COERCION IN CAMPAIGN FINANCE REFORM: A CLOSER LOOK AT FOOTNOTE 65 OF *BUCKLEY V. VALEO*

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Legal scholars have thoroughly analyzed Buckley v. Valeo's treatment of limits on campaign contributions and expenditures. Scholarship has paid substantially less attention to footnote 65 of Buckley, in which the U.S. Supreme Court held that Congress could condition the provision of public funding to candidates on their willingness to accept expenditure limits. Critics have argued that the Court, by conditioning a public benefit on the forfeiture of a constitutional right, permitted the imposition of an unconstitutional condition. Furthermore, the Court has failed to provide a test for determining when incentives and penalties designed to encourage acceptance of expenditure limits become unconstitutionally coercive. In this Comment, Grant Davis-Denny defends footnote 65 from the unconstitutional-conditions criticism and proposes a test for addressing the coercion concern. He argues that conditional expenditure limits are permissible because they serve a compelling state interest in reducing corruption. After reviewing footnote 65 reforms at the state and local levels, the author criticizes three coercion tests that have been proposed by lower courts and commentators. He concludes by suggesting that the test should ask whether the challenged campaign finance law, taken as a whole, allows a typical candidate to run a competitive campaign without accepting the conditional expenditure limit.

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INTRODUCTION

Buckley v. Valeo[1] is the landmark case for campaign finance regulation. *Buckley*'s critics usually focus on two aspects of its holding: the constitutionality of contribution limits and the unconstitutionality of expenditure limits.[2] There is no sign, however, that the U.S. Supreme Court will reverse these holdings anytime soon.[3] Yet there is another tension in *Buckley* that has largely been ignored and is arguably more important to the future of campaign finance reform.

Buckley held that limits on the amount of money that a candidate may spend on her campaign are an unconstitutional abridgement of the freedom of speech.[4] In the same decision, however, the Court stated that such ex-

1. 424 U.S. 1 (1976) (per curiam).

2. *See, e.g.*, RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 353–54 (2000) (arguing that *Buckley v. Valeo* requires a "democratic wager" because it assumes that even well-intentioned attempts to improve democracy through expenditure limits will result in a harm to democracy); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1397 (1994) (criticizing *Buckley*'s strict ban on government interference in the expenditure marketplace for being analogous to the *Lochner* era). My goal in this Comment is not to criticize *Buckley*'s holding that expenditure limits are unconstitutional. While there are legitimate reasons to disagree with this holding, my own feeling is that the most effective type of campaign finance reform would not include mandatory expenditure limits. Additionally, the test that is proposed in Part IV is designed not to require a significant change in the Supreme Court's campaign finance doctrine. Accordingly, this Comment will not argue for the constitutionality of mandatory expenditure limits.

3. *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 396–98 (2000) (reaffirming the constitutionality of contribution limits).

4. *Buckley*, 424 U.S. at 58–59.

penditure limits are permissible if they are imposed only on candidates that voluntarily accept public financing. Footnote 65 of *Buckley* specifically stated that:

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.[5]

Since *Buckley* was handed down in 1976, the Supreme Court has provided no further reasoning to justify its statement in footnote 65.[6] The Court has also failed to establish a test for determining how far government may go in attempting to induce acceptance of expenditure limits.

This Comment is a modest attempt to assist the Court, or lower courts, in accomplishing these two tasks. First, I defend footnote 65's conclusion from critics who contend it violates the unconstitutional conditions doctrine.[7] Building on this defense of footnote 65, I then develop a test for evaluating the constitutionality of benefits, burdens, and conditions that are integrated into conditional expenditure limit programs.

Part I analyzes the threshold issue of whether the government may condition the distribution of public financing on a candidate's willingness to abide by expenditure limitations. Some commentators have argued that denying public funding to candidates who choose to exercise their constitutional right to unlimited expenditures may violate the unconstitutional conditions doctrine. After analyzing the Supreme Court's inconsistent application of the doctrine, I discuss why a more particularized analysis, which balances the competing interests in reducing corruption and protecting free speech, is necessary. I conclude this part by arguing that the well-recognized state interest in eliminating corruption justifies the expenditure limit condition.

The more difficult issue is how far a government may go to encourage participation in conditional expenditure limit programs. Because mandatory expenditure limits are unconstitutional and because implementing full public financing can be politically difficult, state and local governments have

5. *Id.* at 57 n.65.

6. As will be discussed, the Court summarily affirmed a district court's judgment that the Federal Election Campaign Act's (FECA's) expenditure limits on candidates participating in the presidential public financing program are constitutional. Republican Nat'l Comm. v. FEC (RNC), 487 F. Supp. 280, 283–88 (S.D.N.Y. 1980), *aff'd*, 445 U.S. 955 (1980).

7. "The doctrine of unconstitutional conditions holds that the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

developed a diverse set of incentives to encourage participation. Part II surveys the inducements that have been adopted by state and local governments. This part also examines the effectiveness of these reforms and introduces the coercion concerns that they raise.

Part III analyzes three tests put forth by courts and commentators for evaluating the coerciveness of inducements to participate in expenditure limit programs. The leading test applied by the courts, which examines whether the benefits and burdens of participation are roughly proportional, is fatally flawed. The rough proportionality test does not directly address the coercion concern, provides insufficient direction to policymakers, and creates a needless tension between encouraging participation and meeting constitutional strictures. I also argue that a proposed alternative test, which looks for a coercive purpose, would be impossible to implement and will ignore provisions that have a coercive effect. The third suggested approach of distinguishing between inducements that are carrots and those that are sticks is equally unappealing because of the difficulty of establishing a comparative baseline. Even if penalties can be identified, merely penalizing a nonparticipant does not amount to coercion.

Part IV proposes a new test for determining whether a campaign finance regulatory scheme is unconstitutionally coercive. The inquiry in the test focuses on whether the regulatory scheme rises to the level of compulsion, at which point the policy should be declared unconstitutionally coercive. I articulate a test for compulsion that asks whether the challenged law has the effect of prohibiting a candidate from raising sufficient funds to mount a competitive race. The proposed test has the benefit of being consistent with the Court's doctrinal approach to contribution limits. Both *Buckley* and the Court's recent decision in *Nixon v. Shrink Missouri Government PAC*[8] indicate that contribution limits become impermissibly low only if candidates are left with no opportunity to run a competitive campaign. The test would also permit national, state, and local governments to utilize a wide range of reform tools to encourage participation. I conclude by analyzing objections to the compulsion test and argue that, although the standard would be difficult to apply, it directly addresses the coercion concern while leaving open the possibility for successful reform.

Before beginning my analysis, it is necessary to explain briefly four assumptions that I will rely upon repeatedly in this Comment. First, I assume that private fundraising poses a significant risk of corruption, or at least the public appearance of corruption.[9] This concern centers on the potential of

8. 528 U.S. 377 (2000).

9. "By consensus, the empirical foundation and impetus for passage of the 1974 Federal Election Campaign Act amendments was the corruption surrounding the fundraising and campaign spending in the 1972 presidential election, generically referred to as Watergate." David Schultz,

large campaign contributions to buy legislative votes (*quid pro quo* corruption), more subtly influence legislative decisionmaking (undue influence), or create the perception that either of these is occurring. It is true that the empirical research into the link between campaign donations and legislative voting patterns has not revealed a "smoking gun."[10] The Supreme Court itself has conceded that "the scope of such pernicious practices can never be reliably ascertained."[11] Nonetheless, the Court has concluded that the "problem is not an illusory one,"[12] pointing to abuses uncovered in the 1972 elections.[13]

My own logic for concluding that corruption is a real threat stems from both the obvious importance of avoiding an inherent conflict of interest on the part of elected officials and the concededly anecdotal statements made by former elected officials. As to the first justification, it seems self-evident that an elected official who receives money from a third party is placed in a precarious position when it comes to making decisions that affect that party's interest.[14] As to the second, conservative Senator Barry Goldwater stated that "[s]enators and representatives, faced incessantly with the need to raise ever more funds to fuel their campaigns, can scarcely avoid weighing every decision against the question, 'How will this affect my fundraising

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Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws, 18 REV. LITIG. 85, 91 (1999).

10. Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 333–34 (1989) ("There is no 'smoking gun' in this, or in most cases, but neither is there reason for anyone other than a criminal investigator to search for one. The campaign contribution is pervasive."); *see also* FRANK J. SORAUF, MONEY IN AMERICAN ELECTIONS 307–17 (1988). Frank Sorauf notes that the findings of the empirical studies have "been mixed and ambiguous. Some studies find modest relationships . . . but others do not." *Id.* at 311–12. Sorauf concludes from his review of the empirical research that "there is at best a case for a modest influence of money." *Id.* at 312. Daniel Lowenstein, however, concludes from his review of the research that the problem is the "single-mindedness" with which the research is conducted. Lowenstein, *supra*, at 322. Because campaign contributions "interact [in the human mind] with other influences" in an unfathomable but complex dynamic, empirical studies will inevitably fail to find the smoking gun. *Id.*

11. *Buckley*, 424 U.S. at 27. However, the impact of contributions may have a particularly pernicious effect if the issue lacks public visibility. "There is . . . a scholarly consensus that contributions do have an impact on voting when 'the issues under deliberation [tend] to be low-visibility, nonpartisan ones on which other voting cues [are] lacking.'" Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 580 (1999) (quoting DAVID B. MAGLEBY & CANDACE J. NELSON, THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 77–78 (1990)).

12. *Buckley*, 424 U.S. at 27.

13. *Id.* ("The Court of Appeals' opinion in this case discussed a number of the abuses uncovered after the 1972 elections."). The abuses included the Committee for the Reelection of the President's campaign finance activities, which were "often in illegal fashion or otherwise in ways meant to bypass the 1971 FECA disclosure requirements." Schultz, *supra* note 9, at 91.

14. *See* Lowenstein, *supra* note 10, at 325 ("The conflicts of interest caused by campaign contributions are illustrated routinely in nearly every daily newspaper.").

prospects?' rather than 'How will this affect the national interest?'"[15] Former Congressman Mel Levine has also stated that "[o]n the tax side, the appropriations side, the subsidy side, and the expenditure side, decisions are clearly weighted and influenced . . . by who has contributed to candidates."[16] Even if the threat of corruption is illusory, I agree with the *Buckley* Court's conclusion that "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."[17] Throughout this Comment, I will refer to the threat of corruption and the appearance of corruption as the anticorruption interest.

My second assumption is that raising private campaign contributions requires candidates and elected officials to spend a significant amount of time fundraising that should be spent on other activities.[18] Because they must run for reelection every two years, members of the U.S. House of Representatives must engage in constant fundraising to keep their campaign war chests full. Due to the expense of running U.S. Senate campaigns, "[s]enators now must raise nearly $13,000 each week for their entire six-year terms."[19] Unlike the anticorruption rationale which the Court has recognized as a legitimate source of concern, the Court has never addressed the candidate time interest.[20] However, the Court's failure to consider this rationale in *Buckley* is not dispositive because "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."[21] How significant is this problem? In a 1987 survey of members of the

15. CENTER FOR RESPONSIVE POLITICS, TEN MYTHS ABOUT MONEY IN POLITICS, MYTH FIVE (1996), *available at* http://www.opensecrets.org/pubs/myths/contents.htm (last visited Sept. 12, 2002).

16. *Id.* For a laundry list of such confessions, see PUBLIC CAMPAIGN, PEOPLE ARE TALKING, *at* http://publiccampaign.org/quotesmain.html (last visited Sept. 12, 2002). Senator Paul Simon summed up the matter by saying, "Fundraising has a corrupting influence on all of us." *Id.*

17. *Buckley*, 424 U.S. at 27 (holding that "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent'") (quoting Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548, 565 (1973)).

18. The leading article on the effects of fundraising on the candidate's time is Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994). Vincent Blasi proposes that the candidate time interest should serve as a sufficiently compelling interest to justify expenditure limits. *Id.* at 1325.

19. *Id.* at 1282 (noting that this amount of fundraising is necessary "to amass the average that a winning Senate race costs").

20. *Id.* at 1287 ("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.").

21. *Id.* at 1288.

U.S. Congress, 29.7 percent of respondents found that fundraising "significantly" reduced the time they spent on legislative work.[22] Additionally, 47.5 percent of congressional staff felt that fundraising had a significant effect on the amount of work conducted by their bosses.[23] It is likely that this problem has only worsened. Whereas the average House incumbent spent $380,000 in the 1988 election cycle[24] when the survey was taken, that figure had nearly doubled to $747,900 in 2000.[25] One former congressman disturbingly reported that "'[80] percent of my time, 80 percent of my staff's time, 80 percent of my events and meetings were fundraisers. Rather than go to a senior center, I would go to a party where I could raise $3,000 or $4,000.'"[26] Thus, there is reason to fear that "[t]he 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, information gathering, political and policy analysis, debating and compromising with fellow representatives, and the public dissemination of views."[27]

My third assumption is that private fundraising creates inequalities among citizens and among candidates for elected office. The Supreme Court has explicitly rejected the equality rationale as a justification for expenditure limits.[28] Even if equality does not justify speech restrictions, however, the equality interest might still be a policy argument in favor of one type of campaign finance reform over another. The equality argument is quite simple: "[A] citizen's wealth should have no bearing upon her opportunity to participate in the electoral process."[29] Assuming that campaign contributions or private wealth purchase influence over electors, help to buy access to candidates, assist with the election prospects of one's favored candidates, or partially determine one's own ability to run for office,[30] unequal access to

22. *Id.* at 1283 n.6 (citing LARRY MAKINSON, CENTER FOR RESPONSIVE POLITICS, THE PRICE OF ADMISSION: CAMPAIGN SPENDING IN THE 1992 ELECTIONS 11 (1993)).

23. *Id.*

24. *Id.*

25. CENTER FOR RESPONSIVE POLITICS, ELECTION OVERVIEW: 2000 CYCLE: STATS AT A GLANCE, *at* http://www.opensecrets.org/overview/index.asp?Cycle=2000 (last visited Sept. 12, 2002).

26. Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1188 (1994) (quoting former Congressman Bob Edgar).

27. Blasi, *supra* note 18, at 1282–83.

28. Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .").

29. Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994).

30. For a disturbing look at the effects of wealth on one's ability to run for this nation's highest elected office, see Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 289 (1993). Jamin Raskin and John Bonifaz observe that "millionaires are overrepresented at least one hundred times in the U.S. Senate" while "there is not a single U.S.

personal wealth translates into unequal participation in the electoral process.[31] Americans who earn over $75,000 per year are "100 times more likely" than poor individuals to make campaign contributions.[32] Thus, although *Buckley* rejected the equality rationale for restricting speech, I will refer to the promotion of equality as a positive goal of campaign finance policy.

Having stated these three background assumptions, which typically are used to justify regulatory measures, let me take a step in the opposite direction and emphasize my sincere concern about the free speech interest at stake. Money may not be speech, but modern campaigns absolutely require money to operate.[33] For example, "[i]f spending more than $1,000 on expression is outlawed, then you may not place more than a tiny ad in any major newspaper, buy virtually any television time, put up a billboard, or mail more than a few thousand newsletters."[34] Now it is not very likely that Congress would limit expenditures to $1000, given that the current House incumbent spends over seven hundred times as much in a single campaign. But we should be concerned about the potential for incumbents to establish ceilings that prevent challengers from running competitive races.[35] As Gary Jacobson has argued:

Senator who was legally defined as poor prior to election. Indeed, there is not a single Senator who was making anything close to the median personal income." *Id.*

31. Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1645–46 (1999) ("Equality demands that every individual be given, so far as practical, the same political capital, so that each individual has a roughly equal ability to pursue both an electoral strategy and a legislative strategy.").

32. Raskin & Bonifaz, *supra* note 26, at 1178 ("Less than one percent of the nation's population contributed seventy-seven percent of all campaign funds raised in the 1992 election cycle in individual contributions of $200 or more.").

33. Justice John Paul Stevens recently argued that "Money is property; it is not speech." Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring). Eugene Volokh responds:

> [While this] is literally true . . . it doesn't show much by itself. After all, expenditure limits don't just bar the use of money; they single out the use of money to speak. A law restricting people from flying places to give speeches would be a speech restriction, not because "flying is speech" but because giving a speech is speech and burdening such speech . . . is a speech restriction.

Eugene Volokh, *Freedom of Speech and Speech About Political Candidates: The Unintended Consequences of Three Proposals*, 24 HARV. J.L. & PUB. POL'Y 47, 57 (2000).

34. Volokh, *supra* note 33, at 47.

35. Bradley A. Smith, *Some Problems with Taxpayer-Funded Political Campaigns*, 148 U. PA. L. REV. 591, 606–07 (1999) (noting that spending caps proposed in 1997 congressional legislation set the limit so that "[e]very challenger spending less than the proposed limit in Senate campaigns had lost in each of the 1994 and 1996 elections, whereas every incumbent spending less than the limit had won"). While this argument is typically marshalled by those opposed to regulation, I believe it should be a substantial concern of those who support reform. This problem should not be overlooked, especially given its importance not only to competitive elections, but also to candidate participation and ultimately the success of a public financing scheme. *See* Briffault, *supra* note 11, at 586–87.

> Challengers, in contrast [to incumbents], typically begin the campaign in obscurity. Because voters are demonstrably reluctant to vote for candidates they know nothing about, challengers have a great deal to gain by making themselves better . . . known. . . . Their level of campaign activity . . . thus has a strong influence on how well they do at the polls.[36]

Therefore, besides the potential for limits to impact free speech, we should be particularly concerned about damaging the competitiveness of elections.

Building on these four assumptions, I now begin the analysis of *Buckley*'s footnote 65 by examining whether its holding that conditional expenditure limits are constitutional can be justified.[37]

I. CONDITIONAL EXPENDITURE LIMITS ARE CONSTITUTIONAL

A. An Introduction to *Buckley v. Valeo*

The essential holding of *Buckley* is simple. Expenditure limits are unconstitutional; contribution limits are constitutional.[38] The logic of *Buckley* is slightly more complicated. The case involved a number of challenges to the constitutionality of the Federal Election Campaign Act of 1971 (FECA),[39] as amended in 1974. FECA placed limits on: (1) contributions to campaigns by individuals,[40] political action committees (PACs), and the candidates themselves,[41] (2) expenditures by federal campaigns,[42] and (3) amounts that an individual or organization can spend independent of a can-

36. Gary C. Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments*, 34 AM. J. POL. SCI. 334, 335 (1990).

37. My goal here is not to defend these four assumptions; I recognize that there are significant arguments against each one. It is my hope, however, that the reader now understands the basic interests that I believe must be balanced in debates over campaign finance reform.

38. *Contributions* is the term used to describe donations from a third party to a candidate, while *expenditures* denotes spending by the candidate. *Independent expenditures* describe spending made by a third party without coordination with a candidate or her campaign. For the statutory definitions of these terms, see 2 U.S.C § 431 (2000).

39. Federal Election Campaign Act of 1971, Pub. L. No. 93-443, § 101(6), 88 Stat. 1263, 1264 (1974).

40. 18 U.S.C. § 608(b) (1975) (repealed 1976) ("[N]o person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000.").

41. *Id.* § 608(a) (repealed 1976). Candidates for president or vice president could contribute up to $50,000, while Senate candidates were limited to $35,000, and House candidates were limited to $25,000.

42. *Id.* § 608(c) (repealed 1976). Presidential candidates could spend $10 million in the primary election and $20 million in the general election. In the general election, Senate candidates had a spending cap of at least $150,000 (or $.12 multiplied by the voting-age population of the state, whichever was greater), and House candidates typically were limited to $70,000 in expenditures in the general election.

didate on that candidate's behalf.[43] Furthermore, FECA established a system for the public financing of presidential election campaigns.[44] During the presidential primary, FECA provided matching funds for all contributions up to $250 to eligible candidates.[45] Additionally, the presidential nominees of the two major parties were eligible for full public financing in the general election.[46] Presidential candidates who accepted public financing had to abide by specified expenditure limits.[47]

The Supreme Court rejected the challenge to the contribution limits and presidential public financing provisions.[48] The Court held that contribution limits are only "a marginal restriction upon the contributor's ability to engage in free communication."[49] Because a contribution is symbolic of the contributor's support for the candidate, the "quantity of communication . . . does not increase perceptibly with the size of his contribution."[50] The Court noted that although the limits in FECA did not impose such restraints, "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy."[51] The Court held, however, that the "marginal restriction" on freedom of speech imposed by $1000 contribution limits was justified by the state's interest in avoiding corruption and the appearance of corruption that may be associated with large campaign contributions.[52]

43. *Id.* § 608(e)(1) (repealed 1976). Independent expenditures were limited to $1000 in reference to a clearly identified candidate.

44. 26 U.S.C. §§ 6096, 9001–9013, 9031–9042 (2000).

45. *Id.* § 9034(a).

46. *Id.* § 9004(a)(1). The amount of the public financing grant was $20 million when the program was first implemented.

47. *Id.* § 9003(b).

48. Buckley v. Valeo, 424 U.S. 1, 29, 84 (1975) (per curiam).

49. *Id.* at 20–21.

50. *Id.* This conclusion can be criticized for ignoring the link between the amount of the contribution one can give and the amount of speech that one's favored candidate can make. *See* James Bopp, Jr., *Constitutional Limits on Campaign Contribution Limits*, 11 REGENT U. L. REV. 235, 237 (1999) ("Contribution limits adversely affect our system of representative government by restricting the resources available for political dialogue."). Unlike expenditure limits, however, contribution limits do not foreclose a particular party from expending unlimited sums of money in the political marketplace. Third parties (by which I mean noncandidates) are still permitted to make unlimited independent expenditures even under a regime of contribution limits. Candidates are free to raise a larger number of smaller contributions to make up for the smaller number of large contributions, although this will certainly be more difficult. By contrast, expenditure limits leave candidates with no alternative avenues. *See* Volokh, *supra* note 33, at 65 (arguing that while independent expenditures might not be as effective at communicating the intended message as contributions, this is probably not sufficient to render contribution limits constitutionally infirm).

51. *Buckley*, 424 U.S. at 21.

52. *Id.* at 29 ("[T]he weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling."). Note the balancing that the Court engages in when

Although FECA's contribution limits were constitutional, the Court held that its expenditure limits were unconstitutional.[53] Expenditure limits "impose direct and substantial restraints on the quantity of political speech"[54] because "virtually every means of communicating ideas in today's mass society requires the expenditure of money."[55] The Court rejected several justifications that were put forward by the government as compelling state interests. First, the Court held that expenditure limits are not necessary to reduce corruption because this interest "is served by the Act's contribution limitations and disclosure provisions."[56] Second, *Buckley* also held that there was no compelling government interest in equalizing expenditures made by candidates, because the amount of funds raised with contribution limits in place would tend to reflect the candidate's popular support.[57] Additionally, the Court noted that equalizing expenditures could harm candidates who need to spend larger amounts to establish name recognition.[58] Finally, the Court rejected the notion that there was a compelling state interest in controlling the escalating costs of campaigns. It reasoned that "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. . . . [I]t is not the government, but the people . . . who must retain control over the quantity and range of debate on public issues in a political campaign."[59]

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upholding contribution limits. The Court implicitly forecloses the notion that campaign finance reform policies that have an effect upon freedom of speech can never be justified, eschewing bright-line rules in favor of a more nuanced analysis. This principle of balancing interests will be central to formulating my theory of impermissible coercion.

53. *Id.* at 58.

54. *Id.* at 39.

55. *Id.* at 19.

56. *Id.* at 55. Although it is true that contribution limits and disclosure requirements target corruption, the Court failed to justify its conclusion that these measures were sufficient by themselves to solve the corruption problem.

57. *Id.* at 56. Thus, the Court felt that popular candidates would have a roughly equal ability to raise and expend campaign contributions. This conclusion ignores inequality among donors. *See supra* note 32 and accompanying text. For example, a candidate with five thousand supporters who have $2000 per year in disposable income will certainly raise less from her supporters than a candidate with fifty supporters who have $100,000 of disposable income. Accordingly, the amount one receives will not always reflect the intensity of one's support. Because past state-imposed racial segregation has present-day economic effects, this also means that contributions received may be racially biased. Spencer Overton, *Voices From the Past: Race, Privilege, and Campaign Finance*, 79 N.C. L. REV. 1541, 1551 (2001) (noting that a survey of contributors found that 95 percent identified as white and less than 1 percent identified as being persons of color).

58. *Buckley*, 424 U.S. at 56–57 ("[T]he 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 the campaign.").

59. *Id.* at 57.

B. The Controversy Surrounding Footnote 65

The unconstitutional conditions doctrine is the principle that the government may not deny a benefit on the basis of an unconstitutional condition. Critics of footnote 65 contend that it is inconsistent with this doctrine.[60] For example, one article published shortly after *Buckley* proclaimed that "[t]he spectacle of government's demanding that a candidate restrict, in return for federal payments, what the Court itself has squarely held to be his first amendment right to speech would seem to present one of the strongest cases imaginable for application of the unconstitutional-condition doctrine."[61]

The unconstitutional conditions argument was not before the Court in *Buckley*.[62] Accordingly, the decision does not provide an answer to the unconstitutional conditions criticism. The text to which footnote 65 is attached does not explain why Congress should be able to condition public funding on the acceptance of expenditure limits. Indeed, if government

60. *See* Brice M. Clagett & John R. Bolton, Buckley v. Valeo, *Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VAND. L. REV. 1327, 1336 (1976) ("Having voided expenditure limits early in its opinion, the Court later and almost without explanation upheld such limits when accompanied by federal subsidies to candidates."); *see also* Joel M. Gora, *Campaign Finance Reform: Still Searching Today For a Better Way*, 6 J.L. & POL'Y 137, 159 (1997) ("Whether that conditional funding scheme would survive close scrutiny under the Court's unconstitutional conditions doctrine is a substantial question."); John Copeland Nagle, *Voluntary Campaign Finance Reform*, 85 MINN. L. REV. 1809, 1817–25 (2001); *id.* at 1819 ("The cases are not sufficiently attentive to the voluntariness problem inherent in the conditions imposed upon government funding of political campaigns."); David J. Schwartz, *Campaign Finance Reform: Limits on Out-of-State Contributions and the Question of Unconstitutional Conditions*, 23 U. DAYTON L. REV. 87, 108–09 (1997); *id.* at 113 (contending that "by denying benefits to candidates who retain their right to speak, [a reform] is susceptible to the doctrine of unconstitutional conditions"); Smith, *supra* note 35, at 627 ("The only real 'voluntary' spending limit comes when those who care about politics decide not to spend any more—everything else is a coercive limit on political speech, else it need not be included in the law."); Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 328 (1998) ("The constitutional problems [for public financing] multiply if public funding comes with strings attached, especially limits on the right to private fund-raising. . . . In particular, the subsidy ought not make candidates who decline the subsidy worse off other than through loss of the subsidy."). *But see* Kenneth J. Levit, *Campaign Finance Reform and the Return of* Buckley v. Valeo, 103 YALE L.J. 469, 486 (1993) (taking the view that conditional expenditure limits should be permissible so long as they are accompanied by offers rather than threats). In sum, the majority of commentary related to footnote 65 and conditional expenditure limits has been highly skeptical of their constitutionality.

61. Clagett & Bolton, *supra* note 60, at 1336. Clagett and Bolton contend that the pressure is even greater on candidates who would want to opt out because (1) their participant opponent is no longer concerned with fundraising, and (2) FECA's contribution limits make it more difficult to raise a sufficient amount to run a competitive race. *Id.*

62. Gora, *supra* note 60, at 158 ("[T]he Court did not address the unconstitutional conditions issue in *Buckley* because the argument was not made."); *see also* Schwartz, *supra* note 60, at 108 (noting that the unconstitutional conditions "doctrine was neither mentioned by the Court nor argued by the parties").

does not have the power to determine when "spending . . . is wasteful, excessive, or unwise,"[63] then presumably government should not be able to condition a benefit on spending limits.

Furthermore, neither of the two reasons offered in footnote 65 for the permissibility of conditional expenditure limits is compelling. The footnote begins with the phrase, "For the reasons discussed in Part III."[64] Although Part III of the *Buckley* opinion addresses the constitutionality of the presidential public financing provisions,[65] there was no challenge to the constitutionality of the conditional expenditure limit.[66] The Court did utilize the conditional expenditure limits to reason that FECA did not discriminate against minor-party presidential candidates. The Court noted that whereas "acceptance of public financing entails voluntary acceptance of an expenditure ceiling[,] [n]oneligible candidates are not subject to that limitation."[67] Furthermore, said the Court, because of the spending limits on major-party candidates, "other candidates will be able to spend more in relation to the major-party candidates."[68] However, unless the government has a compelling interest in increasing the relative spending power of minor-party candidates, Part III does not explain the text of footnote 65.

The only other reason that the Court offered is that "[j]ust as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding."[69] This analogy is not persuasive. First, the issue is not whether the candidate should "accept public funding," but whether the candidate should accept expenditure limits. A candidate who voluntarily chooses to limit the size of contributions, does so without a modicum of government inducement. In contrast, public financing provides an incentive for candidates to accept expenditure limits. Conditional expenditure limits may be constitutional, but it is not because candidates may voluntarily limit the size of their contributions. In sum, *Buckley* fails to explain why Congress may condition public financing on the acceptance of spending limits.

Subsequent to *Buckley*, the Supreme Court summarily affirmed the judgment of a federal district court that FECA's conditional expenditure limit was not an unconstitutional condition. In *Republican National Commit-*

63. *Buckley*, 424 U.S. at 57.

64. *Id.* at 57 n.65.

65. *Id.* at 85–109.

66. *Id.* at 90. The challengers argued that FECA violated the General Welfare Clause (an argument which is irrelevant to footnote 65), violated the First Amendment, and discriminated against third parties in violation of the Fifth Amendment's Due Process Clause. *Id.*

67. *Id.* at 95.

68. *Id.* at 99.

69. *Id.* at 57 n.65.

tee v. FEC (RNC),[70] a three-judge panel held that the challenged provision (1) did not infringe on protected speech rights[71] and (2) served compelling state interests.[72] The *RNC* court reasoned that there was not a First Amendment burden because the public financing option was merely an "additional funding alternative."[73] Accordingly, the rational candidate would select the option that would enhance her ability to communicate with the electorate.[74]

The *RNC* court also held that even if there was a burden on free speech, conditional expenditure limits furthered two compelling state interests. It reasoned that limits were necessary to the effectiveness of public financing in reducing corruption. Without limits, candidates would continue to raise private funds, risking a conflict of interest between their obligations to the public and to their benefactors.[75] Further, said the *RNC* court, the absence of limits would mean that candidates would continue to have to take time away from communicating with their constituents in order to solicit donations.[76]

But the unconstitutional conditions argument did not disappear in the wake of *RNC*. David Schwartz contends that "[t]he [*RNC*] court's lack of thoroughness leaves much to be debated."[77] He faults the district court for

70. 487 F. Supp. 280 (S.D.N.Y. 1980), *aff'd*, 445 U.S. 955 (1980).

71. *Id.* at 285.

72. *Id.* at 285–86.

73. *Id.* at 285. The *RNC* court explained the First Amendment implications of this alternative by stating:

> The Fund Act merely provides a presidential candidate with an additional funding alternative which he or she would not otherwise have and does not deprive the candidate of other methods of funding which may be thought to provide greater or more effective exercise of rights of communication or association than would public funding.

Id.

74. *Id.* ("Since the candidate remains free to choose between funding alternatives, he or she will opt for public funding only if, in the candidate's view, it will enhance the candidate's powers of communication and association."). This may be an oversimplification. A candidate might opt for public financing because they do not wish to spend time fundraising or because of public pressure to accept public funding.

75. *Id.* The district court reasoned that an absence of conditional expenditure limits would undermine the anticorruption interest:

> The public interest purposes behind the decision of Congress to provide for the financing of presidential elections would hardly be served unless some reasonable limits and conditions were imposed. If a candidate were permitted, in addition to receipt of public funds, to raise and expend unlimited private funds, the purpose of public financing would be defeated. Although the total amount raised and spent by each candidate, and hence the candidate's speech power, would be increased by the sums contributed from the public coffers, the candidates would no longer be relieved of the burdens of soliciting private contributions and of avoiding unhealthy obligations to private contributors.

Id.

76. *Id.* For a discussion of the candidate time interest, see *supra* note 17 and accompanying text.

77. Schwartz, *supra* note 60, at 109.

failing to consider the Supreme Court's decisions in *Perry v. Sindermann*,[78] *Elrod v. Burns*,[79] and *Rust v. Sullivan*.[80] Schwartz argues that because political speech is an area of speech that has "been traditionally open to the public for expressive activity," the unconstitutional conditions doctrine should be utilized to invalidate conditions on public funding.[81] In the next part, I take a closer look at the unconstitutional conditions doctrine in order to evaluate these claims.

C. Conditional Expenditure Limits Are Not Unconstitutional Conditions

The unconstitutional conditions doctrine is not as coherent or omnipotent as footnote 65's critics contend. As constitutional law scholar Cass Sunstein has argued, "[T]he very idea of a unitary unconstitutional conditions doctrine . . . is misconceived."[82] Brooks Fudenberg's review of Supreme Court decisions in this area found them to be "wonderfully inconsistent."[83]

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78. 408 U.S. 593 (1972). The Court held that the government

> may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

Id. at 597.

79. 427 US. 347 (1976). David Schwartz seems to ignore the Court's conclusion in *Elrod v. Burns* that the "[s]ubordination of some First Amendment activity was permissible to protect other such activity." *Id.* at 371.

80. 500 U.S. 173 (1991) (upholding the restriction of Title X funding to projects that are separated from prohibited abortion activities). The Court's reasoning tends to support the constitutionality of conditional expenditure limits:

> Potential grant recipients can choose between accepting Title X funds—subject to the Government's conditions that they provide matching funds and forgo abortion counseling and referral in the Title X project—or declining the subsidy and financing their own unsubsidized program. We have never held that the Government violates the First Amendment simply by offering that choice.

Id. at 199 n.5. Similarly, with conditional expenditure limits, a grant recipient (the candidate) may opt to accept the subsidy with its conditions or forgo the subsidy in favor of raising funds herself.

81. Schwartz, *supra* note 60, at 109. David Schwartz's statement relies on dicta in *Rust v. Sullivan*, in which the Court states that its holding does not mean that a government grant of property entitles the government to restrict speech (that is, suppress speech on a public university's campus). I find this limitation inapplicable to government subsidies, and Schwartz ignores language from the opinion which is far more on point and supports the constitutionality of conditional expenditure limits. *See Rust*, *supra* note 80.

82. Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 595 (1990). Cass Sunstein explains that the doctrine assumes government involvement is the exception, which is "inconsistent with both the realities of contemporary government and the principles that gave rise to it." *Id.*

83. Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 374 (1995).

Because it has been so randomly applied, numerous scholars have attempted to bring coherence to the doctrine by prescribing new tests or standards to determine whether the government may condition a benefit on the sacrifice of a protected right.[84] Arguably, no one has succeeded. As one scholar explained the challenge, "[P]erhaps some constitutional problems appear intractable because we are looking for coherent principles and usable doctrines in areas of policy where questions of degree predominate, and where seemingly arbitrary lines are necessary to settle temporarily, but not to resolve in any deeper sense, intrinsically competing policy objectives."[85] Thus, even if there were an unconstitutional conditions issue with conditional expenditure limits, it is not evident that the Court ultimately would deem these provisions unconstitutional.

Despite the doctrinal inconsistency, I argue that the Supreme Court's decisions reveal three specific reasons that conditional expenditure limits are not unconstitutional conditions.

First, conditions that may affect constitutional rights deserve less exacting scrutiny than direct limits on constitutional rights. As the Court stated in *South Dakota v. Dole*,[86] "[T]he constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly."[87] Indeed, the Court's recent decisions in the realm of unconstitutional conditions have increasingly deferred to Congress's judgment on the necessity of particular conditions. Thus, in *Rust*, the Court held that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[88] In particular, if conditions are not "'aimed at the suppression of dangerous ideas,' . . . [Congress's] 'power to encourage actions deemed to be in the public interest is necessarily far broader.'"[89]

84. *See generally* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Fudenberg, *supra* note 83; Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Sullivan, *supra* note 7, at 1413; William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

85. Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 990 (1995).

86. 483 U.S. 203 (1987).

87. *Id.* at 209 (upholding a federal statute that conditioned the provision of federal highway funds on states adopting a minimum drinking age of twenty-one).

88. 500 U.S. 173, 193 (1991).

89. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 550 (1983) (holding that limiting tax exemptions to nonprofits that do not engage in lobbying activities is constitutional) (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959), and Maher v. Roe, 432 U.S. 464, 476 (1977)).

Applying these holdings to campaign finance law, the distinction between mandatory expenditure limits and conditional expenditure limits becomes more apparent. The principle that government may not impose mandatory expenditure limits does not logically lead to the conclusion that it may not condition public financing on the acceptance of expenditure limits. Intuitively, if the government leaves a candidate with no choice but to abide by expenditure limits, it is committing a far greater harm than if it offers spending limits as one possible alternative. Additionally, conditional expenditure limits are not targeted at suppressing dangerous ideas, but at reducing corruption and enhancing communication with the electorate. Therefore, the courts should be deferential to legislative judgments on conditional expenditure limits.

The second reason that conditional expenditure limits are not unconstitutional is that it is permissible to constrain First Amendment rights if other First Amendment values are protected as a result. Schwartz relies heavily on language in the Court's *Elrod* decision to argue that "government employment cannot be conditioned on the employee's willingness to restrict his or her speech, absent a compelling state interest."[90] Two points made by the *Elrod* Court substantially undermine the unconstitutional conditions doctrine's application to conditional expenditure limits. First, the Court said, "Preservation of the democratic process is certainly an interest protection of which may in some instances justify limitations on First Amendment freedoms."[91] Interestingly, the Court cited *Buckley* for this proposition. Presumably, therefore, if conditional expenditure limits serve the anticorruption rationale recognized in *Buckley*, they also might justify modest infringements on free speech. The Court further noted that "[s]ubordination of some First Amendment activity [i]s permissible to protect other such activity."[92]

If conditional expenditure limits burden First Amendment activity, they are nonetheless permissible because of their importance in protecting democracy and expanding communication with the electorate. Public financing could not succeed without conditional expenditure limits.[93] As the district court noted in *RNC*, "If a candidate were permitted, in addition to receipt of public funds, to raise and expend unlimited private funds, the pur-

90. Schwartz, *supra* note 60, at 109.

91. Elrod v. Burns, 427 U.S. 347, 368 (1976) (holding that political patronage dismissals did not significantly serve the democratic process).

92. *Id.* at 371.

93. In addition to the practical argument that the anticorruption purpose of public financing would be defeated by the lack of expenditure limits, there is also the likelihood that "floors without ceilings" would lack political support. *See* Briffault, *supra* note 11, at 568 (noting that although not required, "public funding is in practice intertwined with spending limits").

pose of public financing would be defeated."[94] Public financing serves the democratic process by reducing or eliminating the corruption connected with private fundraising.

Furthermore, public financing, if provided as an alternative to private financing, expands communication with the electorate.[95] The Court recognized in *Buckley* that public financing "is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [public financing] furthers, not abridges, pertinent First Amendment values."[96] Accordingly, conditional expenditure limits are permissible because they are critical to public financing, which, in turn, enhances First Amendment rights.

The final answer to the unconstitutional conditions challenge is that conditional expenditure limits are justified by a compelling state interest. Reducing corruption or the appearance of corruption is a compelling state interest.[97] Even if public financing without expenditure limits were politically viable, "candidates would no longer be relieved of the burdens of soliciting private contributions and of avoiding unhealthy obligations to private contributors."[98] Thus, while the practical effect of offering benefits without restrictions might increase the amount spent on campaign communication, such a policy would sacrifice other important goals of public financing.

Opponents of conditional spending limits might argue that there is no compelling interest in reducing corruption because contribution limits solve this problem. The Court held in *Buckley* that the corruption rationale did

94. Republican Nat'l Comm. v. FEC, 487 F. Supp. 280, 285 (S.D.N.Y. 1980). By "the purpose," the *RNC* court meant the anticorruption rationale and the candidate time interest. Full public financing with conditional expenditure limits would eliminate the need for a candidate who accepts the limits to engage in private financing. Eliminating limits would permit the candidate to raise private funds in addition to the public funds already received. Accordingly, the candidate would once again be subject to the time demands of private fundraising and the risk of corruption.

95. Briffault, *supra* note 11, at 578. Briffault reasons that candidates will participate or not participate based on which approach maximizes their speech:

> Public funding . . . increases voter equality while providing new funds for campaign communications. . . . [E]ven where public funding is accompanied by spending limits, public funding is unlikely to curtail electoral communications. A candidate's acceptance of public funding with a spending limit must be voluntary. Thus, each candidate has the opportunity to decide whether, on balance, public funding with limits would help or hinder her campaign and may opt in or out accordingly.

Id.

96. Buckley v. Valeo, 424 U.S. 1, 92–93 (1975) (per curiam).

97. *See* FEC v. Nat'l Conservative Political Action Comm. (NCPAC), 470 U.S. 480, 500 (1985) (recognizing "the compelling governmental interest in preventing corruption"). The Court variously refers to the interest in reducing corruption as a compelling interest and as a sufficient interest. *Compare* NCPAC, *id.*, *with* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 388 (2000), and *Buckley*, 424 U.S. at 25–26.

98. *RNC*, 487 F. Supp. at 285.

not justify the heavy burdens of mandatory expenditure limits because the concern was more directly addressed by the contribution limits and the disclosure provisions of FECA.[99] Yet conditional expenditure limits, unlike mandatory ceilings, directly complement FECA's goal of reducing corruption. Conditional expenditure limits in combination with public financing allow presidential candidates in the general election to be completely free of the burdens of fundraising.

Finally, there is no reason to believe that FECA's contribution limits have eliminated the threat of corruption. As Professor Richard Briffault has noted, "Our existing federal campaign finance system . . . is in a state of disarray. The system is no longer capable of accomplishing the goals pursued by Congress and embraced by the Court a quarter century ago."[100]

D. Conclusions

In sum, the Supreme Court has failed to justify the conclusion stated in footnote 65. Nonetheless, FECA's conditional expenditure limit is not a significant burden on freedom of speech. To the contrary, these limits enhance First Amendment values while insulating public policy decisions from the corrupting influence of campaign contributions. Accordingly, conditional expenditure limits should not be struck down on unconstitutional conditions grounds.

Before I attempt to develop a standard for evaluating the coerciveness of conditional expenditure limits, three important principles should be discerned from this part's analysis of footnote 65. First and most obviously, the Court has upheld conditional expenditure limits in combination with a very strong incentive: full public financing. Second, there is an indirect compelling interest in encouraging participation in public financing programs because such programs counter wealthy contributors' power to purchase undue influence over legislative decisions. Finally, campaign finance regulations become impermissible if they prevent "candidates . . . from amassing the resources necessary for effective advocacy."[101] A test for coerciveness should be evaluated on its ability to incorporate and balance these three principles. I will return to this issue in Part III after a discussion of the types of reforms that state and local governments have implemented.

99. *Buckley*, 424 U.S. at 55.
100. Briffault, *supra* note 11, at 563.
101. *Buckley*, 424 U.S. at 21.

II. FOOTNOTE 65 REFORMS AT THE STATE AND LOCAL LEVELS ASSIST IMPORTANT PUBLIC POLICIES

In the aftermath of *Buckley*, public funding became a popular type of reform at the state and local levels. Just four years after the decision was handed down, seventeen states had adopted public financing statutes and fourteen states had held at least one election with public financing.[102] Conditional expenditure limits continue to be a popular type of campaign finance reform at the state and local levels. In fourteen states, candidates may voluntarily agree to abide by spending limits in return for a benefit.[103] Eleven local governments have also set voluntary spending limits, including Los Angeles, New York, and San Francisco.[104] The elements of these footnote 65 reforms are extremely diverse. I discuss below the key components, their effectiveness, and the coercion concerns they raise.

A. Conditional Spending Limits

Every state and local government that provides public financing imposes conditional spending limits.[105] Spending limits are either established

102. Ruth S. Jones, *State Public Campaign Finance: Implications for Partisan Politics*, 25 AM. J. POL. SCI. 342, 343 (1981).

103. These fourteen states are Arizona, Florida, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Rhode Island, Vermont, and Wisconsin. *See* ARIZ. REV. STAT. ANN. § 16-940 to 16-961 (West 2001), FLA. STAT. ANN. § 106.30–.36 (West 1992), HAW. REV. STAT. § 11-217 to 11-229) (Michie 1998); KEN. REV. STAT. § 121A.020–.990 (Michie 1993); ME. REV. STAT. ANN. tit. 21-A M.R.S. § 1124–1128 (West 1999); MD. CODE ANN. Art. 33 § 15-103 (Michie 2001); MASS. ANN. LAWS ch. 55A § 1–18 (Law Corp. 2001); MICH. COMP. LAWS ANN. § 169.20–.271 (West 1989); MINN. STAT. ANN. § 10A.30–.36 (West 1997); NEB. REV. ST. § 32-1606 to 32-1614 (1998); N.J. STAT. ANN. 19:44A-27 to 19:44A-47 (West 1999); R.I. GEN. LAWS § 17-25-19 to 17-25-30.1 (2000); VT. STAT. ANN. 17-2851 to 17-2856 (2001); WIS. STAT. ANN. § 11.50–.66 (West 1996). This list of states with public financing laws was provided by Craig Holman of the Brennan Center at New York University School of Law. Statutory analysis was conducted by the author.

104. These cities are Austin, Texas; Boulder, Colorado; Cary, North Carolina; Long Beach, California; Los Angeles, California; Miami-Dade County, Florida; New York, New York; Oakland, California; San Francisco, California; Suffolk County, New York; and Tucson, Arizona. *See* AUSTIN, TEX., AUSTIN CITY CHARTER art. III, § 8 (2001); BOULDER COLO. REV. CODE § 13-2-21 (2000); CARY, N.C. CODE OF ORDINANCES § 2-55.6 (2000); L.A., CAL. CODE OF ORDINANCES § 49.7.13 (2002); LONG BEACH, CAL. MUN. CODE § 2.01.310, -.410 (1999); MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 12-22(e) (2001); N.Y., N.Y. ADMIN. CODE § 3-706(1)(a) (2001); OAKLAND, CAL. MUN. CODE § 3.12.200 (1999); S.F., CAL. ADMIN. CODE § 1.130 (2001); SUFFOLK COUNTY N.Y. §§ C41-5 (A) and (B) (2001); TUCSON, ARIZ. CODE OF ORDINANCES XVI, subch. B, § 3 (2002). The compilation of these ordinances and the analysis of their provisions was performed by Paul Ryan of the Center for Governmental Studies.

105. Briffault, *supra* note 11, at 568 ("All existing systems for providing public funds to candidates require those who accept public funds to agree to accept limits on their campaign spending.").

at a set amount or linked to the number of registered voters. The amount of the spending limits varies dramatically. For example, the Boulder, Colorado ordinance sets the conditional limit at $.15 per registered voter.[106] Oakland, California provides a spending limit of $.50 to $1.50 per resident, depending on which office is being sought.[107] It is difficult, however, to compare expenditure limits across states or localities because the cost of running competitive campaigns varies, even taking into account the number of registered voters.

Expenditure limits indirectly serve several common goals of campaign finance reform. As the costs of campaigns increase,[108] candidates must proportionally increase their fundraising. This worsens three problems that are endemic to private financing. First, candidates must spend more time on fundraising and less time working for their constituents.[109] Second, if it is more difficult to raise additional amounts, each contribution has a greater potential to have a corrupting effect. Finally, as campaigns become more expensive, it becomes increasingly difficult for individuals without access to vast sums of wealth to mount competitive campaigns.[110]

Expenditure limits better serve these purposes if implemented in combination with full public financing. If the government offers to cover all of a candidate's expenses up to the expenditure limit, the public financing completely eliminates the need to raise private contributions. Accordingly, proponents contend, there is less risk of corruption,[111] of draining the candidate's time,[112] or of excluding viable candidates because they lack access to wealth.[113]

Further, whether the policy is full or partial public financing, conditional expenditure limits also serve to cap the amount that the government must provide to participating candidates. Practically speaking, it is highly unlikely in a time of declining tax receipts that a government could afford to

106. BOULDER, COLO. REV. CODE § 13-2-21(b)(1) (2000).

107. OAKLAND, CAL. CODE § 3.12.200.

108. The average amount spent by winning U.S. Senate candidates rose to $8.2 million in the 2000 election cycle, compared to just $3.9 million in 1990. CENTER FOR RESPONSIVE POLITICS, ELECTION OVERVIEWS: 1990 ELECTION CYCLE: STATS AT A GLANCE, *at* http://www.opensecrets.org/overview/index.asp?Cycle=1990 (last visited Sept. 12, 2002); CENTER FOR RESPONSIVE POLITICS, ELECTION OVERVIEWS: 2000 ELECTION CYCLE: STATS AT A GLANCE, *at* http://www.opensecrets.org/overview/index.asp?Cycle=2000 (last visited Sept. 12, 2002).

109. *See generally* Blasi, *supra* note 18.

110. ANTHONY CORRADO, CAMPAIGN FINANCE REFORM 34 (2000).

111. Briffault, *supra* note 11, at 582 ("Public funding reduces the role of large private donors and, thus, their potential for leverage over the decisions of elected officials.").

112. Raskin & Bonifaz, *supra* note 26, at 1203 (noting that public financing would allow candidates "to devote extremely little time to the chore of fundraising").

113. *Id.* at 1201–02 (arguing that with full public financing "all citizens, regardless of personal wealth or class position, [to] have a genuine opportunity to run for office, since the task they would face would not be to gather hundreds of thousands of dollars from wealthy contributors").

provide unlimited funding. A policy that gave politicians unlimited public funds for their campaigns would not be a politically viable option.[114]

There are problems with spending limits, although they can be overcome if the political will exists to do so. Foremost among these is the risk that incumbents will set the expenditure limit so low that challengers will be unable to compete.[115] While incumbents begin campaigns with high name and message recognition, challengers must expend resources in order to establish these assets.[116] As a result, low expenditure limits will potentially undermine the competitiveness of elections.[117]

There are legitimate empirical reasons to be concerned about the level at which incumbents will establish spending limits. Bradley Smith notes that congressional reform proposals and the experience of Wisconsin show that spending limits may be set at an amount far too low for challengers to compete.[118] But Smith also recognizes that Minnesota has had exactly the opposite experience. Minnesota's program started off providing adequate spending limits and has indexed the limits to the rate of inflation. Indeed, social scientists have found that Minnesota's conditional expenditure limit system has successfully increased the competitiveness of legislative elections.[119] To the extent that public financing is a voluntary option that provides challengers with an additional alternative, it will not reduce the competitiveness of elections. At worst, if the spending limit is set too low, the challenger can opt to remain with private financing.

The effectiveness of spending limits may be undermined by the exploitation of loopholes in the overall campaign finance laws of a jurisdiction. At the presidential level, for example, candidates have created loosely affiliated organizations that pay for many of the services that would normally count towards their spending limit. Additionally, presidential candidates may evade the spending limits by rerouting some of their spending through party committees.[120] However, the likelihood that candidates will attempt

114. *See* Briffault, *supra* note 11, at 568.

115. *See* BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 69–72 (2001); *see also* GARY C. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS 170–73 (1980); Jacobson, *supra* note 36, at 357–58.

116. *See* Jacobson, *supra* note 36 at 334–35.

117. *See id.* at 357–58.

118. SMITH, *supra* note 115, at 100; *see also* Kenneth R. Mayer & John M. Wood, *The Impact of Public Financing on Electoral Competitiveness: Evidence from Wisconsin, 1964–1990*, 20 LEGIS. STUD. Q. 69, 72, 83 (1995). Kenneth Mayer and John Wood note that the Wisconsin spending cap for Assembly races was $17,250, while the average successful challenger spent $35,000 in 1988. *Id.* at 73. Thus, the average winning challenger spent twice as much as the Wisconsin spending cap.

119. Patrick D. Donnay & Graham P. Ramsden, *Public Financing of Legislative Elections: Lessons from Minnesota*, 20 LEGIS. STUD. Q. 351, 362–63 (1995).

120. *See* CORRADO, *supra* note 110, at 65–66.

to find loopholes should not deter reform efforts. Studies of spending patterns in state legislative elections show that states that have more restrictive campaign finance laws, like Wisconsin and Minnesota, have lower rates of spending per eligible voter.[121]

The level at which spending caps are set will significantly impact the rate at which participants are willing to enter into the public financing system. If the expenditure limit is substantially lower than the average cost of previous campaigns for that office, candidates will be hesitant to accept this restriction on their ability to communicate with the electorate.[122] Spending limits are unlikely to coerce participation for two reasons. First, given the self-interest of incumbents in controlling the costs of campaigns, it is unlikely that the ceilings will be set much higher than the amount currently spent by candidates outside the system.[123] Second, a high ceiling by itself is not an inducement because privately financed candidates are not subject to any limits.[124] In sum, conditional spending limits set at levels that approximate the amount necessary to communicate effectively with the electorate are a crucial component of any reform effort.

B. Public Financing

While all states and localities that impose conditional expenditure limits provide some amount of public financing, the level of support varies wildly. The most comprehensive measures fully finance participating candidates' campaigns in return for an agreement to abide by the expenditure limits. Arizona and Maine have taken this approach, offering full public financing to all candidates who run for state office.[125] To take campaigns for

121. *See* Robert E. Hogan & Keith E. Hamm, *Variations in District-Level Campaign Spending in State Legislatures*, *in* CAMPAIGN FINANCE IN STATE LEGISLATIVE ELECTIONS 72–73 (Joel A. Thompson & Gary F. Moncrief eds., 1998).

122. *See* Briffault, *supra* note 11, at 586–87 (noting that "both the attractiveness of public funding to candidates and the ability of the system to advance its goals will be related to the level of the spending limit, if a spending limit is used").

123. *See* Smith, *supra* note 35, at 606 (noting that the reason "spending caps will likely be set too low is simply that incumbents, who want to be reelected, will set the levels of the caps").

124. It may be that a high limit combined with full public financing and significant restraints on the nonparticipating candidate's ability to fundraise will induce participation. The point here is that voluntary expenditure limits by themselves are far more likely to discourage participation (because they are set too low) than to coerce participation.

125. For a more extensive discussion of the Maine system, see generally Michael E. Campion, Note, *The Maine Clean Election Act: The Future of Campaign Finance Reform*, 66 FORDHAM L. REV. 2391 (1998); Theodore Lazarus, Note, *The Maine Clean Election Act: Cleansing Public Institutions of Private Money*, 34 COLUM. J.L. & SOC. PROBS. 79 (2000); Molly Peterson, Note, *Reexamining Compelling Interests and Radical State Campaign Finance Reforms: So Goes the Nation?*, 25 HASTINGS CONST. L.Q. 421 (1998). Although Maine and Arizona held their first elections under the so-called clean money system in 2000, it is probably too early to draw firm empirical conclusions about the successfulness of the programs. *See* SAMANTHA SANCHEZ, INSTITUTE ON MONEY IN

the office of governor in Maine as an example, candidates must solicit twenty-five hundred contributions of $5 from registered voters in Maine.[126] Once they are certified as participating candidates, the state disburses an amount equal to the average spent in the previous two elections by all candidates for the respective office.[127] Except in limited circumstances explained below, participating candidates may not spend more than the public financing grant.

Other states, such as Florida, match private contributions in return for a candidate agreeing to expenditure limits. Florida's partial public financing scheme provides that candidates for governor must raise $150,000 in contributions to qualify for matching funds.[128] For funds raised up to this qualifying amount, Florida will provide $2 for every $1. Only the first $250 of each contribution is matched. For funds raised above the qualifying amount, the ratio changes to $1 to $1 with the same $250 restriction.[129] Participating gubernatorial candidates must limit their expenditures to $5 million.[130]

Full public financing, as discussed above, is aimed at an almost complete elimination of private contributions from the fundraising process for participating candidates.[131] The goals of partial public financing are somewhat different. The principal justification is that it lessens the burdens of fundraising and often rewards candidates for focusing on smaller contributions.[132] If partial public financing with conditional expenditure limits is compared to a system without any public financing, then we would expect a decrease in the amount of time that must be spent on fundraising, a reduction in the risk of corruption, and greater opportunities for candidates without access to vast sums of wealth.[133] At the same time, if compared to full public financing, the matching funds system appears less appealing. Participating candidates must still solicit private contributions, thus perpetuating

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STATE POLITICS, FIRST RETURNS ON A CAMPAIGN FINANCE REFORM EXPERIMENT: MAINE, ARIZONA AND FULL PUBLIC FINANCING: MAINE, ARIZONA, AND FULL PUBLIC FUNDING, *available at* http://www.followthemoney.org/press/MaineArizonaFullReport.phtml.

126. ME. REV. STAT. ANN. tit. 21, § 1125 (West Supp. 2001–2002).

127. *Id.* § 1125(8).

128. FLA. STAT. ANN. § 106.33(2)(a) (West Supp. 2002).

129. *Id.* § 106.35(2)(a).

130. *Id.* § 106.34(1)(a).

131. Some private fundraising would probably still be necessary for participants. To qualify for public financing, candidates may be required to demonstrate popular support by raising a specified number of small contributions. One plan, for example, requires candidates for the House of Representatives to raise one thousand $5 "qualifying contributions." Raskin & Bonifaz, *supra* note 26, at 1190.

132. *See* CORRADO, *supra* note 110, at 62–63.

133. This comparison assumes that all other variables are the same. Thus, a partial public financing system with low contribution limits might actually increase the amount of time spent fundraising if the system without public financing had higher contribution limits.

the three risks of private financing: candidate time consumption, corruption, and inequality.

Full public financing and partial public financing differ with respect to their implications for coercion analysis. Providing total public financing offers more of an inducement than merely providing matching grants. Because full public financing completely relieves the participating candidate of the burdens of fundraising, a nonparticipating candidate who must compete against a participating opponent will be disadvantaged in two respects. First, she will be forced to spend a significant amount of time and financial resources on the process of fundraising.[134] Second, she will not have the same degree of certainty that her participating opponent will have in the amount that she will be able to raise.[135]

Partial public financing will not place as much pressure on candidates to accept conditional expenditure limits as a system of full public financing. The benefits of participation are significantly less because the candidate must still engage in some private fundraising. However, the reduced risk of coercion comes at the expense of failing to address fully corruption, the candidate time interest, and inequality.

The practical shortcomings of partial public financing could also have negative constitutional consequences. Recall that the *RNC* court approved conditional spending limits, in part, because they complemented the goal of full public financing—completely eliminating the burdens of fundraising.[136] Because partial public financing does not seek to eliminate these burdens, but only to reduce them, spending limits appear less necessary to the effectiveness of a system that provides matching funds. Because the government is willing to accept some private financing, it becomes more difficult to justify expenditure limits. Thus, partial public financing with conditional expenditure limits is imperfectly tailored because it does not sufficiently advance the asserted interest.[137]

One final type of public financing should be mentioned: reduced-rate or free advertising privileges. Only Rhode Island currently provides free advertising privileges. Participating candidates are entitled to free time on community antenna television and public broadcasting systems that are operated under the jurisdiction of the Rhode Island public telecommunications authority. Rhode Island's law requires the candidate personally to present her

134. *See* Claggett & Bolton, *supra* note 60, at 1336.

135. The significance of this concern will obviously vary depending on the nonparticipating candidate's fundraising potential.

136. *See* Republican Nat'l Comm. v. FEC, 487 F. Supp. 280, 284 (S.D.N.Y. 1980).

137. Whether this should render all partial public financing plans constitutionally infirm is a question of how perfectly tailored the courts will require such plans to be. Contribution limits are generally required to be "closely drawn." Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387 (2000). The standard of review for conditional expenditure limits is not clear.

message during these free broadcasts.[138] By itself, a reduced-rate advertising privilege should have similar benefits and raise similar coercion concerns as partial public financing. However, as I discuss below, if this particular benefit is combined with so-called trigger provisions, nonparticipants may face a significant burden.

To summarize, full public financing is essential, in combination with conditional expenditure limits, to eliminate the threat of corruption, protect a candidate's time, and reduce inequality to the maximum extent possible. As the level of public financing provided decreases, so does the compelling interest that undergirds the constitutionality of conditional expenditure limits. Thus, although full public financing may provide a stronger incentive than partial public financing for the acceptance of conditional expenditure limits, it should have a better chance of withstanding constitutional scrutiny.

C. Trigger Provisions

A participating candidate who accepts conditional expenditure limits may find herself at a competitive disadvantage if a nonparticipating opponent exceeds the expenditure limit. Some state and local governments that have conditional limits have attempted to deal with this problem by adopting so-called trigger provisions. Generally speaking, a trigger releases a participating candidate from the conditional expenditure limit if a nonparticipating candidate spends a certain amount. Ten states and nine local governments include triggers in their campaign finance regulations.[139] Thus, triggers are an important part of the policy and constitutional debate surrounding conditional expenditure limits.

There are significant differences among the trigger provisions currently in place. Maine's and Arizona's full public financing systems provide match-

138. R.I. GEN. LAWS § 17-25-30 (2000).

139. The states with trigger provisions are Arizona, Florida, Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, Rhode Island, and Wisconsin. *See* ARIZ. REV. STAT. ANN. § 16-917 (1996); FLA. STAT. ANN. § 106.355 (West 1992); KY. REV. STAT. ANN. §§ 121A.030(5)(a), 121A.080(4)(a) (Michie 2001); ME. REV. STAT. ANN. tit. 21-A, § 1125(9) (West 2001); MASS. ANN. LAWS Ch. 55A § 11 (Law Co-op 2001); MICH. COMP. LAWS ANN. § 169.269 (West 1989); MINN. STA. ANN. § 10A.25 Subd. 10 (West 2002); NEB. REV. ST. § 32-1606 (1998), R.I. GEN. LAWS § 17-25-24 (2000); WIS. STAT. ANN. § 11.50(2)(i) (West 1996). The local governments with trigger mechanisms are Austin, Texas; Cary, North Carolina; Miami-Dade County, Florida; New York, New York; Oakland, California; San Francisco, California; Suffolk County, New York; and Tuscon, Arizona. AUSTIN, TEX. CODE OF ORDINANCES § 2-9-12 (2001), CARY, N.C. CODE OF ORDINANCES § 2-55.4 (2000); MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 12-22(i) (2001), N.Y., N.Y. ADMIN. CODE § 3-706(3) (Supp. 2001); OAKLAND, CAL. MUN. CODE § 3.2.220 (1999); S.F., CAL. ADMIN. CODE §§ 1.134(a), 1.146(a) (2001); SUFFOLK COUNTY, N.Y. § C41-5(D) (2001), TUSCON, ARIZ. CODE OF ORDINANCES XVI, subch. A, § 2 (2002).

ing funds to participating candidates when a nonparticipating opponent exceeds the expenditure limit. The matching funds are equal to the difference between what the nonparticipant has spent and the expenditure cap. Maine caps the amount that it will match at two times the original expenditure limit, Arizona at three times the original limit. Four of the states that provide partial public financing and have triggers match private contributions that are raised once the trigger has been pulled.[140] The other states merely release the candidate from the expenditure limit. With the exception of Minnesota,[141] a trigger is not activated until the nonparticipant has raised or spent more than the conditional expenditure limit.

The matching trigger that accompanies full public financing virtually ensures that a participating candidate will not be outspent by a nonparticipating opponent. Because the trigger includes a full grant, releasing the candidate from the expenditure limit does not impose the burdens of fundraising on the participant. Thus, the threat of these matching grants provides a strong incentive for nonparticipating candidates to abide by the spending limits as well. Because of this pressure, however, critics contend that triggers with matching grants are unconstitutionally coercive.[142] Essentially, every $1 spent by a nonparticipating opponent results in a $1 contribution to her participating opponent. Faced with this dilemma, the speech of nonparticipants might be chilled.[143] Additionally, because a nonparticipating candidate would no longer be able to outspend her participating opponent, this

140. The states that provide additional public funding after the trigger has been pulled are Florida, Kentucky, Massachusetts, and Nebraska. FLA. STAT. ANN. § 106.355 (West 1992); KY. REV. ST. ANN. § 121A.080(4)(a) (Michie 2001); MASS. ANN. LAWS ch. 55A § 11 (Law Co-op 2001); NEB. REV. ST. § 32-1606 (1998). The only local government to provide additional public financing is New York City, which increases the matching fund rate by $1. N.Y., N.Y. ADMIN. CODE § 3-706(3) (Supp. 2001).

141. Minnesota releases participants from the expenditure limit if a nonparticipating opponent spends 20 percent of the expenditure limit prior to ten days before the primary election or 50 percent any time after ten days before the primary. MINN. STA. ANN. § 10A.25 Subd. 10 (West 2002). The U.S. Court of Appeals for the Eighth Circuit held that this trigger provision was not coercive in *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1551 (8th Cir. 1996).

142. *See* Joseph E. Finley, Note, *The Pitfalls of Contingent Public Financing in Congressional Campaign Spending Reform*, 44 EMORY L.J. 735, 752 (1995). Joseph Finley contends that in contrast to other forms of conditional public financing, "the penalties imposed on the nonparticipating candidate by contingent public financing [by which Finley means triggers which provide matching grants] are unbargained-for penalties. . . . [C]andidates have *no choice* without a price; either way their First Amendment rights are burdened." *Id.*; *see also* SMITH, *supra* note 115, at 235 n.9; Sullivan, *supra* note 60, at 328 n.99 (contending that triggers "do not simply decline to subsidize a noncomplying candidate but make that candidate worse off than if the program did not exist, by penalizing private spending with state-financed opposition").

143. *See* Mitch McConnell, *Election Reform That Fetters Free Speech*, WASH. POST, May 16, 1991, at A19. *But see* Kenneth N. Weine, *Triggering the First Amendment: Why Campaign Finance Systems That Include "Triggers" Are Constitutional*, 24 J. LEGIS. 223, 233–34 (1998) (arguing that "the total amount of public discourse will be increased as a result of the trigger's subsidy").

trigger provision could effectively coerce her into accepting the spending limits and/or the public financing grant.

If a state that provides partial public financing matches contributions at a rate exceeding a one-to-one ratio, there may also be strong coercion concerns. If, for example, a state matches contributions raised privately at a ratio of two-to-one, then a nonparticipant must spend three times as much as the participating candidate to stay even. Accordingly, in this situation, a nonparticipant may be discouraged from surpassing the conditional expenditure limit. The least coercive approach is simply to release the participating candidate from the spending limits. However, the disadvantage is that the participating candidate now becomes subject to the full burdens of fundraising, undermining the original incentives for the adoption of conditional expenditure limits and public financing.

Finally, soft money loopholes may allow nonparticipants effectively to circumvent trigger provisions. Consider the experience of Florida. In 1994, Jeb Bush challenged Lawton Chiles for the governorship of Florida. Governor Chiles participated in the partial public financing system, while Bush opted to remain outside of it. Even though it is a partial public financing state, Florida provides participating candidates with a full grant equal to the amount that a nonparticipant spends above the expenditure limit. As a result, Bush's spending triggered $4 million in public financing for Governor Chiles.[144] Bush's narrow loss taught him an important lesson. Four years later, he carefully orchestrated his campaign spending so that it fell just short of the expenditure limit, preventing his Democratic opponent from receiving the full matching funds.[145] However, the amount spent *on behalf of* his campaign was not reduced. Bush simply had the Florida Republican Party pay for a large portion of his campaign expenses.[146] Thus, loopholes may undermine the effectiveness of conditional spending limits and trigger provisions.

144. Peter Wallsten, *Bush Won by Hard-Selling Softer Image*, ST. PETERSBURG TIMES, Nov. 7, 1998, at 1A. As one Florida newspaper noted, "[I]n the final weeks of the campaign . . . Jeb Bush was Lawton Chiles' most effective fund-raiser." Adam C. Smith, *MacKay Running Short of Money*, ST. PETERSBURG TIMES, Oct. 22, 1998, at 1B.

145. *See* Wallsten, *supra* note 144 ("By meticulous design, the Bush campaign never reached the $5.75 million spending cap that would have triggered matching money for MacKay. . . . Instead, Bush took advantage of a 1997 law passed by the Legislature that expanded the ability of the political parties to pay campaign expenses.").

146. *See id.*; *see also* Smith, *supra* note 144 ("This year, the state GOP is paying most of Bush's campaign expenses, so MacKay is receiving far less matching money."). Florida permits political parties to pay for a candidate's campaign staff, consultants, and research. Additionally, the party can pay for the candidate's advertisements so long as at least two other candidates are mentioned in the advertisement. David Nitkin, *Big Money Squeezes Out Little Guy*, ORLANDO SENTINEL, Oct. 13, 1998, at A1.

D. Contribution Limits and Cap Gaps

One approach that has been used to encourage acceptance of expenditure limits has been to impose low contribution limits on nonparticipants. The main goal of contribution limits is to reduce the potential for any one individual or organization to have an improper influence over a candidate. However, by making it more difficult for candidates to raise the necessary funds, contribution limits may also increase the amount of time spent fundraising, the importance of contributions to the candidate, and the advantage of incumbents with well-organized constituencies.[147]

Contribution limits may not be considered a direct part of a conditional expenditure limit system. However, contribution limits may, more than any other provision, force candidates to accept expenditure limits. Extremely low limits would make it nearly impossible for nonparticipants to raise sufficient funds to run a competitive race.[148] In effect, contribution limits may become indirect mandatory expenditure limits.

States that provide partial public financing use another mechanism known as a "cap gap." Cap gaps provide differential contribution limits for participants and nonparticipants. Under Rhode Island's system, for example, participating candidates are free to receive up to $2000 from individual contributors. Nonparticipants, however, may accept contributions up to $1000 only.[149] Unlike trigger provisions, cap gaps are uncommon elements of conditional spending limit systems. California voters passed a law that contained differential contribution limits, but a district court struck down the provision.[150] The court held that the existence of the higher contribution limit demonstrated that there was no threat of corruption from contributions at this higher amount. Accordingly, the court argued, there was no compelling state interest in the lower contribution amount.[151]

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147. *See* SMITH, *supra* note 115, at 66–67.

148. The *Buckley* Court explicitly acknowledged the risk that contribution limits could "prevent[ ] candidates and political committees from amassing the resources necessary for effective advocacy." Buckley v. Valeo, 424 U.S. 1, 21 (1976) (per curiam). One author argues that "contribution limits that prevent candidates from communicating their message are unconstitutional because they are *de facto* expenditure limits." Bopp, *supra* note 50, at 239.

149. R.I. GEN. LAWS § 17-25-30 (2000).

150. *See* Cal. Prolife Council PAC v. Scully, 989 F. Supp. 1282, 1296 (E.D. Cal. 1998). Proposition 208 provided in part that candidates who did not agree to spending limits could solicit contributions in amounts of $100 for local elections, $250 for state legislative seats, and $500 for statewide office. For candidates who participated by accepting spending limits, these contribution caps were raised to $250, $500, and $1000. *Id.* at 1292.

151. *Id.* at 1296. The *Scully* Court reasoned that

> the electorate has manifested its judgment that the higher limitations are not unacceptably corrupting . . . . It follows that the lower limits are not closely drawn . . . . [T]he adoption of the variable limits reflects a conclusion on the part of voters that the $200 limit suffices to

Low contribution limits and cap gaps have the potential to be highly coercive. Both provisions may directly interfere with a nonparticipating candidate's ability to raise the funds that are necessary to run a competitive campaign.[152] If incumbents are looking for a way to disadvantage challengers, a far more effective method than conditional expenditure limits would be to impose low contribution limits. Yet, as was shown above, in a system of private financing, reasonable contribution limits are necessary to reduce the potential for wealthy contributors to gain undue influence over the legislative process.[153] Thus, one method for evaluating tests for coerciveness is whether they tolerate reasonable contribution limits while protecting against anticompetitive contribution limits.

III. CURRENT TESTS FOR COERCIVENESS ARE INADEQUATE

The conclusion that FECA's conditional expenditure limits are constitutional only answers the first part of the inquiry into the implications of footnote 65. In the previous part, I examined a number of examples of conditional expenditure limits that have been adopted in conjunction with public financing schemes at the state or local levels. The next question is how far government may go to induce acceptance of those conditional expenditure limits. This dilemma is a natural extension of the *Buckley* decision. Unfortunately, as the U.S. Court of Appeals for the Sixth Circuit stated in *Gable v. Patton*,[154] "[T]he [Supreme] Court has not provided any guidance as to how much farther a campaign finance scheme can go in providing incentives for participation before it crosses the line and becomes unconstitutionally coercive."[155] Therefore, the issues of footnote 65 cannot be resolved unless a test is formulated which delineates when conditional expenditure limits cease to be voluntary and instead become unconstitutionally coercive. Below, I analyze three tests that have been used by the courts or proposed by commentators. Part IV suggests an alternative test that more adequately reflects coercion concerns, is more consistent with Supreme Court doctrine, and permits legitimate reform efforts.

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address the issue of corruption even if it is not the lowest amount which would do so. That conclusion requires a finding that the lower limit is not closely drawn.

Id.

152. *See* Sullivan, *supra* note 60, at 328 ("The constitutional problems multiply if public funding comes with strings attached, especially limits on the right to private fundraising.").

153. I utilize the term "reasonable" here not to suggest a vague standard of reasonableness, but as a shorthand phrase to indicate that the contribution limit should not be so low that it makes it impossible for the average candidate to raise sufficient funds to run a competitive campaign. This ability-to-compete test is the subject of Part IV.

154. 142 F.3d 940 (6th Cir. 1998).

155. *Id.* at 949.

A. The Rough Proportionality Test

Courts have typically asked whether the benefits of accepting a conditional expenditure limit are roughly proportional to the burdens of participation. The U.S. Court of Appeals for the First Circuit developed the test in *Vote Choice, Inc. v. DiStefano*,[156] announcing that "there is a point at which regulatory incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive."[157] However, "Rhode Island's law achieves a rough proportionality between the advantages available to complying candidates . . . and the restrictions that such candidates must accept to receive these advantages."[158] The First Circuit's test did not require the benefits and burdens of participation to be in perfect balance. So long as the nonparticipant "suffers no more than 'a countervailing denial,' the statute does not go too far."[159] Other courts have phrased the test as prohibiting "a package [from] becom[ing] so benefit-laden as to create such a large disparity between benefits and restrictions that candidates are coerced to publicly finance their campaigns."[160]

The rough proportionality test appears to be the governing standard in the U.S. Courts of Appeals for the First,[161] Sixth,[162] and Eighth Circuits.[163] Applying the test, the courts have upheld (1) full public financing,[164] (2) a cap gap of $1000 for nonparticipants and $2000 for participants,[165] (3) a tax refund for contributions to participants,[166] (4) the labeling of participating

156. 4 F.3d 26 (1st Cir. 1993).

157. *Id.* at 38.

158. *Id.* at 39.

159. *Id.* The court did not specify what it meant by a mere "countervailing denial." The *Buckley* Court used the term to indicate that participating candidates were required to accept expenditure limits. Buckley v. Valeo, 424 U.S. 1, 95 (1976) (per curiam). In contrast, the *Vote Choice* court used the language to refer to a denial imposed on a nonparticipant, namely a $2000 to $1000 dollar cap gap. *Vote Choice*, 4 F.3d at 39.

160. Rosenstiel v. Rodriguez, 101 F.3d 1544, 1550 (8th Cir. 1996).

161. *See* Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445, 467 (1st Cir. 2000); *Vote Choice*, 4 F.3d at 38–39.

162. Gable v. Patton, 142 F.3d 940, 948 (6th Cir. 1998). It is not entirely clear whether the U.S. Court of Appeals for the Sixth Circuit adopted the rough proportionality test in *Gable*. The court quoted the *Vote Choice* court's concern that incentives should not "'stray beyond the pale, creating disparities so profound that they become impermissibly coercive.'" *Id.* (quoting *Vote Choice*, 4 F.3d at 38). The *Gable* court also quoted a passage from *Rosenstiel* that focused on whether there was a "'large disparity between the benefits and restrictions.'" *Gable*, 142 F.3d at 948 (quoting *Rosenstiel*, 101 F.3d at 1550). While this language from *Vote Choice* and *Rosenstiel* reflects the rough proportionality test, the *Gable* court never explicitly applied this test in its analysis of the challenged trigger provision.

163. *See Rosenstiel*, 101 F.3d at 1550–51.

164. *See Daggett*, 205 F.3d at 470–72.

165. *See Vote Choice*, 4 F.3d at 38–39.

166. *See Rosenstiel*, 101 F.3d at 1551.

and nonparticipating candidates,[167] (5) a trigger that provided matching funds at a two-for-one matching ratio,[168] and (6) a trigger that offered full public financing to participants once their nonparticipating opponent exceeded the expenditure limit.[169] The only provision to be struck down under this test was a cap gap that allowed participants to accept $500 contributions while nonparticipants were limited to contributions of only $100.[170] In short, courts applying the rough proportionality test appear consistently deferential to legislative judgments.

There are three critical problems with the rough proportionality test that could lead to a far more restrictive application of the standard. First, the test is too vague, leaving it open to radically different applications. No court has explained how the benefits and burdens are supposed to be compared. For example, do the benefits outweigh the burdens when the participating candidate is able to raise more than she would have been able to obtain without public financing? Are burdens on a nonparticipant supposed to be considered benefits to participants? As one commentator has described balancing tests generally, "[B]eing without content, the test yields neither guidance nor prediction; 'natural justice,' 'what judges thought best,' or 'class interest' are equally descriptive and equally unilluminating."[171]

The second drawback with the test is that it is only indirectly related to the coercion problem. For example, when a district court struck down Kentucky's $500/$100 cap gap, it emphasized the enormous barriers that this created for the nonparticipating candidate. Although the district court used the rough proportionality test, it is not clear how the burden of the cap gap on the nonparticipant related to this test. The rough proportionality test inappropriately focuses on the participant, rather than the nonparticipant. Because it is the hopeful nonparticipant that is threatened by coercive conditional expenditure limit systems, coercion analysis should examine statutes from the perspective of the nonparticipant.

Further, a test should focus on the burdens, rather than the benefits, of nonparticipation. If we do otherwise, then a low conditional spending limit may count as a benefit for the nonparticipant. However, simply because a challenger can outspend a low-spending incumbent does not mean that she has a fair opportunity to participate in the electoral process. The campaign finance laws may still prevent the nonparticipating challenger from raising sufficient funds to establish name and message recognition. Accordingly,

167. *See Daggett*, 205 F.3d at 470.

168. *See* Gable v. Patton, 142 F.3d 940, 949 (6th Cir. 1998).

169. *See Daggett*, 205 F.3d at 468–470.

170. *See* Wilkinson v. Jones, 876 F. Supp. 916, 929–30 (W.D. Ky. 1995).

171. Kreimer, *supra* note 84, at 1348.

the rough proportionality test is faulty because it focuses on the wrong candidate and the wrong side of the balancing scales.

The final problem with the rough proportionality test is that it creates an inherent tension between the ability of a law to encourage participation and the law's constitutionality. In *Vote Choice*, the court explained that the failure of the two major gubernatorial candidates in the previous election to accept conditional expenditure limits demonstrated the rough balance that was achieved by Rhode Island's system.[172] Thus, the law fared better constitutionally because of a lack of candidate participation. This is particularly surprising in light of the *Vote Choice* court's recognition that "the state possesses a valid interest in having candidates accept public financing."[173]

Applying the rough proportionality test, the Sixth Circuit stated that "a voluntary campaign finance scheme must rely on incentives for participation, which, by definition, means structuring the scheme so that participation is usually the rational choice."[174] Given the importance of public financing and conditional expenditure limits to reducing corruption, the burden on candidates' time, and political inequality, the Eighth Circuit's emphasis on high participation is correct. However, it is difficult to reconcile this policy goal with a test that attempts to make the advantages and disadvantages of participation roughly equal. Accordingly, courts should look for a new test for evaluating the coerciveness of campaign finance laws.

B. The Purpose Test

One possible alternative would be to look at the motives behind the imposition of the government condition. This theory is based on the premise that while government may have the power to deny a benefit outright, it cannot do so in order to achieve an unconstitutional purpose.[175] John Nagle argues that we should look at the primary purpose of campaign finance laws as a test for voluntariness. If the purpose is to impose restrictions on freedom of speech, then the condition is unconstitutional.[176] Nagle argues that other conditions placed on government spending conform with this principle. For example, the federal government's primary purpose in providing highway funding to the states is not to coerce states into adopting drinking-and-driving laws.[177] Nagle concludes that although the purpose of campaign finance reform may be reducing corruption or the time pressures of

172. *See* Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 39 n.14 (1st Cir. 1993).
173. *Id.* at 39.
174. Gable v. Patton, 142 F.3d 940, 949 (6th Cir. 1998).
175. *See* Kreimer, *supra* note 84, at 1327–32 (detailing and arguing against a purpose standard for unconstitutional conditions).
176. *See* Nagle, *supra* note 60, at 1819–21.
177. *Id.* at 1819–20.

fundraising, most reform measures aim at decreasing campaign expenditures, an unconstitutional goal.[178]

Initially, it is not clear that the courts have failed to consider legislative purpose, as Nagle argues. For example, in *Vote Choice*, the court held that the plaintiff "has adduced no legislative history or other evidence suggestive of punitive purpose."[179] Thus, it appears that Nagle's test may already be subsumed in the rough proportionality test.

Whatever the case may be, the purpose test is undesirable for a number of reasons. First, there is no precedent which supports this primary-purpose test. *South Dakota v. Dole*, which upheld the minimum drinking age condition on federal highway funds, was not decided on the basis of the purpose, but on the grounds that the coercive effect of the condition did not cross the line into the realm of compulsion.[180]

The purpose test also requires judges to determine the motives of a complex body examining an issue with interconnected and competing goals.[181] In other words, the test would "leav[e] the courts to engage in historical psychoanalysis to uncover the illegitimate motivation."[182] The purposes of legislatures are particularly difficult to evaluate because these bodies are made up of multiple actors with competing priorities.[183] To compound the issue even more, the ability to ferret out a single motive becomes nearly impossible when complex issues are the subject of the dispute, or when legislation results from negotiation and compromise, as is certainly the case with campaign finance reform. Finally, Nagle's test does not suggest how to determine the primary purpose when the legislative record points to multiple goals.

Perhaps courts could discover the purpose by inferring that the only possible motive for a given action was an unconstitutional one. To do so, however, courts would have to ignore the possibility that the policy was the result of unstated motives, inconsistent policies, or an irrational process. More importantly, courts would have to impose their own view of the proper actions of a legislature in order to establish a baseline from which to infer a motive. As a result, "[a] focus on purpose . . . encourages the court to smug-

178. *Id.* at 1820–21.

179. Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 38 (1st Cir. 1993).

180. South Dakota v. Dole, 483 U.S. 203, 211 (1987).

181. *See* Kreimer, *supra* note 84, at 1334–35 ("Individual officials are unlikely to disclose impermissible motives, leaving the courts to engage in historical psychoanalysis to uncover the illegitimate motivation. More important, most allocation decisions are made not by a single individual, but by a collective legislative body or by a bureaucratic-hierarchy through a series of determinations.").

182. *Id.* at 1335.

183. *Id.*

gle its own preferred values into the analysis without the discipline of expressly articulating the content or underpinnings of those values."[184]

The problem of discovering legislative purpose in the area of campaign finance law is not conjectural. During debate in the Minnesota legislature over that state's public funding program, a state senator who was a leading proponent of the program came to the floor and argued that the Minnesota law operated not as a stick or carrot, but as "a real heavy club."[185] This might seem to be an easy case under the purpose test. Yet the Eighth Circuit was correct when it held that "an isolated statement by an individual legislator is not a sufficient basis from which to infer the intent of that entire legislative body."[186]

Purpose analysis is also inadequate because it may simply miss the point of concern. In one sense, purpose analysis is underinclusive because some conditions that are imposed without an unconstitutional purpose have nevertheless been found unconstitutional. In *Sherbert v. Verner*,[187] the Supreme Court struck down a condition on unemployment benefits that required an individual to be available to work when work was offered.[188] The plaintiff's religious beliefs prevented her from working on Saturday. There, the purpose of the government condition was not to discriminate against any particular religion, but the effect was to force the individual to sacrifice her beliefs. To take an example from campaign finance law, few would agree that a $50 contribution limit on nonparticipants is necessarily permissible simply because the legislature's stated purpose was to reduce corruption. Thus, the purpose test would be difficult to implement and would fail to prevent laws which have an obviously coercive effect.

C. The Carrots-and-Sticks Test

Another possibility is that the constitutionality of conditional expenditure limit programs should depend on whether the inducements are carrots for participation or sticks used against nonparticipants.[189] Carrots, which would be constitutional, are offers that expand the options available to candidates. The test would prohibit sticks, which are threats that necessarily make an individual worse off because of her exercise of constitutional rights.

184. *Id.* at 1337.

185. Rosenstiel v. Rodriguez, 101 F.3d 1544, 1552 (8th Cir. 1996) (citing *Minnesota Congressional Campaign Reform Act, 1990: Hearing on S. 577 Before the Subcommittee on Elections and Ethics*, 76th Legis. (Minn. 1989) (statement of Senator John Marty)).

186. *Id.*

187. 374 U.S. 398 (1963).

188. *Id.* at 403–04.

189. Levit, *supra* note 60, at 486.

In *Shrink Missouri Government PAC v. Maupin*,[190] the Eighth Circuit struck down two inducements that it determined were unconstitutional penalties on nonparticipating candidates. In return for accepting spending limits, Missouri allowed candidates to solicit contributions from PACs, political parties, labor unions, and corporations. Nonparticipants, by contrast, could only receive contributions from individuals and were required to submit daily disclosure reports once the spending limits were exceeded. The court of appeals held that Missouri's conditional spending limits "differ substantially from the scenario described in footnote 65 . . . . The . . . limits are not voluntary because they provide only penalties for noncompliance rather than an incentive for voluntary compliance."[191] Missouri's law was a penalty because "a candidate agreeing to abide by the spending limits receives no benefit other than the state's blessing to seek the private funding he or she would be free to seek in any event."[192] Additionally, the state's argument that it was offering benefits to complying candidates was labeled "disingenuous."[193]

The *Maupin* case was an easy decision because the ban on PAC and organizational contributions was unconstitutional per se.[194] Imagine if Missouri only banned contributions by for-profit corporations to nonparticipating candidates. Alternatively, assume that Missouri had a long-standing policy of prohibiting contributions by for-profit corporations, but lifted the ban for participants when it adopted its conditional spending limit program. The question of whether the law offers participants a benefit or penalizes nonparticipants becomes more difficult.

The principal problem with a carrot-and-sticks approach is that it requires the establishment of a baseline.[195] In other words, to determine if a nonparticipant is made worse off or if participants are made better off, the status quo must be compared to an alternative model. Otherwise, as the *Vote Choice* court argued, "[t]he question whether [a] system of public financing imposes a penalty on non-complying candidates or, instead, confers a benefit on those who do comply is a non-issue, roughly comparable to bickering over whether a glass is half full or half empty."[196]

190. 71 F.3d 1422 (8th Cir. 1995).

191. *Id.* at 1425.

192. *Id.*

193. *Id.*

194. *See* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263 (1986) (holding that a federal ban on corporate contributions was unconstitutional as applied to nonprofit corporations).

195. *See* Levit, *supra* note 60, at 483 (conceding that this is a challenge with the carrots-versus-sticks approach, but contending that Kreimer's baseline analysis addresses the concern); *see also* Kreimer, *supra* note 84, at 1352 ("The distinction between liberty-expanding offers and liberty-reducing threats turns on the establishment of an acceptable baseline against which to measure a person's position after imposition of an allocation.").

196. Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 38 (1st Cir. 1993).

To deal with this problem, Kenneth Levit suggests that courts utilize Seth Kreimer's three-baseline approach to distinguish offers from threats.[197] Kreimer's baselines are history, equality, and prediction.[198] The historical baseline is based on the premise that it is significantly worse to lose a benefit than never to have received the benefit. Kreimer contends that this comparison to the status quo is "ground[ed] in the real world."[199] Additionally, it is conceptually simple to tell whether a benefit was provided in the past.[200] Kreimer asserts that while "it is costly for the government to devote its resources to altering the current situation[,] . . . [c]hange . . . requires justification."[201] The equality baseline asks whether the challenged measure discriminates against similarly situated individuals on the basis of their exercise of a constitutional right.[202] Finally, the prediction baseline examines whether the government would have offered the benefit if it could not have imposed the conditions. If the benefit would have been provided regardless, then the condition appears more coercive.[203]

Kreimer's baselines do not solve the principal problem with the carrots-versus-sticks approach. First, the historical baseline requires us to accept the notion that the burdens on nonparticipants are at a perfect point of acceptability in the status quo. In other words, the restrictions on nonparticipants are appropriately tailored to achieve public policy goals. State and local governments have a compelling interest in adopting contribution limits and should be free to do so at any time so long as the limits do not prohibit candidates from communicating with the electorate. However, under the historical baseline, a state that has no contribution limits would be forbidden from imposing caps at the same time it adopted a conditional expenditure limit.[204]

197. *See* Levit, *supra* note 60, at 486. Kenneth Levit refers generally to the analytic framework developed by Seth Kreimer without discussing the specific baselines. It is not enough to say that threats can be identified on the basis of whether "by refusing it, [potential recipients] are made worse off." *Id.* at 486. This begs the question of how to determine if an individual is made worse off. Because Kreimer directly addresses these concerns, I will focus on his analysis. It should be pointed out that Kreimer's test was developed to identify unconstitutional conditions generally, not coercive campaign finance laws.

198. Kreimer, *supra* note 84, at 1359–71.

199. *Id.* at 1361.

200. *See id.*

201. *Id.*

202. *See id.* at 1363–71.

203. *See id.* at 1371–74.

204. As was suggested by Professor Daniel H. Lowenstein, this would lead to the bizarre result that a law that was constitutional in one state might be unconstitutional in another state. For example, a contribution limit of $1000 might be upheld in a state that had the limit in place before the adoption of its conditional expenditure limit, while elsewhere an identical $1000 limit could be struck down under the carrot-and-sticks test because the neighboring state waited to adopt its contribution limit at the same time it enacted its conditional expenditure limit.

Nonparticipants might also be unfairly penalized under the carrots-and-sticks approach. Imagine a clever legislature that implemented extraordinarily low contribution limits (that is, $50 limits for contributions to gubernatorial candidates in California) one year before it adopted full public financing. Obviously, such a system would make it impossible to raise sufficient funds from private sources. However, the law would be permissible because the low contribution limit would have been adopted before the public financing law. The low contribution cap thus set the baseline, and public financing merely expanded options. Accordingly, the assumptions and the results of the historical baseline analysis are unsatisfactory.

The equality baseline is equally unappealing. It would seem to prevent any constitutionally related condition from being placed on a government benefit. The crux of the unconstitutional conditions problem is that similarly situated individuals are treated dissimilarly because of their exercise of a constitutional right. Yet, as explained in Part I, not all conditions are unconstitutional, especially when the conditions promote democratic or First Amendment values. Furthermore, the prediction baseline would suffer from the same problems as the purpose test. In deciding whether the government would have offered the benefit if it could not have imposed conditions, courts again would be forced to look into the motives of the legislature and engage in a particularly difficult form of counterfactual analysis. In sum, the carrots-versus-sticks approach would be nearly impossible to apply, would prohibit laws that are necessary and have little coercive effect, and would allow regulations that force candidates to accept conditional expenditure limits.

D. Conclusion

The courts and commentators have failed to develop an adequate test for evaluating the coercive effects of footnote 65 reforms. The flaw common to each test is its failure to directly address the crux of the problem. The problem that I am referring to is the potential inability of nonparticipants to run a competitive campaign. At the point that a candidate has no hope of raising sufficient private funds because of government regulations, she is coerced into accepting expenditure limits. Examining the purpose behind the campaign finance law, focusing on the benefits and burdens of participating, or trying to distinguish between an offer and a penalty all miss this critical inquiry. Instead, we should refocus our attention on the burdens imposed by conditional spending limit systems on nonparticipating candidates.

IV. The Ability-to-Compete Test

There is a legitimate government interest in encouraging participation in conditional expenditure limit programs. These policies, especially if combined with full public financing, are effective at reducing corruption. However, it is essential that conditional expenditure limits remain voluntary. Incumbents enjoy a natural advantage over their challengers when a campaign begins. Accordingly, legislators have an incentive to impose spending limits that prevent challengers from amassing the funds necessary to establish name and message recognition. The ideal test would therefore balance the goal of high participation in voluntary expenditure limit programs against the threat of mandatory expenditure limits.

A. The Proposal

To address these concerns, I propose a test that examines whether (1) a jurisdiction's overall campaign finance regulatory system (2) prevents a typical candidate who wants to refuse conditional expenditure limits (3) from being able to raise enough money through contributions to run a competitive campaign. I have divided the last sentence into numbered segments so that the individual elements of the test can be discussed in greater detail.

The first element focuses attention not on a particular provision, but the entire statutory scheme for regulating campaign finances. Individual provisions may have radically divergent consequences depending on the other provisions in the campaign finance system. For example, a trigger that provides matching funds is far less harmful to a nonparticipant by itself than in combination with a reduced-rate broadcasting privilege.[205] Accordingly, courts should look at the entire regulatory system when examining the effects on a hopeful nonparticipant. This element of the test also requires courts to examine whether it was the law that undermined the hopeful nonparticipant's fundraising. Thus, a challenger will not succeed if her inability to raise funds is the result of insufficient support for her candidacy.

205. *See* Finley, *supra* note 142, at 754–62. When a matching trigger is combined with reduced-rate television privileges, the nonparticipant will almost inevitably fall behind the participating candidate in advertising buys. Because of the reduced-rate privilege, the participant will be able to purchase more advertising time than the nonparticipant for expenditures up to the spending cap. To attempt to balance the scales, the nonparticipant could attempt to spend more than the participant. However, in doing so, she would trigger a windfall of public subsidies to her participating opponent. The opponent could then take the public funds and purchase more television time at a reduced rate, expanding the disparity between the candidates. Although I contend below that strict equity is not required, such a system may impose such a burden on nonparticipants that it should be found unconstitutionally coercive.

Stated another way, the courts should apply the test with the candidate of average fundraising abilities in mind.

The second element places a heavy burden on those who would challenge a campaign finance regulatory scheme. The complaining candidate would have to demonstrate that the law foreclosed her ability to raise the necessary funds. The strictness of this standard is justified by the legitimate government interest in encouraging participation in conditional expenditure programs. As the *Gable* court suggested, the rational choice should be for a candidate to accept the limits.[206] A program only becomes presumptively unconstitutional when the hopeful nonparticipant has no choice but to accept the expenditure limit. At that point, the conditional expenditure limit becomes, in effect, mandatory, rather than voluntary.

The premise behind element three is that the campaign finance system need not strike a balance between the amount spent by participants and nonparticipants. Instead, what is essential is that nonparticipants have the ability to spend the threshold amount necessary to run a competitive campaign. Social science research supports the notion that candidates, particularly challengers, must raise a threshold amount to be competitive.[207] Incumbent spending is relatively ineffective at increasing support because incumbents begin campaigns with name and message recognition. Challenger spending, in contrast, can be quite successful at attracting support. This indicates that most challengers will require a threshold amount of money to communicate sufficiently with the electorate.[208] The studies also demonstrate "that once a candidate spends the minimal amount needed to penetrate the public consciousness, additional spending affects a very limited number of votes."[209]

If high spending was all that mattered, we would expect to see the candidate that spent the most money constantly prevailing. This is simply not the case. For example, in 1994, the Republican candidates that defeated Democratic incumbents "were, on average, outspent by approximately $300,000." In 40 percent of the open-seat races in 1994, the victorious Republican was outspent.[210] At the same time, we must recognize that, as one of the leading experts on the effects of spending has said, "no matter how

206. Gable v. Patton, 142 F.3d 940, 949 (6th Cir. 1998) ("[A] voluntary campaign finance scheme must rely on incentives for participation, which, by definition, means structuring the scheme so that participation is usually the rational choice.").

207. *See* Briffault, *supra* note 11, at 569.

208. *See, e.g.*, Jacobson, *supra* note 36, at 334–35.

209. SMITH, *supra* note 115, at 68.

210. ROBERT K. GOIDEL ET AL., MONEY MATTERS: CONSEQUENCES OF CAMPAIGN FINANCE REFORM IN U.S. HOUSE ELECTIONS 65 (1999).

persuasive the message, it will not do any good if voters do not hear it, so the money, if not sufficient, is almost certainly *necessary*."[211]

Accordingly, what is crucial is that all legitimate candidates have the ability to communicate their identity and basic message. Or as Briffault contends, "Funding parity is not essential for fair elections. Challengers can do well so long as they have a critical mass of funds."[212] How much must a challenger have in her bank account to reach this critical mass?

The answer will depend on localized factors such as the costs of advertising and the size of the district. A candidate could be considered competitive when she receives at least 45 percent of the votes cast in an election.[213] Examining historical expenditure and contribution data, legitimate plaintiffs should be able to demonstrate that it is impossible to raise sufficient funds to compete. For example, if all candidates for a given office in the past three election cycles have had to spend $100,000 to receive 45 percent of the vote, and if 90 percent of these contributions came in amounts that exceeded the newly imposed cap gap limit, then the law could be rightly considered overly burdensome on a candidate's ability to communicate.

Where an undue burden can be demonstrated, the law should have to pass strict scrutiny. Such a burden directly interferes with the competitiveness of elections, the ability of citizens to receive needed information, and the First Amendment rights of candidates. The defendant government should have to come forth with highly particularized evidence that the burdening provision is necessary to achieve a compelling interest (presumably in reducing corruption).

B. The Test Would Encourage Measures That Maximize Candidate Participation

Because the ability-to-compete test is only concerned with the ability of a hopeful nonparticipant to run a competitive campaign, footnote 65 reforms that might fail under other tests will usually be permissible under the proposed standard. Benefits given to participating candidates, such as full public financing, will almost never be found unconstitutionally coercive under the proposed test. If equity in expenditures is not critical to electoral outcomes, then benefits to one candidate should not be a significant burden on the other. Thus, trigger mechanisms will typically be permissible because they do not impair the ability of the nonparticipant to spend sufficient amounts to achieve name and message recognition.

211. Jacobson, *supra* note 36, at 357.

212. Briffault, *supra* note 11, at 569.

213. *See id.* at 587 (urging that conditional spending limits reflect the amount spent by competitive candidates, defined as those that receive at least 45 percent of the vote).

In other respects, the ability-to-compete test might be stricter than the standards currently applied by the courts. Cap gaps, and contribution limits generally, are most likely to interfere directly with the ability of a nonparticipant to raise sufficient funds. Under the test, it is irrelevant whether the contribution limits or cap gaps were adopted simultaneously with the conditional expenditure limit system. The sole question is whether the limits inhibit a nonparticipating candidate's ability to compete.

C. The Test Is Consistent with the Court's Contribution Limits Doctrine

The proposed test would bring the analysis of the issue at hand into line with the Supreme Court's doctrine on contribution limits. Recently, in *Nixon v. Shrink Missouri Government PAC*, the Court examined whether Missouri's contribution limits, which ranged from $275 to $1075, were unconstitutionally low in light of *Buckley*. Justice Souter, writing for the majority, reasoned that the $1000 limit upheld in *Buckley* was not the constitutional baseline.[214] Rather, the question in *Buckley* was "whether there was any showing that the limits were so low as to impede the ability of candidates to 'amas[s] the resources necessary for effective advocacy.'"[215] Justice Souter elaborated:

> We asked . . . whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless. Such being the test, the issue in later cases . . . must go to the power to mount a campaign with all the dollars likely to be forthcoming.[216]

The Court thus upheld Missouri's contribution limits, noting the lower court's conclusion that candidates were "quite able to raise funds sufficient to run effective campaigns."[217]

Buckley and *Shrink Missouri* both make clear that the relevant consideration for contribution limits is whether candidates retain the ability to run competitive campaigns. Thus, a standard for footnote 65 conditions that focuses on the competitiveness of a nonparticipating candidate is consistent with the Court's approach to contribution limits.

The competitiveness focus is also in line with the Court's analysis of other conditions on government benefits. For example, when it upheld the

214. Wilson v. Shrink Mo. Gov't PAC, 528 U.S. 377, 397 (2000).
215. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 21 (1975) (per curiam)).
216. *Id.*
217. *Id.* at 396 (quoting Shrink Mo. Gov't PAC v. Adams, 5 F. Supp.2d 734, 740 (E.D. Mo. 1998)).

federal minimum drinking age in *Dole*, the Court stated that government conditions on subsidies become impermissible when potential recipients have no choice but to accept the state's offer. Specifically, the Court held that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[218] The challenging state argued that the coercive effect was proven by the number of states that accepted the conditioned highway funds. The Court rejected this argument, noting "We cannot conclude . . . that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective."[219]

Like the petitioners in *Dole*, the advocates of other tests might contend that increased acceptance of expenditure limits demonstrates a coercive effect of a footnote 65 reform. However, it is not necessary to create an inherent tension between the goal of increased participation and the constitutional infirmity of coercion. As the Court recognized in *Dole*, the better approach is to permit the state to apply pressure up until the point of compulsion—in other words, pressure is permissible as long as candidates wishing not to participate have a legitimate choice.

D. Objections to the Proposal

Undoubtedly, this test could be criticized for allowing too much coercion. If by unconstitutional coercion critics mean a range of pressure along a continuum, then the test certainly does allow for some amount of coercion. But if one defines unconstitutional coercion in this manner, then constitutional doctrine must radically change. After all, parents who wish to send their children to private schools undoubtedly face added pressure because the state does not subsidize private education. Striking workers face greater pressure to end their strike because the state refuses to provide them with food stamps. In short, all pressure is coercive to some degree, but not all pressure rises to the level of unconstitutional coercion. Thus, coercion does lie along a continuum. The critical issue is where to draw the line between permissible pressure and unconstitutional coercion.

There is no simple answer that can be applied across the board. However, coercion under footnote 65 reform measures becomes impermissible when candidates wishing not to participate are left with no practical choice but to concede their right to expend unlimited sums of money.

218. South Dakota v. Dole, 483 U.S. 203, 211 (1987) (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

219. *Id.*

The proposed test encourages policies that maximize the exercise of First Amendment rights. High participation rates are critical to the success of public financing programs. Public financing provides resources to candidates who would otherwise be unable to communicate their message to the electorate. Additionally, the test is superior to others at protecting the First Amendment rights of challengers. Therefore, the test strikes an appropriate balance between encouraging participation and protecting against unacceptable levels of coercion.

A second criticism of the proposed test might be that it does not provide direct assistance to candidates without access to personal wealth. In other words, wealthy candidates or candidates with easy access to wealth may have a legitimate choice between accepting and rejecting spending limits, but candidates without access to "big money" are forced into public financing. Thus, the burden of the condition falls heaviest on the poorest members of society.

While I am sympathetic to the notion that government should do more to improve political participation, this criticism misplaces the blame. Candidates that do not have personal wealth are clearly better off with the option of public financing.[220] Additionally, as Kathleen Sullivan has argued, "the case for coercion becomes attenuated the less government causes the dilemma."[221]

Finally, critics might contend that the test is simply too difficult to apply. Admittedly, courts would have to engage in a fair amount of statistical analysis and would have to look at individualized fact patterns to reach conclusions. However, as I have shown, every other test that has been proposed has similar implementation problems. The ability-to-compete test is less troubling because it makes these difficulties explicit and attempts to address the issue directly. Moreover, the obstacles presented by the proposed test may be overcome with more advanced modes of statistical analysis. In contrast, we are unlikely to discover more sophisticated means for understanding the motives of a legislative body. Finally, even if the test is difficult to apply, it directly addresses the issue of concern. Courts should not sacrifice the appropriate result at the altar of easy administration.

CONCLUSION

The Supreme Court was correct when it held in footnote 65 that FECA's conditional expenditure limits are constitutional. The condition

220. *See* Raskin & Bonifaz, *supra* note 26, at 1202 (contending that "the current wealth and class-based exclusion of political candidates—along with its corresponding structural bias in government—would be eliminated" by public financing).

221. Sullivan, *supra* note 7, at 1436.

imposes a very minor burden on First Amendment rights and serves a compelling state interest in reducing corruption. The more difficult question faced by contemporary courts is how to establish the boundaries for permissible inducements in conditional expenditure limit programs. The federal courts have failed to develop a test that encourages maximum participation while protecting against coercion by incumbent legislators. Fortunately, this problem can be addressed by refocusing attention on the burdens that are placed on nonparticipants. This test will encourage increased communication with the electorate and improve the consistency of the Court's campaign finance doctrine.

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