in to combat an unhealthy reliance by the parties on institutional donors. A regulatory structure was put in place to deal with the relatively new technology of television. In many ways, the scope and extent of these reforms remain quite revolutionary today, a full twenty-five years after their introduction.

One commentator has noted that the Canada Elections Act (1974) was designed to

> reflect Parliament's desire to develop ways of attaining objectives, such as (i) to restore the citizen's confidence in their political representatives; (ii) to have the citizens participate more in the life of political parties; (iii) to allow parties and candidates to play their role more fully; (iv) to ensure more equality in the opportunities afforded to parties and candidates; (v) to ensure that voters exercise their right to vote in a rational manner.[307]

These aims read like a virtual laundry list of the kinds of concerns found at the heart of a conditional vision of the electoral moment. Central to the legislation was the notion that the government has a crucial role to play in both defining and protecting the overall fairness of the electoral process to ensure its value and validity.[308] Ensuring fairness involves

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304. For a discussion of the development of campaign practices in Canada, see Thomas S. Axworthy, *Capital-Intensive Politics: Money, Media and Mores in the United States and Canada*, *in* ISSUES IN PARTY AND ELECTION FINANCE IN CANADA (F. Leslie Seidle ed., 1991). For the role of scandal in the creation of the Canada Elections Act (1974), see Mutch, *supra* note 68.

305. CANADA ELECTIONS ACT, R.S.C. ch. E-Z (1974).

306. *See infra* notes 364-373 and accompanying text.

307. Professor Robert Boilly, *cited in* Barette v. Canada, [1994] 113 D.L.R. (4th) 623, 630.

308. *See* J. LaCalamita, *The Equitable Campaign: Party Political Broadcasting Regulation in Canada*, 22 OSGOODE HALL L.J. 543 (1984) (claiming a basic concern for fairness has long underpinned the regulation of election broadcasting in Canada).

making decisions—trade-offs between the competing values of liberty and equality in the political process. For the Canadian legislature, this trade-off was weighted in favor of equality and participation both by restricting the potential influence that wealth could wield in the electoral process and by providing some public assistance to candidates and political parties running for office.

It should be noted that at the time of the legislation's introduction, the courts had no constitutional role to play in reviewing the new measures, although judicial interpretation did play a part in how they were applied.[309] This position changed in 1982 with the adoption of the Charter as higher law. The imposition of this new constitutional framework has thrown onto the courts the task of interpreting the precise meaning of the rights and freedoms it guarantees. With regard to the right to freedom of expression, it has necessitated that courts consider the relationship between this individual guarantee and broader social interests.[310] This task has been neither easy nor free from controversy, implicating the making of fundamental choices about the connection between the rights of the individual and the wider ethical self-understanding of a society.[311] In particular, and of most relevance to this Article, it has forced the courts on a number of occasions to consider the association between the spending of money on political speech and the nature and ordering of the Canadian democratic system.

Conducting this exercise has resulted in a tangle of conflicting authorities issued by the courts at the provincial and federal level, conflicts explained by the competing interpretations generated by the aggregative and conditional visions of the electoral moment. During the

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309. *See infra* note 312 and accompanying text.

310. Section 1 of the Charter explicitly requires a court to consider whether any breach of the guaranteed right to freedom of speech is a "reasonable limit . . . prescribed by law and demonstrably justified in a free and democratic society." For a sample of how the Supreme Court has approached this balancing exercise in the last decade, see *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (striking down limits on reporting on matrimonial cases); *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 (upholding limits on advertising to children); *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 231 (striking down ban on advertising by dentists); *R. v. Keegstra*, [1990] 3 S.C.R. 697 (upholding antihate speech legislation); *R. v. Butler*, [1992] 1 S.C.R. 452 (upholding antipornography statute); *R. v. Zundel*, [1992] 2 S.C.R. 731 (striking down ban on publishing 'false news'); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 (striking down mandated health warnings on cigarette packs); *Ross v. New Brunswick Sch. Dist. No. 15*, [1996] 1 S.C.R. 825 (upholding sanctions against teacher for racist remarks outside school). *See generally* Dwight Newman, *The Limitation of Rights: A Comparative Evolution and Ideology of the Oakes and Sparrow Tests*, 62 SASK. L. REV. 543 (1999).

311. *See, e.g.*, James Cameron, *The Past, Present, and Future of Expressive Freedom Under the Charter*, 35 OSGOOD HALL L.J. 1 (1997); Richard Moon, *The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication*, 45 U. TORONTO L.J. 419 (1995).

1980s and the 1990s, courts in the province of Alberta frustrated successive legislative attempts to limit the amounts that third parties may spend on speech with interpretations of the Charter's guarantee of freedom of expression that draws heavily from an aggregative view of elections. Recently, the Canadian Supreme Court expressly disapproved of these decisions and made a strong statement of its sympathy for the conditional vision of the electoral process that underpins the Canada Elections Act (1974). That being said, the Supreme Court then in a subsequent decision has seemed to be motivated more by an aggregative approach to elections. The end result of these differentiated decisions is that the constitutional status of limits on third-party expenditures on elections still remains somewhat unclear.

B. Alberta's Courts vs. Parliament: Playing Ping-Pong with Expenditure Limits

The Canada Elections Act (1974) originally banned anyone apart from an agent of a candidate or political party from incurring an "election expense" without first receiving the permission of the agent of the candidate or party supported.[312] Spending money on promoting or attacking a candidate or political party during an election period was prohibited unless the candidate or party first agreed to adopt the expenditure as contributing towards their own (limited) campaign expenses. Under the original legislative scheme, however, a defense to this prohibition was provided where the expense was incurred for the "purpose of gaining support for views held by [a third party] on an issue of public policy."[313] Due to an expansive reading of this defense by the courts, virtually any expense incurred by third parties during an election came to be regarded as spending on "an issue of public policy," essentially frustrating the aims of the legislation.[314] As a consequence, the Chief Electoral Officer (CEO) recommended to Parliament that this defense be dropped from the legislation. Parliament complied in 1983,

312. CANADA ELECTIONS ACT ch. 14, § 70.1(1) (1974) (Can.). One problem that arose was that the Act defined the term "election expenses" as those expenditures incurred during the election period "for the purpose of promoting or opposing, directly and during an election, a particular registered party, or the election of a particular candidate." *Id.* ch. 14, § 2. It has been claimed that this definition has "caused a great deal of uncertainty and has given rise to fears that much of the potential impact of the Act is lost by a very narrow reading of such a profoundly unhelpful definition." EWING, *supra* note 303, at 79-80. While it was qualified (but not limited) by reference to such matters as advertising expenses and mailing of promotional material there is still a large amount of confusion as to whether a particular expense was covered by this definition or not.

313. CANADA ELECTIONS ACT ch. 14, § 70.1(4)(a) (1974) (Can.).

314. *See* R v. Roach, [1980] 101 D.L.R. (3d) 736 (holding that hiring a plane to tow a banner reading "[Union members] vote but not Liberal" fell within the § 70.1(4)(a) defense).

thereby making it a blanket offense to spend money, without an agent's permission, supporting or opposing a political party or candidate in the run up to an election.

Not surprisingly, this complete prohibition aroused the ire of pressure groups whose very *raison d'être* was their ability to become involved in the election process. One such group, the National Citizens Coalition, took its concerns before Alberta's Court of Queens Bench on the grounds that the ban breached the recently adopted Charter's guarantee of free expression.[315] In the resulting case, *National Citizens Coalition (Inc.) v. Canada (A.G.)*,[316] the Court agreed with the claim and struck down the ban on third-party spending. First, the Court held that the ban on third-party spending was a prima facie breach of the right to freedom of expression under section 2(b) of the Charter.[317] Second, the balancing test under section 1 of the Charter was applied, with the Court holding that the government failed to meet its burden of proving the breach was a "reasonable limit on the guaranteed freedoms prescribed by law and demonstrably justified in a free and democratic society."[318] In making this judgment, the Court expressly adopted the reasoning, and along with it the aggregative view of elections underpinning that decision, of the United States Supreme Court in *Buckley v. Valeo*.[319] Indeed, this was the first case the Court cited in only the second footnote of its decision. We can therefore see the reasoning in the *NCC* case as being as much an *obiter* attack on expenditure limits for candidates and

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315. As Keith Ewing has pointed out, "It may or may not be a coincidence that the Alberta Courts are reputedly conservative and the Calgary court is particularly so regarded." EWING, *supra* note 303, at 138.

316. [1984] 11 D.L.R. (4th) 481.

317. The wording of the right to free expression under section 2 of the Charter reads:

> Everyone has the following fundamental freedoms:
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> . . . .
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

Charter, *supra* note 302, ch. 2.

318. *Id.* ch. 1. The government had argued in *NCC* that the ban was necessary to counteract the "unfair advantage to those who have access to large campaign funds" and "ensure a level of equality amongst all participants in federal elections." *See* [1984] 11 D.L.R. (4th) at 494-95. The trial judge rejected this argument on the grounds that "[f]ears or concerns of mischief that may occur are not adequate reasons for imposing a limitation. There should be actual demonstration of harm or a real likelihood of harm to a society before a limitation can be said to be justified." *Id.* at 453 (per Medhurst J.). This argument seems very strange, for it implies that the prohibition on third-party expenditures was in breach of the Charter because it was actually working to stop them from dominating the political process, thereby preventing them from posing a "real likelihood of harm to a society."

319. 424 U.S. 1 (1974); *see supra* notes 72-92 and accompanying text.

parties as it was a finding on the constitutionality of bans on third-party expenditures.[320]

The judgment in the *NCC* case was technically binding only in the province of Alberta. However, with a general election looming in 1984, the Attorney General did not appeal the case, and the CEO chose to apply its finding across all of Canada, rather than have different rules apply in different provinces. The result of this virtual deregulation became clear in 1988, when conflict over whether to enter the North American Free Trade Agreement became the central issue in a general election. Independent groups spent an unprecedented amount of money on this issue, the bulk of it in support of Free Trade.[321] Following this experience there was a widespread and well-documented public feeling that moneyed interest groups were enjoying an unfair advantage in the political process.[322] To allay this public concern, the government created a Royal Commission on Electoral Reform, named after its chairman, Pierre Lortie. In its final report, the Lortie Commission reaffirmed the conditional approach to elections that informed the original Canada Elections Act.[323] Specifically, it found:

> Restrictions on the election expenditures of individuals or groups other than candidates or parties were central to the attempt to ensure that the financial capacities of some did not unduly distort the election process by unfairly disadvantaging others. The objective of these restrictions on independent expenditures was to ensure that money was not spent in ways that would nullify the effectiveness of spending limits on candidates and political parties. If individuals or groups were permitted to run parallel campaigns augmenting the spending of certain candidates or parties, those

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320. Patrick Monahan, *Judicial Review and Democracy: A Theory of Judicial Review*, 21 U.B.C. L. REV. 87, 160 (1987); *see also* Jane Herbert, *Fair Elections and Freedom of Expression Under the Charter*, 24 J. CAN. STUD. 72, 75 (1989-1990).

321. Pro-free trade groups were estimated to have outspent antifree trade groups by four to ten times. *See* MICHAEL MANDEL, THE CHARTER OF RIGHTS & THE LEGALIZATION OF POLITICS IN CANADA 290 (1994); Stanbury, *supra* note 303, at 97-99. *But see* Pac. Press v. AGBC (Jan. 9, 2000), 2000 BCSC 0248, *available at* http://www.courts.gov.bc.ca/jdb-txt/sc/00/02/s00-0248.htm (last visited Mar. 15, 2001), ¶¶ 29-40 (expressing doubt that the spending affected the outcome of the election).

322. The perception of such an unfair advantage was possibly the kind of "real likelihood of harm" demanded by Medhurst, J. *See supra* note 318.

323. ROYAL COMMISSION ON ELECTORAL REFORM AND PARTY FINANCING, REFORMING ELECTORAL DEMOCRACY 6-18, 322 (1991) [hereinafter LORTIE REPORT] ("The constitutional recognition of these rights and freedoms constitutes a necessary but insufficient condition if citizens are to have an equal opportunity to exercise meaningful influence over the outcomes of elections. For this fundamental equality of opportunity to be realized in the electoral process, our electoral laws must also be fair.").

> candidates or parties would have an advantage over others not similarly supported.[324]

To restore the objectives of the Canada Elections Act, the Lortie Commission recommended the institution of a $1,000 limit per individual or group on partisan third-party expenditures made during the period of an election campaign, while leaving spending outside this period untouched.[325]

The government accepted this proposal, and introduced legislative changes placing a $1,000 limit on spending made by a third party "for the purpose of promoting or opposing, directly and during an election campaign, a particular registered party or the election of a candidate."[326] Exactly how effective this legislation would have been in practice is open to debate, as it would actually appear to have allowed most of the spending that occurred in the 1988 election, as well as running into the definitional problems seen in *R v. Roach*.[327] The legislation was never given a chance to operate, as just two months after it was passed, the National Citizens Coalition took the matter back to the Alberta courts. Once again the trial court struck down the provision on the basis that it represented a breach of the plaintiff's freedom of expression not justified by section 1 of the Charter. The Attorney General then appealed the matter to the Alberta Court of Appeal.[328] In affirming the trial court's decision, the court of appeal found the spending limits breached the Charter's rights to free expression and free association, as well as the right to vote.[329] When it came to deciding whether these breaches were justified under section 1 of the Charter, the court issued a general condemnation of limits on third-party spending as inconsistent with the idea of a free and democratic society. In the court's opinion, because the expenditure restrictions on third parties gave preferential treatment to the expression of candidates and parties to the virtual exclusion of other groups in the electoral process, the provision "arguably [is] legislation

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324. *Id.* at 327.

325. *Id.* at 356, recommendation 1.6.6.

326. AN ACT TO AMEND THE CANADA ELECTIONS ACT ch. 19, S.C. 112 (1993) (Can.). This definition was actually narrower than that recommended by the Lortie Commission in that it did not include expenditures used "to approve or disapprove a course of action advocated or opposed by a candidate, registered party or leader of a registered party." *See* LORTIE REPORT, *supra* note 323, at 341.

327. *See* R v. Roach, [1980] 101 D.L.R. (3d) 736.

328. Somerville v. Canada (A.G.), [1996] 136 D.L.R. (4th) 205.

329. *Charter*, *supra* note 302, § 3, enshrines the "right to vote." The Somerville Court held that third-party expenditure limits breached this right because "[t]he alternative to allowing third-party advertising is that a so-called 'informed vote' amounts to little more than a choice from among various candidates, where citizens are only as 'informed' (or not) as the news media, the parties and the candidates themselves want the citizens to be." *Id.* at 225.

which has at its very purpose the restriction of these rights and freedoms, which can never be justified."[330]

By refusing to allow the government to distinguish between participants in the electoral process, and by framing the debate over the justifiability of limits on third-party expenditures in terms of the electorate's access to information rather than in terms of equality of voice or the possible domination of the process by those with wealth, the Alberta courts once again demonstrated a commitment to an aggregative vision of the election process.[331] Not surprisingly, given what has been described in Part IV *supra*, this commitment led the Alberta Court of Appeal to approvingly cite *Buckley v. Valeo* and suggest that the system of contribution limits and disclosure requirements adopted in the U.S. context could provide a "less intrusive means of fostering the purported objectives of this legislation."[332] Faced with this decision, the CEO again chose to apply the Alberta court's ruling to all of Canada—once more deregulating third-party spending on election campaigns. In the face of the Alberta courts' apparent refusal to allow any sort of limits on third-party spending, it seemed as if this was the only possible decision that the CEO could make.[333]

C. The Supreme Court's Ambiguous Response

The picture has become more complicated with the entry of the Canadian Supreme Court into the fray. Its first sally consisted of a unanimous judgment in *Libman v. Quebec*.[334] Here, the Court was called upon to consider the constitutional validity of the Quebec Referendum Act, which prohibited most forms of third-party spending in support of or opposition to a referendum in Quebec unless first authorized by a

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330. *Id.* at 236. However, one judge did suggest further examining "the validity of the suggestion that new forms of advertising are at once overwhelmingly influential and extremely expensive, [because] if both these suggestions are or may in the future be true, elections may be debates only about the merits of those ideas that are supported by those with access to huge sums of money. I find that possibility troubling for the future of our society and our democracy, if only because I am not aware of any natural association between wealth and wisdom." *Id.* at 243 (Kerans, J.).

331. *See id.* at 235-36.

332. *Id.* at 238.

333. *See id.* at 242 (striking down the Canada Elections Act § 213(1) prohibition on campaigning by both third parties and individual candidates before the twenty-ninth day preceding an election and within the last forty-eight hours of the campaign period); *see also* Canada (A.G.) v. Reform Party of Canada, [1995] 123 D.L.R. (4th) 366 (striking down restrictions on the amount of television advertising time political parties may purchase).

334. [1997] 151 D.L.R. (4th) 385.

National Committee of an officially recognized campaign.[335] While these restrictions were overturned on the grounds that they formed an unjustified breach of the freedom of expression of those individuals or groups who did not wish to affiliate themselves with an official campaign, in reaching this conclusion the Supreme Court also unanimously rejected the decision reached in *Somerville*. Describing the limits on third-party spending in the Canada Elections Act as motivated by a "highly laudable" purpose,[336] the Court concluded, "[W]e cannot accept the Alberta Court of Appeal's point of view because we disagree with its conclusion regarding the legitimacy of the objective of the provisions."[337] The Court has thus made it clear (albeit in *obiter* comments) that it views a $1,000 limit on independent third-party spending at the federal level to be constitutionally valid. Equally, it has indicated that the Alberta courts' reliance on an aggregational view of elections in interpreting the Charter's guarantee of freedom of expression is a constitutional misstep.[338] The manner in which the *Libman* Court approached the limits on third-party spending instead represents a strong endorsement of a conditional vision of the election process.

It began with a restatement of the importance to "democratic societies and institutions" of the right to freedom of expression guaranteed by section 2(b) of the Charter,[339] before accepting that the restrictions complained of in the Quebec Referendum Act were a prima

335. The Quebec Referendum Act did allow for spending of up to C$600 by "unaffiliated" individuals or organizations, but only for the sole purpose of holding a meeting. QUEBEC REFERENDUM ACT, R.S.Q. C-64.1, § 409, *cited in Libman*, 151 D.L.R. (4th) at 391-94.

336. *Libman*, 151 D.L.R. (4th) at 414.

337. *Id.* at 427; *see also* Colin C.J. Feasby, Libman v. Quebec (A.G.) *and the Administration of the Process of Democracy Under the Charter: The Emerging Egalitarian Model*, 44 MCGILL L.J. 5 (1999) ("What separates *Libman* from *Somerville* is that the Supreme Court has embraced an egalitarian theory of democracy whereas the Alberta Court of Appeal's decision was informed by libertarian ideals.").

338. *See Libman*, 151 D.L.R. (4th) at 411, 425-27. The Canadian Supreme Court has been criticized for the apparent contradiction in its rejecting the C$600 restriction on unaffiliated third-party spending contained in the Quebec Referendum Act while approving of the C$1000 limit struck down by the *Somerville* court. *See* Paul Horwitz, *Citizenship and Speech—A Review of Owen M. Fiss, The Irony of Free Speech and Liberalism Divided*, 43 MCGILL L.J. 445, 477 (1998); Andrew Coyne, *The Supreme Court of Canada Has Lost Its Sense of Proportion*, VANCOUVER SUN, Oct. 16, 1997, at A19. However, it should be noted that in addition to limiting how much third parties could spend, the Quebec Referendum Act also contained prohibitions on the types of activities that third parties were allowed to spend money on. Such restrictions on what money could be used for (as opposed to the amount that may be used) were absent from the legislation struck down by the *Somerville* Court. The Supreme Court in *Libman* took this difference to be crucial, *See id.* at 424-25. In fact, the Court pointedly refrained from commenting on whether an overall spending limit of C$600 would have been constitutionally acceptable. *Id.* at 425.

339. *Libman*, 151 D.L.R. (4th) at 403 (quoting Edmonton Journal v. Alberta (A.G.), [1989] 2 S.C.R. 1326, at 1336, (Cory, J.)).

facie breach of this right.[340] This then brought the Court to the question of whether or not this breach could be justified under section 1 of the Charter as responding to a "pressing and substantial concern in a democratic society" through means that "are proportional to that objective."[341] The question of whether the egalitarian objective of the Act was a "pressing and substantial" concern was treated as a nonissue, as even the appellant conceded that it was.[342] As such, the Court was faced solely with the question of whether or not the measures chosen by the Quebec legislature (and, by inference, the Federal Parliament in the Canada Elections Act) were a proportionate means to achieving the legitimate goal of equality between participants in the election process.

In its discussion of this issue, the Court relied heavily on the findings of the Lortie Commission, especially the high level of public support for spending limitations.[343] Perhaps this shows the Court's sensitivity to charges that it is not the best qualified, or most legitimate, body to decide how the electoral system should be shaped. Rather, this is a matter for the people's elected representatives to decide after deliberating on the advice of considered expert opinions.[344] However, the Court went beyond simply deferring to and endorsing the

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340. *Id.* at 406. The Court also found the restrictions to be a prima facie breach of the right to freedom of association guaranteed under section 2(b) of the Charter, but chose to treat the two issues together.

341. *Id.* at 407 (citing the test developed in *R v. Oakes*). The latter "proportionality" strand of the test was then said to involve three steps:

> [T]he restrictive measures chosen must be rationally connected to the objective, they must constitute a minimal impairment of the violated right or freedom and there must be proportionality both between the objective and the deleterious effects of the statutory restrictions and between the deleterious and salutary effects of those restrictions.

Libman, 151 D.L.R. (4th) at 407. For a discussion of the approach taken by the Supreme Court to examining the justifiability of a breach of freedom of expression under section 1 of the Charter, see Moon, *supra* note 311, at 442-46; Newman, *supra* note 310.

342. *Libman*, 151 D.L.R. (4th) at 408. The Court identified three purposes served by the legislation: protecting equality of participation and influence irrespective of participants wealth, permitting an informed choice by stopping some voices from drowning out others, and ensuring public confidence in the process.

343. *Id.* at 410. *But see* Pac. Press v. AGBC (Jan. 9, 2000), 2000 BCSC 0248, *available at* http://www.courts.gov.bc.ca/jdb-txt/sc/00/02/s00-0248.htm (last visited Mar. 15, 2001) ¶ 47 ("In summary the experts who testified at trial agreed that there is no empirical study or evidence that third-party spending has ever impacted on a referendum campaign or an election campaign in Canada.").

344. "[C]ourts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups." *Libman*, 151 D.L.R. (4th) at 416 (quoting RJR-MacDonald v. Canada, [1995] 127 D.L.R. (4th) 1, 277 (LaForest J.)).

Commission's findings to spell out a theory of democratic participation that justified restricting third-party expenditures. Indeed, the very nature of the "proportionality" test necessitates such an exploration, requiring a consideration of whether the legislature's chosen means are commensurate with the desired legitimate ends. In deciding whether restrictions on the expenditures of third parties are a proportionate way to preserve equality of the participants in the electoral process, the Court was led to expound a theory of the democratic process and the role played in it by electoral speech.

It is worth quoting at length the Court's view on this matter:

> The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of political equality of citizens. If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate. To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of freedom to spend does not hinder the communication opportunities of others.[345]

Applying this approach to third-party spending, the Court continued:

> While we recognize their right to participate in the electoral process, independent individuals and groups cannot be subject to the same financial rules as candidates or political parties and be allowed the same spending limits. Although what they have to say is important, it is the candidates and political parties that are running for election. Limits on independent spending must therefore be lower than those imposed on candidates or political parties.[346]

To summarize, the Canadian Supreme Court in *Libman* affirmed two central features of the Canadian electoral process. The first is the importance of fairness and equality between participants in structuring how the electoral race is to be regulated.[347] The second is that third parties are not the most important contestants in this event—rather the candidates for election and the parties they represent are. It is these voices that the voters should hear the most from in the election process, and the government may act to privilege their speech in order to ensure

345. *Id.* at 410 (citation omitted).

346. *Id.* at 412. "It is also important to limit independent spending more strictly than spending by candidates or political parties." *Id.* at 411.

347. Feasby, *supra* note 337, at 8 ("[A]n egalitarian conception of democracy informed by the ideas of Rawls and other liberal theorists has been adopted by the Supreme Court of Canada in *Libman* under the guise of the elusive idea of 'fairness.'").

that this occurs. Both of these features justify governmental intervention to restrict the ability of third parties to affect election outcomes.

While *Libman* forms a worthy and complete statement of an analysis informed by the same basic conditional concerns that underpin the Canada Elections Act, it does not settle the issue of the constitutionality of limiting third-party participation in the electoral process as finally as it may at first appear. Five months after handing down its *Libman* decision, the majority of the Supreme Court appears to have had second thoughts about its reasoning. The case at issue, *Thomson Newspapers Co. v. Attorney General*,[348] involved a legislative ban on publishing opinion polls within seventy-two hours of an election.[349] In defense of the prohibition, the government claimed it was necessary to protect the electorate from the appearance of a last minute opinion poll that may contain inaccurate information but that cannot be responded to or corrected before the vote occurs. The majority of the Supreme Court found three reasons for holding this ban to be a breach of section 2(b) of the Charter that could not be justified under the section 1 balancing test. First, the majority claimed that "[t]he presumption in this Court should be that the Canadian voter is a rational actor who can learn from experience and make independent judgments about the value of particular sources of electoral information."[350] It then went on to observe that during an election campaign, there will be a multiplicity of polls conducted and published, and on this basis the Court held that most voters will be able to spot and discount any erroneous poll. Finally, the majority found a less-intrusive remedy to the purported mischief to be available; namely, requiring that the polling methodology and margin of error be reported along with the poll result.

Squaring this decision with *Libman* would seem to pose some problems. After all, if Canadian voters are presumptively rational and able to vet information sources for potential biases, then why should third parties in the election process be prevented from providing as much information to the voters as they can pay for?[351] The majority dealt rather weakly with this argument by distinguishing between the risk of "undue manipulation" posed by third-party spending and the purported interest of all the parties involved in providing accurate and true poll results. It constructed a world in which voters may be protected from "expression . . . being a means of manipulation and oppression" by "a

348. [1998] 159 D.L.R. (4th) 385.
349. *See* CANADA ELECTIONS ACT, R.S.C. 1985, E-2, § 322.1.
350. *Thomson Newspapers*, 159 D.L.R. (4th) at 442-43.
351. *See* Horwitz, *supra* note 338, at 477-78.

powerful interest."[352] Voters must, however, remain exposed to as much polling information—provided by a news media wishing to "uphold their reputation for integrity and accuracy"—as they wish to consume.[353] Even should the media (or polling industry) slip up and produce or publish an inaccurate or rouge poll, then this discerning voting public—educated by their exposure to a multitude of polling results from many sources over a long period of time—can be counted on to recognize the error and reject it. For those who do not do so, and who are mislead by an inaccurate poll, the majority has little sympathy. It refused to accept as constitutional a measure

> which decides that information which is desired and can be rationally and properly assessed by the vast majority of the voting electorate should be withheld because of a concern that a very few voters might be so confounded that they would cast their vote for a candidate whom they would not have otherwise preferred. That is to reduce the entire Canadian public to the level of the most unobservant and naïve among us.[354]

Whether the majority has really done enough to distinguish *Thomson Newspapers* from *Libman* is open to doubt.[355] First, the Court is still not entirely convincing in distinguishing the presumably rational and clear-headed voter in *Thomson Newspapers* from the easily manipulated and deceived voter in *Libman*.[356] If a "free market" of opinion polls can allow a voter to spot and discount an erroneous result published on the eve of an election, then why can it not function to allow a voter to spot errors in, and weigh the value of, a third party's intervention in an election campaign? If the difference is seen as lying in the presence of structural incentives to deceive the voter (third parties presumptively bad, news media presumptively good), then this misses the point of the ban challenged in *Thomson Newspapers*. The legislature was concerned less that the media would consciously want to deceive the public than that they may accidentally, unwittingly, or negligently do so. There seems to be strong structural reasons for a concern that such misinformation may occur. Given the market-driven imperatives of media, it is likely that a newspaper or television station will publish a last minute poll, which after all may represent a significant sunk cost to the media outlet, even where there are doubts that it may be erroneous.

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352. *Thomson Newspapers*, 159 D.L.R. (4th) at 445.
353. *Id.* at 444.
354. *Id.* at 455.
355. Feasby, *supra* note 337, at 32.
356. *Horwitz*, *supra* note 338, at 478 ("The difficulty of reasonably reconciling both opinions, in light of the assumptions of voter autonomy and intelligence voiced in Thomson, suggests that the Court must do more thinking about the implications of these assumptions.").

Indeed, the "surprise value" of a poll giving radically different results to those hitherto reported may actually serve to increase its attractiveness as "news." Aggravating this concern is the practical fact that many people will actually rely on only one media source for their information about the world, severely limiting their ability to compare and contrast different poll results.

The minority in the *Thomson Newspapers* decision viewed the majority's opinion as a kind of betrayal of the Canadian voter. They pointed out that

> [v]oters are free to cast their ballot as they see fit; however, the democratic process cares about each voter and should not tolerate the fact that, in the polling booth, some voters would express themselves on the basis of misleading, or potentially misleading, information that is *de facto* immunized from scrutiny and criticism.[357]

This passage sounds a lot more like the strong equality thesis espoused by the Court in *Libman* than does the majority's opinion. The minority remains focused on the potential effect of an erroneous last-minute poll on voters as individuals seeking to participate meaningfully in the electoral process, rather than looking simply at its likely overall impact on the final tally. Furthermore, the minority rejected the notion that a kind of "free market" in opinion polls would by itself virtually eliminate the potential for misinformation occurring.[358] The whole point of banning new polls from appearing late in the electoral race is that the normal processes of critique, debate, and public challenge will not be available. Without the ability to subject the figures in a particular opinion poll to a critical evaluation, informed by a public discussion, the conditions under which any given voter rationally chooses how to cast her vote could be potentially undermined by the publication of an incorrect result.[359] In turn, this has lurking consequences for the rational

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357. *Thomson Newspapers*, 159 D.L.R. (4th) at 411. The minority restated this in a slightly different way later in the decision

> Our democracy, and its electoral process, finds its strength in the vote of each and every citizen. Each citizen, no matter how politically knowledgeable one may be, has his or her own reasons to vote for a particular candidate and the value of any of these reasons should not be undermined by misinformation.

Id. at 418.

358. *Id.*

359. The minority actually appears to disapprove altogether of opinion polls as a source of electoral information. *See id.* at 391-92. This disapproval may provide an additional, unvoiced reason as to why the minority would seek to completely remove the influence of new polls in the last days before an election. *But see id.* at 455-56 ("[T]he ban denies access to electoral information which some voters may consider very useful in deciding their vote. . . . This undermines the very faith in the electoral process which the government suggests is one of the rationales for the ban.").

acceptability of the results of the electoral process for those who have been misled by the poll results.

It seems that the difference between the two cases really lies less in the potential content of the information in question and more in the majority's altered view of what elections are about and participants' roles in them. In *Thomson Newspapers*, the majority was simply content to allow some potential misinformation into the electoral process so long as that misinformation affects only "a small number of voters."[360] In their opinion, even if "some voters might . . . be misled by an inaccurate poll and cast their vote on what amounts to a misrepresentation,"[361] this is at worst an unfortunate but acceptable cost, provided that "such possible distortions are [not] significant to the conduct of an election."[362] The *Thomson Newspapers* majority treats elections as being at the most basic level about aggregating the preferences of informed voters. If this process of aggregation is not substantially affected by the appearance of a rogue poll, then the government simply has no justification for limiting their publication.

Compare this reasoning to the approach in *Libman*, which is echoed by the minority in *Thomson Newspapers*. In *Libman*, the Supreme Court did not simply base its decision on the fear that third-party spending might affect the overall election outcome—rather that it could create a context in which "a right of equal participation in democratic government" might be compromised.[363] Remember also that a desire to enable such participation actually led the Court to require that the Quebec Referendum Act include a provision allowing for some level of expenditure to be made by all persons wishing to express themselves. The potential effectiveness of this spending in affecting the overall outcome of an election may be only minimal in practice—and indeed the government was permitted to limit it tightly precisely in order to prevent it from being *too* effective. But central to the decision was the view that a legitimate election process should allow all to be involved under conditions that ensure a measure of equal respect for their capacity to rationally participate in choosing those who will wield public power. According to the minority in *Thomson Newspapers*, this respect should also extend to voters who may be misled by an erroneous poll result, and

360. *Id*. at 455.

361. *Id*. at 443.

362. *Id*. at 447; *see also id*. at 455 ("This concern is also very remote from any danger that the guarantee of effective representation will be undermined."). Colin Feasby points out that in *Thomson Newspapers* the majority seems to be saying that "in order for electoral speech to be limited under the guise of 'fairness,' the speech must be the source of genuine harm to the electoral process and serve an identifiable interest." Feasby, *supra* note 337, at 33.

363. *See supra* note 345 and accompanying text.

thereby cast their ballot—engage in the electoral process—in ways that they would not have done had they been properly informed. Even where such votes do not, in the final analysis, "count" in the sense of altering who obtains the support of the majority in the contest for public power, each citizen should be able to expect that the basis on which their vote is cast *matters*.

D. Legislative Proposals and a New Round of Conflict?

The outcomes of these conflicting cases at both the provincial and federal levels leave the current status of limits on third-party expenditures in some doubt. On the one hand, there is a line of authority in the province of Alberta, including a direct decision on the point from its highest court, that such limits are unconstitutional. Underlying these decisions, we can detect a set of concerns derived from an aggregative vision of the election process. In opposition to this line of authority, we have very strong (but as yet only *obiter*) comments from the Supreme Court that the Alberta courts have got it wrong, and that campaign spending limits on independent expenditures do not breach the Charter. Drawing on a more conditional vision towards elections, the Supreme Court has endorsed an egalitarian notion of a fair democratic process that justifies Parliament acting to limit the ability of some to speak. Given the unanimous nature of the decision in *Libman*—and the way it specifically singles out the Alberta courts for criticism—it would appear that the Supreme Court would uphold some form of spending restrictions on third parties if and when it is called on to reexamine this issue. Yet in *Thomson Newspapers*, the majority of the Supreme Court has handed down a decision that seems to be somewhat at odds with the underlying reasoning adopted in its earlier opinion. By turning towards a more aggregative view of the electoral process, the Court has once again opened up room to debate the scope of governmental regulation that may be allowed in a legitimate electoral process.

The recent passage of the new Canada Elections Act of 2000[364] looks likely to lead the courts eventually to reconsider these issues. Included in this new legislative framework is a new, broad definition of "election advertising," along with both nationwide and local expenditure limits on third parties that engage in spending on this type of expression. Under the new rules, any "advertising during an election period that

364. *See* CANADA ELECTIONS ACT 2000, Bill C-2, ch. 9. This legislation substantially replaces the provisions of the existing Canada Elections Act. In addition to placing limits on third-party interventions in the electoral process, the new legislation will also impose a new ban on publishing a new "election opinion survey" on the day of an election. *See id.* ch. 9.

promotes or opposes a registered party or the election of a candidate, including by taking a position on an issue with which the registered party or candidate is associated" will be considered to be "election advertising."[365] An "election period" is defined as "the period beginning with the issue of the writ and ending on polling day,"[366] meaning that virtually all expenditures made on election-related matters after an election date has been formally announced will fall under this definition. Third parties will be limited to spending no more than C$150,000 on election advertising nationwide, with the additional stipulation that no more than C$3,000 of this may be spent in supporting or opposing an identifiable candidate in a particular electoral district.[367] There is an outright prohibition on third parties circumventing, or even attempting to circumvent, this spending limit by setting up multiple "front" organizations or by colluding with other groups.[368]

Third parties will also be banned, along with political parties and candidates, from publishing or broadcasting any election advertisements on the day of the election itself.[369] In addition to limiting both the overall amounts and the particular times when third parties may make expenditures on election advertising, the proposed new legislation will impose a registration and disclosure regime on them. All election advertising must identify the third party that is paying for it.[370] Once a third party expends more than C$500, it must apply to be registered with the CEO[371] and comply with a series of administrative procedures.[372] All registered third parties must also file an "election advertising report" not more than four months after an election disclosing all the advertising they have undertaken as well as the identities of all donors giving more than C$200 to the third party.[373]

In adopting these legislative changes, Parliament seems concerned to reestablish what it views to be the rules for a fair and legitimate electoral process that takes place under conditions of relative equality, drawing from *Libman* the constitutional authority to do so. But despite the fact that the reforms had their genesis in an all-party report by The

365. *Id.* § 319. There are exceptions made under the clause for editorials, news, as well as speeches or interviews published or broadcast by the media. *See also id.* § 349.

366. *Id.* § 2.

367. *Id.* § 350.

368. *Id.* § 351.

369. *Id.* § 323. This overturns the Alberta court of appeal's decision in the *Somerville* case allowing third parties and candidates to advertise throughout the electoral period. *See supra* note 333.

370. CANADA ELECTIONS ACT 2000, Bill C-2, ch. 9, § 352.

371. *Id.* § 353.

372. *Id.* § 354-55, 357-58.

373. *Id.* § 359, 360.

Standing Committee on Procedure and House Affairs,[374] they did not garner unanimous support from all members. In particular, the effect of the spending cap on third parties received very strong criticism.[375] It is true that given the wide scope of the proposed limit on third-party spending—encompassing as it does broad limits on the discussion of public policy issues on which candidates or parties are campaigning[376]—the new legislation will create a significant restraint on third-party involvement during an election campaign. Not surprisingly, therefore, these measures, and the justification given for enacting them, are also opposed by other groups in the electoral process, with promises to challenge the measures under the Charter already forthcoming.[377] Underlying these challenges is a more aggregational view of the election process; in the words of the president of the National Citizen's Coalition, "any attempt to control or restrict communications between citizens during election campaigns . . . is unconstitutional."[378]

It may be anticipated that the majority's opinion in *Thomson Newspapers* will be drawn on to support the proposition that putting limits on virtually all speech about public issues at election time will have the effect of "reduc[ing] the entire Canadian public to the level of the most unobservant and naïve among us,"[379] with consequent implications for the legitimacy of the electoral system. Already one provincial court has stated that, in the absence of any concrete evidence that third-party expenditures significantly affect the way people vote, it believes *Libman* was too hasty in its conclusion that limits on such spending are justified under the Charter.[380] Whether the courts choose to

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374. Standing Committee on Procedure and House Affairs, Report 35, Canada Elections Act, Electoral Law (tabled in the House June 18, 1998), *available at* http://www.parl.gc.ca/infocomdoc/36/1/prha/studies/reports/prharp35-e.htm (last visited Mar. 14, 2001).

375. *See, e.g.*, Mr. Ted White, HANSARD, No. 57, Feb. 25, 2000, at 1040, *available at* http://www.parl.gc.ca/36/2/parlbus/chambus/house/debates/057_2000-02-25/han057-e.htm (last visited Mar. 9, 2000)

> It is not the place of the government to limit the right of individual Canadians or groups of Canadians to spend their own money in support of a cause or candidate. The right to spend one's own money on election advertising is a right which is just as valid for the poor as it is for the wealthy.

376. *See supra* note 365 and accompanying text.

377. *See, e.g.*, Daniel Leblanc, *Groups Vow to Fight New Election Bill*, GLOBE & MAIL, June 8, 1999, at A4 [hereinafter LeBlanc, *Groups Vow to Fight*]; Daniel Leblanc, *Taxpayers Group Threatens to Flout Spending Limits*, GLOBE & MAIL, Nov. 16, 1999, at A6.

378. LeBlanc, *Groups Vow to Fight*, *supra* note 377, at A4.

379. Thomson Newspapers Co. v. Attorney General, 159 D.L.R. (4th) 385, 455; *see also Horwitz*, *supra* note 338, at 478.

380. Pac. Press v. AGBC (Jan. 9, 2000), 2000 BCSC 0248, ¶¶ 88-89, at 107-10 ("There is no indication that elections in Canada or in this province are not fair, nor that elections in other jurisdictions which have not imposed limits on third-party spending are not fair. Further, there is no evidence that third-party spending is or has presented a problem in Canadian elections.").

follow this road in upcoming decisions will further reveal which of the opposing visions of the electoral process they consider best able to deliver a legitimate democratic system to Canada.[381]

VII. CONCLUSION

A central claim of this Article is that attempts to garner an accord on the proper role that private wealth should play in a society's political process founder on the fact that precious little agreement exists with respect to exactly how we should define the problems that require a solution. Agreement eludes us because the very way in which we will perceive these problems depends to a large degree upon our prior choice of an always contestable vision of the electoral moment. Practices and consequences that are unacceptable under one normative view of the voting process may not only be tolerable but even considered necessary under another. It is unavoidable that when we come to evaluate and judge our particular electoral practices and the role that we allow private wealth to play in them, we must consider how closely the underlying normative commitments that these practices reflect correspond to our own best understandings of what the purpose and meaning of democracy should be. That being so, I should like to hazard some concluding words of my own on which system of regulation I believe to be most justified in a democratic society.

Let me begin by stating my case in the negative. Of the three systems of regulation considered above, that adopted by the United States has had the most hazardous effect upon the democratic election process.[382] The U.S. public at large displays a level of mistrust of government and disconnection with the political process that is disturbingly high.[383] In large part this is because the most basic form of democratic choice—being able to select between candidates in a competitive struggle for public power—has largely disappeared from the U.S. electoral system. In the 1998 elections, challenging a sitting representative proved to be virtually futile.[384] Unsurprisingly, therefore, in nearly twenty-five percent of House seats, the incumbent member "raced" against no major party opponent, while in over a quarter of the

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381. Feasby, *supra* note 337, at 38; *see also* Harper v. Canada (A.G.), 2000 S.C.C. 57 (refusing to uphold an injunction issued by the Alberta Court of Appeal, suspending the new third-party expenditure limits for the 2000 general election).

382. Baker, *supra* note 6, at 33; Neuborne, *supra* note 6, at 794. *But see* Smith, *supra* note 30, at 591 ("If one were trying to identify the world's healthiest democracy, the United States . . . would seem as good a candidate as any.").

383. *See supra* note 36.

384. Reelection rates for incumbents in the 1998 Congressional elections topped ninety-eight percent for House incumbents and ninety-nine percent for the Senate.

"contests" the incumbent faced only a nominal opponent with less than $25,000 to spend.[385] The overall picture painted by these facts makes for grim viewing to anyone who cares about a government of the people, by the people, and for the people. Rather, we find a disenfranchised and increasingly disinterested electorate given only the most minimal scope to select those responsible for making public policy decisions on their behalf. Under such conditions, democracy in America has turned into something of a shell game in which the incumbent representative is able to maintain his position in all but the rarest of cases.

While the blame for the current situation cannot simply be ascribed to any one variable alone,[386] there does seem to be a particular aspect of the present morass that cries out for attention. The increasing importance of money in the electoral process is one of the central reasons why incumbents are able to maintain their virtual sinecure in power, and is a central cause for why people are turning off politics.[387] It is the effect that large-scale spending has on the voting public's belief in the legitimacy of the electoral system—whether we choose to label this effect as constituting "corruption" or not—that is the most powerful argument against further deregulating the way money may be used in political campaigns.[388] Rather, by looking to the experiences of Canada and the United Kingdom, we can see how restrictions on the flow of

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385. According to the Common Cause's review of spending during the 1998 election

> [Of the 401 House incumbents up for re-election in 1998,] ninety-five [of them] faced no challenger. Another 127 were financially unopposed—facing challengers who raised $25,000 or less. Of these 222 financially unopposed incumbents, more than half of all incumbents, all won reelection. Eighty-seven percent of House incumbents, 347 of 401, were in financially uncompetitive races, where the incumbent had more than twice the challenger's campaign resources, and they all won reelection.

News: Common Cause, *House of Representatives* (Nov. 6, 1998), *available at* http://commoncause.org/publications/110698_house.html (last visited Mar. 20, 2000).

386. *See* Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1706-07 (1999).

387. *See* SIDNEY VERBA, KAY L. SCHLOZMAN, & HENRY E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 531 (1995) (pointing out that "a participatory system in which money plays a more prominent role is one unlikely to leave either activists or the citizenry at large feeling better about politics"); Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 581-82 (1999) (the increasing importance of money in the political process offends "strongly held and deeply rooted popular beliefs" about democracy).

388. The deregulation of campaign finance law, also called the "No Limits/Full Disclosure" approach, finds its most complete form in the Citizen Legislature and Political Freedom Act, H.R. 1922, 106th Cong. (1st Sess. 1999), introduced by Rep. John Doolittle (R-CA). At least two of the current Justices on the Supreme Court, Justices Thomas and Scalia, have indicated they regard deregulation to actually be constitutionally required. *See* Nixon v. Shrink Missouri Government PAC, 120 S. Ct. 897, 925-26 (Thomas, J., dissenting). For a critical appraisal of the "No Limits/Full Disclosure" approach, see Thomas E. Mann, *Deregulating Campaign Finance: Solution or Chimera?*, 16 BROOKINGS REV. 20 (1998); John Ferejohn, *It's Not Just Talk*, 85 VA. L. REV. 1725, 1731 (1999).

money into the electoral process can address and arrest citizen concerns about the way money has come to dominate other forms of political participation. Therefore, I would argue that central to the health of any democratic society are not only restraints on how candidates and political parties may use money to position themselves in the electoral race, but also the existence of some controls over third-party spending on the electoral process. Such limits can help to reverse the increasing public perception that "special interests" or "the rich" control governmental decision-making to the exclusion of "ordinary voters," and can help to turn around the downward trend in active public participation in voting and other forms of political activity.[389]

That being said, there are lessons to be drawn from the regulatory experience of the above-surveyed countries which open up two interrelated arguments against this call for greater regulation. The first argument is what Samuel Issacharoff and Pamela Karlan refer to as the "hydraulic effect" of regulation.[390] Rather than blocking money from entering the electoral process, controls placed on one form of expenditure in the electoral arena can have the effect of diverting spending into other, less regulated forms. For instance, one of the reasons why third-party spending is much more common in the United States compared to Canada or the United Kingdom is that the former system has imposed much tighter restrictions on contributions to candidates and political parties than have the other two regulatory regimes. Anyone wishing to influence the outcome of an election cannot as easily give directly to a participant in the electoral race—engage a political intermediary to represent their interests[391]—but must instead engage in advocacy of his own. In turn, the means by which this advocacy is carried out will depend on how the regulatory system is structured. Third parties will seek out the legal form that imposes the least costs on them while allowing for the maximum political involvement.[392] Thus, the argument is made, regulation of campaign financing can actually lead to a worse situation through shifting spending

389. STEVEN J. ROSENSTONE & JOHN M. HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA ch. 3 (1993).

390. *See* Issacharoff & Karlan, *supra* note 13; *see also* Sullivan, *Political Money*, *supra* note 14, at 687-88.

391. *See* Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999).

392. For instance, the recent emergence of nonprofit political organizations set up under section 527 of the Internal Revenue Act as a vehicle for paying for "issue ads." These groups can raise and spend unlimited amounts of money, with no disclosure requirements for donors, as long as they do not expressly advocate the election or defeat of any candidate. *See* John M. Broder & Raymond Bonner, *A Political Voice, Without Strings*, N.Y. TIMES, Mar. 29, 2000, at A1; Todd S. Purdum, *A New Player Enters the Campaign Spending Fray*, N.Y. TIMES, Apr. 2, 2000, at A24.

away from accountable, public actors into the unaccountable, private realm.[393]

The second objection that can be raised against attempting to impose tighter controls on third-party expenditures we might call the "definitional problem." How do we distinguish between election-related speech, which the government has a legitimate interest in restricting to protect the integrity of the democratic process, and general speech about public issues, over which the government should have no such control?[394] Given the "hydraulic pressures" that exist for money to enter into the election process, there will be a constant incentive for third-party participants to try and evade restraints on the kind of expressions on which they may make expenditures. Attempting to close these loopholes will lead to greater inroads into the public discourse about political issues at large.[395] In Canada and the United Kingdom, legislative restrictions have been put into place, not only on spending that overtly names candidates or political parties,[396] but also on how much can be spent on discussing the *issues* on which candidates or political parties are campaigning.[397] Clearly, under an aggregative view of the election process, this interference represents a gross violation of an individual's right to free expression, calling into question the legitimacy of the entire election process.

These arguments really merit more of a response than can be given here. However, I do not believe they raise fatal objections to the idea that third-party expenditures on the election process should be subject to tight governmental controls. To begin with, the "hydraulic" metaphor is not the only, nor necessarily the most appropriate, one that can be applied to election-related spending. Water, after all, obeys a set of impersonal, unalterable rules which dictate that it has to flow somewhere, has to "seek its own level."[398] Political expenditures do not necessarily obey laws of the same fixed, natural character. Instead, they seem much more analogous to an "arms race problem" where spending by one group in

393. Issacharoff & Karlan, *supra* note 13, at 1717.

394. Anthony Corrado, *On the Issue of Issue Advocacy: A Comment*, 85 VA. L. REV. 1803, 1807 (1999).

395. *See* Sullivan, *Political Money*, *supra* note 14, at 688.

396. In the United States, it has been suggested that the definition of "express advocacy" be expanded to include a "delimited time period" test. Under this test, any communication "referring to one or more clearly identified candidates in a paid advertisement . . . within 60 calendar days preceding the date of an election" would be deemed to be "express advocacy." *See* Bipartisan Campaign Reform Act of 2001, S.27, 107th Cong., § 201(b).

397. *See supra* notes 296, 365, and accompanying text.

398. Issacharoff & Karlan, *supra* note 13, at 1713.

society or a nation increases the incentives for other groups (or nations) to do the same.[399]

Political activity, unlike the flow of water, is the result of conscious human choices that are made in relation to the actions of other participants in the electoral process. Therefore, allowing easier access to the electoral arena, or increasing the ability of some participants to spend, is going to motivate all participants to do likewise on the assumption that they may otherwise be put at a disadvantage in the electoral race. Conversely, limits on the amount of spending that participants are allowed to make, or the form that those expenditures can take,[400] may set up a counter set of incentives. Rather than forcing money to flow in another direction, limits may actually lead to it not being spent at all. The answer to the problem of the "hydraulic effect" of regulation is that there will be less pressure placed on third parties to find ways to use money to influence the election process if rules are put into place that mean each participant can be reasonably confident that they will not have to forego making such expenditures.[401]

Of course, there still remains the argument that any such attempt to limit speech in the lead-up to an election—to put in place such "arms control" rules—represents too great an inroad into the individual rights of those wishing to spend. My simple answer would be that we should not feel obliged to recognize such a right on the part of individuals or groups to make limitless expenditures on trying to influence the outcome of an election. The interests at stake in making these expenditures do not seem to be as important as the maintenance of an electoral process in which all participants, regardless of their wealth, can have faith that their participation and viewpoints are respected and valued. In striving to create such a process, restrictions on the amount that may be spent on attempting to influence an election are justifiable on the grounds that they choose to place the autonomy of the majority, who lack money to spend, above that of those who have lots to spend.[402] I recognize, of course, that this choice may reflect a certain cultural bias, having grown up in a political context (New Zealand) where the active, individual participation of all voters is more highly valued than are the expressive rights of those with wealth. Equally, and probably inseparably, assuring

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399. Burt Neuborne, *Is Money Different?*, 77 TEX. L. REV 1609, 1617 (1999).

400. As Daniel Ortiz points out: "Even if hydraulics implies that influence-trading will not cease, regulation can decrease it by forcing it into ever less efficient means." Daniel R. Ortiz, *Water, Water Everywhere*, 77 TEX. L. REV. 1739, 1745 (1999).

401. This is what lies behind the calls of many business leaders for a ban on "soft money" donations to political parties in the United States. *See supra* note 94.

402. Neuborne, *supra* note 399, at 1620.

the voters that their participation and viewpoints are respected and valued above the individual liberty claims of those wishing to spend reflects a normative commitment to a conditional vision of what elections in a democracy should be. However, if I am right that the rules adopted by a country to regulate the use of money in the election process presuppose such a commitment, then no one seeking to argue for one regulatory structure over another can avoid having to make this choice.