Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment after All Symposium on Campaign Finance Reform

Vincent A. Blasi
*Columbia Law School, blasi@law.columbia.edu*

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)

Part of the Constitutional Law Commons, and the First Amendment Commons

**Recommended Citation**


Available at: [https://scholarship.law.columbia.edu/faculty_scholarship/10](https://scholarship.law.columbia.edu/faculty_scholarship/10)

---

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)

Part of the Constitutional Law Commons, and the First Amendment Commons

---

Recommended Citation


Available at: [https://scholarship.law.columbia.edu/faculty_scholarship/10](https://scholarship.law.columbia.edu/faculty_scholarship/10)

---

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.
FREE SPEECH AND THE WIDENING GYRE OF FUND-RAISING: WHY CAMPAIGN SPENDING LIMITS MAY NOT VIOLATE THE FIRST AMENDMENT AFTER ALL

Vincent Blasi*

I. INTRODUCTION

Candidates for office spend too much of their time raising money. This is scarcely a controversial proposition.¹ A major impetus for campaign finance reform is the frustration politicians now feel concerning how much time they must devote to courting potential donors, often by methods borrowed from the marketplace that can only be described as demeaning.² The situation has gotten worse as electoral merchandising has grown ever more sophisticated and expensive.³ Herbert Alexander, a

---

* Corliss Lamont Professor of Civil Liberties, Columbia Law School.

1. See Dan Clawson et al., Money Talks: Corporate PACs and Political Influence 7–9, 203–04 (1992); Elizabeth Drew, Politics and Money: The New Road to Corruption 96 (1983); Brooks Jackson, Honest Graft: Big Money and the American Political Process 69, 91–92, 108 (1990); Burdett Loomis, The New American Politician: Ambition, Entrepreneurship, and the Changing Face of Political Life 195–96 (1988); David B. Magleby & Candice J. Nelson, The Money Chase: Congressional Campaign Finance Reform 43–45, 197 (1990); Frank J. Sorauf, Inside Campaign Finance: Myths and Realities 72–73, 187–88 (1992) [hereinafter Sorauf, Inside]; Frank J. Sorauf, Money in American Elections 183–84 (1988) [hereinafter Sorauf, Money]. One (unnamed) Republican senator summarized the problem vividly: "I knew Congress well before I came here, but I did not know the amount of time consumed by fundraising and how that encroaches on your ability to work here. It devours one's time—you spend the two or three years before your re-election fundraising. The other years, you're helping others." Peter Lindstrom, Center for Responsive Politics, Congress Speaks: A Survey of the 100th Congress 80 (1988) [hereinafter Congress Speaks]. In his memoir describing life as a member of the House of Representatives, Congressman David Price, a former political science professor, decries "the constant preoccupation with fundraising." See David Price, The Congressional Experience: A View from the Hill 26 (1992). House majority leader Richard Gephardt, a hugely successful fund-raiser, has noted how time-consuming the process is: "If you have the need to raise three or four hundred thousand dollars, you're taking an enormous amount of the members' time just to raise the money." Quoted in Drew, supra, at 51.

2. For a description of the bazaars staged by political parties to display their candidates for the inspection of potential contributors, see Jackson, supra note 1, at 91–92. Many political action committees require candidate-suppliants to fill out questionnaires pertaining to how they would vote on hypothetical legislative proposals. See Sara Fritz & Dwight Morris, Gold-Plated Politics: Running for Congress in the 1990s 171 (1992).

student of campaign finance for over thirty years, sketches the disturbing pattern that has developed:

Throughout the 1980s, as campaign costs escalated, candidates for federal office spent increasing amounts of time in activities related to fund raising. For House members, the pursuit of campaign donations is never-ending. While senators serve six-year terms, many of them are now starting to hold fund-raising events shortly after election and well in advance of reelection, so they can store up enough of a war chest to fend off any serious political opposition. Senators now must raise nearly $13,000 each week for their entire six-year terms to amass the average that a winning Senate race costs.4

The problem is serious quite apart from the supposition that past and potential donors exert influence over the behavior of representatives far greater than that exerted by constituents who do not make sizable contributions. "Disproportionate influence" is hard to measure, and absent particularly nefarious patterns perhaps is defensible as an inevitable phenomenon in any real world of power. In the effort to criticize the current system of campaign finance on grounds of political favoritism, reformers until recently have failed to emphasize sufficiently how the system harms the candidates themselves.5 The quality no less than the equity of representation is a concern of constitutional dimension.

A major goal of campaign finance reform is coming to be—and surely ought to be—to protect the time of elected representatives and candidates for office. The quality of representation has to suffer when legislators continually concerned about re-election are not able to spend the greater part of their workday on matters of constituent service, infor-

4. Alexander, supra note 3, at 54 (footnote omitted).

information gathering, political and policy analysis, debating and compromising with fellow representatives, and the public dissemination of views. Likewise, the quality of future representation has to suffer when aspirants for legislative office are not able to spend the bulk of their time learning what questions and problems most trouble voters, formulating positions on major issues, and holding themselves and their views up to public scrutiny. No doubt when candidates spend so much time fund-raising they encounter grievances, information, and ideas of potential donors that an enlightened representative would want to consider. If the candidate is not substantially free, however, to spend her time considering as well the grievances, information, and ideas of non-donors—in particular her geographic constituents—the process falls short, not just of the ideal but of the constitutional norm. Article One, the Republican Form of Government Clause, and the Seventeenth Amendment guarantee to the People of the United States and of the individual states that they shall be governed by representatives. Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not in essence representatives.

Such an extreme way of stating the problem might suggest that I plan to argue that campaign finance reform is a constitutional imperative, judicially enforceable even in the absence of legislation. I can imagine how such a claim could be supported in terms of constitutional theory, but the institutional and remedial problems remain formidable, perhaps prohibitive. More promising is the claim that certain forms of campaign finance legislation can be justified, even against First Amendment challenge, by resort to the constitutionally ordained value of representation. In the debate that continues in the wake of Buckley v.

6. See Alexander, supra note 3, at 4, 51, 96, 166–67; Drew, supra note 1, at 98; Larry J. Sabato, Paying For Elections: The Campaign Finance Thicket 1 (1989). In a survey of members of Congress conducted in 1987, 29.7% of the respondents stated that the demands of campaign fund-raising “significantly” cut into the time they devote to legislative work. When their staff members were asked the same question, 47.5% saw a significant reduction attributable to fund-raising in the time their bosses spent on legislative work. See Congress Speaks, supra note 1, at 92. The problem has almost certainly gotten worse in the House since the survey was taken: in 1988 the average House incumbent spent $380,000 campaigning for re-election; by 1992, that figure had risen to $543,000. See Larry Makinson, Center for Responsive Politics, The Price of Admission: Campaign Spending in the 1992 Elections 11 (1993) [hereinafter The Price of Admission]. Spending in Senate elections has held fairly even over the last six years. See id. at 10.

7. Unless they hold other positions in government, candidates who challenge incumbents do not have official responsibilities that could be discharged were fund-raising a smaller part of effective candidacy. Nevertheless, the process of representation really begins in the campaign itself. That is when future representatives forge their political identities and often when constituents are most actively engaged in expressing their complaints and preferences. Thus, the way nonincumbent candidates allocate their time is a constitutional concern. This does not mean, however, that challengers must be treated exactly the same as incumbents in the matter of campaign finance regulation. See infra text accompanying notes 46–47, 49.

8. See U.S. Const. art. I, § 2; id. art. IV, § 4; id. amend. XVII.
Valeo, too much emphasis has been placed on the anticorruption and equalization (or enhancement) rationales for regulating campaign contributions and expenditures. This emphasis has diverted attention away from the rationale that I believe holds the most promise of answering First Amendment concerns: candidate time protection.

II. Spending Limits, Buckley, and the Rise of the War Chest Mentality

If candidate time protection is the objective, the principal regulatory measure must be a limit on the overall amount of money that can be spent in an election campaign. From this perspective, it is a matter of secondary importance what restrictions are placed on the size of contributions to candidates, parties, and political action committees; on the sources of funds collected by candidates; and on "independent" expenditures in support of candidates. Even the availability of public financing of some election expenses, or of a voucher system designed to equalize the opportunity to contribute, pales in significance compared to the need to limit overall spending. Candidates facing or fearing tight races will be preoccupied with fund-raising (or voucher raising) under any system that does not restrict total spending. If candidates are permitted to spend vast amounts of money in pursuit of votes, they will inevitably spend vast amounts of time in pursuit of money. Spending limits are the sine qua non of candidate time protection.

The centrality of candidate spending limits was not so apparent when Congress passed its major campaign finance reforms in 1971 and 1974, nor when the Supreme Court in 1976 held several provisions of that legislation unconstitutional, including the mandatory ceilings on


overall campaign spending by congressional candidates. At that time, what has come to be known as the war chest mentality had not yet seized the Congress. Four years after the Buckley decision, however, several House and Senate incumbents were unexpectedly defeated in the 1980 elections. The losers attributed those upsets to massive expenditures by challenger candidates and supportive political action committees in the closing days of the campaign. Ever since, incumbents have lived with the nightmare of a well-financed opponent saturating the media at the eleventh hour and "stealing" an election. No matter how long his tenure, how prominent his position, how favorable the electoral arithmetic in his district, how unimpressive and under-financed his last opponent was, and how hypothetical his next opponent may be, almost every member of Congress feels the need to amass a large war chest, just in case. No package of campaign finance reforms will change substantially how representatives spend their time unless war chests are made unimportant. The best way to make a war chest unimportant is to prohibit the money in it from being spent in the cause of re-election.

One indication of how dramatically the war chest mentality has altered the regulatory landscape is the fact, startling in retrospect, that the Supreme Court in Buckley never considered how spending limits might be justified as a means of preventing candidates from spending excessive amounts of time on fund-raising. In 1976, candidate time protection was not seen as a major objective of campaign finance reform. Corruption, disproportionate influence, the fencing out of impecunious candidates, and the alienation of the electorate were the dominant concerns.


13. See Drew, supra note 1, at 20-22; Jackson, supra note 1, at 49-50, 68.

14. See Alexander, supra note 3, at 7-8, 97. See also Morris P. Fiorina, Congress: Keystone of the Washington Establishment 93 (2d ed. 1989) (commenting on the electoral insecurity of congressional incumbents); Gary C. Jacobson, Money in Congressional Elections 121-22 (1980) ("Despite the well-known statistics on the reelection rates of incumbent members, they are a surprisingly insecure lot."). In 1980, only three members of Congress had a post-election balance (a "war chest") of greater than $250,000. By 1986, 54 had such a post-election balance. See Loomis, supra note 1, at 189-90. After the 1992 election, 49 representatives had more than $250,000 remaining in their campaign coffers. Computation by the author from data reported in The Price of Admission, supra note 6, at 46-170. Of course, many representatives with a low balance immediately after an expensive campaign are able to amass a large war chest during the two years preceding the next election, or at least try hard to do so.

15. This is not to suggest that candidate time diversion went completely unnoticed during that period. The bill passed by the Senate that eventuated in the Federal Election Campaign Act Amendments of 1974 [hereinafter 1974 Act] contained a provision, eliminated in the conference committee, for the public financing of congressional elections. In the Senate committee report, that ill-fated provision was justified partly on the ground that financing expensive campaigns entirely out of private funds "is a great
The statutory limits on total campaign spending contained in the 1974 Act were analyzed by the Buckley Court in terms of three alternative rationales that have almost nothing to do with the problem of how candidates spend their time. First, spending limits were evaluated as a means of making large contributions less important in election contests so that candidates would have less incentive to find ways to evade the statutory restrictions on such contributions. The Court rejected this rationale on the ground that vigorous enforcement of the laws prohibiting large contributions to candidates was the better and sufficient way to address the problem. Second, spending limits were assessed as a device to hold down the costs of running for office, thereby removing a major disincentive to many worthy candidacies, particularly those that might challenge

16. See 424 U.S. at 56.
uninspiring but entrenched incumbents. The Court responded that "the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of a campaign."17 Third, spending limits were considered as an antidote to "wasteful, excessive, or unwise" spending on campaigns, apparently on the theory that voters might be saturated and perhaps misled or alienated by deluges of campaign advertising. This rationale the Supreme Court found paternalistic in a manner deeply antithetical to the fundamental premises of the First Amendment. It is not, said the Court, a proper function of government to protect voters from hearing too much speech.18

Not only did the Court fail to examine the candidate-time-protection rationale, the Buckley majority opinion devoted only 4 1/2 of its 144 pages to the issue of campaign spending limits. Before the advent of pervasive war chests and candidate-PAC merchandizing bazaars, candidate time protection was not at the center of either the reform agenda or the constitutional analysis. Accordingly, the issue of campaign spending limits took a back seat to the issues raised by the effort to reduce the influence of wealthy supporters by prohibiting large contributions and independent expenditures.

Now the situation is different. In the congressional debates of 1993, supporters of campaign finance reform emphasized repeatedly that candidate time protection was one of their central objectives.19 As a result, the search for a constitutionally valid means of establishing campaign spending limits dominated the legislative agenda. A familiar move, upheld in Buckley for presidential elections and extended to congressional elections in the bill passed by the House in 1993, is to link a candidate's acceptance of spending limits with his eligibility for public funding.20 A novel approach introduced in the bill passed by the Senate in 1993 is to tax all the campaign contributions received by candidates who decline to abide by prescribed spending limits.21 On the assumption, derived from Buckley, that spending limits cannot be imposed directly, these efforts to induce candidates to accept limits raise a host of interesting issues under

17. Id. at 56–57.
18. See id. at 57.
19. See supra note 5.
the First Amendment. Even the scheme approved in Buckley for presidential elections has to trouble First Amendment scholars—critics of Rust v. Sullivan, for example—who do not fully embrace the proposition that government funds can be used to purchase the waiver of constitutional rights. Such is the priority attached to spending limits, however, that both the House and Senate chose in 1993 to navigate among these dangerous constitutional shoals. Candidate time protection pursued by means of spending limits is now seen as the centerpiece of campaign finance reform.

In recent congressional deliberations, opposition to campaign spending limits has most often been expressed in terms of constitutional concerns. There are at least four reasons, however, why the conclusion of the Supreme Court in Buckley v. Valeo that limits on overall spending by a campaign violate the First Amendment should not be considered settled law. First, the problem of candidate time diversion is far more serious today than it was in 1976 as a result of dramatic changes in the institutional mechanisms of both fund-raising and campaigning. Second, were new spending limits to be enacted, they would reflect a legislative recognition of both their central importance and their justification as a means of protecting the quality of the relationship between candidates and constituents; the spending limits invalidated in Buckley reflected no such legislative judgments. New spending limits would also reflect a legislative calculation not available to the Buckley Court regarding what regulations are most efficacious in an environment in which independent expenditures to express views relating to an election cannot be prohibited under the Constitution and in which the constitutionally permissible

22. For a survey of the constitutional objections raised by congressional opponents of the scheme to tax excessive campaign spending, see Donovan, Constitutional Doubts Bedevil, supra note 21, at 2217; Donovan, Gutting Public Funding, supra note 5, at 1539.


24. For a powerful critique of Buckley on this point, see Polsby, supra note 15, at 26–31. For a thorough discussion, written shortly before Rust v. Sullivan was decided, of the question whether public grants can be conditioned on a waiver of the right to engage in abortion counseling within the subsidized program, see Alexandra A.E. Shapiro, Note, Title X, the Abortion Debate, and the First Amendment, 90 Colum. L. Rev. 1737, 1747–67 (1990). The classic treatment of the unconstitutional conditions doctrine is, of course, William Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968). A more recent general examination that is exceptional in its thoroughness and subtlety is Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293 (1984). In his contribution to this symposium, Professor Sunstein, an expert on the issue of unconstitutional conditions, signals his approval of Buckley’s conclusion that certain campaign finance reforms that cannot be instituted directly by means of prohibition can be achieved indirectly by means of financial incentives. See Cass R. Sunstein, Political Equality and Unintended Consequences, 94 Colum. L. Rev. 1390, 1411–12 (1994).

25. See Donovan, Constitutional Doubts Bedevil, supra note 21, at 2217; Donovan, Gutting Public Funding, supra note 5, at 1539; Donovan, Constitutional Issues, supra note 5, at 434–35.
restrictions on contributions have proved to have significant side effects largely unforeseen twenty years ago. Third, what is today the most commonly voiced and widely acknowledged rationale for overall campaign spending limits—candidate time protection—was never considered when the Court decided Buckley v. Valeo. Fourth, as a justification for spending limits, candidate time protection raises a set of First Amendment questions and analogies quite different from those the Court confronted when it reached its conclusion in Buckley.

A fresh look at the constitutional issue is in order. If the direct imposition of campaign spending limits does not violate the First Amendment after all, recent legislative efforts to achieve limits indirectly by means of public funding conditions or tax incentives are (1) far less problematic constitutionally and (2) not necessary, given the alternative of direct prohibitions.

III. Money and Speech

Campaign spending limits raise a First Amendment issue because they have an undoubted impact on what candidates are able to communicate to voters and on what voters are able to learn about candidates. Money is not speech literally, and although money can buy the production and dissemination of speech, that is not all that it buys in political campaigns. Restrictions on spending by candidates thus are not regulations of speech as such, but they are laws the incidence of which falls predictably and heavily on speech. That is enough to trigger serious First Amendment inquiry.

Concern about the impact of campaign finance regulation is not alleviated, at least not under the conventional understanding of First Amendment principles, by the particular character of the speech that is likely to be lost due to spending limits. Campaign commercials and live addresses made possible by expensive advance work and travel arrangements surely qualify as forms of political speech properly accorded the highest constitutional value. Unrestricted cash contributions to candidates may be characterized as facilitating only “speech by proxy” so far as

26. In the 1990 elections for the House of Representatives, over 60% of the campaign expenditures of incumbents went for items other than media advertising, voter contact mail, and actual campaigning. Salaries, office expenses, travel, polling, fund-raising overhead, and donations to other candidates collectively took more out of the campaign dollar than did directly communicative activities. See Fritz & Morris, supra note 2, at 18–19, table 1-3. Challengers spent proportionately more on speech activities, but still on average only 57% of their campaign budgets. See id.

27. For a general discussion of how laws that burden speech only incidentally are treated under the First Amendment, see Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 105-17 (1987). Stone believes the Court in Buckley was correct to subject spending limits to a rigorous standard of justification because of the impact they have on opportunities for communication. See id. at 56–60.
the contributor's First Amendment claim is concerned, but the attempt by a candidate to spend money she has legally raised in order to generate communications in support of her candidacy should be considered a pure First Amendment activity. That is true, I believe, even if the communications so purchased are produced by political marketing specialists, designed to emphasize imagery and avoid substantive discussion, and disseminated in a manner that trades on repetition. We might sorely be tempted to notice features such as these in scaling the value of various communicative endeavors, but to do so would open the door to a jurisprudence of speech evaluation that in the end is certain to be abused, to the detriment of some of the most unpopular yet socially challenging speakers, messages, and methods of protest. Flag-burners and speakers who challenge language taboos, for example, would not fare well in a regime that authorized judges to devalue communicative acts they regarded as insufficiently substantive.

If the speech that spending limits would curtail is of full First Amendment pedigree, the crucial variables in the constitutional calculus become the manner, magnitude, and distribution of the regulatory impact on the speech; the nature of the regulatory rationale; and the degree to which the purposes implied by that rationale are likely to be served by the regulation. This description of the structure of analysis may seem to imply a pragmatic, unprincipled approach, but that need not be the case. Certain impacts and certain rationales may be completely disallowed as a matter of First Amendment principle. Or certain impacts may be treated as presumptively invalid because historically they have proved to be good indicators of illicit government motivation, and certain rationales so treated because they are too easily abused or too often invoked as pretexts.

IV. THE IMPACT OF SPENDING LIMITS

Spending limits reduce the amount of campaign speech, but that fact in itself cannot be dispositive of the First Amendment issue. As Justice White pointed out in *Buckley*, labor and environmental laws impose costs on news organizations that result in less news consumption. Compliance with those laws diverts funds that otherwise could be used to pay for more and better reporting, or greater reader access due to lower prices and wider distribution. Political campaigns are subject to burdensome financial reporting obligations; costs associated with the discharge of those obligations reduce the amount of pure speech activity campaigns

---

31. See *Buckley*, 424 U.S. at 262–63 (White, J., concurring in part and dissenting in part).
32. See id. at 60–84.
can afford to undertake. The limits on the size of individual contributions that were upheld in *Buckley* against First Amendment challenge had the effect of reducing the total receipts of most candidates and thus the funds available for communicative endeavors. So long as reduction in the quantity of speech is not the purpose of a regulation but only its unavoidable byproduct, this phenomenon of adverse impact is not by itself sufficient to invalidate the law.33

If the impact of spending limits were distributed in a way that is problematic under the First Amendment, impact alone might be a basis for invalidating them. In *Buckley* the Court suggested that spending limits might disadvantage insurgent candidacies.34 Critics of spending caps

---

33. Labor laws, environmental laws, contribution limits, reporting requirements, and spending limits are all comparable in that their adverse impact on the level of communication does not make them unconstitutional ipso facto. Labor and environmental laws might be considered more “incidental” in their effects on speech, and thereby less problematic under the First Amendment, because they apply to a wide range of activities only a small percentage of which are speech activities. In contrast, reporting requirements, contribution limits, and spending limits apply to campaign activities and nothing else. For that reason, such laws raise special concerns under the First Amendment. See generally Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986) (laws that single out speech activities as the object of regulation have a higher burden of justification than laws of broader applicability that burden speech activities).

One might seek to distinguish spending limits from reporting requirements and contribution limits on the ground that spending limits are violated by an act—the purchasing of media time for example—that is an integral part of a communicative activity, whereas contribution limits and reporting requirements are violated by acts that are not quite so inherently communicative. See id. at 706. It is not obvious, however, why any such difference in the “inherent” nature of the act of violation should matter in First Amendment terms. Nor is it clear that the acts that trigger violations of contribution limits and reporting requirements are less integral to communication than the acts that violate spending limits. Many campaign expenditures are for items such as staff salaries, travel expenses, building rentals, and polling that may support communicative activities (as well as other endeavors) but are not themselves communicative activities. Conversely, the “act” that constitutes a violation of a reporting requirement is the failure to report combined with the doing of something that legally must be reported. Most of the time, that something is making a campaign expenditure or receiving a campaign contribution. Similarly, the “act” that constitutes a violation of a contribution limit is the making of a contribution of prohibited size. As the Court recognized in *Buckley*, the associational link created by a campaign contribution has First Amendment significance. See 424 U.S. at 21. The “inherent” nature of the act of violation is not a promising basis for distinguishing the various regulations that affect campaign speech.

I do not question the *Buckley* Court’s holding that spending limits raise issues under the First Amendment that differ from the issues raised by contribution limits and reporting requirements. Those differences, however, go to the strength and nature of the respective regulatory rationales and how severely the regulations burden speakers and listeners, not to any differences concerning the degree to which the regulations can be characterized as “incidental” in their impact on communication. So long as the reduction of communication is not the purpose of a regulation, an adverse impact on communication begins the First Amendment inquiry but does not resolve it.

34. See 424 U.S. at 56–57.
sometimes characterize them as incumbent protection measures.\textsuperscript{35} Quite apart from differential impact on challengers and incumbents, campaign spending limits might adversely affect Republicans more than Democrats, or third-party candidacies more than major party candidacies, or business-oriented candidates more than environmentalist candidates. Election laws designed to have such political impacts would certainly be invalid under the First Amendment. Even if the differential impact is neither the rationale nor the dominant political impetus for spending limits, First Amendment principles can be implicated by the way the effects of speech regulation are distributed.

This concern for the distribution of regulatory effects has not received much explicit attention in First Amendment analysis, but I would argue that distributional considerations have profoundly if only indirectly shaped the law of free speech, and properly so. One of the most favored of modern First Amendment principles is that against so-called content regulation.\textsuperscript{36} The scope and justification of this principle are much disputed, but one reason to disfavor laws that apply selectively based on speech content is that such laws are more likely to have a disparate ideological impact than is true for laws that operate irrespective of the content of speech.\textsuperscript{37}

Campaign spending limits are, in these terms, content neutral: all expenditures above a limit are forbidden without regard to the content of the communications they might purchase. However, if the distribution of impact of content-neutral spending limits is otherwise problematic in First Amendment terms, at least some of the concerns that underlie the disfavored status of content regulation would be present.\textsuperscript{38} We can be confident that those who draft and vote for spending limits give careful consideration to the question of which candidates will gain or lose partisan advantage under the new regime.\textsuperscript{39} Those who would judge the constitutionality of spending limits should not accept their formal content neutrality as conclusive evidence that the distribution of impact satisfies the First Amendment.


\textsuperscript{38} For a detailed argument that regulations of speech that are content-neutral in form but have a disparate impact on various speakers and ideas should be considered problematic in much the same way that content-based regulations are, see Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615, 674–701 (1991).

\textsuperscript{39} See Alexander, supra note 3, at 4, 159.
Impact will vary, of course, with the level at which spending limits are set. To explore whether spending limits should be considered either presumptively or per se invalid due to the distribution of their impact, we may posit limits roughly in the range of those prescribed—by means of incentives rather than outright prohibitions—in the bills passed by the House and Senate in 1993. These would allow future congressional campaigns to proceed at approximately the level of expenditure of most recent electoral contests but would constrain some of the most lavishly financed recent campaigns.

In closely contested House elections (those in which the winner received less than fifty-five percent of the vote) in 1992, incumbents on average outspent challengers by margins of over three-to-one in races won by incumbents, and over two-to-one even in races won by challengers. In addition, a common explanation for the large number of congressional seats that are not vigorously contested is that serious challenges are deterred by the formidable war chests incumbents are able to acquire by accumulating PAC contributions year after year. These patterns, by

40. Low limits are commonly thought to favor incumbents because challengers need to spend substantial amounts just to become visible to the electorate. See Magleby & Nelson, supra note 1, at 171; Price, supra note 1, at 27.

41. The bill passed by the Senate in 1993 (S.3) sets the limits (spending above which activates a punitive tax) according to a formula that takes into account population variations among the states as well as inflation. In 1994 the limits for Senate races would range from $1.2 million to $5.5 million for general election campaigns, and either 67% of the general election limit or $2.75 million (whichever is less) for primaries. See Donovan, Campaign Finance Provisions, supra note 21, at 2239. The bill passed by the House (H.R. 3) sets the limit at $600,000 for House general elections, with the provision that survivors of contested primaries can spend an additional $200,000; violation of the limit would disqualify a candidate from receiving the public funding authorized by the bill. See Campaign Finance Bills Compared, supra note 20, at 262-64. In the 1993 bills, neither house ventured to set limits for the other chamber.

42. In 1992, the median level of spending in House elections by Democratic incumbents was $517,594; by Republican incumbents, $485,778; by Democratic challengers, $68,324; by Republican challengers, $83,201; by Democrats competing for open seats, $397,873; by Republicans competing for open seats, $420,800. Ninety-two candidates for House seats spent more than $800,000 in their general election campaign in 1992; fifty spent more than $1,000,000; three spent over $2,000,000. The highest spending House candidate, Rep. Michael Huffington of California, spent $5,435,177. The limits on Senate campaign spending contained in the 1993 Senate bill vary with state population, but nine candidates in 1992 spent more than $5.5 million, the maximum allowed in the most populous state. The leading spender, Sen. Alphonse D'Amato of New York, spent $9,175,533 in his successful bid for re-election. Computations made by the author from data supplied by the Federal Election Commission, Press Release, supra note 3, at 14-40.

43. In close elections (so defined) in 1992, the median spending by victorious incumbent candidates was $746,611, and by losing challengers, $248,152. Challengers who won such elections had a median spending level of $397,841. Incumbents who lost in close races spent the most: a median level of $859,805. See Federal Election Commission, Press Release, supra note 3, at 10.

44. See Linda L. Fowler & Robert D. McClure, Political Ambition: Who Decides to Run for Congress 5 (1989); Loomis, supra note 1, at 185.
no means so pronounced when Buckley was decided,\textsuperscript{45} suggest that challengers would benefit from constraints on overall spending, which reduce the value of a war chest by making much of the money in it unspendable.

No doubt incumbents have built-in advantages in addition to the capacity to attract numerous contributions. Name recognition, the franking privilege, staff resources, experience at media relations, the capacity to deliver timely benefits to constituents—these and many other perquisites of office severely tilt the electoral playing field.\textsuperscript{46} That incumbent representatives serve as scapegoats for voter malaise and have calls on their time that divert them from campaigning hardly restores the balance, as is shown by the astonishing statistics regarding congressional incumbent re-election rates.\textsuperscript{47} There is much to be said for imposing spending limits asymmetrically (permitting challengers to spend more than incumbents) in order to counteract the multifarious advantages of incumbency. But the failure of a legislature composed of incumbents to exhibit such magnanimity should not impeach a regime of symmetrical spending limits.

The fact that incumbents are notoriously hard to unseat may suggest that a challenger must be allowed to spend unlimited amounts of money in the endeavor. If, however, most challengers in competitive races are badly outspent and many potential challenges never materialize due to that prospect, the general distribution of the impact of spending limits should not be regarded as inherently favorable to incumbents. No doubt some incumbents—those facing the rare challenger capable of outspending them—gain from spending limits, but most do not.\textsuperscript{48} Absent a gen-

\textsuperscript{45} The appellant in Buckley argued that although incumbents at that time outspent challengers overall, "the principal impact of limits will be on those close races [defined by the brief as elections for which the winning percentage is 55% or less] in which usually spending is already fairly equal." See Brief of the Appellants at 99, Buckley v. Valeo, 424 U.S. 1 (1976) (Nos. 75-436 and 75-437). Today, spending in closely contested congressional races is far from "fairly equal." See supra note 43. In state elections, incumbents have increased their spending advantage over challengers. In 1976, incumbents running for re-election to the California Assembly outspent their challengers by a ratio of three-to-one. Ten years later, that margin had increased to thirty-to-one. See Alexander, supra note 3, at 124.

\textsuperscript{46} See Sorauf, Inside, supra note 1, at 176, 216.

\textsuperscript{47} Since 1984, incumbents have prevailed in 1,569 of the 1,619 elections for the House of Representatives involving an incumbent, a winning percentage of 96.9%. (During that period, 122 elections were for open seats due to redistricting or the incumbent's death or decision not to seek re-election.) Computation by the author from data reported in Sorauf, Inside, supra note 1, at 62. The median re-election rate for United States Senators between 1974 and 1990 was 85.2%. See id. at 61. Re-election rates in state legislatures have been running at well over 90%. See Alexander, supra note 3, at 5.

\textsuperscript{48} See Sorauf, Inside, supra note 1, at 211. In an influential analysis, Gary Jacobson argued in 1980 that spending limits hurt challengers because their electoral success depends heavily on spending level whereas the success of incumbents seems hardly to vary with spending. See Jacobson, supra note 14, at 218–20. Jacobson's thesis has been challenged. See Donald P. Green & Jonathan S. Krasno, Salvation for the Spendthrift Incumbent: Re-estimating the Effects of Campaign Spending in House Elections, 32 Am.
eral pattern of pro-incumbent bias, distributional effects along this axis would not seem to be of constitutional import. Disparate impact systematically in favor of challengers should not be a basis for invalidation under the First Amendment, given the many other disadvantages they face.49

Democrats tend to favor spending limits; Republicans tend to oppose them.50 That fact alone can hardly serve to invalidate a law on constitutional grounds, but is there good reason to conclude that spending restrictions cancel some of the legitimate advantages that candidates of the Republican Party enjoy? During the 1970s, Republicans raised a great deal more money than Democrats.51 This happened, it would seem, partly because Republican voters on average have higher net worth than Democratic voters, and possibly are less alienated from the political system as a general matter.52 At least as important, however, may be that the

J. Pol. Sci. 884, 898 (1988). Everyone agrees that incumbents have a much easier time raising money than challengers. Sorauf observes that Jacobson's study may be dated because the levels and dynamics of fund-raising have changed significantly since 1980 as many PACs have shifted their emphasis away from trying to unseat incumbents toward attempting to establish good relations with them; a major trend since Jacobson wrote is that contributions from PACs are flowing increasingly to incumbents. See Magleby & Nelson, supra note 1, at 80–89; Sorauf, Inside, supra note 1, at 67–68. In 1994 spending limits pitched in the general range of the amount spent by the median successful candidate would constrain incumbents more than challengers to a far greater degree than would have been true in 1980 had spending limits been pitched to then prevalent median levels. See id. at 215–16.

In a recent study, the Committee for the Study of the American Electorate, a respected nonpartisan organization, concluded that spending limits set at levels near those of the 1993 Senate and House bills (the Committee studied earlier versions of that legislation) would favor incumbents. The conclusion was based on the finding that between 1978 and 1992 55.3% of successful challengers for Senate seats and 35.2% of successful challenges for House seats spent more (in dollars adjusted for inflation) than would be permitted under the proposed limits. See Committee for the Study of the American Electorate, A Study of Campaign Expenditures for Winning Challengers in U.S. Senate and House Races 1978–92 (1993). However, the study did not control for the amount of spending by the losing incumbents in those races, a variable that would be severely affected were the proposed spending limits in place. Nor did the study measure spending in races narrowly lost by challengers. In fact, the data reported in the study reveal that in the first four election cycles examined (1978–1984), successful challengers outspent their incumbent opponents in 47 of the 86 races won by challengers (55%), whereas in the last four election cycles (1986–1992), winning challengers spent more than the incumbents they unseated in only 11 of 59 such races (19%). See id. at 6. Unless the Jacobson thesis that spending by incumbents matters very little is correct, the Committee's study fails to prove its point. Moreover, the study does not purport to show that spending limits invariably favor incumbents, only that limits at the levels contained in the congressional proposals studied would do so.

49. See Fiorina, supra note 14, at 57.


52. See id. at 150–51.
Republican Party developed sophisticated techniques of fund-raising by direct mail long before the Democratic Party did.\textsuperscript{53} Today, the distribution of fund-raising success is not nearly so skewed as it once was.\textsuperscript{54} Incumbency appears to matter more than anything else in the mad scramble to attract PAC contributions, and congressional Democrats have not been slow to exploit that line of support.\textsuperscript{55} The Democratic Party also has tried to close the gap in direct mail solicitation by borrowing techniques developed by the Republicans, but with only limited success.\textsuperscript{56}

Doubtless there will continue to be differences between the two major parties in both fund-raising effectiveness and fund-raising potential. But those differences are not really fundamental, and in recent years they have not been either particularly large or particularly predictable for the most part. The more entrenched differences (e.g., the Republican advantage in direct-mail solicitation and the Democratic advantage in PAC contributions) have been offsetting. Many Democratic congressional incumbents fear the impact of the spending limits contained in the bills passed in 1993, and with good reason.\textsuperscript{57} Disparate impact along party lines should not serve as a basis for invalidating spending limits.

For similar reasons, other patterns of impact that might be hypothesized do not seem sufficient to establish a constitutional objection. To say that spending limits disadvantage the candidate who has raised the most money is to beg the First Amendment question. That is exactly the point of spending limits: to make fund-raising beyond a certain measure irrelevant. If the reasons for wanting fund-raising to matter less in elections are otherwise constitutionally legitimate, that the net impact of such a reform operates to the disadvantage of successful fund-raisers can hardly be the controlling consideration under the Constitution. Only if successful fund-raising systematically functions as a proxy for other phenomena of First Amendment import should we be concerned about disadvantaging skillful fund-raisers. Many pro-development candidates are able to raise large campaign war chests but so also can environmentalist candidates.\textsuperscript{58} Third and fourth-party challengers may sometimes be well financed, but given the link between incumbency and fund-raising there is

\textsuperscript{53} See Jacobson, supra note 14, at 92.
\textsuperscript{54} See Alexander, supra note 3, at 53–54.
\textsuperscript{55} See Magleby & Nelson, supra note 1, at 80–81.
\textsuperscript{56} See Jackson, supra note 1, at 100–01.
\textsuperscript{57} For an account of the resistance to spending limits among House Democrats, and the extraordinary efforts of the Democratic leadership to overcome that resistance, see Donovan, House Takes Step, supra note 5, at 3248.
\textsuperscript{58} During the 1992 election cycle, several House members compiled outstanding ratings (80 or above) from the League of Conservation Voters and still managed to raise more than $1,000,000. Representatives in this category include Rosa DeLauro of Connecticut, Nita Lowey of New York, Gerry Studds of Massachusetts, and Mike Synar of Oklahoma. Computation by the author from data supplied by the Federal Election Commission, Press Release, supra note 3, at 25, 30, 33, 36, and The World Almanac of U.S. Politics 138, 193, 232, 252 (1993–1995 ed.).
little reason to believe that the net effect of spending limits would be to entrench further the two-party system, even assuming that to be a consequence of constitutional significance. Distributional effects are not irrelevant to First Amendment analysis, but to provide the basis for invalidating a law they need to be a good deal more pronounced, more fundamental, more predictable, and more ideologically or politically charged than any effects that have been shown thus far to attach to campaign spending limits.59

If neither the fact nor the distribution of impact on campaign speech is sufficient to establish that spending limits violate the First Amendment, perhaps the severity of impact can justify a finding of unconstitutionality. Were spending limits to be set so low as to disable candidates from conducting campaigns that approached recent common practices in terms of media exposure and organizational complexity, severity of impact by itself might be a constitutional concern. The First Amendment ought to create at least a presumption against any law that would require modern campaign techniques to be scrapped in favor of the simpler methods of a bygone era: expectations born of familiar contemporary practices deserve some consideration in constitutional analysis.

However, only an unusually severe impact ought to invalidate a regulation on this basis. That some relatively expensive campaigns are curbed while all others are able to proceed at their pre-existing levels of expenditure should not be enough. The First Amendment does not mandate that degree of sensitivity to effects that, however predictable and inevitable, are not the object of regulation. Again, the appropriate analogy is to reporting requirements and contribution limits.60 At least in their current form, both of these regulations have an impact on political campaigns that is far from trivial—and in fact more broadly based than that of spending limits keyed to customary levels of spending—but not severe enough to resolve the constitutional issue on that count alone.

V. COMMUNICATIVE-ImpACT HARMS AND SPEECH-GENERATION HARMS

Neither the fact nor the distribution nor the severity of impact on campaign speech can serve to invalidate spending limits in the manner of a trump card that subordinates all other considerations. Additional variables must be taken into account. Whether spending limits with the effects discussed above can be reconciled with the First Amendment depends on how the rationale for such limits fits in the scheme of constitutional values, and the degree to which spending limits are efficacious and essential to the objectives embodied by that rationale.

When campaign spending limits were found in Buckley v. Valeo to violate the First Amendment, two of the rationales proffered in justifica-

59. For a sophisticated argument that the disparate impact must be substantial if it is to invalidate a content-neutral regulation, see Stone, supra note 37, at 222–27.
60. See supra note 33.
tion of limits—preventing corruption and facilitating insurgent candidacies—were found to be insufficiently served by the regulations at issue.\textsuperscript{61} The third rationale—preventing wasteful and excessive campaigns for office that diminish the quality of public debate—was found to be constitutionally objectionable as a matter of principle.\textsuperscript{62} In terms both of efficacy and First Amendment principle, the candidate-time-protection rationale does not suffer from the problems that plagued the three rationales for spending limits that were considered in \textit{Buckley}. Whatever problems the candidate-time-protection rationale presents under the First Amendment are of a different order.

As a rationale for regulation, candidate time protection has two particularly noteworthy features. First, the problem it addresses is caused not by the communicative impact of speech but by the process of generating speech. Second, candidate time protection serves a value—the quality of representation—that is itself of constitutional dimension, and indeed is closely intertwined with the values that inform the First Amendment. On these points, it is instructive to compare the candidate-time-protection rationale with the quality-of-public-debate rationale that the Court rejected in \textit{Buckley}.

Why should we care whether the harms caused by speech activities occur in the process of generating the speech rather than as a result of the communicative impact of the speech? In either event, reduction or elimination of the harms may entail reduction or elimination of the speech. Consider, by way of illustration, several of the regulations of speech the Supreme Court has encountered that were justified in terms of the need to control harms endemic to the speech-generation process. Films depicting children engaged in sexual activities were banned in large part to save the child actors from the psychological (and sometimes physical) harms they were thought to experience in the process of producing the films.\textsuperscript{63} Certain campaign activities by public employees were made illegal in part to spare them from coercive pressures and threats of retaliation from their politically connected supervisors.\textsuperscript{64} Revenues derived from commercial depictions of criminal activities were escrowed for the benefit of victims, in part to ensure that perpetrators do not profit financially from acts the society means to condemn, even when those acts generate valuable subsequent expression.\textsuperscript{65} Breaches of promise by news

\textsuperscript{61} See \textit{Buckley v. Valeo}, 424 U.S. 1, 55–57 (1976).
\textsuperscript{62} See id. at 57.
\textsuperscript{65} See \textit{Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.}, 112 S. Ct. 501, 510 (1991). The Supreme Court struck down the New York law on grounds of overinclusiveness—it applied to crime-recounting raconteurs who had never been convicted or formally accused—but made clear its judgment that a state "has an
reporters were subjected to civil damage sanctions without regard to the value of the stories generated by the practice. In each of these instances, potentially valuable speech was directly or indirectly regulated because of concern for the harmful consequences not of its dissemination but of its production. Why should this distinction matter?

One reason is that harms caused by the communicative impact of speech sometimes can be countered or mitigated by countervailing speech, something that cannot be said about harms caused by the production of speech. It is a central tenet of the First Amendment that the preferred remedy for harmful speech is more speech. No sophisticated proponent of the “more speech” remedy claims that this response erases the harm or makes whole those who suffer from it. But neither do criminal prosecutions, civil damage awards, or even prior restraints fully undo or prevent speech harms. The claim is rather that counter-speech is often a significant response, and is no less effective than coercive regulation in many situations. Moreover, the very experience of attempting to answer harmful speech is properly viewed as a valuable challenge, a source of political and cultural strength.

In contrast, more speech seldom is an apt response to harms that stem from the process of producing speech. If children are injured by the experience of acting in sexually explicit performances, no amount of public counter-speech is likely to alleviate the harm. If public employees are subject to political coercion from supervisors, responses to the speech generated thereby would not speak to the harm suffered, whether it be involuntary participation in a campaign or workplace reprisals for failure to campaign. The practice of exploiting children or public employees can of course be made an issue in public debate, but the effectiveness of that response would turn on its capacity to stimulate public concern about the practice, not its capacity to counter the persuasive appeal of the speech itself. In this regard, the sufficiency of public criticism as a response to speech that causes harm by the way it is generated would be no different were the harmful practice integral to the production of a non-speech commodity. We might as well say we cannot forbid the sale of furniture produced by child labor because we can always criticize those who would use children that way.

The issue of campaign spending limits exemplifies how counter-speech can be an appropriate remedy for harms caused by the communicative impact of speech but not for harms that occur in the process of

undisputed compelling interest in ensuring that criminals do not profit from their crimes.”
Id. at 510.
67. The classic articulation of this principle is the Brandeis opinion in Whitney v. California, 274 U.S. 357, 375, 377 (1927) (“the fitting remedy for evil counsels is good ones”; “the remedy to be applied is more speech, not enforced silence”). See also Texas v. Johnson, 491 U.S. 397, 419–20 (1989) (appropriate response to flag burning is to demonstrate respect to the flag, not impose punitive measures on flag burner).
producing speech. High levels of spending on campaign communications by one candidate may result, some critics would say, in a misinformed, manipulated, or overwhelmed electorate. That danger, if such it be, can be forestalled or at least mitigated by additional communications in behalf of the opposing candidate. Those additional communications may be difficult to generate and may not be fully effective, but at least the remedy of more speech is responsive to the nature of the harm in question. That is not true for the absorption of a candidate's time on fund-raising, a different sort of harm that is caused by expensive political campaigns. More speech will not mitigate this harm, only exacerbate it, because more speech usually requires more fund-raising. This observation hardly resolves the constitutional issue, but it helps to explain why harms that are not caused by the communicative impact of speech should not be equated for purposes of First Amendment analysis with harms that are so caused.

A second reason why harms that result from the very process of generating speech may warrant distinctive treatment is that generally speaking they are somewhat easier to identify than communicative-impact harms. In part this is true because of the mysteries that surround the phenomenon of persuasion. "Communicative impact" is exceedingly difficult both to predict and to measure. Witness, for example, the uncertainty that persists, after years of expensive studies, regarding the effects of pretrial publicity.68 The same can be said concerning the communicative impact of pornography.69 The most conceptually significant interpretation of the First Amendment in the modern era, New York Times Co. v. Sullivan, was prompted, it seems, by doubts regarding whether the plaintiff in that defamation action had been harmed at all by the communication at issue.70

Even when the causal connection between speech and a set of consequences appears to be strong, the kinds of consequences that result from the communicative impact of speech are not always self-evidently "harms." Is it a harm for voters to perceive a candidate as compassionate after repeatedly viewing warm, fuzzy campaign commercials? Is it a harm for voters to learn far more about the views of one candidate than those of her opponent as a result of gross disparities in campaign budgets? When consequences are measured or mediated by what audiences come to think, any process of evaluation is bound to be steeped in controversy. Particularly is this likely to be the case when the effects of speech might be mitigated by counter-speech, so that the relevant harms are those that would remain after some hypothetical response has had its impact.

Harms caused by the process of generating speech may be disputable as well, but the sources of uncertainty are different. Although speech-generation harms surely present problems of causation and measurement, the resolution of those sometimes difficult questions does not require a judgment regarding how audiences are likely to respond to particular messages. Not only is that kind of judgment typically more speculative than most assessments judges are called upon to make, it is also the kind of judgment that can easily be influenced by one’s evaluation of the message.\footnote{See John H. Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1501 (1975).} In contrast, even when the message generated by an allegedly harmful practice is controversial, the standards for assessing the harmfulness of the practice will ordinarily draw on social norms that have nothing to do with how the message itself may be evaluated. Persons who strongly object to the messages communicated by child pornography no doubt may be affected by that revulsion when they conclude that the acting experience itself is harmful to the children. Nevertheless, the very fact that the harm must be described and condemned in terms independent of the message reduces, if only to a degree, the risk that moral values will distort empirical judgments. Whether children are harmed in their emotional development by simulating sexual encounters or posing as sexual objects depends on considerations that have little to do with the communicative impact on adults of viewing the depictions thereby produced. To assess the harm to the actors, one needs evidence relating to child development, not moral decay or the causes of sexual violence.\footnote{Research regarding the impact on a child’s psychological development from the experience of participating in the production of pornography is cited by the Court in New York v. Ferber, 458 U.S. 747, 758 n.9 (1982). The existence of a film or photograph may exacerbate the psychological harm because it constitutes a permanent record of the experience. See id. at 759 n.10. That audiences can observe what the actor has come to regard as a degrading endeavor may contribute to the harm he or she experiences, but that effect has very little to do with the communicative impact of the pornographic material on those audiences. Were audiences to find the picture or film to be of no particular interest, the actor’s humiliation-based harm would not be much reduced. It can be argued that the messages conveyed by child pornography contribute to the attitudes of those producers who physically or psychologically abuse the child actors they employ. This seems a plausible contention, but there would be plenty enough basis for concern about the welfare of the actors even if producers were shown to be completely inured to the content of the depictions they disseminate.} 

The differences between speech-generation harms and communicative-impact harms are significant, but not enough to warrant a judicial posture of strong deference to legislative judgments whenever speech-generation harms are invoked. Even though the regulatory rationale does not rely upon the communicative impact of speech, risks remain of partisan abuse, of inflated perceptions of speculative harms, and of failure to appreciate the value of the speech that is lost by a particular regu-
lation. My only contention is that risks of this sort are present to a lesser degree when speech-generation harms provide the basis for regulation.

VI. THE QUALITY OF REPRESENTATION AS A CONSTITUTIONAL CONCERN

The candidate-time-protection rationale is notable not only because it does not depend on the communicative impact of speech, but also because it invokes an interest that is itself of constitutional dimension: the quality of representation. One need only read The Federalist Papers and the debates in the House of Representatives preceding the passage of the First Amendment to appreciate how much emphasis the framers of the Constitution and the Bill of Rights gave to the question of representation.\(^\text{73}\) They thought long and hard, wrote much, and debated vigorously about how to structure the political system in a way that would encourage certain kinds of persons to seek office and would facilitate certain kinds of relationships between elected officials and their constituents. Indeed, the principal drafter of the First Amendment, James Madison, went so far as to insist that the relevant constituency of members of Congress should be taken to be the nation as a whole rather than the electoral district of each member, in large part because of the quality of representation he thought would follow from that formulation.\(^\text{74}\) To a considerable degree, the debates over the Constitution were debates over how best to achieve a high quality of representation.\(^\text{75}\)

Candidate time protection is a regulatory rationale that speaks to the quality of representation. 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. Financial "constituencies" become recognizable and compete with geographic constituencies and with Madison's national constituency for the representatives' time and loyalty. How responsive or independent representatives decide to be may depend on the priority they believe they must give to fund-raising. A constitutional system founded on a set of objectives regarding

---

\(^{73}\) Many numbers of The Federalist Papers refer to various facets of representation. Particularly important discussions are in Nos. 10, 52, 56, 57, and 63. On August 15, 1789, the House of Representatives engaged in a lengthy debate over a proposal that constituents be granted the authority to issue binding instructions to their representatives. This discussion occurred during consideration of what became the First Amendment. See Creating The Bill of Rights: The Documentary Record from the First Federal Congress 151–77 (H. Veit et al. eds., 1991). Representative James Madison led the opposition to the proposal, invoking many of the views regarding representation that he had advanced in The Federalist Papers. See id. at 152, 155, 167.


representation must be concerned with how candidates for election spend their time.

These observations are important, but they barely begin to establish the proposition that candidate time protection should be considered a special type of regulatory interest capable of justifying the burdens on speech that spending limits would entail. The framers of the Constitution were concerned not only with the quality of representation but also with the quality of public debate.76 And yet the Court in Buckley stated in the strongest terms that Congress may not impose campaign spending limits in order to shape the character of public debate:

In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.77

Might not the same be said about who must retain control over the quality of representation?

The Buckley opinion does not spell out exactly why the regulatory objective of improving the quality of campaign debate cannot be considered a legitimate basis for spending limits. It is not difficult, however, to supply reasons for the Court’s conclusion. Some of those reasons apply also to the regulatory objective of candidate time protection, but some do not.

One reason why legislation designed to improve public debate must be viewed with suspicion is the lack of widely shared norms regarding what should count as an “improvement.” Partly because political partisanship so dominates perceptions on this question, and partly because the very concept of “the public debate” is amorphous, one despair of developing meaningful constitutional standards for evaluating legislative efforts to reform public debate. Lillian BeVier effectively articulates the problem:

When has the public received “enough” information to satisfy the constitutional value of an “informed public”? At what point does effective participation in political debate become transformed into constitutionally proscribed “undue influence”? Is the average citizen sufficiently “active and alert”? What is the constitutional norm against which “distortions” of election outcomes can be said to occur? Is the concept of political equality compatible with the concept of political freedom, and if not, what does the Constitution say about how the tensions are to be resolved? Does the concept of political equality embrace eliminating the impact of all the ways in which citizens can be differ-

76. See Beer, supra note 74, at 270–75.
entially effective, or does it only refer to differences traceable to
equalities of wealth? And if only the latter, why only those?  

In contrast, the normative landscape regarding the problem of can-
didate time diversion is not so complicated or controversial. As difficult
as the general subject of representation can be, one does not need a so-
plicated understanding of either republican theory or modern interest
group politics to conclude that there is a failure of representation when
candidates spend as much time as most of them now do attending to the
task of fund-raising. This feature of modern representation should
trouble those who favor close constituent control as well as those who
favor relative independence for legislators; those who favor an "aristoc-
racy of virtue" as well as those with more populist ideals regarding who
should serve; those who conceive of representation as flowing exclusively
from geographic constituencies as well as those who see a role for constit-
uencies defined along other lines, be they racial, ethnic, gender, eco-
nomic, religious, or even ideological. Whatever it is that representatives
are supposed to represent, whether parochial interests, the public good
of the nation as a whole, or something in between, they cannot discharge
that representational function well if their schedules are consumed by the
need to spend endless hours raising money and attending to time de-
mands of those who give it.

It might be argued that the modern money chase can be character-
ized as a system of representation with a certain logic of its own. So long
as candidates are required to solicit a large number of donors, as is now
the case given that both individual and PAC contributions are subject to
highly restrictive caps but overall spending is unrestricted, those who
achieve elective office will have had to consider a fairly wide range of
grievances and opinions. They will in most cases have had to make a

78. Lillian R. BeVier, Money and Politics: A Perspective on the First Amendment and

79. This idea was central to Jefferson’s view of representation and illustrates how the
quality of representation can be important even in the context of egalitarian concerns.
Jefferson contrasted the “natural” aristocracy of virtue and wisdom with the “tinseled” or
“pseudo” aristocracies of birth and wealth. He thought public education was especially
important because it would promote the ascendance of the natural aristocracy composed
of citizens from humble as well as privileged backgrounds, a phenomenon he thought
essential to the survival of the democratic form of government. See Garrett W. Sheldon,

80. An important recent development is the growth of PACs that support candidates
who represent racial, gender, or religious perspectives. Particularly influential has been
EMILY’s List, which supports female candidates. See Alexander, supra note 3, at 57.
Proposals to limit contributions by PACs have occasionally caused concern among
legislators who support minority and feminist agendas. See Donovan, Constitutional
Doubts Bedevil, supra note 21, at 2216; Donovan, Gutting Public Funding, supra note 5, at
1533; Beth Donovan, Campaign Finance: Clinton Offers Details of Plan: Big Test is GOP
Details]; Beth Donovan, Clinton Readies New Proposals: Senate Panel OKs Old Bill, 51
variety of commitments and to have established lines of future communication with many different financial "constituents." We may now have an "extended republic" of multifarious contributors, whose divergent agendas might cancel each other out somewhat in the manner envisioned by Madison in *Federalist No. 10* when he argued for sizable geographic constituencies as a safeguard against domination by concentrated local factions.81

This argument ought not to be accepted, even by those who believe that representatives should be little more than conduits for the preferences of their constituents however defined. For even if independence of mind, quality of judgment, and concern for the common good are not important attributes in a representative—a view of representation directly antithetical to Madison's, incidentally82—other personal qualities are important, for example the capacity to pursue a legislative agenda (no matter how parochial) energetically, systematically, knowledgeably, and shrewdly. Representatives who must devote huge portions of their time to fund-raising no doubt learn something in the process about the regulatory issues that most concern their financial constituents, but not as much as they could if spending limits curtailed the importance of fund-raising. For those who, more in the spirit of Madison, see representation as a process by which elected officials "refine" and "enlarge" the views of their constituents,83 the focus on fund-raising is diversionary even when not corrupting. An electoral system that leads most incumbents and challengers to spend large amounts of their time courting donors violates a norm that is important across a broad spectrum of theories of representation: that representatives must have the opportunity and the incentive to serve well the political objectives of the persons they represent, not just their own political objective of getting elected.

The availability of a coherent norm, derived from the constitutional concern for the quality of representation, makes the candidate-time-protection rationale for spending limits less problematic than the quality-of-public-debate rationale that was ruled illegitimate in *Buckley*. Nevertheless, the availability of a norm does not put to rest the fear that any legislation governing campaign finance will be overwhelmingly the product of partisan objectives. This concern is one of the reasons to be suspicious of

81. Still the best brief discussion of *Federalist No. 10* is Douglass Adair, "That Politics May Be Reduced To a Science": David Hume, James Madison, and the Tenth Federalist, 20 Huntington Libr. Q. 343 (1957), reprinted in Douglass Adair, Fame and the Founding Fathers 93–106 (Trevor Colbourn ed., 1974). For an insightful discussion of whether in democratic theory the making of a campaign contribution should be analogized to other forms of constituent preference assertion, see David A. Strauss, Corruption, Equality, and Campaign Finance Reform, 94 Colum. L. Rev. 1369, 1375–80 (1994).


83. See Wills, supra note 82, at 223–37.
legislative efforts to reshape public debate, and there is no reason to think that efforts to redirect how candidates spend their time are any less infected by self-interested political calculations. To the degree that is true, congressional implementation even of a coherent, widely accepted norm regarding representation would reflect no judgment worthy of respect in the face of a constitutional challenge.

There is much force to this point, but it must be embraced with care lest it prove too much. If the high likelihood of partisan motivation were to invalidate legislation ipso facto, then all campaign finance laws must fall, even the limits on the size of contributions that were upheld in *Buckley* and the prohibition on corporate contributions to candidates that has been on the books since the Tillman Act of 1907. The fear of partisan motivation rather should operate to refute any suggestion that Congress' judgment regarding the validity and importance of its regulatory justification deserves deference from the judiciary. When serious speech interests are adversely affected by campaign finance regulation, as they are in the case of spending limits, it is incumbent on courts to scrutinize closely and evaluate independently the regulatory rationale. When such independent scrutiny is undertaken, the availability of a coherent justificatory norm should be a major factor in the constitutional calculus. For this reason, the First Amendment issue posed by the candidate-time-protection rationale for spending limits is fundamentally different from that posed by the quality-of-public-debate rationale.

The lack of norms and the fear of partisan motivation are not the only reasons why Congress might be denied any authority to improve the quality of public debate. Robert Post argues that the very concept of self-government, the value that many consider to be the foundational justification for the freedom of speech, implies that public discourse be "open-ended" in the sense that government may not seek to structure communication according to any norm, any "specific sense of what is good or valuable." Public discourse, says Post, must not be regulated by a particular conception of national identity. Rather, that collective identity must remain "perpetually indeterminate." Post himself hedges regarding whether this idea precludes campaign finance laws, but defenders of *Buckley's* rejection of the quality-of-public-debate rationale for spending limits certainly could build on his analysis. Might not the quality of repre-

---

86. For a persuasive argument that deference to the legislative judgment is inappropriate in the context of campaign finance legislation, see BeVier, supra note 78, at 1074–81. In his contribution to this symposium, Professor Schauer places this issue of deference in the broader context of constitutional and democratic theory. See Federick Schauer, *Judicial Review of the Devices of Democracy*, 94 Colum. L. Rev. 1326 (1994).
88. Id. at 1116.
89. See id. at 1132–33.
sentation, particularly as it relates to how candidates spend their time, similarly be considered so basic to the concept of self-government that Congress lacks all authority to shape it in a purposive manner?

This is a question that goes to the heart of the comparison between the candidate-time-protection rationale and the quality-of-public-debate rationale. Professor Post treats as the linchpin of his case for an un-prescribed public discourse the proposition that the "collective identity" of the political community must be left free to develop on its own. How we talk to each other, what speech is disseminated and what speakers are given credence, what informational and ideological environment we inhabit, are factors that profoundly shape our individual and collective identities. How our representatives spend their time may be a crucial determinant of political power but does not seem quite so central to questions of collective identity as is the structure of public discourse. We are not really "constituted" as a community by the time allocations of our representatives the way we are constituted by the form our public debate takes. For one thing, every citizen is shaped by the structure of public discourse: our lives change as it changes, as the modern movement toward shorter units of discourse demonstrates. When representatives spend more and more of their time fund-raising, or when the quality of representation changes in other respects, the consequences can be serious but the collective identity of the community need not be altered. Perhaps the cynicism that can follow from a weakening of representation can be considered identity-destroying, but even in the best of representational worlds ordinary citizens participate very little in determining the time allocations of their elected officials. As a result, few persons are really shaped by, or define themselves or their citizenship according to, how much time politicians spend fund-raising. The widening gyre is pernicious, but its effects are incremental, insidious, and easy for citizens to ignore.

Moreover, we have long since passed beyond the point where how candidates spend their time can be considered open-ended in the sense that Post uses the term. The recent increase in time devoted to fund-raising did not evolve "naturally." Rather, it developed in response to the patchwork legislative scheme that was left standing after the selective invalidations of *Buckley v. Valeo*: no limits on overall spending, severe limits on the size of contributions, and no limits on independent expenditures for and against particular candidates. The war chest mentality was born of this regulatory residue. Had the 1974 campaign finance law at issue in *Buckley* either never been passed or been upheld in its entirety, the quest for contributions would look very different. Almost certainly, it would be far less time consuming because either candidates would not seek to raise so much money (if they couldn't spend beyond a set limit) or they

90. See id. at 1116.
91. See Magleby & Nelson, supra note 1, at 205.
could raise it much more efficiently (by means of large contributions). So even if we are constituted as a political community by how our representatives allocate their time, that feature of our collective identity is already the result of prescription at least as much as open-ended evolution.

Professor Post finds the conscious structuring of public discourse to be a violation of the premise of self-government because such a project treats citizens not as autonomous subjects but as heteronomous objects of political prescription. He does not invoke any kind of antipaternalism principle in the strict sense. His argument is not that citizens should be trusted to protect themselves from being unduly influenced by the way public discourse is structured. He argues instead that autonomous citizens must be permitted to create the public discourse, not just be protected from it. However, the holding in *Buckley* that Congress has no authority to try to improve the quality of electoral debate might also be defended on antipaternalism grounds. Because that is true, we must inquire whether the candidate-time-protection rationale offends the antipaternalism principle implicit in the First Amendment.

On several occasions, the Supreme Court has expressed its aversion to the argument that audiences must be protected from being misled, offended, tempted, or conditioned by the communications they receive. The Court has insisted that audiences be trusted to protect themselves from both wily demagogues and importuning boors. One could go so far as to view the First Amendment as a commitment to audience self-help. Reject the message, avert the eyes, put down the book—these are the remedies that must be preferred "if authority is to be reconciled with freedom." If speech during an election campaign is unbalanced, voters can compensate by tuning out the messages of some candidates and seeking out the messages of others. Whether or not this antipaternalism argument is fully persuasive in the special context of election campaigns, the principle that audiences ought to be trusted whenever possible is both appealing and well recognized in our First Amendment tradition.

The effort to protect candidates from fund-raising demands can be considered paternalistic in one sense: candidates could just refuse to get drawn into the war chest syndrome, or opponents could agree among themselves to hold down spending and thereby free up time from fund-raising. The nature of this paternalism, however, is rather different from that which informs the effort to improve the quality of public debate. Candidate time protection reflects no distrust of audiences and no denigration of the traditional self-help remedies relating to audience response. In fact, one of the major problems with the current system of campaign finance is that voters seldom have a choice between candidates

---

92. See Post, supra note 87, at 1116.
who differ greatly in their devotion to fund-raising; virtually all candidates spend long hours soliciting donors, the candidates who get outspent no less than the candidates who outspend. Candidate time protection may indeed reflect distrust of candidates, but that seems less problematic under the First Amendment than distrust of citizens generally. The principle of self-government embodies, among other things, the precept that the people, the true sovereigns, are more to be trusted than their delegates, those who hold elective office.95

Moreover, the "distrust" of candidates reflected in spending limits is not so much a low estimation of their character or judgment as a recognition of a collective action problem they all face. That most candidates would benefit from ending the war chest syndrome does not mean they will agree to cease round-the-clock fund-raising. Unless parties to self-imposed restraints can be assured that rogue candidates will not be able to take advantage of the situation, unilateral forbearance or agreements to cap spending are not likely to occur. In this respect, it is not paternalistic to impose spending limits by law in order to circumvent the collective action problem that partly explains why fund-raising has gotten out of control.

Once again, the candidate-time-protection rationale introduces some important new elements into the constitutional calculus regarding spending limits. With regard to paternalism as well as to the absence of norms and the ideal of citizen control over collective identity, the quality-of-public-debate justification for spending limits proves to be in tension with First Amendment values in ways that the candidate-time-protection justification is not.

VII. Efficacy

Even if candidate time protection is a rationale for spending limits that cannot be dismissed as antithetical to the First Amendment in a fundamental way, there remains the question of efficacy. Recall that in Buckley only one of the three rationales proffered, improving the quality of public debate, was rejected in principle.96 The two other rationales—reducing the incentive to violate contribution limits and facilitating insurgent candidacies—were held to be insufficiently advanced to justify limiting the overall quantity of electoral speech.97 Can we say that the goal of candidate time protection is better served by spending limits than were these other goals?

One must be extremely circumspect about any claim of reform efficacy in the realm of election practices. The stakes are high and so, conse-

95. See James Madison, A Memorial and Remonstrance Against Religious Assessments (1785), in 2 The Writings of James Madison, para. 2, at 185 (Gallard Hunt ed., 1901).
97. See id.
quently, will be the ingenuity devoted to adaptation and evasion. The history of campaign finance regulation is largely a history of reforms that have misfired, often making matters worse. Conservatives who exalt the law of unintended consequences can reap a rich harvest of object lessons in this regulatory domain.

Moreover, several of the most careful and balanced proponents of campaign finance reform question whether spending limits would have a salutary effect. There is reason to doubt, for example, whether the Federal Election Commission and state counterparts would ever be given enough authority and resources to monitor effectively the numerous campaigns that would be covered were spending limits applied to legislative elections. Money that could not be spent by candidates legally sometimes would be spent nonetheless, by means of funneling to various supporters whose ties to the candidate would be kept secret. Apart from fraud of this sort, a regime of spending limits on candidates might enhance the relative effectiveness of genuinely independent expenditures for or against particular candidacies. In the past, many independent expenditures have gone for inflammatory and arguably misleading

98. See Sorauf, Inside, supra note 1, at 214.

99. See Alexander, supra note 3, at 23–46, 161; Jacobson, supra note 14, at 163–97; BeVier, supra note 78, at 1078–80. Spending limits regarding Senate and House campaigns were, in fact, on the books from 1911 until 1971. However, the levels were unrealistically low and virtually all candidates evaded the limits by establishing numerous campaign committees whose expenditures were not cumulated. The Justice Department declined in effect to enforce the laws limiting spending; no record exists of anyone ever having been prosecuted for violating them. See Alexander, supra note 3, at 25–26.

100. For example, the limits placed by the 1974 Act on the size of contributions to candidates reduced the role of large donors but also contributed greatly to the fund-raising preoccupation that now consumes the time of candidates. See Magleby & Nelson, supra note 1, at 205. The restrictions in the 1974 Act on donations to candidates from political parties, together with the Act’s parallel legitimation of political action committees, contributed to the weakening of the parties during the last two decades, a development some knowledgeable observers regard as especially lamentable. See Alexander, supra note 3, at 42; Sabato, supra note 6, at 43–50. The legislative effort in 1979 to restore vitality to the parties by encouraging contributions of soft money, see infra text accompanying notes 110–113, led to vast amounts of unreported contributions flowing into the campaign finance system, possibly undercutting the heroic attempt in the 1974 Act to reduce the risks of undue influence stemming from large contributions. See Sorauf, Inside, supra note 1, at 149–51. For a rumination on possible unintended consequences of various proposals on the current reform agenda, see Cass R. Sunstein, supra note 24, at 1400–11.

101. See Alexander, supra note 3, at 169–70; Sabato, supra note 6, at 22–23; Sorauf, Inside, supra note 1, at 210–14.

102. See Sorauf, Inside, supra note 1, at 213.

103. Buckley v. Valeo invalidated limits on expenditures in support of a candidate made by persons or organizations independently of the candidate’s campaign. See Buckley v. Valeo, 424 U.S. 1, 39–51 (1976). Thus, were a candidate able to siphon money to such ostensibly independent supporters, or even to help them raise money, the expenditures that would result could not be subjected to limits so long as the candidate’s connection to those supporters remained concealed. For accounts of how nominally independent supporters can act in tandem with a campaign, see Drew, supra note 1, at 134–45; Jackson, supra note 1, at 217–18.
negative advertising; the notorious "Willie Horton" commercial of the 1988 presidential campaign was produced and disseminated independently of the Bush campaign.\textsuperscript{104} Furthermore, candidates subject to spending limits might be tempted in their own advertising to "go negative" earlier or more often on the theory that a negative message can influence voters more quickly, with less repetition or development and thus with less expenditure, than can a positive message.\textsuperscript{105}

These are valid concerns, perhaps serious enough to lead one to doubt the efficacy of spending limits as a means to achieve fairer elections or the reduction of influence over politicians stemming from surreptitious forms of large financial support. Critics of spending limits, however, have not addressed their arguments to the specific problem of candidate time diversion.\textsuperscript{106} If altering how candidates spend their time is taken to be a priority for campaign finance reform, spending limits are not so vulnerable to objections grounded in lack of efficacy as is true when other regulatory objectives are emphasized.\textsuperscript{107}

The regulatory logic pertaining to time diversion is remarkably simple. The problem is not subtle, as are the problems of undue influence exerted by donors and inequitable electoral competition due to wealth disparities or negative advertising. The time problem is one of degree, so there is room for dispute regarding what state of affairs should be considered satisfactory. But if we can agree that currently most candidates devote quite a bit more time to fund-raising than any tenable theory of representation can justify, even a modest reduction in time spent seeking contributions would represent an improvement. The logic of this reform is not all or nothing: incremental progress is real progress.

Moreover, the logical relationship between spending limits and time directed to fund-raising is relatively direct. If only so much money can be spent, only so much money need be raised. Were spending limits in force, some incentive to build a war chest probably would remain, perhaps as a hedge against a future election cycle when even the limited amount that can be spent might be more difficult to raise. Candidates, however, have many demands on their time. There is little reason to fear

\textsuperscript{104} See Alexander, supra note 3, at 104.

\textsuperscript{105} See id. at 170.

\textsuperscript{106} In their various criticisms of spending limits, neither Alexander, Sabato, nor Sorauf discusses the time-protection rationale as a basis for spending limits. See authorities cited supra note 101. Alexander and Sorauf both mention that public financing might relieve the time pressure on candidates but do not consider the possible effect in this regard of spending limits independent of public subsidies. See Alexander, supra note 3, at 70; Sorauf, Inside, supra note 1, at 212.

\textsuperscript{107} Misgivings about promoting negative campaigning or otherwise harming the electoral process might lead one to oppose spending limits on policy grounds. Not everyone will view the time problem as the controlling consideration. Such misgivings, however, would not weaken the constitutional defense of spending limits under the candidate-time-protection rationale.
that under a regime of spending limits they would attach much priority to raising money they cannot spend.

But would time freed up from fund-raising be spent in ways that serve the quality of representation? Perhaps candidates no longer desperate for donations would spend even less time with ordinary citizens, and less time studying the regulatory issues that concern potential contributors. Perhaps the newly liberated hours would be devoted to leisure, or to forms of self-promotion that benefit neither constituents nor the broader public good. No doubt some candidates would use most of their freed-up time in ways that did not improve the quality of representation, and most candidates would continue to fall short of the ideal in the matter of time allocation. No one mildly cognizant of human nature should think that spending limits could bring about a direct and complete redistribution of candidate time from fund-raising to representation.

That tidy a consequence is hardly the proper standard of efficacy, however. So long as a significant number of candidates currently are precluded by fund-raising chores from paying as much attention to constituents and legislative business as they would like, there is good reason to believe that spending limits could have a salutary effect on the quality of representation. Many candidates complain that fund-raising has just such a preclusive impact. Even if the time-drain of fund-raising can serve as a scapegoat for shortcomings that have deeper, more personal causes, it seems likely that most candidates would find valuable ways to spend at least some of the extra time they might gain from spending limits. Progress might entail fairly simple changes, such as spending more time in one's home district or attending more legislative sessions, reducing problems of absenteeism that are often attributed to fund-raising demands.

Of course, if spending limits were easily evaded, the regulatory logic would collapse. And it probably is true that, at the margin, spending limits are difficult to enforce, at least when they are not confined to a particular medium that can be monitored systematically. But marginal violations ought not to affect substantially how candidates spend their time. A system of spending limits need not be completely impermeable in order to tame the war chest syndrome. Even if spending limits could be evaded to some degree by accounting legerdemain or fraudulent siphoning to "independent" supporters, candidates indulging in such evasions would still have little incentive to spend long hours raising money that could only be spent with great ingenuity and at considerable risk.

The most serious threat to the efficacy of spending limits may come from the practice of raising what is known as "soft money." Contributions made to state political parties for use in state campaigns are not regulated by federal law. Yet these funds typically are deployed for generic party

108. See supra notes 1 and 4.
109. See Clawson et al., supra note 1, at 8–9; Magleby & Nelson, supra note 1, at 3–4.
advertising and get-out-the-vote drives that can benefit all the party's candidates, including those running for federal office.\textsuperscript{110} Soft money has become so important that now even presidential candidates devote time to helping their parties raise it.\textsuperscript{111} Many states permit individual contributors to give unlimited amounts of soft money, and some allow corporations and labor unions to do so.\textsuperscript{112} Consequently, this type of solicitation by candidates is potentially highly productive. Were federal campaigns to be governed by spending limits, the pursuit of soft money might intensify, with resultant increases in the time candidates allocated to the enterprise. In terms of candidate time protection, soft-money fund-raising is just as problematic as hard-money fund-raising, even though the two categories of solicitation differ in other respects, such as potential links to corruption.

Reform proposals sometimes prohibit efforts by federal candidates to raise soft money for state political parties. The otherwise divergent bills passed by the House and Senate in 1993 both contain this feature.\textsuperscript{113} Properly drafted prohibitions of this sort certainly qualify as efficacious in terms of the candidate-time-protection rationale. Spending limits coupled with such restrictions also would seem not to be problematic on grounds of efficacy.

But what if spending limits were imposed without any restrictions on the raising of soft money by candidates? Whether the soft-money phenomenon would be sufficient to undercut the regulatory efficacy of spending limits then would depend on how strictly specified and monitored were the uses to which soft money could be put. If candidates did not stand to gain much for their own campaigns from the money so raised, one doubts that party loyalties (or pressure) would lead to excessive diversion of candidate time to this form of fund-raising. Were that supposition to prove false in actual practice, however, the system of spending limits might well be invalidated for lack of efficacy.

As the preceding discussion illustrates, the case for the regulatory efficacy of spending limits depends rather heavily on the assumption that how candidates spend their time is highly responsive to their calculations of personal electoral advantage. In this realm, one can fairly speculate, habits, affections, and ideals count for less than in many other endeavors that require time allocation judgements. Thus, the primary way to change behavior is to change partisan incentives. It would be a mistake, however, to treat candidates as nothing but rational calculators. One reason to believe that spending limits would reduce the time devoted to

\textsuperscript{110} See Sabato, supra note 6, at 64–66.
\textsuperscript{111} See Alexander, supra note 3, at 104–05.
\textsuperscript{112} See Magleby & Nelson, supra note 1, at 19.
\textsuperscript{113} See Donovan, House Will Vote, supra note 5, at 3093; Donovan, Campaign Finance Provisions, supra note 21, at 2241. The Senate Bill also prohibits federal candidates from raising soft money for candidates seeking state office, a practice permitted by the House bill. See id.
fund-raising is that most candidates begrudge the time so spent. Many no doubt enjoy a competitive advantage in a system that rewards solicitation stamina, but almost all would benefit in some ways they value were the money chase to be brought under control. Efforts to reform behavior are more likely to succeed when most members of the target population have something to gain from the desired reform, even if many of them have still more to lose.

Perhaps the strongest ground for considering spending limits a potentially efficacious way to protect the time of candidates is that the objective itself is a relatively modest one. Proponents of this reform need have no perfectionist ambitions. They need not claim it will create genuinely fair election contests or legislatures that are free from inequities of access or leverage. For spending limits to serve a valuable purpose, all that needs to happen is that candidates for office find themselves able to behave more like politicians and less like mendicants and merchants.

VIII. OVERBREADTH

One type of candidate who need not beg or trade as much as others is the person who is able to finance a campaign for office out of personal funds. To subject such a candidate to spending limits would be to limit her speech without necessarily altering how she spends her time. Yet a regime of spending limits that exempted self-financed candidates would place an even greater premium on personal wealth as a political credential than is true under our current system, which already seems seriously askew in this respect. Would the imposition of spending limits on self-financed candidates violate the First Amendment for overbreadth? Or would the desire not to disadvantage persons who cannot finance their campaigns out of personal resources justify limiting self-financed candidates to the same levels of spending that bind all other candidates?

_Buckley v. Valeo_ invalidated restrictions on the use of personal wealth in election campaigns. The limits at issue were set at levels much lower than the overall campaign spending limits that were established in the federal statute under review. This feature presented the possibility that a candidate who was being outspent by his opponent (a successful fund-raiser) could be prevented from drawing on his personal wealth to close the gap. The Court observed that such a system of limits “may fail to promote financial equality among candidates,” and also could not be justified as a means to prevent corruption. A spending limit that made no differentiation based on the source of funds would permit wealthy self-financed candidates to close but not create spending gaps, and thus

114. See Fiorina, supra note 14, at 129; Sorauf, Inside, supra note 1, at 72–73.
116. Id. at 54.
117. See id. at 53.
should promote greater "financial equality among candidates" regarding actual expenditures.

In *Buckley*, however, the Court did not rest content with its showing that the limits on the use of personal funds were not narrowly tailored to serve equality and anticorruption values. "Second, and more fundamentally," said the Court, "the First Amendment simply cannot tolerate" a restriction on the use of a candidate's personal funds to speak "on behalf of his own candidacy."118 Read broadly, this dictum seems to assert that the First Amendment is particularly solicitous of expression made possible by personal wealth.119 Perhaps that priority can be derived from a robust notion of autonomy or from an amalgam of property and liberty interests that might be read into the First Amendment. The putative right to project one's views as fully as one's private resources allow does have a distinct plausibility in a liberal constitutional tradition built upon the right of private property.

I would argue, however, that in the context of election speech, the claim to use personal wealth without limit is strongest regarding independent expenditures made by individuals who are neither candidates themselves nor surrogates speaking in co-ordination with a candidate's campaign organization. Just as candidates and campaign workers can properly be subjected to reporting requirements in the interest of the smooth and lawful conduct of elections, such persons can be made to forgo at least some opportunities to leverage their private resources. The freedom to conduct a campaign from personal resources is surely a First Amendment interest of considerable weight, but that interest is not so fundamental either to the concept of representative democracy or the concept of limited government that no constraints whatsoever on the use of private wealth by candidates can be justified. After all, candidates cannot purchase votes, even from would-be sellers who, acting with full knowledge and uncoerced will, wish to trade their government-created asset for something they value more. Designation on a ballot is another government-created asset of a character that should preclude those who seek to exploit it from making claims grounded in pristine liberty (as contrasted with claims grounded in the implications of the system of self-government).

How much the use of private wealth by candidates can be limited is a difficult question. There is much to be said for *Buckley's* holding that a candidate cannot be precluded from using his private wealth to match expenditures by an opponent who is able to draw effectively on other sources. If private wealth can buy quality education and health care, why

118. Id. at 54.
119. In his close reading of the *Buckley* opinion, Daniel Polsby adopts this construction of the dictum: "the implication is that of all First Amendment rights, the right to stand for public office using one's own money to communicate with the electorate is the most basic of all . . . . This seems if not obvious, at least an entirely allowable reading of the First Amendment." Polsby, supra note 15, at 26.
should it not also buy name recognition or state-of-the-art polling? Additional considerations enter the equation, however, when spending by self-financed candidates is limited not in order to promote equality or protect the electorate from hearing too much speech but rather to make workable an electoral system not dominated by the time-drain of fund-raising. If spending limits can be justified under the First Amendment when imposed on candidates who in their absence would feel the need to devote long hours to fund-raising, permissible also should be the regulatory decision to apply such limits universally so as not to create disparities in the spending opportunities of different candidates. It is true that such universalization would result in the imposition of spending limits on some candidates who would not in any event devote much time to fund-raising, but that fact neither establishes the irrationality of the scheme of coverage nor resolves the overbreadth issue.

IX. LESS DRASTIC MEANS

Before spending limits can pass scrutiny under the First Amendment, there must be no less drastic means of achieving the goal of candidate time protection. One can imagine a variety of reforms that

120. Congressman Price believes that any regime of spending limits would be undercut were self-financed candidates permitted to spend as much as they could afford while their opponents were constrained by the limits. See Price, supra note 1, at 23, 27.

121. It might be argued that the less drastic means requirement should not apply to spending limits justified by the candidate-time-protection rationale. In Ward v. Rock Against Racism, 491 U.S. 781 (1989), the Court held that content-neutral regulations of the time, place, or manner of speech need not satisfy the strictures of the less drastic means doctrine. See id. at 797. Furthermore, the Court said in Ward that “[t]he government’s purpose is the controlling consideration” in deciding whether a regulation should be characterized as content-neutral. Id. at 791. A broad reading of the Ward dictum would support the contention that only regulations justified by a concern for the communicative impact of speech need satisfy the less drastic means doctrine, a standard that would exempt spending limits instituted in order to protect the time of candidates. In Buckley, however, the Court relied upon the less drastic means requirement in rejecting the defense of spending limits as a means to reduce the incentive to violate the limits on large contributions. See 424 U.S. at 56. This anti-evasion rationale does not depend on a concern about the communicative impact of speech, unlike the quality-of-public-debate rationale which was also rejected in Buckley. Thus, at the time of Buckley the less drastic means doctrine was given a broader scope of application than that suggested by the broad reading of Ward. The Court in Buckley, moreover, was explicit in rejecting the argument that spending limits should be considered only a time-manner-place regulation, although that judgment was made without considering the candidate-time-protection rationale. See 424 U.S. at 18. This is not the place to sort out the Court’s cryptic statements and conflicting innuendos regarding the proper scope of the less drastic means principle. See also City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1510, 1516 (1993) (applying the less drastic means requirement to invalidate a ban on sidewalk newsracks used to distribute commercial handbills; Ward distinguished). Suffice it to say that I do not favor the broad reading of the Ward dictum, even though that reading would make it easier to justify spending limits under the candidate-time-protection rationale. Rather, I believe that to pass constitutional muster spending limits should have to satisfy the less drastic means requirement.
might make it easier to finance campaigns, and hence reduce the need to raise funds, without imposing a ceiling on how much a candidate can spend. In addition, we must consider the alternative of direct regulation of how candidates spend their time.

A favorite reform of many specialists in campaign finance is to institute some form of public funding.\textsuperscript{122} Usually, proposals for public funding include spending limits on candidates who choose to accept the subsidy.\textsuperscript{123} Presidential elections have been publicly funded in this manner since 1976, and the consequence seems to be that presidential candidates spend substantially less time fund-raising, at least after the primary season, than do their counterparts running for Congress.\textsuperscript{124}

To the extent that public funding is tied to the willingness to accept spending limits, the cost of this reform in terms of the quantity of speech lost from candidates subject to the limits would be no different, and thus not "less drastic," than if the limits were imposed directly. Perhaps the cost can be considered less drastic because some candidates may refuse the bargain and spend as much as they can raise. But that contingency only illustrates how a system of optional public funding would run the risk of perpetuating the war chest syndrome. A candidate facing a well-funded opponent who declined to abide by spending limits might feel the need to do likewise, even if that meant redoubling fund-raising efforts. Moreover, most public funding proposals provide for some form of suspension of limits on a candidate who accepts them initially in return for public funds and then faces the prospect of being outspent by an opponent who relies entirely on private sources.\textsuperscript{125} So long as the possibility persists of a spending battle as the campaign heats up, candidates will believe they need a war chest and will feel compelled to invest whatever time it takes to accumulate one.\textsuperscript{126} Any reform that does not

\textsuperscript{122} See, e.g., Alexander, supra note 3, at 167-68; Magleby & Nelson, supra note 1, at 199-202; Sorauf, Inside, supra note 1, at 227.

\textsuperscript{123} See, e.g., Magleby & Nelson, supra note 1, at 159, 201; Sorauf, Inside, supra note 1, at 133. The Clinton Administration's original campaign finance proposal had this feature. See Donovan, Clinton Offers Details, supra note 80, at 1121.

\textsuperscript{124} See Sorauf, Money, supra note 1, at 214. In the general election, presidential candidates who accept public funds are forbidden from accepting contributions from private sources except to cover legal and accounting costs, but are not prohibited from raising soft money or appearing at public events with candidates for other offices who are seeking contributions. See Alexander, supra note 3, at 104-05; Sorauf, Money, supra note 1, at 206.

\textsuperscript{125} Both the bill passed in 1992 by the Congress and vetoed by President Bush and the Clinton Administration's initial campaign finance proposal in 1993 had this feature. See Donovan, Clinton Offers Details, supra note 80, at 1121; Donovan, Constitutional Issues, supra note 5, at 435. So also does the bill passed by the House in 1993. See Campaign Finance Bills Compared, supra note 20, at 263.

\textsuperscript{126} This concern should not be discounted on the ground that the war chest mentality has not plagued presidential campaigns beyond the nomination stage. Because the cost of mounting a serious campaign for the presidency is so vast, the threat of being swamped by an opponent not subject to spending limits has not led presidential candidates to eschew public funding or to accumulate war chests that would permit them to do so.
satisfactorily address that problem cannot be considered a less drastic means of achieving the goal of candidate time protection.

Public funding that is not tied to the acceptance of spending limits should impose no burden on the overall quantity of speech, but rather ought to increase the total amount of communication related to an election. In this respect, unencumbered public funding can be considered a less drastic measure. But that type of reform also stands a poor chance of inducing candidates to spend substantially less time on fund-raising. Even if public funding levels were high, so that a decent campaign could be waged with little or no assistance from private contributors, the prospect of competitive advantage via fund-raising would remain. War chests would still be prized. Public funding is likely to promote the goal of candidate time protection only when combined with spending limits, and only when those limits bind all candidates, not just those who choose to accept public funds.

A final consideration counsels against the invalidation of mandatory spending limits on the ground that the alternative of public funding might burden speech less. Many persons have philosophical objections to the public funding of election campaigns. The Republican Party has made this an issue of principle in all recent congressional struggles over campaign finance reform.\(^{127}\) The failure to employ an alternative that excites so much philosophical and political opposition should not be a basis for invocation of the less drastic means principle. Part of what makes an alternative efficacious, and thereby potentially a required less drastic means, is its capacity to command serious consideration in the same political environment that produced the regulation under challenge. Any other construction of the less drastic means doctrine would give those who oppose all regulation of a controversial practice too much leverage to block reforms.

Also inadequate as less drastic means are laws that would make campaign speech less expensive or fund-raising more productive but competition in those realms no less intense. For example, postal rates might be reduced for candidates, or challengers might be given the benefit of the franking privilege. Broadcasters might be required to sell time for candidate advertisements at fixed rates substantially below market levels. Some

---

Every Democratic and Republican presidential nominee has accepted public funding since it was instituted prior to the 1976 election. (In 1980 John Connally, an aspirant for the Republican nomination, declined public funding during the primaries.) See Sorauf, Inside, supra note 1, at 135. In 1992, independent candidate Ross Perot did not accept public funding, and thus was permitted to exceed the spending limits to which his two major opponents were subject. See Beth Donovan, Much-Maligned 'Soft Money' Is Precious to Both Parties, 51 Cong. Q. Wkly. Rep. 1195, 1195 (1993). Were the Perot phenomenon to be repeated or emulated, and were candidates who accepted public funding to be badly outspent as a result, the war chest mentality might well return to presidential campaigns.

127. See Magleby & Nelson, supra note 1, at 158; Sorauf, Inside, supra note 1, at 156; Donovan, Gutting Public Funding, supra note 5, at 1533–34.
free media time could be set aside for candidates. Like public funding, reforms of this sort might make it feasible to mount a campaign without having to raise huge amounts of money. But if speech made possible by fund-raising is allowed to supplement subsidized speech, the money chase will continue.

Similarly, so long as the prospect of competitive advantage remains, laws that make fund-raising more productive are not likely to alter significantly how candidates spend their time. Individual contributions could be subsidized by tax credits, as they were from 1972 until 1986.128 The current restrictive limits on individual and PAC contributions to congressional candidates—increasingly restrictive because they are not indexed for inflation—could be raised and indexed so that candidates could collect more money from fewer sources, presumably in less time. Or the ceilings on how much political parties and their campaign committees can give to candidates could be raised. These proposals would probably make it easier for some candidates to generate the amount of money necessary to achieve a threshold level of visibility. However, reforms that make fund-raising efforts more productive would only encourage candidates to allocate even more time, not less, to such efforts.

A different kind of reform would discourage or abolish one source of fund-raising the pursuit of which currently consumes a large chunk of the time of most candidates. Political action committees could be prohibited from making campaign contributions (as the bill passed by the Senate in 1993 would do),129 or candidates could be prohibited from receiving more than a specified amount in total contributions from PACs (as the bill passed by the House in 1993 provides, setting the limit at $200,000).130 If candidates were protected from having to court numerous PACs in order to stay competitive, perhaps the overall time they devoted to fund-raising would drop significantly.

This prospect is not inconceivable but it seems unlikely to materialize. No doubt the explosion during the 1970s and early 1980s in the number of PACs and the sophistication of their operations131 contributed in a variety of ways to the war chest phenomenon and other harmful features of the fund-raising culture that has emerged. One might speculate that had this explosion never occurred, candidate expectations regarding spending capacity would be commensurately lower and so too would be the time candidates were willing to devote to fund-raising. This history, however, cannot be expunged. Expectation levels, regarding both the raising of money and the spending of it, have been shaped by the experience of the last twenty years. Moreover, the priority now given to fund-raising is partly a response to the development of expensive techniques—

130. See Donovan, House Will Vote, supra note 5, at 3092.
131. See Drew, supra note 1, at 10–14; Fiorina, supra note 14, at 125; Sorauf, Inside, supra note 1, at 15–16.
from elaborate polling to the deployment of repeated spot advertisements—that have expanded the ways in which money can be used to gain electoral advantage.\textsuperscript{132} The disappearance of PACs or a reduction in their aggregate contribution levels would probably send candidates scurrying to find ways to raise more money from individuals, especially by means of sophisticated—and often time-consuming for the candidate—schemes for "bundling" and "brokering" individual contributions.\textsuperscript{133} There may be good reasons for trying to reduce the role of PACs in campaign finance, but the impact of that move on how candidates spend their time is not likely to be salutary. Controlling or eliminating PACs should not be considered a less drastic means of achieving the goal of candidate time protection.

Perhaps the most fundamental campaign finance reform currently being discussed is a voucher system that would provide that the expenses of candidacy cannot be financed by money, only by vouchers distributed equally to all citizens and subject to solicitation by candidates and their supporters.\textsuperscript{134} Under this system, fund-raising would be replaced by voucher-raising. The scheme could be structured so that vouchers could "buy" as much or more campaign speech (as well as other campaign resources) as is currently purchased with money. In terms of its impact on the overall quantity of speech, this reform could be designed to be less drastic than the kinds of spending limits that would permit candidates to spend less time fund-raising.\textsuperscript{135}

A well-designed voucher system thus would burden speech less than would an efficacious system of spending limits. But would such a voucher system achieve the goal of candidate time protection? The scramble for

\begin{itemize}
  \item \textsuperscript{132} See Alexander, supra note 3, at 8, 79.
  \item \textsuperscript{133} "Brokering" occurs when a person or group arranges events at which numerous contributors (individuals or PACs) assemble to meet a candidate and make contributions to her campaign. "Bundling" takes place when a person or group (often a PAC) collects contributions from others and forwards them to the candidate. Both practices result in identifiable persons and groups being indirectly responsible for sums of money flowing to candidates that far exceed the limits of what those persons or groups legally can contribute on their own. See Fritz & Morris, supra note 2, at 157-65; Sorauf, Inside, supra note 1, at 53-55.
  \item \textsuperscript{134} See Bruce Ackerman, Crediting the Voters, 13 Am. Prospect 71, 71-75 (1993). For a detailed, philosophically informed defense of the voucher concept and an argument that its application to the financing of elections is a constitutional imperative, see Edward B. Foley, Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance, 94 Colum. L. Rev. 1204 (1994).
  \item \textsuperscript{135} It is true that in principle a voucher system would necessarily institute some kind of ceiling on overall spending for speech because the value of the voucher would be prescribed by law and all other means of purchasing speech would be disallowed. Nevertheless, by permitting each voucher to purchase a considerable amount of speech, the impact of this theoretical limit could be eliminated as a practical matter without compromising the efficacy of the voucher system. In contrast, were conventional spending limits to be set so high as to have no real impact on the overall quantity of campaign speech, the objective of candidate time protection would not be served because candidates would have no incentive to reduce the time they devote to fund-raising.
\end{itemize}
vouchers could turn out to be every bit as time-consuming as the scramble for money. That vouchers would be distributed among voters more equitably than are dollars would not make the competition for vouchers any less fierce, or less important. Currently much of the time of candidates is spent courting not the donors themselves but brokers who arrange events at which individual and PAC contributions are made, or who actually collect “bundles” of such contributions and transmit them to candidates.136 This process of brokering and bundling would probably continue under a voucher system; at least two major proponents of campaign finance vouchers expect and hope that it would.137 PACs might deal in vouchers the way they now deal in money.

It might be argued, however, that time spent by candidates raising vouchers should be considered qualitatively different from time spent raising money. If all citizens are equal in what their vouchers can buy, and if their vouchers can buy nothing but campaign resources for the candidates of their choice, the process of seeking vouchers begins to resemble the process of seeking votes. The voucher chase might then be characterized as a quintessentially democratic activity: not a threat to representation but an embodiment of it.

There is much to be said for this view, but the analogy to voting is far from perfect. Presumably, vouchers could be given to more than one candidate in the same election, could be brokered and bundled, and could only reflect choices the candidates would be able to monitor (unlike voting with a secret ballot). In these respects, contributing a voucher would differ from casting a ballot. A purist (or a realist) might believe that democratic values are better served when candidates focus their energies on getting votes rather than vouchers, and on discharging their duties of office in the interim between elections rather than accumulating war chests full of vouchers.

Furthermore, as appealing as the move to a voucher system might be, such a reform would represent truly a revolution in how elections are conducted. A more conventional reform such as the adoption of spending limits should not be invalidated on the ground that the more daring alternative was not pursued, even if the revolutionary alternative would have a less drastic impact on the overall quantity of campaign speech. The less drastic means principle would cut too wide a swath if it were used to invalidate moderate reforms that in their own terms are well designed simply because judges were persuaded that a more fundamental change would be desirable.

Spending limits might be considered particularly burdensome to a candidate who faces substantial independent expenditures, either in opposition to her candidacy or in favor of her opponent’s.138 If independ-

---

136. See Fritz & Morris, supra note 2, at 164–65.
137. See Ackerman, supra note 134, at 74; Foley, supra note 134, at 1206–08, 1253.
138. Congressman Price, a proponent of spending limits, warns against this problem. See Price, supra note 1, at 27.
ent expenditures are not coordinated with the candidate who benefits from them, under Buckley v. Valeo they cannot be restricted.\textsuperscript{139} The less drastic means principle may require that a law imposing spending limits contain some provision to mitigate the inequity of a candidate who is bound by the limits having to contend with critics who are not similarly constrained. Independent expenditures played a major role in several elections during the early 1980s.\textsuperscript{140} Were spending limits to be established in congressional and statewide races, more PACs might attempt to influence the outcome of elections by means of large independent expenditures, a strategy that has been in decline in recent years.\textsuperscript{141}

One regulatory response to this possibility would be to suspend spending limits for a candidate who is the target of substantial independent expenditures. Another would be to permit such a targeted candidate to spend a fixed amount above the level that otherwise would be in force and that would continue to bind his non-targeted opponents. A third approach would be that adopted in both the Senate and House bills passed in 1993: public subsidies (possibly in the form of vouchers that can be redeemed for media time) for candidates facing independent expenditures above a certain high threshold.\textsuperscript{142}

Any effort to solve the problem of massive independent expenditures by means of the first alternative, the suspension of spending limits on the targeted candidates, would severely undercut the candidate-time-protection rationale. If candidates believe they may wind up in a campaign of unlimited spending, they will prepare for the contingency by amassing a war chest. Indeed, many politicians will view the war chest as the best means of discouraging independent expenditures in opposition to their candidacy. The second alternative, raised limits for targeted candidates, may lead to more time devoted to fund-raising, but need not degenerate into the war chest phenomenon. The third alternative, public subsidies for targeted candidates but no increased capacity to spend

\textsuperscript{139} See Buckley v. Valeo, 424 U.S. 1, 44–51 (1976).
\textsuperscript{140} See Alexander, supra note 3, at 64; Magleby & Nelson, supra note 1, at 89–94.
\textsuperscript{141} See Sorauf, Inside, supra note 1, at 180–83. Sorauf explains why many PACs ceased making independent expenditures: "Independent spending created intraorganizational problems for the PACs that tried it; some of their donors either did not approve of it generally, or they were outraged at the PACs' choice of targets. It also raised the wrath of incumbents, especially when it was spending in favor of challengers, and they quickly learned to ignite voter backlash to it." Id. at 183. Presumably, these factors would operate to discourage independent expenditures by PACs even if spending limits were in force. Alexander cautions, however, that independent expenditures might increase significantly if direct contributions by PACs to candidates were severely restricted. See Alexander, supra note 3, at 65.
\textsuperscript{142} See Campaign Finance Bills Compared, supra note 20, at 262, 264. The Senate bill provides that targeted candidates are eligible for federal funds that would offset dollar-for-dollar any independent expenditure from a single source greater than $10,000. The House bill provides a targeted candidate with communications vouchers equal in value to the sum total of independent expenditures in opposition to her candidacy once that total exceeds $10,000. Id.
money raised from private sources, is by far the most desirable from the standpoint of candidate time protection.

The complete suspension of all spending restrictions on candidates facing hostile independent expenditures should not be required under the less drastic means doctrine, partly because that would destroy the efficacy of the regulatory scheme. However, a regime of spending limits that made no provision whatever for the plight of the targeted candidate might well be vulnerable to constitutional challenge on the ground that the objective of candidate time protection can be served sufficiently by the less drastic means of adjusted limits or compensating public subsidies. Although subsidies are preferable to adjusted limits on policy grounds, the difference does not rise to the level of a constitutional imperative, at least not unless a scheme of adjusted limits is shown to be ineffective in preventing the war chest mentality from continuing to dictate how candidates spend their time.

A final less drastic means to consider is direct regulation of how much time candidates spend fund-raising. Were this course feasible, it might serve the objective of candidate time protection better than would spending limits, which after all provide only a disincentive to devoting excessive time to fund-raising, not a legal prohibition on doing so. Direct regulation might also be less restrictive of speech in quantitative terms because unusually efficient candidates capable of raising large sums with modest expenditures of time would be permitted to spend as much money on communication as they could raise.

Direct regulation could never work, however, because there is no practical way to monitor how candidates spend their time. The requisite surveillance would be absurdly expensive as well as constitutionally suspect. Self-reporting would be unreliable. Determining which campaign encounters, not to mention which staff meetings, had fund-raising significance would be a daunting task. The only way to change how candidates allocate their time is by altering their incentives. The impetus that drives the quest for contributions is the felt need to spend ever expanding sums of money on increasingly expensive and sophisticated campaign services and products. Only when this spending is brought under control will fund-raising be brought under control. There is no less drastic means.

143. It might be argued that any provision designed to benefit candidates who are targeted by massive independent expenditures would violate the First Amendment because it would discourage such constitutionally protected expenditures. That claim seems implausible, however, even assuming that the right to make independent expenditures can be violated by deterrence as well as proscription. The decision to alter the spending opportunities of targeted candidates can be viewed as an effort to prevent the regime of spending limits from artificially magnifying the impact of independent expenditures that are not subject to the limits. There is little reason to suppose that fewer independent expenditures would be made under a scheme of modified rules for targeted candidates than if no spending limits on any candidates were in place.
X. Conclusion

I have shown, I believe, that in terms of the traditional canons of First Amendment doctrine, campaign spending limits justified by the objective of candidate time protection should not be presumed to be unconstitutional. Spending limits are content neutral in form and indeterminate in political impact. The time-protection justification does not depend on any concern about the communicative impact of speech. Spending limits address a problem that is central to the system of representation ordained by the Constitution. The regulation of spending is the most efficacious way to alter how candidates spend their time. No comparably effective less drastic means to this goal can be identified. The reasons given in *Buckley v. Valeo* for invalidating spending limits under the First Amendment do not apply to the candidate-time-protection rationale.

I have not shown in this essay that spending limits designed to free candidates from excessive fund-raising can be defended against the full range of First Amendment objections that could be mounted. For example, it might be argued that under the principle of freedom of speech properly understood it is axiomatic that a candidate has an unqualified individual right to purchase whatever speech she can, using whatever money she can legally raise. This argument would not proceed from the premise of self-government and would not rely on claims regarding the aggregate consequences of the liberty claimed. The focus of such an argument would be on the sphere of individual freedom that is invulnerable to any regulatory rationale, rather than the legitimacy or efficacy of a particular rationale. Other objections to spending limits can be imagined that proceed from elaborate calculations of consequences, or sensitive calibrations of partisan bias and benefit, or affirmative duties to reform the financing of elections more fundamentally so as better to empower voters or broaden the opportunity to run for office.

Responses to these objections can be imagined that build from the proposition that time freed from fund-raising creates new opportunities for speech—among representatives, for example, or by a candidate to ordinary constituents and vice versa—as well as financial constraints on the capacity to project speech maximally. To the degree that spending limits restore voter confidence in the quality of representation, the gain in citizen engagement can be computed in First Amendment terms. There can be little doubt, moreover, that candidates in the present fund-raising environment frequently hold back on the expression of their views and intentions for fear of alienating some of the many diverse donors they must court. Naturally, candidates would do this to some degree to avoid the wrath of voters even were funding not a concern, but there is reason to fear that the need to keep various donors in line exacerbates the age-old problem of trimming. If so, once again the loss is

---

144. See Jackson, supra note 1, at 108–09.
truly one of free speech. When the conventional reluctance to look beyond one-dimensional notions of quantity in measuring speech effects is overcome, spending limits can be seen to advance First Amendment values in some ways, even while threatening them in other ways.

Whatever may be true on the cutting edge of constitutional argument, the conventional doctrines and principles of the First Amendment are not inhospitable to spending limits so long as they are instituted not to prevent corruption and undue influence, alter the balance of electoral competition, or improve public debate, but to redirect how candidates spend their time. In this respect, the candidate-time-protection rationale can and should move the debate over spending limits beyond Buckley.