

Drafting *Buckley v. Valeo* The Court, Liberty, and Politics

By

Allison R. Hayward



*The Federalist Society
for Law and Public Policy Studies*

The Federalist Society takes no position on particular legal or public policy initiatives. All expressions of opinion are those of the author or authors. We hope this and other white papers will help foster discussion and a further exchange regarding current important issues.

Drafting *Buckley v. Valeo*
The Court, Liberty, and Politics

Allison R. Hayward

The Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976)(per curiam) frustrates reformers who want to limit speech in campaign contexts. So, some advocates are calling for "overturning" *Buckley* – making a frontal assault on its free speech teachings to allow more invasive campaign finance regulations. Others take a more subtle approach, instead insisting that *Buckley* requires "updating" to reflect modern campaign practices unknown in the 1970s when the opinion was written. But some of their fundamental claims about the Courts' alleged political naiveté do not withstand examination.

In *Buckley*, regulations of campaign speech were limited to messages containing express advocacy of the election or defeat of a clearly identified candidate for federal office. Reformers want more. The Bipartisan Campaign Reform Act ("BCRA") contains prohibitions on "electioneering" messages that mention a candidate within thirty days of a primary or sixty days of a general election, as well as restrictions on political party messages that "support or attack" a candidate. Because these laws do not limit their application to express advocacy, under a straight reading of *Buckley* they are unconstitutional.

Critics argue that *Buckley* Justices could not have anticipated the use of issue advocacy that might invoke a candidate or campaign issues yet not contain express advocacy. The litigants in *Buckley* could not have shown the Court the potential for corruption when "issue advocates" weigh into campaigns, "distorting" the debate, "muddying the waters" and perhaps even earning chits from grateful candidates. Since the *Buckley* Justices did not understand this potential, a contemporary court, claims reformers, could be justified in moving away from the protective "express advocacy" standard to allow regulation or even prohibition of this issue advertising.

These arguments include assertions of fact about what the Court knew, or could be expected to have known, about the interplay of campaigns and regulation.¹ For textual support, they quote a passage in *Buckley*, where the court wrote that "the independent advocacy restricted by the provision [banning independent expenditures over \$1,000] does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." 424 U.S. at 46. They suggest that other methods of regulation of independent political expression – perhaps a

¹ See, e.g., Cass R. Sunstein, Political Equality and Unintended Consequences, 94 Colum. L. Rev. 1390 (1994). In a previous article, I have discussed the presence of "issue advertising historically in campaigns, hopefully debunking the notion that speech by interest groups about issues in campaigns is somehow a "new" thing. See Allison R. Hayward, When is an Advertisement about Issues an Issues Ad?, 49 Catholic University Law Review 63(1999).

higher expenditure limit, or a broader standard than express advocacy, could be justified with new facts.

Statements about the Court's knowledge are made hypothetically, but that should not be the case. Both Justices Thurgood Marshall and Lewis Powell participated in *Buckley* and their papers are usually available to researchers.² Of course, there is no guarantee that these collections of drafts, memos, notes and other miscellany contain all the material from the time. According to one manuscript room librarian, the Marshall papers are frequently examined, and they exhibit the disorder associated with heavy use. Yet, the documents in these collections may be the only source that can shed light on the thinking of the Justices free from any possible taint from bias or *post hoc* rationalization. One should never use such behind-the-scenes material to make a legal argument – the Court's opinion is the only source for the law in *Buckley*. But when lawyers make statements of fact about what the court “understood” or “knew”, those arguments should be checked against the available material.

In the independent expenditure provision at issue in *Buckley* (Section 608(e) of the Act), individuals were prohibited from spending independently over \$1,000 “relative to a clearly identified candidate.” Section 608(e)(1) provided that

No person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other such expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds \$1,000.”

Exceptions to this rule were provided for the press, and for member communications. Violators could be punished by fine or imprisonment under section 608(i).

The Court heard oral argument on November 10, 1975. Since Justice William O. Douglas retired from the Court November 12, and Justice Stevens was appointed to the Court in December, eight Justices participated in *Buckley*.

Some critics have been dismissive of the *Buckley* decision because it was reviewed under an expedited schedule. The available documents demonstrate that the Court invested considerable time and effort to this case before argument. Before drafts of the decision were circulated, Justices had carefully parsed the issues raised in the case.

Justice Powell's papers contain a lengthy preliminary bench memorandum outlining the key issues of the case, dated two months before oral argument. On the independent expenditure restriction, it reads:

² Justice Marshall's files are available through the Manuscript Reading Room at the Library of Congress. Manuscript findings aids are available online at <http://lcweb.loc.gov/rr/mss/f-aids/mssf.html> Lewis Powell's papers are at the Powell Archives, Washington & Lee University School of Law, and access requires prior permission of the archivist. Potter Stewart's papers are housed at Yale, and are closed to research pending the retirement of all Justices who served with Justice Stewart (that is, Rehnquist and Stevens). Access to Justice Stewart's papers would be most useful, since Stewart authored the portion of the opinion regarding independent expenditures and express advocacy. See *infra*.

Section 608(e) closes what would otherwise be a large loophole in the contribution and expenditure limitations. But, unlike the contribution limits themselves, it imposes a direct restriction on the personal expression of the views of the spender. In some cities, the limitation would bar a citizen from placing a full-page ad in support of his candidates in the town's leading newspaper.

The problem is compounded by the difficulty in drawing the line between political advocacy and discussion of issues. CADC [the court of appeals] attempts to resolve this problem by construing the statute to reach only expenditures for material that "taken as a whole amounts to a clear advocacy of the election or defeat of a clearly identified candidate." This effort to limit the reach of 608(e) is admirable, but it leaves too vague a line between issue discussions protected by the First Amendment and conduct that is subject to civil and criminal sanctions. Some protected activity will still be deterred. The only statutory construction that would avoid this ambiguity would limit the reach of the section to expenditures for material that expressly advocates the election or defeat of a candidate. Since this criterion could be avoided with relative ease, it is doubtful that the provision would effectively close the loophole foreseen by Congress.

Powell's annotation in the margin states "Difficult[y] in drawing line bet[ween] supporting a candidate & discussing an issue is serious, but limitation on pure speech is more serious." The memorandum then suggests that a less intrusive method to prevent "the most egregious circumvention of the expenditure and contribution limits without creating vagueness problems" would be to count expenditures "that are made by prearrangement with the candidate" as contributions. Powell added a note: "Very difficult to prove."

In the notes Powell made before the oral argument in *Buckley* (dated November 9, 1975), he continued to reflect on how "candidate" and "issues" messages blend. He noted

There are perennial issues in this country, not peculiar to a particular campaign; e.g., continued federal deficits, women's rights amendment, government's role in public and social welfare, expanded medicare, national defense, isolationism, foreign aid, etc. In a campaign, candidates – by long platforms and otherwise – become clearly identified with many of these issues. Ask: Is a citizen thereby limited to \$1,000 in expressing views on one or more of these issues? Such views, expressed without identifying a candidate, nevertheless may help or hurt one significantly. Ask: Does a candidate who wishes to express his views on a perennial issue during a campaign do so at his peril?

Later, Justice Powell pondered the vagueness issue:

One who wishes to spend more than \$1,000 expressing his views on any public issue during a campaign is faced with a number of vague phrases: (i) Who are the “clearly identified candidates”(ii) Would expressing of views on the issue be deemed “advocating the election or defeat of such a candidate.” To what extent is the citizen’s subjective intent relevant? (iii) Does the citizen have to obtain an advisory opinion in advance? Does he act at his peril? In view of these and similar questions, is a citizen fairly advised by the language of the Act as to what he may do?

Unfortunately, Justice Marshall’s papers do not include similar pre-argument notes and memoranda. Nevertheless, at least one Justice had thought through the issues related to the limit on independent expenditures, including the necessity of tailoring the law to regulate only express advocacy. Knowing that Justices and their clerks talk among themselves, the reasonable conclusion is that other Justices were also weighing these questions in advance of oral argument.

Justice Powell’s preconference notes of November 11 reflect similar positions. As to the independent expenditure limit in Section 608(e), Powell’s notes state “plainly unconstitutional.” as a direct restriction on the exercise of First Amendment rights, which was also facially vague and overbroad. Powell’s notes from Conference on November 12 indicate that five of his colleagues (Chief Justice Burger (“not at rest”) and Justices Stewart, Blackmun, Powell and Rehnquist) would find 608(e) unconstitutional while three (Justices Brennan, White, and Marshall) would affirm. Next to Justice Brennan’s name Powell wrote: “Affirm. This is really nothing more than a ‘contribution’. Thus, Bill has no 1st Amend problem. But may be void for vagueness – but still inclined to affirm (why??) There is a criminal penalty.” Powell did not make substantive notes about the other affirming Justice’s views. Marshall’s papers contain a similar summary of his colleagues’ reactions.

Buckley was not, as rumor has long maintained, authored by Justice Brennan. Following conference, on November 18, the issues were assigned to various Justices for drafting Chief Justice Burger circulated a memo to the conference noting that the Justices had agreed:

that the disposition of [Buckley] should have high priority and that, time being crucial, no one Justice should undertake the task. Justices Stewart, Powell and I agreed on a five-part outline and I have assigned the parts to a “drafting team” of Justices Brennan, Stewart, Powell, Rehnquist and myself. I have also invited Byron [White] to write on Part V, which Bill Rehnquist will address initially. Naturally the part assigned was geared to the expressions of each Justice at Conference so that each is writing in an area to which five or more Justices appear to be in agreement. When the parts are “glued” into a tentatively acceptable whole, the draft will be circulated to all.

Justice Potter Stewart drafted the portion of *Buckley* that dealt with the independent expenditure issue presented by the challenge to Section 608(e). A markup showing how

Stewart's first draft differs from the final *Buckley* section on independent expenditures is appended at the end of this essay for readers' convenience.

Justice Stewart circulated his draft on contribution and expenditure limits, which included the section on independent expenditures, on December 24. The draft resembles the final text of *Buckley* in most important respects. It first established that the "relative to a candidate" standard in the Act was too vague to provide sufficient guidance. It then rejected the Court of Appeals construction narrowing "relative to" a candidate to mean "advocating the election or defeat of" a candidate as too vague. Instead, Section 608(e) could only be applied to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." In Justice Stewart's draft this statement stood alone. In the final opinion, as readers may be aware, two footnotes have been added. Footnote 51 in *Buckley* provides examples of the type of identification required for a candidate to be "clearly identified" and footnote 52 provides examples of "express advocacy." Footnote 52 has been derided by some at the "magic words" footnote.

Evidently, during the review process Justices considered whether the opinion provided adequate guidance about the express advocacy standard, and the notes were incorporated to better explain the rule. The available documents do not show which Justice in particular requested these additions. But the available information provides a hint.

The papers contain several comments about Stewart's 608(e) draft and "express advocacy". Justice Marshall's clerks in an undated memorandum comment at some length on Justice Stewart's treatment of Section 608(e):

We agree with PS that 608(e) which limits a person's independent expenditures "relative to a clearly identified candidate" to \$1,000, is vague in the absence of a more explicit definition of the words "relative to." And we also agree that any definite standard the Court can come up with – such as "expressly advocating the election or defeat of a candidate" – renders the provision ineffective. For this reason, 608(e) is unconstitutional – as construed to avoid vagueness problems, it no longer promotes any compelling governmental interest

PS, however, does not stop here; he goes on to conclude that 608(e) is unconstitutional for the additional reason that it is overbroad. We think it both unnecessary and unwise to consider the additional question whether 608(e) is overbroad. We have real doubts whether it is, and it is certainly unnecessary to reach the question. What PS does is foreclose the possibility that Congress could come up with a non-vague statute that is also effective. For example, if Congress had a broad definition of covered expenditures, and provided that all citizens could get a prompt advisory opinion from the Federal Election Commission, there would be no vagueness problem and the provision would be effective. PS unnecessarily decides in his opinion that such a provision would be unconstitutional.

Justice Marshall circulated a memorandum on January 19 concurring with Justice Stewart's draft "except the invalidation of section 608(c) which limits the amount a candidate can spend from his personal funds and from family funds under his control." Either Justice Marshall did not share his clerks' opinion about the flaws in Stewart's draft, or Stewart was able to persuade Marshall to join the aspect of the opinion dealing with Section 608(e).

Justice Brennan, however, stated in a January 2, 1976 memorandum to the conference that he remained unpersuaded that Section 601(e) was invalid. He doubted that the law's ineffectiveness made it unconstitutional. About the draft's treatment of the vagueness issue, he noted that the conference discussion persuaded him that 608(e) contained "fatal vagueness" "particularly since criminal penalties are imposed for violations." But Brennan continued: "Potter's proposed construction does not wholly cure the vice of vagueness in my view; there remain a myriad of examples of its uncertain application even as so construed." In light of Brennan's articulated concerns about specificity and examples, it may be that the explanatory footnotes at No. 51 and 52—including the so called "magic words" footnote, were incorporated into the decision to address his comments.

Other Justices made limited comments. Chief Justice Burger circulated a memorandum on December 30 stating "I agree that 608(e)(1) is unconstitutional but I have difficulty reconciling it with sustaining other restraints [contribution limits] which seem equally to trespass constitutional limits." In the final draft of *Buckley* Justice Burger dissented from the majority on that issue.

A memorandum to the conference from Justice Powell, dated December 29, 1975, shows his general impressions of Justice Stewart's draft. Justice Powell (who drafted the portion of the opinion related to disclosure) expressed his "substantive agreement" but noted that "corporations and labor unions" remain able to exercise influence through PACs (which he saw as a "vastly larger loophole" than any closed by 608(e)). Justice Powell believed finding 608(e) unconstitutional would reduce the Act's "benefit [for] incumbent members of the Congress." He stated: "Our invalidating of 608(e) and the ceiling on overall campaign expenditures substantially ameliorates the Act's original disadvantaging of challengers." In correspondence dated January 6, Justice Powell asked Justice Stewart to include a section discussing the relatively more favorable treatment of corporate and labor communications to stockholders and members under the expenditure law. Stewart rejected that request.

A defense of the independent expenditure limit was that it was required as a loophole-closing provision. Justice Stewart's draft and the final opinion responded that, once construed to apply to express advocacy only, the law would not be effective. It would be easy for persons and groups to avoid express terms of advocacy, and be "free to spend as much as they want to promote the candidate and his views." In short, Justice Stewart and his colleagues understood from the start that anyone could construct what we

now call “issue ads” and avoid the independent expenditure limits in the law. None of the available documents demonstrate any ambiguity or prevarication on this point.

The final version of *Buckley* contains language stating, “independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.” (See 424 U.S. 1, 46.) Read in context, this caveat was applied only to the Court’s discussion about whether speakers could coordinate with candidates, and turn independent expenditures into in-kind contributions that avoided the federal limits. The changes made to the first draft in this section indicate that Justices were struggling to understand at what point “coordination” transforms free speech into a regulated contribution. This question remains a point of contention today, and to the extent the opinion could be read to invite additional proof from future litigants, it could only be on this issue. There is no evidence that the caveat about “present appearances” had any application to the express advocacy standard. The available documents indicate that the express advocacy construction was a necessary antecedent holding for those Justices who joined Stewart’s draft, however they might have viewed coordination.

The archival papers demonstrate that the Justices considered carefully the implications of the express advocacy standard in this area. Marshall’s clerks even recognized the necessity – and effect -- of a limited construction in this area. Moreover, their argument that the overbreadth determination should be removed was not adopted or made a topic in Marshall’s separate dissent.

A review of the Marshall and Powell papers shows that the Justices, faced with numerous complex issues in the *Buckley* case, nevertheless thought through the decision regarding express advocacy and the potential for “issue ads.” The Justices knew that the express advocacy standard would permit individuals and groups to discuss issues relevant to campaigns without regulation, but remained committed to providing a clear and narrow standard to address constitutional concerns. It was not, as some critics seem to suggest, a hasty, naive, or ignorant Court that set forth this standard, but one aware of reality, concerned about liberty, and protective of speech in campaigns.

Comparison: First Draft with Final Opinion *Buckley v. Valeo* on Independent Expenditures

This language in Buckley begins at 424 U.S. 1, 39, and page citations are included in brackets throughout. Draft language that was omitted in the final is indicated by a strikethrough. Final language not appearing in the draft is underlined. "DFN" means "draft footnote." The author prepared this comparison and accepts responsibility for any errors.

The \$1,000 Limitation on Expenditures "Relative to a Clearly Identified Candidate"

Section 608 (e) (1) provides that "[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds \$1,000." 45 The plain effect of 608 (e) (1) is to prohibit all individuals, who are neither candidates nor owners of institutional press facilities, and all groups, except political parties and campaign organizations, from voicing their views "relative to a clearly identified candidate" through means that entail aggregate expenditures of more than \$1,000 during a calendar year. The provision, for example, would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement "relative to a clearly identified candidate" in a major metropolitan newspaper. 46

Before examining the interests advanced in support of 608 (e) (1)'s expenditure ceiling, consideration must be given to appellants' contention that the provision is unconstitutionally vague. 47 Close examination of the [424 U.S. 1, 41] specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests. See *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287-288 (1961); *Smith v. California*, 361 U.S. 147, 151 (1959). 48 The test is whether the language of 608 (e) (1) affords the "[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S., at 438.

The key operative language of the provision limits "any expenditure . . . relative to a clearly identified candidate." Although "expenditure," "clearly identified," and "candidate" are defined in the Act, there is no definition clarifying what expenditures are "relative to" a candidate. The use of so indefinite a phrase as "relative to" a candidate fails to clearly mark the boundary between permissible and impermissible speech, unless other portions of 608 (e) (1) make sufficiently explicit the range of expenditures [424 U.S. 1, 42] covered by the limitation. The section prohibits "any expenditure . . . relative to a clearly identified candidate during a calendar year which, *when added to all other expenditures . . . advocating the election or defeat of such candidate*, exceeds

\$1,000." (Emphasis added.) This context clearly permits, if indeed it does not require, the phrase "relative to" a candidate to be read to mean "advocating the election or defeat of" a candidate. 49

But while such a construction of 608 (e) (1) refocuses the vagueness question, the Court of Appeals was mistaken in thinking that this construction eliminates the problem of unconstitutional vagueness altogether. 519 F.2d, at 853. For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest. 50 In an analogous [424 U.S. 1, 43] context, this Court in *Thomas v. Collins*, 323 U.S. 516 (1945), observed:

[W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No 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. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

"Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." *Id.*, at 535. See also *United States v. Auto. Workers*, 352 U.S. 567, 595 -596 (1957) (Douglas, J., dissenting); *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

The constitutional deficiencies described in *Thomas v. Collins* can be avoided only by reading 608 (e) (1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate, much as the definition of "clearly identified" in 608 (e) (2) requires that an explicit and unambiguous reference to the candidate appear as part of the communication. 51 This [424 U.S. 1, 44] is the reading of the provision suggested by the non-governmental appellees in arguing that "[f]unds spent to propagate one's views on issues without expressly calling for a candidate's election or defeat are thus not covered." We agree that in order to preserve the provision against invalidation on vagueness grounds, 608 (e) (1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office. 52

We turn then to the basic First Amendment question - whether 608 (e) (1), even as thus narrowly and explicitly construed, impermissibly burdens the constitutional right of free expression. The Court of Appeals summarily held the provision constitutionally valid on the ground that "section 608 (e) is a loophole-closing provision only" that is necessary to prevent circumvention of the contribution limitations. 171 U.S. App. D.C., at 204, 519 F.2d, at 853. We cannot agree.

The discussion in Part I-A, *supra*, explains why the Act's expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations. The markedly greater burden on basic freedoms caused by 608 (e) (1) thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations. Rather, the constitutionality of 608 (e) (1) turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations [424 U.S. 1, 45] on core First Amendment rights of political expression.

We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify 608 (e) (1)'s ceiling on independent expenditures. First, assuming, *arguendo*, that large independent expenditures pose the same dangers of actual or apparent quid pro quo arrangements as do large contributions, 608 (e) (1) does not provide an answer that sufficiently relates to the elimination of those dangers. Unlike the contribution limitations' total ban on the giving of large amounts of money to candidates, 608 (e) (1) prevents only some large expenditures. So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views. The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or office-holder. It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign. Yet no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office. Cf. *Mills v. Alabama*, 384 U.S., at 220 .

Second, quite apart from the shortcomings of 608 (e) [424 U.S. 1, 46] (1) in preventing any abuses generated by large independent expenditures, the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. The parties defending 608 (e) (1) contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities. They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act. 53 Section 608 (b)'s [424 U.S. 1, 47] contribution ceilings rather than 608 (e) (1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. By contrast, 608 (e) (1) limits expenditures for

express advocacy of candidates made totally independently of the candidate and his campaign. Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the 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. Rather than preventing circumvention of the contribution limitations, 608 (e) (1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.

While the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming [424 U.S. 1, 48] the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression. For the First Amendment right to "speak one's mind . . . on all public institutions" includes the right to engage in "vigorous advocacy" no less than "abstract discussion." *New York Times Co. v. Sullivan*, 376 U.S., at 269, quoting *Bridges v. California*, 314 U.S. 252, 270 (1941), and *NAACP v. Button*, 371 U.S., at 429. Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation. 54

It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by 608 (e) (1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in [424 U.S. 1, 49] order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *New York Times Co. v. Sullivan*, supra, at 266, 269, quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945), and *Roth v. United States*, 354 U.S., at 484. The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion. Cf. *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 139 (1961). 55 [424 U.S. 1, 50]

The Court's decisions in *Mills v. Alabama*, 384 U.S. 214 (1966), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), held that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment. In *Mills*, the Court addressed the question whether "a State, consistently with the United States Constitution, can make it a crime for the editor of a daily newspaper to write and publish an editorial on election day urging people to vote a certain way on issues submitted to them." 384 U.S., at 215 (emphasis in original). We held that "no test of reasonableness can save [such] a state law from invalidation as a violation of the First Amendment." *Id.*, at 220. Yet the prohibition of election-day editorials invalidated in *Mills* is clearly a lesser intrusion on constitutional freedom than a

\$1,000 limitation on the amount of money any person or association can spend *during an entire election year* in advocating the election or defeat of a candidate for public office. More recently in *Tornillo*, the Court held that Florida could not constitutionally require a newspaper [424 U.S. 1, 51] to make space available for a political candidate to reply to its criticism. Yet under the Florida statute, every newspaper was free to criticize any candidate as much as it pleased so long as it undertook the modest burden of printing his reply. See 418 U.S., at 256 -257. The legislative restraint involved in *Tornillo* thus also pales in comparison to the limitations imposed by 608 (e) (1). 56

For the reasons stated, we conclude that 608 (e) (1)'s independent expenditure limitation is unconstitutional under the First Amendment.

Footnotes

[Footnote 45] The same broad definition of "person" applicable to the contribution limitations governs the meaning of "person" in 608 (e) (1). The statute provides some limited exceptions through various exclusions from the otherwise comprehensive definition of "expenditure." See 591 (f). The most important exclusions are: (1) "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate," 591 (f)(4) [424 U.S. 1, 40] (A), and (2) "any communication by any membership organization or corporation to its members or stockholders, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any person to Federal office," 591 (f)(4)(C). In addition, the Act sets substantially higher limits for personal expenditures by a candidate in connection with his own campaign, 608 (a), expenditures by national and state committees of political parties that succeed in placing a candidate on the ballot, 591 (i), 608 (f), and total campaign expenditures by candidates, 608 (c).

[Footnote 46] Section 608 (i) provides that any person convicted of exceeding any of the contribution or expenditure limitations "shall be fined not more than \$25,000 or imprisoned not more than one year, or both."

[Footnote 47] Several of the parties have suggested that problems of ambiguity regarding the application of 608 (e) (1) to specific campaign speech could be handled by requesting advisory opinions from the Commission. While a comprehensive series of advisory opinions or a rule delineating what expenditures are "relative to a clearly identified candidate" might alleviate the provision's vagueness problems, reliance on the Commission is unacceptable because the vast majority of individuals and groups subject to criminal sanctions for violating 608 (e) (1) do not have a right to obtain an advisory opinion from the Commission. See 2 U.S.C. 437f (1970 ed., Supp. IV). Section 437f (a) of Title 2 accords only candidates, federal [424 U.S. 1, 41] officeholders, and political committees the right to request advisory opinions and directs that the Commission "shall render an advisory opinion, in writing, within a reasonable time" concerning specific planned activities or transactions of any such individual or committee. The powers delegated to the Commission thus do not assure that the vagueness concerns will be remedied prior to the chilling of political discussion by individuals and groups in this or future election years.

[Footnote 48] In such circumstances, vague laws may not only "trap the innocent by not providing fair warning" or foster "arbitrary and discriminatory application" but also operate to inhibit protected expression by inducing "citizens to `steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108 -109 (1972), quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

[Footnote 49] This interpretation of "relative to" a clearly identified candidate is supported by the discussion of 608 (e) (1) in the Senate Report, S. Rep. No. 93-689, p. 19 (1974), the House Report, H. R. Rep. No. 93-1239, p. 7 (1974), the Conference Report, S. Conf. Rep. No. 93-1237, pp. 56-57 (1974), and the opinion of the Court of Appeals, 171 U.S. App. D.C., at 203-204, 519 F.2d, at 852-853.

[Footnote 50] In connection with another provision containing the same advocacy language appearing in 608 (e) (1), the Court of Appeals concluded:

"Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections." 171 U.S. App. D.C., at 226, 519 F.2d, at 875.

[Footnote 51] Section 608 (e) (2) defines "clearly identified" to require that the candidate's name, photograph or drawing, or other unambiguous reference to his identity appear as part of the communication. Such other unambiguous reference would include use of the candidate's initials (e. g., FDR), the candidate's nickname (e. g., Ike), his office (e. g., the President or the Governor of Iowa), or his status as a [424 U.S. 1, 44] candidate (e. g., the Democratic Presidential nominee, the senatorial candidate of the Republican Party of Georgia).

[Footnote 52] This construction would restrict the application of 608 (e) (1) to communications containing 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."

[Footnote 53] Section 608 (e) (1) does not apply to expenditures "on behalf of a candidate" within the meaning of 608 (c) (2) (B). The latter subsection provides that expenditures "authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate" are to be treated as expenditures of the candidate and contributions by the person or group making the expenditure. The House and Senate Reports provide guidance in differentiating individual expenditures that are contributions and candidate expenditures under 608 (c) (2) (B) from independent expenditures subject to the 608 (e) (1) ceiling. The House Report speaks of independent expenditures as costs "incurred without the request or consent of a candidate or his agent." H. R. Rep. No. 93-1239, p. 6 (1974). The Senate Report addresses the issue in greater detail. It provides an example illustrating the distinction between "authorized or requested" expenditures excluded from 608 (e) (1) and independent expenditures governed by 608 (e) (1):

[A] person might purchase billboard advertisements endorsing a candidate. If he does so completely on his own, and not at the request or suggestion of the candidate or his agent's [sic] that would constitute an 'independent expenditure on behalf of a candidate' [424 U.S. 1, 47] under section 614 (c) of the bill. The person making the expenditure would have to report it as such.

However, if the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter and an expenditure by the candidate - just as if there had been a direct contribution enabling the candidate to place the advertisement, himself. It would be so reported by both." S. Rep. No. 93-689, p. 18 (1974).

The Conference substitute adopted the provision of the Senate bill dealing with expenditures by any person "authorized or requested" to make an expenditure by the candidate or his agents. S. Conf. Rep. No. 93-1237, p. 55 (1974). In view of this legislative history and the purposes of the Act, we find that the "authorized or requested" standard of the Act operates to treat all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate as contributions subject to the limitations set forth in 608 (b).

[Footnote 54] Appellees mistakenly rely on this Court's decision in *CSC v. Letter Carriers*, as supporting 608 (e) (1)'s restriction on the spending of money to advocate the election or defeat of a particular candidate. In upholding the Hatch Act's broad restrictions on the associational freedoms of federal employees, the Court repeatedly emphasized the statutory provision and corresponding regulation permitting an employee to "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates." 413 U.S., at 579 , quoting 5 CFR 733.111 (a) (2). See 413 U.S., at 561 -568, 575-576. Although the Court "unhesitatingly" found that a statute prohibiting federal employees from engaging in a wide variety of "partisan political conduct" would "unquestionably be valid," it carefully declined to endorse provisions threatening political expression. See *id.*, at 556, 579-581. The Court did not rule on the constitutional questions presented by the regulations forbidding partisan campaign endorsements through the media and speechmaking to political gatherings because it found that these restrictions did not "make the statute substantially overbroad and so invalid on its face." *Id.*, at 581.

[Footnote 55] Neither the voting rights cases nor the Court's decision upholding the Federal Communications Commission's fairness doctrine lends support to appellees' position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society.

Cases invalidating governmentally imposed wealth restrictions on the right to vote or file as a candidate for public office rest on the conclusion that wealth "is not germane to one's ability to participate intelligently in the electoral process" and is therefore an insufficient basis on which to restrict a citizen's fundamental right to vote. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966). See *Lubin v. Panish*, 415 U.S. 709 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972); *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970). These voting cases and the reapportionment decisions serve to assure that citizens are accorded an equal right to vote for their representatives regardless of factors of wealth or geography. But the principles that underlie invalidation of governmentally imposed restrictions on the franchise do not justify governmentally imposed restrictions on political expression. Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.

In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Court upheld the political-editorial and personal-attack portions of [424 U.S. 1, 50] the Federal Communications Commission's fairness doctrine. That doctrine requires broadcast licensees to devote programming time to the discussion of controversial issues of public importance and to present both sides of such issues. *Red Lion* "makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case," by demonstrating that "it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Columbia Broadcasting v. Democratic Comm.*, 412 U.S. 94, 101 (1973), quoting *Red Lion Broadcasting Co.*, *supra*, at 388. *Red Lion* therefore undercuts appellees' claim that 608 (e) (1)'s limitations may permissibly restrict the First Amendment rights of individuals in this "traditional free speech case." Moreover, in contrast to the undeniable effect of 608 (e) (1), the presumed effect of the fairness doctrine is one of "enhancing the volume and quality of coverage" of public issues. 395 U.S., at 393.

[Footnote 56] The Act exempts most elements of the institutional press, limiting only expenditures by institutional press facilities that are owned or controlled by candidates and political parties. See 591 (f) (4) (A). But, whatever differences there may be between the constitutional guarantees of a free press and of free speech, it is difficult to conceive of any principled basis upon which to distinguish 608 (e) (1)'s limitations upon the public at large and similar limitations imposed upon the press specifically.



Our Purpose

The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities.

THE FEDERALIST SOCIETY
for Law and Public Policy Studies
1015 18th Street, NW, Suite 425
Washington, D.C. 20036

Phone (202) 822-8138
Fax (202) 296-8061

www.fed-soc.org

The Courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequences would be the substitution of their pleasure for that of the legislative body."

The Federalist No. 78