TESTIMONY OF SEN. ORRIN G. HATCH
BEFORE THE
COMMITTEE ON RULES AND ADMINISTRATION
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"CITIZEN PARTICIPATION IN ELECTIONS"

Mr. Chairman and Members of the Committee, I am honored today to have the opportunity to speak about an issue that is of growing concern to the American electorate and has already played an important role in the presidential election: campaign finance reform. My thesis today is "beware of the rush to reform," or more accurately, "beware of pseudo-reform."

I know that "reform" is the buzz-word of the times, but unless we know what we are doing, and understand the consequences of our actions, the good intentions of the so-called reformers could very well lead to uncalculated hardships. As Coleridge warned, "Every reform, however necessary, will by weak minds be carried to an excess that itself will need reforming."

Although I certainly do not believe that those of my colleagues who advocate reform of the campaign finance system have "weak minds," I do believe that what they are advocating is unworkable and extreme. It is unworkable because their plans solve no problem. It is extreme because their schemes create new problems that weaken the very cornerstone of citizen participation in our democracy – free speech. And it is free speech that guarantees free elections.

I. Free Speech and Free Elections

The Founders of our country certainly understood the link between free elections and liberty. Representative government – with the consent of the people registered in periodic elections – was -- to these prescient leaders of the new nation -- the primary protection of natural or fundamental rights. As Thomas Jefferson put it in the Declaration of Independence, to secure rights "Governments are instituted among Men" and must derive "their just Powers from the Consent of the Governed."

And the nexus between free elections and free speech was equally understood. To Jefferson in a republic:

> The people are the only censors of their governors: and even their errors will tend to keep these to true principles of their institution. . . .The basis of our government being the opinion of these people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without government, I should not hesitate a moment to prefer the latter.

[Letter from Thomas Jefferson to Edward Carrington (January 16, 1787), *reprinted in* 5 The Founder's Constitution 122 (P. Kurland & R. Lerner eds., 1987)].

And the Father of the Constitution and the draftsman of the Bill of Rights, James Madison, in supporting the House of Representatives adoption of what became the First Amendment to the Constitution, argued that the primary value of freedom of speech was to protect the right of citizens to criticize government officials. [1 Annals of Cong. 434-36, 440-43 (J. Gales ed. 1989), *reprinted in* 5 The Founders Constitution 128-29 (P. Kurland & R. Lerner eds., 1989)].

That freedom of speech and press was considered by Madison to be vital in assuring that the electorate receives accurate information about political candidates was demonstrated by his vehement arguments against the Alien and Sedition Acts in 1800. The Sedition Act, of course, in effect, made it a crime to criticize government or government officials. Its passage was a black mark on our history. It is instructive to quote a small slice of Madison's polemic against the Act:

> As the Act was passed on July 14, 1798, and is to be in force until March 3, 1801, it was of course that, during its continuance, two elections of the entire House of Representatives, an election of a part of the Senate, and an election of a President, were to take place.
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> That consequently, during all these elections, intended by the Constitution to preserve the purity or to purge the faults of the Administration, the great remedial rights of the people were to be exercised, and the responsibility of their public agents to be screened, under the penalties of the Act.
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> May it not be asked of every intelligent friend to the liberties of his country, whether the power exercised in such an Act as this ought not to produce great and universal alarm? Whether a rigid execution of such an Act, in communication among the people which is indispensable to the just exercise of their electoral rights? And whether such an Act, if made perpetual, and enforced with rigor, would not, in time to come, either destroy our free system of government, or prepare a convulsion that might prove equally fatal to it?

[Report on the Virginia Resolutions, January 1800, *reprinted in* 5 The Founders Constitution 141, 145 (P. Kurland & R. Lerner eds., 1989)]. Thus, to James Madison, the links between free speech, free elections, and free government must be forged in steel. Any break in those links would result in a calamity to liberty.

Although the exact meaning or parameters of the First Amendment are not clear, most scholars believe that freedom of speech at a minimum was intended by its Ratifiers to protect political speech. [*See, e.g.,* Emerson, "Freedom of Speech" *in* 2 Encyclopedia of the American Constitution 790, 790 (L. Levy, K. Karst & D. Mahoney eds., 1986); BeVier, "The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle," 30 Stan. L. Rev. 299, 307 (1978)]. And the heart of political speech is electoral speech, particularly the right of the people in election cycles to criticize or support their government.

Indeed, the form of government established by the Constitution is uniquely intertwined

with freedom of speech. The very structure of the Constitution itself establishes a representative democracy, which to Robert Bork, is "a form of government that would be meaningless without freedom to discuss government and its policies." [Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1, 23 (1971)].

But it was the late illustrious philosopher and educator Alexander Meiklejohn who most persuasively established as the purpose of the First Amendment the integral relationship between freedom to engage in discussion about government and freedom to participate in elections. [*See* A. Meilkeljohn, "Free Speech and Its Relation to Self-Government" (1948)].

Meiklejohn wrote that the principle of freedom of speech "springs from the necessities of the program of self-government." *Id.* at 27. Speech that facilitates a representative democracy is speech that deals with the "voting of wise decisions" and with "the general welfare." [*Id*.] Consequently, to Meiklejohn, such political speech must receive the utmost First Amendment protection .[*Id*. at 24]. Meiklejohn cogently argued that "public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents." [*Id*]. And, indeed, to him the quality of that public discussion and debate, in turn, must be "measured by its capacity to facilitate [wise] public decision-making." [*Id.* at 84].

Whether one examines the original meaning of the First Amendment or the structure of the Constitution, it is beyond cavil that in our Republic free speech and free elections are inexorably intertwined. But the question arises just how the so-called reformers prescriptions weaken these bulwarks. For that, I turn to the seminal Supreme Court case of *Buckley v. Valeo*.

II. *Buckley v. Valeo,* Its Progeny, and the Paradigm of Electoral Free Speech

To understand why certain recent campaign finance reform measures, such as the McCain-Feingold bill, infringe on free speech and free elections, it is necessary to survey the Supreme Court's decisions on campaign finance reform and the problems it brings to free speech. The granddaddy of these cases is *Buckley v. Valeo,* [424 U.S. 1 (1976)]. *Buckley* established the free speech paradigm in which to weigh the competing campaign reform proposals.

Two decades ago in the wake of the Watergate scandal, Congress passed the Federal Election Campaign Act, or FECA. The Act imposed a comprehensive scheme of limitations on the amount of money that can be given and spent in political campaigns. FECA capped contributions made to candidates and their campaigns, as well as expenditures made to effect public issues, including those that arise in a campaign. The Act also required public disclosure of money raised and spent in federal elections.

The Supreme Court in *Buckley* upheld against a First Amendment challenge the limitation on contributions but not the limitations on expenditures. The Court reasoned that contributions implicated only limited free speech interests because contributions merely facilitated the speech

of others, *i.e.*, candidates. Crucial to the Court's analysis was its belief that limiting contributions was a legitimate governmental interest in preventing "corruption" or the "appearance of corruption" because such limitations would help prevent any single donor from gaining a disproportionate influence with the elected official – the so-called "quid pro quo" effect. *Buckley*, [424 U.S. at 25-27]. A similar interest justified mandatory public disclosure of political contributions above minimal amounts. [*See id.* at 60-84].

But *Buckley* reasoned that *expenditures* of money by the candidate or others outside the campaign did not implicate the same governmental interests because expenditures relate directly to free speech and are less likely to exert a quid pro quo. [*See id.* at 45-48]. Therefore, to the Court, limitations on expenditures could not be justified on any anti-corruption rationale. Nor could they be justified by a theory – popular in radical circles – that limitations on expenditures, particularly on the wealthy or powerful, equalize relative speaking power and ensure that the voices of the masses will be heard.

The Court viewed such governmental attempts at balance as an abomination to free speech and held that this justification for restraints on expenditures was "wholly foreign to the First Amendment." [*Buckley,*424 U.S. at 49]. It seems to me that such "balance" is, in reality, a form of suppression of certain viewpoints, a position that flies in the face of Justice Holmes' notion that the First Amendment prohibits suppression of ideas because truth can only be determined in the "marketplace" of competing ideas. [*Abrams v. United States*, 250 U.S. 616, 630 (1919)(Holmes, J., dissenting)].

Significantly, the Supreme Court in *Buckley* held that any campaign finance limitations apply only to "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."[*Buckley*, 424 U.S. at 44]. A footnote to the opinion elaborated on what has later been termed "express advocacy." To the Court, communications that fall under FECA's purview must contain "magic words" like "vote for" or "elect" or "support" or "Smith for Congress" or "vote against" or "defeat" or "reject." [*Id.* at 44 n.52]. Communications without these electoral advocacy terms have subsequently almost always been classified by courts as "issue advocacy" entitled to full First Amendment strict scrutiny protection.

There are two key underpinnings to the *Buckley* Court's view of the relationship between the freedom of speech and elections. The first was the view that money equates with speech. The Court in a fit of pragmatism recognized that effective speech requires money in the market place to compete. This position has been criticized – most recently by Justice Stevens, [*see Nixon v. Shrink Mo. Gov't. PAC*, No. 98-963 (January 24, 2000)(J. Stevens, dissenting)] who believes that "money is property; it is not speech." But with all due respect to Justice Stevens, in *Buckley* and its later progeny, the Court has escaped the difficult and perhaps erroneous dichotomy of whether the First Amendment's protections encompass either expression or conduct by – as Stanford Law School Professor Kathleen Sullivan noted – "focusing on what the law aims at rather than on what to hit." [Sullivan, "Against Campaign Finance Reform," 1998 Utah L. Rev. 311, 316].

Let me quote Professor Sullivan:

> Campaign finance limits are surely aimed at the communicative impact of speech. To the extent that campaign finance limits are aimed at balancing political discourse, they seek to protect voters from speech that might have too much influence on them; to the extent that they are aimed at preventing so-called corruption, they seek to protect candidates from speech that might have too much influence on them. Either way, such limits seek to protect the relevant audience from its own evaluative or responsive deficiencies and thus violate conventional First Amendment anti-paternalist principles.

[*Id*. at 316].

But beyond looking at the purpose of campaign finance laws, it is clear that restrictions on political spending have the result of limiting the amount and effectiveness of speech. Let me borrow Professor Sullivan's example of a law restricting the retail price of a book to no more than twenty dollars. [*Id*.] To Justice Stevens such a law is about money and not about a particular book. But does not such a law limit the amount and effectiveness of speech because it creates a disincentive to write and publish such books. The Supreme Court has, as Professor Sullivan pointed out, repeatedly held that financial disincentives to specific content-based speech, just as much as direct prohibitions on such speech, trigger strict First Amendment review. [*Id*].

One such example is *United States v. Nat'l. Treasury Employees Union,* [513 U.S. 454 (1995)], where the Court struck down on its face a prohibition on the receipt of honoraria by federal employees who were moonlighting by writing articles on various topics. The Court found that the ban "on compensation unquestionably imposes a significant burden on expressive activity." [*Id.* at 468]. It did not matter to the Court that the law left federal employees able to write and talk for free. Given his later opinion in *Nixon*, it is ironic to note that Justice Stevens quoted Samuel Johnson's remark that "No man but a blockhead ever wrote, except for money." [*Id.* at 469 n.14 (quoting J. Boswell, Life of Samuel Johnson, L.L.D. 302 (R. Hutchings ed., 1952))].

And I must emphasize that restrictions on campaign contributions and expenditures cannot be justified as content neutral regulation. The *Buckley* Court rejected the example given by defenders of the regulations at hand that spending and contribution limits are similar to limiting the decibel level on a sound truck and do not stop the truck from broadcasting. The Court rejected that analogy because, to the Court, decibel limits aim at protecting the eardrums of the closest listener, not at preventing the sound truck from reaching a larger audience. [*Buckley*, 424 U.S. at 18 and 18 n.17]. To the Court, unlike decibel limits, limits on campaign expenditures and contributions do restrict the communicative effectiveness of speech. The Court was right.

Buckley's other key underpinning is its "strict scrutiny" justification of the restrictions on direct contributions to campaigns as needed to combat "corruption" and the "appearance of corruption"-- in other words "quid pro quo" exchanges. This has been criticized by the

congressional reformers not as over-inclusive, but ironically as under-inclusive. Both Shays-Meehan in the House and at least the broader pre-1999 version of McCain-Feingold in the Senate go much further than *Buckley* by banning soft money expenditures and restricting much express and issue advocacy expenditures even if not coordinated with a particular campaign – hitherto protected speech under the *Buckley* rationale and expressly protected by later Supreme Court precedent.

But there is simply no real empirical evidence to support a rational conclusion – let alone evidence to support strict scrutiny – that these types of expenditures lead to corruption. Indeed, I would go further in that there is even little evidence to support *Buckley's* conclusion that direct contributions to campaigns lead to quid pro quo corruption. Whatever studies that have been done have found little or no connection between campaign contributions and legislative voting records.[*See, e.g.,* Stephen G. Bonars & John R. Lott, Jr., "Do Campaign Donations Alter How A Politician Votes?" (1996); Stephanie D. Moussalli, "Campaign Finance Reform: The Case For Deregulation" (1990)]. These studies, instead, as Bradley Smith recently wrote in the Georgetown Law Journal, "have found the dominant force in legislative voting to be personal ideology, party affiliation, and consistency views." [Smith, "Money Talks: Speech, Corruption, Equality, and Campaign Finance," 86 Geo. L.J. 45, 58-59 and n. 92 (1997)].

Simply put, Senators or Representatives are not bought either by contributions or expenditures. Those "reformers" who advocate greater restrictions on the campaign finance system equate contact with officeholders with corruption. But to equate contact with officeholders with corruption threatens to turn the First Amendment right of citizens to petition their government on its head. Access is not corruption. It is representative democracy.

If *Buckley v. Valeo* established the skeleton of First Amendment protection of the electoral process from onerous regulation, *Buckley*'s progeny filled in the flesh. Let me mention a few of the main cases.

In *First Nat'l. Bank v. Bellotti,* [435 U.S. 765 (1978)], the Supreme Court reaffirmed its view in *Buckley* that expenditures for issues are directly related to expression of political ideas and are, thus, on a higher plane of constitutional values requiring the strictest of scrutiny. *Bellotti* found a Massachusetts law that prohibited "corporations from making contributions or expenditures for the purpose of . . . influencing or affecting the vote on any question submitted to the voters" unconstitutional because it infringed both (1) the First Amendment right of the corporations to engage in issue advocacy and, (2) the First Amendment right of citizens to "public access to discussion, debate, and the dissemination of information and ideas." [*Bellotti*, 435 U.S. at 783].

Bellotti did not involve restrictions on corporate donations to candidates. The Court distinguished between portions of the law "prohibiting or limiting corporate contributions to political candidates or committees, or other means of influencing candidate elections"-- which were not challenged – and provisions "prohibiting contributions and expenditures for the purpose

of influencing . . . questions submitted to voters," i.e., issue advocacy. [*Id.* at 768]. The Court explained that the concern that justified the former "was the problem of corruption of elected representatives through creation of political debts" and that the latter "presents no comparable problem" because it involved contributions and expenditures that would be used for issue advocacy rather than communication that expressly advocate the election or defeat of a candidate. [*Id.* at 788].

In *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, [454 U.S. 390 (1981)], the Court once again gave full panoply of protection to expenditures linked to communication of ideas. In this case the Court invalidated a city ordinance that limited to $250 contributions to committees formed solely to support or oppose ballot measures submitted to popular vote. The Court held that it is an impairment of freedom of expression to place limits on contributions which in turn directly limit expenditures used to communicate political ideas.

In *Fed. Election Comm'n. v. Nat'l. Conservative Political Action Comm.,* [470 U.S. 480 (1985)], or *NCPAC*, the Court once again relied on *Buckley*'s distinction between expenditures and contributions, with the former receiving full First Amendment protection. The Court invalidated a section of the Presidential Election Campaign Fund Act which made it a criminal offense for an independent political committee or PAC to spend more than $1000 to further the election of a presidential candidate who elects to receive public funding. The Court held that the PAC's independent expenditures were constitutionally protected because they "produce speech at the core of the First Amendment."[*Id.* at 493].

One year later, in *Fed. Election Comm. v. Mass. Citizens for Life, Inc*., [479 U.S. 238 (1986)], or *MCFL*, the Supreme Court clarified the distinction between issue and express advocacy, holding that an expenditure must constitute express advocacy in order to be subject to FECA's prohibition against the use of corporate treasury funds to make an expenditure "in connection with" any federal election. [*Id.* at 249-250]. In this case, the Court held that a publication urging voters to vote for "pro-life"candidates, that the publication identified, fell into the category of express advocacy. But the Court refused to apply FECA's prohibition in this case to *MCFL* because the organization was not a business organization. "Groups such as *MCFL* . . . do not pose . . . danger of corruption. *MCFL* was formed to disseminate political ideas, not to amass capital." [*Id.* at 247].

Compare this case to *Austin v. Mich. Chamber of Commerce,* [494 U.S. 652 (1990)], which involved the Michigan Chamber of Commerce, not a small voluntary association like MCFL. In *Austin,* the Supreme Court upheld provisions of the Michigan Campaign Finance Act that prohibit corporations – excluding the media – from using corporate treasury funds for independent expenditures in support of or opposition to any candidate in elections to state office. It is important to note that the issue before the Court in *Austin* was the constitutionality of the state's ban on corporation's making independent expenditures *in connection with* state elections. The Michigan law did not prohibit corporations from endorsing candidates, only from making independent expenditures in favor of a candidate. The law did not restrict independent issue

advocacy expenditures, which the Supreme Court in *Buckley* or *NCPAC* clearly held to be core First Amendment speech.

The Supreme Court, in *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n.,* [518 U.S. 604 (1996)], addressed the issue of whether party "hard money" used to purchase an advertising campaign attacking the other party's likely candidate, but uncoordinated with its own party's nominee's campaign, fell within FECA's restrictions on party expenditures. A fractured Court agreed that applying FECA's restriction to the expenditures in question violated the First Amendment.

A plurality of the Court – Justices Breyer, O'Connor, and Souter – based their holding on the theory that the expenditure at hand had to be treated as an independent expenditure entitled to First Amendment protection, not as a "coordinated" expenditure or express advocacy, which may be restricted. [*Id.* at 613-623]. It is significant to note that Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, concurred in the judgment, but would abolish *Buckley*'s distinction between protected expenditures and unprotected contributions, believing that both implicated core expression central to the First Amendment. [*Id.* at 640-644].

It is also significant to note that Justice Breyer, in examining FECA's provisions limiting contributions, cast doubt on whether unregulated "soft money" contributions could be restricted because soft money can not be used to influence a federal campaign, except when used in limited party-building activities specifically designated in the statute. [*Id*. at 616-617]. To Justice Breyer, soft money does not raise the specter of corruption and thus falls within the narrow exception identified in *Buckley*:

> We also recognize that FECA permits unregulated "soft money" contributions to a party for certain activities. . . . But the opportunity for corruption posed by these greater opportunities for contributions is, at best, attenuated. Unregulated "soft money" contributions may not be used to influence a federal campaign . . . Any contribution to a party that is earmarked for a particular campaign is considered a contribution to the candidate and is subject to the contribution limits. A party may not simply channel unlimited amounts of even undesigned contributions to a candidate, since such direct transfers are also considered contributions and are subject to the contribution limits. . . .

[*Id*. at 617].

In other words, because any soft money used to fund a federal campaign must comport with the contribution limits already in place, soft money does not result in the actuality or the appearance of quid pro quo "corruption" warranting intrusions on core free speech protected by the First Amendment. In any event, it is my view that such soft money activities as voter registration drives, voter identification, and get-out-the-vote drives, as well as communication with voters that do not fall within express advocacy, are protected by the First Amendment's freedom of association -- the right to freely associate with a party, union, or association -- as well

as by free speech.

Finally, there is the very recent case of *Nixon v. Shrink Mo. Gov't. PAC,* [No. 98-963, January 24, 2000]. I remember that when this case was decided, proponents of so-called campaign finance reform gloated that this case supported their positions. It did no such thing. All the case did was extend *Buckley*'s restrictions on contributions to state campaign finance laws. The Court rejected a challenge to Missouri's contribution restriction as too limited because it did not take into account inflation. The Court held that *Buckley* demonstrated the dangers of corruption stemming from contributions and that there was sufficient evidence in the record to support the conclusion that Missouri's campaign contribution limit addressed the appearance of corruption. [*Id.* at 10-15]. The case did not address the issues of independent expenditures, issue advocacy, or soft money expenditures.

In short, *Buckley* and its progeny stand for the following propositions: (1) money is speech; that is, electoral contributions and expenditures are entitled to First Amendment protection; (2) contributions are entitled to less protection than expenditures because they create the appearance of corruption or quid pro quos; (3) express advocacy is entitled to less deference than issue advocacy; (4) corporate donations and corporate express advocacy expenditures may be restricted; (5) political party independent expenditures may not be restricted at least if not connected to a campaign; and (6) restrictions on soft money are probably unconstitutional because soft money does not create the same problem of corruption from quid pro quos that contributions bring.

III. Our Crazy Campaign Finance System

This brief review of Supreme Court precedent on campaign finance law demonstrates that what can be called its *ad hoc* approach has left the corpus of law arcane and befuddling. It is a wonder if any campaign would ***not*** run afoul of at least technical violations of the law. Part of the problem is the complexity of FECA, which has inevitably bred a multiplicity of approaches to its interpretation and application. But part of the problem is the Supreme Court itself. It has adopted incoherent approaches to First Amendment jurisprudence, approaches that belie the purpose and meaning of the First Amendment.

If the purpose of the First Amendment is at least to protect political speech, especially electoral speech, then the distinction between protected expenditures and regulated contributions makes little sense, particularly because the Court views both as species of speech and there is little or no evidence that contributions produce corruption.

The practical result of the limitation on contributions is that candidates must seek contributions from a larger set of donors. This means that candidates are spending a greater amount of time raising money than would otherwise be the case. This is aggravated by the need for a lot of money in general to compete in American elections, given our large electoral districts, state-wide elections, and weak political parties, which require candidates to fund direct

communications to the electorate. The rising costs of elections are further aggravated by the rising importance of expensive televison advertising and the use of political consultants, with their reliance on polling and focus groups. Elections have become a money chase.

Ironically, this is the major complaint of the reformers. I say it is ironic because they have proven Coleridge correct. Their initial FECA reforms have caused the problems they are now complaining about. First PAC money, and now soft money, are the result of limitations on contributions. Let's not kid ourselves. Like pressurized gas, money will always find a crevice of escape. In other words, money will always find a loophole. All that the FECA and courts have accomplished is to encourage the substitution of contributions to candidates for contributions and expenditures made to and by organizations such as political parties or advocacy groups. These organizations are less accountable to the voter. The net result is the growth of yet another huge government bureaucracy to police an inherently unworkable scheme.

Furthermore, if one believes, as I do, the efficacy of Justice Holmes' free speech model of a "marketplace of competing ideas," it is impermissible to drown out or even ban corporate speech or the speech of the wealthy, as the "reformers" advocate and the Supreme Court in *Austin* inculcated. If the remedy for "bad" speech is not censorship, but "more" speech, than the remedy for corporate speech is likewise not censorship, but more non-corporate speech. *Austin* was simply wrongly decided.

It should be obvious that in the electoral sphere the wealthy and powerful have no monopoly over speech. This is not analogous to *Turner Broadcasting System, Inc. v. FCC*, [520 U.S. 180 (1997)], where the Court in part upheld the congressional requirement that cable operators carry a certain percentage of local broadcasting of local programs on their lines because cables' monopoly power choked the broadcast competitors. [*Id*. at 1184 (Breyer, J., plurality decision)]. Unlike the open access rule in that case, limitations on contributions offer no guarantee that the market power of speech will be redistributed from the wealthy to the poor. Such spending limits will not stop wealthy candidates like Ross Perot from spending personal wealth or from the rich from influencing mass media through direct ownership or through the purchase of advertisements. Surely, no one would advocate that we attach an income test to the First Amendment.

The wealthy will always have substitutes for electoral speech. And again, the anti-corruption justification to curb corporate speech is without the necessary empirical predicate. I agree with Justice Scalia's observation that what the *Austin* Court has upheld is the Orwellian notion too much speech can be evil. In his words, it is as if the state of Michigan had said:

> Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the view of any single powerful group, your government has decided that the following associations of persons shall be prohibited from speaking in support of any candidate: ____.

[*Austin*, 494 U.S. at 679 (Scalia, J., dissenting)].

Moreover, the success of the labor unions and voluntary associations as competitors in the market place of ideas demonstrate that limitations on contributions from the wealthy and on corporate speech are unnecessary.

I am sure the Rules Committee will be discussing the issue of labor unions in the election process and, specifically, will be considering the question of whether unions are voluntary associations or not. I am sure you will be evaluating the matter of whether mandatory dues and agency fees can rightly be used for political purposes without the knowledge or acquiescence of the payer. But, today, I am merely going to observe that I have not noted any hesitation whatsoever of union leaders to expend millions of union dollars on campaigns. It seems to me that their ability to participate is as robust as ever. The idea that one set of views should be subject to limitations while an opposite perspective allowed to be disseminated freely strikes this Senator as constitutional anathema.

Finally, *Buckley*'s distinction between express advocacy expenditures and issue advocacy expenditures is both astonishing and unworkable. To me it is astonishing, given the Founders' view of the importance of electoral free speech to the First Amendment and the role of the Supreme Court as our guardian of liberty, that express advocacy has not been given the highest level of scrutiny. It is unworkable because the line between the two is certainly a blurred one. Why is it impermissible, for instance, for the use of expenditures for a TV ad saying not to vote for candidate X, but perfectly permissible to expend huge sums of money to make the case for a point of view which is, perhaps not coincidentally, the same point of view as one of the candidates in the election. Simply put, I agree with those who would end the restrictions on both contributions and expenditures.

To summarize, our campaign finance system has walled off electoral political speech and treated it as a regulated industry. Not only does this violate core free speech concerns of the Founders, it has created a jumble of confused regulations and court cases, as well as a bloated FECA bureaucracy.

And the system has become increasingly unworkable, especially given the high tech revolution sweeping our country. A technology news reporter asked this series of questions:

> If a New York businessman running for Congress puts a link in his corporate Web site, does that run afoul of laws restricting corporate political activities?
>
> What if a George Bush supporter sets up a Web page to promote Mr. Bush and sends out e-mail messages advocating his candidacy. Is that a matter of unfettered free speech or a campaign contribution to be regulated? And can the supporter link his Web page to the official George Bush Web site or is that an illegal coordination of activities?

[Wayne, "Regulators Confront Web Role in Politics," The New York Times, April 21, 2000]. The answers to these questions are not apparent. What is apparent is that it is time to simplify our system of campaign finance law and regulations.

IV. The Answer is Complete Disclosure

I am often reminded of the first rule of the Hippocratic oath: Do no harm. Well, adoption of the current thinking in campaign finance reform such as Shays-Meehan or McCain-Feingold – would do nothing more than exacerbate the problems of restrictions to free speech and the need for government bureaucracy to police campaign related speech. Furthermore, Vice President Gore's recently announced campaign finance plan would further complicate our system of campaign financing. [*See* Seelye, "Gore Proposing Endowment Fund to Pay for Political Campaigns," The New York Times, March 27, 2000].

Gore's proposal calls for the establishment of an endowment fund from donations by individuals, unions, and corporations. A tax deduction of 100 percent would act as an incentive to fund the plan. The interest from the funds would be used to pay for the general election expenses of House and Senate candidates, providing that they eschew money from other sources. Presidential elections might be added later. A board of trustees would manage the fund and set the amount of money to be spent in a particular race. Get that – a board of trustees will manage a public fund. Get that a board of trustees will manage a public fund.

What is scary about this plan is that the determination about how much a campaign is to cost is taken out of the hands of individuals and given over to a government-run ministry of elections. As I stated earlier, this shifts responsibility. All we would be doing is redistributing money now going to candidates of a voter's own choice to independent expenditure campaigns undertaken by special interest groups not accountable to the electorate. Furthermore, I do not see why any group would give to a massive fund that equally funds all candidates, regardless of their respective political positions. [*See* Broder & Dao, "Donors Wary of Gore's Plan on Financing," The New York Times, March 28, 2000].

A far better solution – one that I believe is both workable and is consistent with the dictates of the First Amendment – is a campaign system that requires complete disclosure of funds contributed to candidates or used to finance political speech by independent associations, political parties, unions, or individual in connection with an election.

A system of complete disclosure would bring the disinfectant of sunshine to the system. The Democrats will audit the Republicans and the Republicans will scrutinize the Democrats. And outside public interest groups and the media will police both. The winner will be the public. They will be able to make their own assessments. As I have said before, one man's greedy special interest is another man's organization fighting for truth and justice. Campaign laws that impose excessive limitations and prohibitions deny citizens the right to render their own judgements.

There is no legal or constitutional problem with a disclosure requirement for campaign contributions. In fact, this is the law. The 1974 amendments to FECA require disclosure of the identities of individuals or entities giving over $200. [*See* 2 U.S.C. § 432 (b)(1)-(2)].

The problem is that there are legitimate First Amendment objections to mandated disclosure of independent expenditures and, perhaps, even soft money sources. Compelled disclosure of the identity of speakers, particularly where a specific risk stems from the disclosure, has been held unconstitutional by the Supreme Court. Thus, the Supreme Court in *NAACP v. Alabama* [357 U.S. 449, 458-66 (1958)], invalidated an Alabama law that required the NAACP to reveal the names and addresses of its Alabama members. Similarly in *Talley v. California* [362 U.S. 60, 60-65 (1960)], the Court invalidated a city ordinance banning anonymous leaflets. This prohibition on mandated disclosure has been extended to non-threatening situations in *McIntyre v. Ohio Elections Comm'n,* [514 U.S. 334, 357 (1995)], where the Court upheld the right of anonymity in political pamphleteering.

Although these cases may be distinguished because they are issue advocacy situations and express advocacy related to elections, as I previously explained, the line between the two is often blurred and, in any event, I do not think the distinction makes much sense. It should be abolished. Both should be entitled to the full panoply of First Amendment protections.

This is why for this category and for soft money, I would create an incentive for disclosure by creating a tax deduction. Individual donors to the political action committees of associations would be eligible for tax deductions up to $100 if the association's PAC voluntarily disclosed its expenditures. Of course, these contributions are not now deductible.

With respect to contributions to candidates, parties, and political committees, my proposal, S. 1751, the Citizen's Right to Know Act, would require disclosure within 14 days of contributions and expenditures on a publicly accessible website. These postings would be continuous. The bill would enable any citizen to sit at his or her home computer at any time of day or night and check on the donors to any candidate for federal office. No longer would people have to wait for quarterly reports to be filed to peruse who was supporting whom. No longer would the media have to wait until ***after*** the election for the list of the most recent donors.

I would also urge the committee to consider legislation that increases the current limit on individual contributions to candidates. The current limits have not been adjusted since they were established in 1974. As I have indicated, the failure to raise individual donor limits in a quarter-century has, in my view, only had the perverse effect of raising the relative importance of special interests and independent expenditure campaigns – something the reformers argue they wish to curtail.

My plan is certainly not perfect. Disclosure of independent expenditures would be voluntary. But its merit is that it furthers the cause of getting more information to the voters and is consistent with the underlying purpose of the First Amendment – protection of political speech.

V. Conclusion

I appreciate the task facing the Rules Committee. To the extent that our campaign finance laws require updating, I urge you to find a constitutionally sound manner of doing so. I urge you to resist the notion that anything labeled "reform" must be good. I urge you to proceed with care and caution when acting on legislation that would have the impact of regulating freedom or of placing government at the center of determining what is acceptable election speech and what is not. And, I urge you to report legislation that, above all, keeps the power of American elections where it rightfully belongs – in the hands of the voters themselves.