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Voluntary Campaign Finance Reform

John Copeland Nagle[†]

Traditional campaign finance reformers have a dream. Limits on the amount that individuals, political parties, and other organizations can contribute to candidates. Limits on the amount that candidates can spend on their campaigns. Limits on the amount of “soft money” that can be contributed to political parties and interest groups for spending on political advertisements, party building, and get-out-the-vote efforts. Restrictions on the “issue advocacy” advertisements that address current political controversies—and often critique the positions of individual candidates—but stop just short of endorsing one candidate or another. Television stations that broadcast campaign advertisements free of charge, and that provide more substantive discussions of the issues raised in an election.

That is the dream. *Buckley v. Valeo*¹ is the nightmare. *Buckley* and its progeny have applied the First Amendment’s protection of the freedom of speech to invalidate laws containing many of the provisions desired by traditional campaign finance reformers. That has made *Buckley* “the great white whale” of Supreme Court advocacy,² targeted by countless reform groups, academics, politicians, and newspaper editorials. The Court, however, has shown little inclination to overrule *Buckley* so that the First Amendment may accommodate more campaign finance reform. Nor is any amendment of the First Amendment likely to be forthcoming.

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

2. Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. Rev. 311, 311 (describing *Buckley* as “the great white whale of constitutional law: the more elusive its demise becomes, the greater the intellectual exertion expended in its pursuit”).

And so, traditional campaign finance reformers have turned to Plan B. They have encouraged, induced, and pressured political candidates, political parties, interest groups, and television broadcasters to voluntarily accept the restrictions that *Buckley* forbids enacting into law. Such voluntary campaign finance reform has achieved some notable successes. Most presidential candidates have agreed to limit the amount that they spent on their campaigns in order to receive campaign funding from the federal government. Senator Hillary Rodham Clinton and Rick Lazio persuaded their respective political parties and numerous outside interest groups to not spend soft money on political advertisements during their recent Senate campaign.³ The success of such agreements, combined with the durability of *Buckley*, has even led some observers to express their preference for voluntary efforts at campaign finance reform. Mark Neumann, who lost a race to Wisconsin Senator Russell Feingold in 1998, asserted that the restrictions that he and Feingold agreed to during their campaign “showed that campaign finance reform didn’t require changes in law and was best handled on a voluntary basis.”⁴ But that view is anathema to traditional campaign finance reformers. As Common Cause President Scott Harshberger insisted following the agreement between Clinton and Lazio, “voluntary bans, however laudable, are not the solution to our nation’s campaign finance woes—no more than voluntary bans on toxic dumping would qualify as an acceptable environmental solution.”⁵

That is an image with which I am quite familiar. As I have written elsewhere, it may be useful to consider campaign finance problems as those of pollution, in addition to the more common metaphor of corruption.⁶ That idea leads to a number of lessons for campaign finance that can be gathered from environmental law. Harshberger’s dismissal of voluntary attempts to control environmental pollution occurred as President George W. Bush took office with a record of promoting such

3. See *infra* notes 102-15 and accompanying text.

4. Alan J. Borsuk, *Feingold Asks Neumann for Campaign Reform Plan*, MILWAUKEE J. SENTINEL, Sept. 4, 1998, at 3.

5. Common Cause, *Statement of Common Cause President Scott Harshberger on New York Senate Race Soft Money Deal*, at <http://www.commoncause.org/publications/sept00/0925002.htm> (Sept. 25, 2000).

6. John Copeland Nagle, *Corruption, Pollution, and Politics*, 110 YALE L.J. 293, 316-30 (2000) (reviewing ELIZABETH DREW, *THE CORRUPTION OF AMERICAN POLITICS: WHAT WENT WRONG AND WHY* (1999)).

policies in Texas.⁷ Perhaps more interestingly, the view of campaign spending or contributions as somehow polluting the political environment can be compared to how we treat the cultural pollution resulting from violent entertainment that has elicited so many complaints from such diverse personages as Senator Joseph Lieberman, Tipper Gore, Lynne Cheney, and Pat Buchanan.

How, then, would the standard campaign finance reform proposals be viewed if they were applied to violent entertainment instead? Voluntary campaign finance reform is necessary for the same reason that efforts to combat violent entertainment must be voluntary. The public demands such actions, the First Amendment prohibits most efforts to write such restrictions into the law, so voluntary efforts result. This is why Clinton and Lazio, like other political candidates before them, agreed to restrictions on their campaign spending that were not—and possibly could not be—required by the law. It is also why many states and localities are now offering conditional government funding of political campaigns as a means of persuading candidates to agree to campaign restrictions that the government cannot impose directly.⁸

Voluntary campaign finance reform efforts face two challenges from opposite perspectives. On the one hand, traditional campaign finance reformers embrace voluntary efforts cautiously, if at all, lest the need for reform be seen to be satisfied by what they regard as inadequate measures. Their concern is that voluntary efforts do not work, or do not work as well as legally compelled requirements. On the other hand, opponents of standard campaign finance reform proposals object to the characterization of campaign restrictions attached as conditions to public financing as voluntary. They regard such schemes as coercive, and thus, contrary to the First Amendment.

Any effort to achieve voluntary campaign finance reform raises two questions: Is it really voluntary, and does it really work? In Part I of this Essay, I examine the voluntariness of

7. See, e.g., Jim Yardley, *Governor Bush and the Environment; Bush Approach to Pollution: Preference for Self-Policing*, N.Y. TIMES, Nov. 9, 1999, at A1.

8. I refer to “government funding,” rather than “public funding,” for the reasons explained by Bradley Smith. See Bradley A. Smith, *Some Problems With Taxpayer-Funded Political Campaigns*, 148 U. PA. L. REV. 591, 592 (1999) (noting that “public’ funding . . . is a misnomer” because “[c]ampaigns are funded by the public now” through individual contributions).

“voluntary” campaign finance reform. Agreements like that reached by Clinton and Lazio last year—what I term “purely voluntary agreements”—satisfy most legal tests for voluntariness. By contrast, the voluntariness of spending limits and other campaign restrictions that are imposed as a condition for receiving government funding of a political campaign—what I term “governmentally induced agreements”—is more doubtful. The extant jurisprudence recognizes that *Buckley* prohibits governmental actions that are more coercive than inducing, yet that jurisprudence does not go far enough in identifying coercive governmental spending.

Part II examines the efficacy of voluntary campaign finance reform. Here the tables are turned. Governmentally induced agreements have generally been successful in achieving the results sought by campaign finance reformers. Purely voluntary agreements, by contrast, present serious questions about their efficacy. To date, the voluntary agreements demonstrate a surprising level of success, but the number of such agreements remains very small. The continued success of governmentally induced agreements depends upon adherence to the fine line of providing enough governmental funding to induce candidates to accept the conditions without becoming coercive. The election of the first presidential candidate to reject government funding since it was offered in 1976 demonstrates the fragility of the government funding system. Yet the ability of Clinton and Lazio to defy the pundits and persuade a disparate group of supporters to abide by their preferred restrictions suggests that purely voluntary campaign finance reform holds more promise than commonly expected. In the end, though, achievement of both types of voluntary campaign finance reform depends on whether the People really want it.

I. THE VOLUNTARINESS OF VOLUNTARY CAMPAIGN FINANCE REFORM

Candidates, political parties, interest groups, and other interested individuals and organizations need a reason to embrace campaign spending limits and other campaign restrictions. The most obvious reason is that the law requires it. Traditional campaign finance reform proposals feature spending limits, contribution limits, soft money bans, free television time, and other restrictions on what can be spent and done during a political campaign. The proposed McCain-Feingold bill contained most of these provisions at one time or another dur-

ing the past several years.⁹ Similar provisions appear in the “clean election laws” adopted by a handful of states and local jurisdictions, and many more states are considering such provisions.¹⁰

But the law cannot achieve many of the fondest desires of traditional campaign finance reformers. The First Amendment, as applied in *Buckley* and its progeny, prohibits most legal limits on campaign spending and some legal limits on campaign contributions. The constitutionality of proposals such as bans on soft money, restrictions on issue advocacy advertisements, and requirements that broadcasters offer free television time continue to be contested. The greatest dilemma, though, is that the amount spent on today’s political campaigns is the greatest complaint of traditional campaign finance reformers, and spending is exactly what is so difficult to regulate under the First Amendment.

So campaign finance reform must be voluntary because *Buckley* holds that the First Amendment prohibits the government from regulating many aspects of campaign finance. Why, then, would someone voluntarily agree to do what the law cannot require it to do? One reason is public pressure. A candidate may decline a contribution or refrain from airing a particular advertisement if he or she fears that the money or tactic will result in a loss of voter support. Money offers another impetus for voluntary campaign decisions. If the government promises to provide public financing, then a restriction becomes more attractive. Another reason is the threat of government support for an opponent. Government financing schemes contain such carrots and sticks to induce candidates to renounce certain disfavored campaign funding or tactics in favor of the rules accompanying public funding.

9. See Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. (2001) (citing the most recent version of the McCain-Feingold proposal); SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 662-63 (1998) (describing the 1997 version of the McCain-Feingold proposal).

10. See Nagle, *supra* note 6, at 317 n.123 (citing the state clean election statutes). See generally Public Campaign, *Annotated Model Legislation for Clean Money Campaign Reform*, available at http://www.publiccampaign.org/model_bill/fullbill.txt (Dec. 1997) (illustrating a model clean election law); Public Campaign, *Clean Money Campaign Reform*, available at <http://www.publiccampaign.org/cleanmoney.html> (last visited Mar. 1, 2001) (providing an overview of clean election laws).

Efforts to secure either kind of voluntary campaign finance reform involve several different actors and several different kinds of restrictions. The affected actors include political candidates, political donors, political parties and other interest groups, and television broadcasters. The restrictions can be grouped into three categories. Spending limits operate to limit the total amount that a candidate may spend during an election campaign, or the amount that a candidate may spend on television advertisements or other specified activities, or the total that a political party or other interested group may spend on the campaign. Contribution limits restrict the total amount that an individual or organization can contribute to a candidate or to a party, or they impose more specific restrictions on permissible sources of funds. A third category of restrictions relate to television coverage of a campaign, including requirements that broadcasters provide free time to candidates or that the media increase and improve its own coverage of election campaigns.

The question raised by *Buckley* is which of these agreements is voluntary. The law determines voluntariness differently in various contexts. Waivers of the right to counsel are voluntary if they are intentional and knowing.¹¹ A *Miranda* warning must precede any confession of criminal activity before the courts will treat a confession as voluntary.¹² Prayer can be voluntary for those who are praying, but nonetheless impermissible because it coerces others.¹³

What constitutes a voluntary campaign finance agreement is less certain. Much campaign finance reform is denominated voluntary even as it is included in comprehensive legislative enactments. By contrast, Bradley Smith has observed that “[t]he 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.”¹⁴ Perhaps the best way to determine a writer’s view is simply to look at whether the word

11. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (“A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.”).

12. *Dickerson v. United States*, 120 S. Ct. 2326, 2336 (2000) (stating that *Miranda* warnings, and not a totality-of-the-circumstances test, guide the voluntariness inquiry).

13. *Lee v. Weisman*, 505 U.S. 577, 592-95 (1992) (describing how a graduation prayer coerces those who object to a prayer).

14. Smith, *supra* note 8, at 627.

“voluntary” is surrounded by quotation marks.¹⁵ With this in mind, I will briefly consider the voluntariness of purely voluntary campaign finance reform agreements, then address the more controversial question of the voluntariness of governmentally induced campaign finance agreements.

A. PURELY VOLUNTARY AGREEMENTS

The purely voluntary campaign agreements like the one reached by Hillary Rodham Clinton and Rick Lazio are motivated by media pressure, candidate challenge, or fear of electoral rebuke. Government action, in other words, is not responsible for such agreements. Nonetheless, it should be remembered that the motivations for purely voluntary agreements can be regarded as involuntary in other contexts. For example, in *Lee v. Weisman*, the Court invalidated a prayer offered at a high school graduation ceremony because “the government may no more use social pressure to enforce orthodoxy than it may use more direct means.”¹⁶ Outside of that context, though, public pressure on private individuals does not render any resulting action involuntary.

B. GOVERNMENTALLY INDUCED AGREEMENTS

Governmentally induced campaign agreements involve the government offering a benefit in exchange for the recipient’s acceptance of restrictions. Such a quid pro quo is not absolutely necessary. The government could provide funds to political candidates with no strings attached, thereby avoiding all controversy about the voluntariness of the arrangement.¹⁷ No government has been willing to extend such unconditional generosity, which itself raises the initial hint that any government financing of elections will come at a price.

15. See, e.g., Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 667, 669 (1997) (placing “voluntary” in quotation marks).

16. 505 U.S. at 594.

17. See Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 568 (1999) (observing that “spending limits are not essential to public funding, and many of the benefits of public funding in promoting competitive elections and reducing the role of private wealth could be secured without spending limits”); Smith, *supra* note 8, at 628 n.112 (noting that only the ACLU has advocated government spending without any attached limits on contributions or spending).

Government campaign funding is the most common benefit offered to those who agree to participate in the government's program, but the government has also offered free television time, tax credits, franking privileges, statements in official voter guides, reduced reporting requirements, and notations on the ballot.¹⁸ Candidates accepting the government's offer also benefit from additional funding and increased spending and contribution limits that are triggered if a candidate who chooses not to accept the agreement spends more than a specified amount on his or her campaign.¹⁹ The restrictions imposed as a condition for receiving all of those benefits include spending caps, restrictions on the purpose and timing of campaign

18. See, e.g., *Daggett v. Comm'n on Gov't Ethics & Election Practices*, 205 F.3d 445, 451-52 (1st Cir. 2000) (detailing the money provided from the Maine Clean Election Fund to participating candidates, the waiver of certain reporting requirements, and intangible benefits associated with less fundraising time and fewer questions of access to contributors); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 29-30 (1st Cir. 1993) (describing the government funding and free time on public television provided to Rhode Island gubernatorial candidates); *Wilkinson v. Jones*, 876 F. Supp. 916, 920 (W.D. Ky. 1995) (noting that Kentucky offers candidates two government dollars for every privately raised dollar); *Vannatta v. Keisling*, 931 P.2d 770, 787-88 (Or. 1997) (explaining that Oregon offers campaign contributors a tax credit when they contribute to participating candidates and indicates in the official voters' pamphlet whether a candidate agreed to limit his or her campaign spending). See generally ELIZABETH DANIEL, *SUBSIDIZING POLITICAL CAMPAIGNS: THE VARIETY & VALUES OF PUBLIC FINANCING* 3-5 (2000) (providing an overview of the government benefits offered to candidates).

19. E.g., *Daggett*, 205 F.3d at 451 (explaining that Maine provides participating candidates with an additional dollar of government funds for every dollar spent over the initial disbursement by opposing candidates who are not participating in the program or by independent groups opposing the participating candidate, with a limit of double the initial distribution of government funds); *Gable v. Patton*, 142 F.3d 940, 944 (6th Cir. 1998) (indicating that when a non-participating candidate collects more than \$1.8 million in campaign funds, Kentucky lifts the spending limits imposed on participating candidates, matches any additional funds raised by the participating candidate on a two-for-one basis, and lifts a prohibition on fundraising during the twenty-eight days before the election), *cert. denied*, 525 U.S. 1177 (1999); *Day v. Holahan*, 34 F.3d 1356, 1359 (8th Cir. 1994) (describing a Minnesota provision that increases the campaign spending limits applicable to participating candidates by the amount spent by independent groups opposing their candidacy); *Cal. Prolife Council PAC v. Scully*, 989 F. Supp. 1282, 1292 (E.D. Cal. 1998) (noting that California's Proposition 208 imposed contribution limits on participating candidates that were twice as high as the contribution limits applicable to non-participating candidates), *aff'd*, 164 F.3d 1189 (9th Cir. 1999); *Wilkinson*, 876 F. Supp. at 921 (explaining that the Kentucky contribution limits for participating candidates were \$500 per person per year, whereas non-participating candidates could only accept contributions of \$100 per person per year).

spending, limitations on the source of campaign money, reporting requirements, and restrictions on the content of advertisements.²⁰ The combined package of benefits and burdens—of carrots and sticks—varies from one program to another.

Buckley upheld the government financing system established by Congress for presidential elections.²¹ Under that system, major presidential candidates are entitled to as much as \$70 million of government funds for their campaigns if they agree not to spend more than the government gives them.²² The Court sustained that approach in a footnote, explaining 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.²³

Since *Buckley*, the lower courts have generally upheld the voluntariness of conditional public financing schemes. For example, in *Rosenstiel v. Rodriguez*,²⁴ the Eighth Circuit upheld Minnesota's scheme for financing state elections.²⁵ The Minnesota statute provides government funding and a tax refund in exchange for the acceptance of spending limits that vary from just over \$20,000 for state legislative races to more than \$1.6

20. *E.g.*, *Daggett*, 205 F.3d at 451 (indicating that Maine prohibits participating candidates from raising or spending *any* money from sources other than the state's clean election fund); *Vote Choice, Inc.*, 4 F.3d at 30 (noting that funds provided by Rhode Island may only be used for certain enumerated purposes); *Wilkinson*, 876 F. Supp. at 920 (explaining that "[p]ublicly-funded states agree to limit private contributions they accept in each of the primary and general elections to a total of \$600,000"); *City of Seattle v. Washington*, 668 P.2d 1266, 1268 n.2 (Wash. 1983) (describing a city campaign contract that requires participating candidates to provide no more than \$1,000 of their own money to their campaign, spend no more than \$150,000 in a mayoral election or \$50,000 in races for other city offices, spend no more than 75% of all funds by the date of the primary, use campaign contributions for direct campaign purposes only, return half of unspent money to the city, comply with reporting requirements, and abide by the legal decisions of the elections administrator). See generally DANIEL, *supra* note 18, at 9-11 (summarizing the restrictions imposed on candidates).

21. *Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976) (per curiam).

22. See *infra* text accompanying note 75 (describing the presidential financing scheme).

23. *Buckley*, 424 U.S. at 57 n.65 (per curiam).

24. 101 F.3d 1544 (8th Cir. 1996).

25. *Id.* at 1557.

million for gubernatorial races.²⁶ If, however, a candidate who does not accept government funding spends or accepts contributions beyond a set amount, then the spending cap is lifted.²⁷ That system was challenged by two state legislative candidates as contrary to the free speech guarantees of the First Amendment. The state's case for the voluntariness of the campaign funding agreement was complicated by the existence of a rather striking statement in the legislative history. One of the state senate's leading proponents of the government funding scheme explained that it was to operate not as a carrot, nor even as a stick, but rather as "a real heavy club" to encourage participation.²⁸ Nonetheless, a majority of the court upheld that system as voluntary, emphasizing the "relative balance between the benefits provided to publicly financed candidates and the restrictions the candidates must accept."²⁹ Alternately, the majority determined that the system would be constitutional even if it was involuntary because it satisfied strict scrutiny.³⁰ Judge Lay dissented because he concluded that the scheme chilled protected speech.³¹

Other courts have followed the general approach outlined in *Rosenstiel*. The First Circuit has been especially insistent on the constitutionality of similar government induced campaign finance agreements. In *Vote Choice, Inc. v. DiStefano*,³² the court agreed with the constitutional importance of the voluntariness inquiry, advising that "there is a point at which regulatory incentives stray beyond the pale, creating disparities so

26. *Id.* at 1546.

27. *Id.*

28. *Id.* at 1551 (quoting *Weber v. Heaney*, 995 F.2d 872, 877 n.7 (8th Cir. 1993) (quoting *Minnesota Congressional Campaign Reform Act, 1990: Hearing on S. 577 Before the Subcomm. on Elections and Ethics*, 76th Leg. (Mar. 1, 1989) (statement of Senator Marty))).

29. *Id.* at 1550-51 (concluding that the scheme "achieves the rough proportionality necessary to entice, but not coerce, candidate participation"). The *Rosenstiel* court finessed the inconvenient "real heavy club" statement as the mere musings of one legislator on a different bill, and it dismissed the *Weber* court's own troubled account of that statement as dicta. *Id.* at 1551-52.

30. *Id.* at 1553.

31. *Id.* at 1561 (Lay, J., dissenting) (concluding that "Minnesota's current campaign financing scheme, including the spending limits waiver and the retention of the public subsidy, as well as the contribution refund, directly chills the exercise of a privately financed candidate's constitutional right to unfettered political speech" (footnote omitted)).

32. 4 F.3d 26 (1st Cir. 1993).

profound that they become impermissibly coercive.”³³ The court then upheld the challenged Rhode Island scheme because it achieved “a rough proportionality” between the benefits and burdens offered to candidates, even though the scheme “is not in exact balance.”³⁴ Seven years later, the court upheld the Maine Clean Election Act in *Daggett v. Commission on Governmental Ethics and Election Practices*.³⁵ There the court asked a somewhat different question: “[W]hether the elements of the system, considered as a whole, create a situation where it is so beneficial to join up and so detrimental to eschew public funding that it creates coercion and renders a candidate’s choice to pursue public funding essentially involuntary.”³⁶ The court’s answer, though, was the same: the system was voluntary.³⁷ Most courts have agreed that various governmentally induced campaign finance agreements are voluntary and thus constitutional, though a handful of cases (including two Eighth Circuit decisions prior to *Rosenstiel*) come out the other way.³⁸

The cases are not sufficiently attentive to the voluntariness problem inherent in the conditions imposed upon government funding of political campaigns. The lack of voluntariness can be illustrated by the contrasting perspectives of the government providing the money and the candidate accepting the restrictions. From the government’s perspective, the focus of a

33. *Id.* at 38.

34. *Id.* at 39. The court also expressed its suspicion “that very few campaign financing schemes ever achieve perfect equipoise.” *Id.*

35. 205 F.3d 445, 472 (1st Cir. 2000).

36. *Id.* at 466.

37. *Id.* at 472.

38. *Compare* *Gable v. Patton*, 142 F.3d 940, 944 (6th Cir. 1998) (sustaining a Kentucky government financing scheme except for a provision banning candidates from contributing to their own campaigns in the final weeks of an election), *cert. denied*, 525 U.S. 1177 (1999); *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995) (denying a preliminary injunction against another Kentucky government campaign funding statute); *Republican Nat’l Comm. v. FEC*, 487 F. Supp. 280, 289 (S.D.N.Y. 1980) (upholding the federal Presidential Campaign Funding Act), *aff’d*, 445 U.S. 955 (1980); *and Vannatta v. Keisling*, 931 P.2d 770, 773-74 (Or. 1997) (sustaining much of an Oregon government financing initiative), *with* *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 482 (1985) (striking down the federal Presidential Campaign Funding Act’s limitation on independent expenditures); *Shrink Mo. Gov’t PAC v. Maupin*, 71 F.3d 1422, 1423 (8th Cir. 1995) (invalidating the expenditure ceilings contained in a Missouri government funding initiative); *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994) (striking down a Minnesota statute tying government funding to restrictions on expenditures by outside groups); *and* *Cal. Pro-life Council PAC v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998) (invalidating variable contribution limits contained in a California initiative).

voluntary campaign finance program should be upon the funding, not the conditions. That is how conditional government spending operates in other contexts. Consider federal highway funding. Congress provides billions of dollars annually to states who desire financial assistance in building highways and other roads. Congress has attached a number of conditions to the state receipt of that money. States that accept such money must establish a drinking age of twenty-one years old, a provision that the Court upheld in *South Dakota v. Dole*.³⁹ Additionally, states are required to establish a 0.8% blood-alcohol level standard test for driving under the influence of alcohol.⁴⁰ These restrictions demonstrate that Congress pursues other policy goals besides the construction of more roads via federal spending. But the primary purpose of the federal spending remains the construction of roads, not federal regulation of state drinking laws. In other words, Congress is highly unlikely to spend billions of dollars just so it has the authority to impose restrictions on alcohol consumption. Or, to take another recent example, there is little reason to believe that the federal government spends billions of dollars on education each year simply to persuade states to waive their Eleventh Amendment immunity from suits to comply with federal obligations respecting disabled children.⁴¹

The opposite is true of most government campaign finance programs. Reformers explicitly defend government spending as a means of imposing restrictions that the government could not impose directly because of the First Amendment.⁴² Most notably, the First Amendment prohibits most government campaign expenditure limitations imposed on political candidates (and other parties), yet spending caps are a primary condition on the provision of government money to candidates. The purpose of such programs is not to provide funds to encourage speech, but

39. 483 U.S. 203, 212 (1987).

40. Pub. L. No. 106-346, 106th Cong. (2000); see also Remarks on the Establishment of a National Drunk Driving Standard, 36 WEEKLY COMP. PRES. DOCS. 2578 (2000).

41. See *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc) (holding that Arkansas waived sovereign immunity when it accepted federal funding).

42. BURT NEUBORNE, A SURVEY OF EXISTING EFFORTS TO REFORM THE CAMPAIGN FINANCE SYSTEM 11 (1997) (explaining that “[m]any reformers believe that the greatest value of a subsidy approach is that it permits the government to place strings on the candidates who accept the subsidies”).

rather to discourage speech through the attached conditions.⁴³ The fact that *Buckley* endorsed government spending programs that encourage speech thus becomes inapposite.

There are, however, instances where the government financing is the principal motivation, rather than any attached conditions. The provision of government funding frees candidates from the time otherwise spent on fundraising and allays concerns about the influence purchased by campaign contributors. These concerns are legitimate, and they can support a state's decision to finance political campaigns. But they are less persuasive in justifying spending and contribution restrictions, especially variable limits that allow more contributions to and spending by participating candidates than non-participating candidates. For example, the need to save candidates from time spent fundraising can be achieved by a "floors without ceilings" approach which assures that all candidates enjoy a sufficient amount of funding while allowing candidates to raise and spend more money if they choose to do so.⁴⁴ The ability to guarantee a fixed minimum amount of funding responds to the studies indicating that a candidate needs a threshold amount of funding to be competitive, rather than an equal or greater amount of money than one's opponent.⁴⁵ The other purpose of government induced campaign finance reform—to reduce or eliminate the perceived corrupting influence of contributors—can be addressed much more directly. *Buckley* permits most contribution limits, so the vehicle of public funding is wholly unnecessary to impose such limits. In both instances, the ability to achieve the desired purposes via means besides conditions attached to government financing indicates that the expenditure or contribution restrictions are not essential to the government's scheme.

43. See *Constitution and Campaign Reform: Hearing Before the Senate Rules and Admin. Comm.*, 106th Cong. (2000), available at <http://rules.senate.gov/hearings/32200bev.htm> (Mar. 22, 2000) (statement of Lillian R. BeVier, Professor, University of Virginia School of Law) (distinguishing between the purpose of the government spending upheld in *Buckley* and proposed conditional government campaign funding that will "reduce substantially the quantity of campaign speech. Indeed, that must be their purpose . . .").

44. Briffault, *supra* note 17, at 578 (describing the "floors without ceilings" approach); Joel L. Fleishman & Pope McCorkle, *Level-Up Rather Than Level-Down: Towards a New Theory of Campaign Finance Reform*, 1 J.L. & POL. 211, 275-94 (1984) (detailing the virtues of a level-up approach).

45. See Briffault, *supra* note 17, at 569 (suggesting that possession of a critical mass of funds is more important than actual funding parity).

The ubiquity of conditional government campaign funding, as opposed to funding without such conditions, is best explained by the equality argument for campaign finance reform. The equalization of the resources available to competing candidates is a central theme in much of the literature advocating reform.⁴⁶ That argument is also scattered through the cases sustaining various restrictions attached to government campaign funding.⁴⁷ Thus government funding alone is not sufficient if candidates who decline the government's money remain capable of outspending candidates accepting the money. That is why government spending schemes contain triggers, cap gaps, and other provisions aimed at candidates who do not accept government funding. It is also why the First Circuit expressed incredulity at a non-participating candidate's objections to such provisions, ridiculing the contrary argument as "a claim of a First Amendment right to outraise and outspend an opponent."⁴⁸

The inclusion of such restrictions applicable to candidates who do not accept government funding may be constitutional, but it is hard to characterize the resulting decisions as voluntary. The Spending Power faces few limits. The Supreme Court has not invalidated an exercise of the Spending Power since the New Deal.⁴⁹ The Eighth Circuit recently sustained a condition attached to a state's receipt of \$250 million of federal education funds as constitutional, over the dissent of four judges who viewed that inducement as working an effectively involuntary decision.⁵⁰ On the other hand, the Supreme Court

46. See generally Symposium, *Money, Politics, and Equality*, 77 TEX. L. REV. 1603 (1999) (analyzing the equalization of funding argument).

47. See, e.g., *Daggett v. Comm'n on Gov't Ethics & Election Practices*, 205 F.3d 445, 470 (1st Cir. 2000) (acknowledging "the state's goal of distributing roughly proportionate funding, albeit with a limit, to publicly funded candidates"); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1554 (8th Cir. 1996) (holding that an expenditure cap gap satisfies strict scrutiny because it "removes the disincentive a candidate may have to participate in the public financing system because of the candidate's fear of being grossly outspent by a well-financed, privately funded opponent").

48. *Daggett*, 205 F.3d at 464.

49. See *United States v. Butler*, 297 U.S. 1, 77 (1936) (holding that the Agricultural Adjustment Act was not a legitimate exercise of the Spending Power but rather an attempted exercise of congressional regulatory power unauthorized by the Commerce Clause); *South Dakota v. Dole*, 483 U.S. 203, 216 (1987) (O'Connor, J., dissenting) (describing *Butler* as "the last case in which this Court struck down an Act of Congress as beyond the authority granted by the Spending Clause").

50. *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc)

has invalidated conditions on government subsidies to legal services, public broadcasting, and university publications as contrary to the First Amendment.⁵¹ Still, the prevailing rule appears to be that Congress is afforded wide latitude in imposing conditions on the acceptance of federal funds, even though the resulting choices would not be treated as voluntary in other contexts.

Yet none of the decided cases, and none of the conditional funding programs, involve an instance in which the restrictions are regarded as more important than the funds themselves. That distinction could threaten the voluntariness of some of the restrictions attached to government campaign funding. The concern is further illustrated by imagining the other kinds of restrictions that a state could decide to attach to government campaign funding. Suppose that the people of a state wanted to adopt an alternative measure designed to reduce the impact of campaign contributors on members of Congress: term limits. The imposition of term limits could address the perception of the illicit influence of campaign contributors by freeing legislators and other office holders from the temptation to remain in the good graces of contributors to future campaigns. The Court has held that a state is constitutionally barred from imposing term limits on members of Congress,⁵² just like the Court has invalidated most efforts to regulate campaign expenditures. A sufficiently broad view of the Spending Power would allow a state to impose such term limits, though, if they were included as a condition upon government funding of a congressional campaign. Such a law would be likely to survive under the existing Spending Clause jurisprudence, but the purpose of the

(holding 6-4 that the Spending Power authorized Congress to require a state to waive its Eleventh Amendment immunity in return for receiving any federal education funds). The dissent insisted,

[T]he proportion of federal funds for education in Arkansas here placed at risk by the federal scheme (100%), the amount of those funds (some \$250,000,000), and the difficulty of making up for the loss of those funds if the State elects not to waive its Eleventh Amendment immunity with respect to Rehabilitation Act claims all lead to the conclusion that pressure has turned into compulsion and that the waiver given by the State is therefore unenforceable.

Id. at 1083 (Bowman, J., dissenting).

51. *Legal Servs. Corp. v. Velasquez*, 121 S. Ct. 1043 (2001); *Sullivan, supra* note 2, at 317 (citing *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 831-32 (1995), and *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984)).

52. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995).

government's spending program might yet prove to affect the voluntariness inquiry.

The candidate's perspective reveals another voluntariness problem. Richard Briffault has explained that government campaign finance programs are voluntary if "each candidate has the opportunity to decide whether, on balance, public funding without limits would help or hinder her campaign and may opt in or out accordingly."⁵³ A candidate, in other words, should decide whether the carrot offered by the government is sufficiently attractive to accept restrictions that accompany the funding. But many government programs affirmatively penalize a candidate for not accepting the government's offer. If a candidate declines to participate in the government's program and spends more than a specified amount of private funds during the campaign, then the government provides additional funds to an opposing participating candidate and removes the spending caps that otherwise apply to that candidate. Some laws even create "cap gaps," which impose more stringent contribution or expenditure limits on candidates who do not agree to the government's conditions.⁵⁴

These penalties render such schemes involuntary. As Judge Lay explained in dissent in *Rosenstiel v. Rodriguez*,⁵⁵

When a candidate voluntarily abandons all the benefits of public subsidies (including the contribution refund) to exercise her constitutional right, it is a voluntary choice. When such a choice is made, however, Minnesota's campaign finance scheme adds disincentives which make a privately financed candidate worse off than she otherwise would be. Her publicly financed opponent, who has chosen to receive a public subsidy, can now keep the public subsidy, obtain the benefit of the contribution refund for all past *and* future contributions, *and* spend without limit.⁵⁶

It is as if Congress limits the amount of a state's own funds that the state can spend on highways if it refuses federal highway funds. The Spending Power argument that supports conditions on non-participating political candidates could also en-

53. Briffault, *supra* note 17, at 578.

54. *See supra* note 19.

55. 101 F.3d 1544 (8th Cir. 1996).

56. *Id.* at 1561 (Lay, J., dissenting) (citations omitted); *see also* Joseph E. Finley, Note, *The Pitfalls of Contingent Public Financing in Congressional Campaign Spending Reform*, 44 EMORY L.J. 735, 751 (1995) (explaining that "[u]nlike the traditional conditional benefits program, where the nonparticipating candidate is free to spend without risk once participation is declined, contingent public financing provisions . . . continue to burden the nonparticipating candidate even after his choice has been made").

able Congress to force a state to choose between federally-funded highways—with their attached conditions—or underfunded, pothole-laden highways.

The First Circuit rejected the distinction between conditions that penalize non-participants and conditions that benefit participants in *Vote Choice, Inc. v. Distefano*.⁵⁷ Judge Selya asserted that “the distinction . . . between denying the carrot and striking with the stick is, in many contexts, more semantic than substantive.”⁵⁸ He then observed that the challengers to the Rhode Island law had not produced any evidence that the state’s cap gap—which authorized participating candidates to accept contributions of \$2,000 per donor, while non-participating candidates were limited to \$1,000 per donor—was designed to penalize non-participating candidates.⁵⁹ Such evidence is readily available in other cases, though, where a state affirmatively reduced a preexisting contribution limit when it instituted a government campaign financing system.⁶⁰ The creation of the higher contribution limit also contradicts the state’s assertion that a lower limit is necessary to vindicate the state’s interest in opposing the perceived corrupting influence of campaign contributions.⁶¹

The analogy between campaign finance as a problem of pollution and violent entertainment as cultural pollution raises further questions. Could Congress adopt a scheme of public financing for “clean” movies that offers substantial funding to producers who agree not to produce violent entertainment? Could Congress provide additional public financing to producers of “clean” movies whenever another producer spends more than a specified amount on a violent movie? Could Congress subsidize the broadcast of public service advertisements encouraging people to go see particular “clean” movies? Such steps would be comparable to the ways in which the govern-

57. 4 F.3d 26 (1st Cir. 1993).

58. *Id.* at 38.

59. *Id.* at 39.

60. See *Daggett v. Comm’n on Gov’t Ethics & Election Practices*, 205 F.3d 445, 452 (1st Cir. 2000) (noting that “[r]educed limits on contributions by individuals and groups to political candidates were enacted simultaneously with the [Maine Clean Election] Act by the voter referendum and effectively apply only to non-participating candidates”).

61. See *Cal. Prolife Council PAC v. Scully*, 989 F. Supp. 1282, 1296 (E.D. Cal. 1998) (invalidating a lower contribution limit imposed on non-participating candidates for this reason).

ment helps fund political campaigns, yet any governmental involvement in the production of entertainment is controversial.

The outcry in response to the pro-bono match program of the National Youth Anti-Drug Media Campaign illustrates the typical reaction to conditional government spending involving the entertainment industry. In 1998, Congress authorized the spending of nearly \$200 million annually for a national media campaign aimed at discouraging illegal drug use.⁶² Part of those funds were to be used for “entertainment industry collaborations to fashion antidrug messages” in movies, television, music, and other media.⁶³ But those funds were conditioned by the statutory requirement that an equivalent amount of non-federal funds or in-kind contributions be provided by the recipients of the federal money.⁶⁴ Hence the entertainment industry was obligated to provide in-kind contributions in order to receive the spending on federal anti-drug public service announcements. The resulting pro-bono program counted programming with an anti-drug message as satisfying the statutory requirement.⁶⁵ But a January 2000 report in the online journal *Salon* characterized the arrangement as a government effort to control the content of popular television programming.⁶⁶ As *Salon* put it, “Under the sway of the office of President Clinton’s drug czar, Gen. Barry R. McCaffrey, some of America’s most popular shows—including ‘ER,’ ‘Beverly Hills 90210,’ ‘Chicago Hope,’ ‘The Drew Carey Show’ and ‘7th Heaven’—have filled their episodes with anti-drug pitches to cash in on a complex advertising subsidy.”⁶⁷ The report promptly elicited outraged charges that the government was

62. 21 U.S.C. § 1801(a) (Supp. IV 1995-1999) (directing the Office of National Drug Control Policy to “conduct a national media campaign . . . for the purpose of reducing and preventing drug abuse among young people in the United States”); 21 U.S.C. § 1804 (Supp. IV 1995-1999) (authorizing the spending of \$195 million for each fiscal year from 1999 to 2002).

63. 21 U.S.C. § 1802(a)(1)(H) (Supp. IV 1995-1999).

64. 21 U.S.C. § 1802(c) (Supp. IV 1995-1999).

65. See generally OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL YOUTH MEDIA ANTI-DRUG MEDIA CAMPAIGN: PRO-BONO MATCH PROGRAM AND GUIDELINES 3 (2000), available at <http://www.mediacampaign.org/about/guidelines/probono.pdf> (last visited Mar. 1, 2001) (summarizing the pro-bono program).

66. Daniel Forbes, *Prime-Time Propaganda*, SALON (Jan. 13, 2000), at <http://www.salon.com/news/feature/2000/01/13/drugs/index.html>.

67. *Id.* The article credited the pro-bono program with providing as much as \$25 million to television broadcasters in the past year and a half. *Id.*

violating the First Amendment,⁶⁸ and congressional testimony from General McCaffrey denying that the government was interfering with the creative process or requiring changes in program content.⁶⁹ The reminder that the entertainment industry could voluntarily decide whether or not to accept the government's money in the first place, so common when government campaign funding occurs, was nowhere to be seen.

II. THE EFFICACY OF VOLUNTARY CAMPAIGN FINANCE REFORM

Voluntary efforts to control air and water pollution are sometimes viewed as an alternative to governmental regulation, with the assumption that whichever technique works best should prevail. But voluntary efforts to control violent entertainment and other cultural pollution are seen as necessary because the Constitution does not permit anything else. That would seem to be the predicament with respect to campaign finance reform, too, with traditional reformers painting voluntary campaign finance reform as necessary only until that day when an enlightened Court overrules *Buckley* and allows legally enforceable measures. Nonetheless, there are some suggestions that the efficacy of voluntary efforts could determine the propriety of governmental regulation. Justice Breyer has indicated that the appropriate constitutional standard might depend upon whether it allows whatever campaign finance reform is necessary.⁷⁰ This perspective echoes Senator Lieber-

68. See, e.g., Elizabeth Jensen & Eric Lichtblau, *White House Defends Anti-Drug, TV Tie*, L.A. TIMES, Jan. 15, 2000, at A15 (quoting Ira Glasser, executive director of the ACLU, describing the program as "unconstitutional"); Howard Kurtz & Sharon Waxman, *White House Cut Anti-Drug Deal With TV*, WASH. POST, Jan. 14, 2000, at A10 (quoting Andrew Jay Schwartzman, president of the Media Access Project, as saying that "[t]he idea of the government attempting to influence public opinion covertly is reprehensible beyond words").

69. *Evaluating the National Youth Anti-Drug Media Campaign: Hearing Before the Subcomm. on Criminal Justice, Drug Policy and Human Resources of the House Gov't Reform Comm.*, 106th Cong. (2000), available at <http://www.house.gov/reform/cj/hearings/00.07.11/McCaffrey.htm> (July 11, 2000) (statement of Barry R. McCaffrey) ("Recent media reports has [sic] raised two questions: Is the federal government *interfering* with the creative process? *We are not*. Is the financial leverage of the media campaign being used to *require changes* in program content? *The answer is no.*").

70. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 405 (2000) (Breyer, J., concurring) (suggesting that "the Constitution would require us to reconsider *Buckley*" if that decision "denies the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance").

man's admonition that cultural polluters would be given six months to clean up their act before the government would step in to regulate violent entertainment.⁷¹ These suggestions notwithstanding, one of the principal questions about voluntary campaign finance reform is whether it works.

A. GOVERNMENTALLY INDUCED CAMPAIGN FINANCE REFORM

Any government campaign financing scheme confronts a fundamental tension between providing enough incentives to get candidates to join but not so many incentives that it becomes coercive. If all candidates participate, then the program looks involuntary. If no candidates participate, the program is useless. The middle-ground is difficult to find.

This is illustrated by the federal program for funding presidential elections. Presidential candidates are eligible for matching government funds during the primary elections.⁷² Only those contributions of \$250 or less are matched, though, and funding is discontinued if a candidate receives fewer than ten percent of the vote in two consecutive primaries.⁷³ During the general election, the Republican and Democratic candidates can receive nearly \$70 million in government funds—provided that they agree not to spend more than that amount.⁷⁴ Candidates of minor parties that received at least five percent of the vote in the most recent presidential election are eligible for a lesser amount of federal funds.⁷⁵

Most presidential candidates have accepted the government's offer since it was first extended in 1976. But the growing number of presidential candidates who have declined gov-

71. See *The Marketing of Violence to Children: Hearing Before the Senate Commerce Comm.*, 106th Cong. (2000), available at <http://www.senate.gov/~commerce/hearings/0913lie.pdf> (Sept. 13, 2000) (testimony of Senator Joe Lieberman) (stating that "Vice President Gore and I believe that vigorous self-regulation is the best solution to this problem, and we hope these entertainment industries step up to the plate in the next six months. . . . But if these industries fail to act, and if they market adult-rated products to kids in violation of their own standards, then they must be held accountable" through the regulation of false and deceptive advertising).

72. See generally ANTHONY CORRADO, *PAYING FOR PRESIDENTS: PUBLIC FINANCING IN NATIONAL ELECTIONS* (1993) (describing the presidential financing scheme); NEUBORNE, *supra* note 42, at 12 (same); Federal Election Committee, *Public Funding of Presidential Elections* (1996), available at <http://www.fec.gov/pages/pubfund.htm> (same).

73. See sources cited *supra* note 72.

74. See sources cited *supra* note 72.

75. See sources cited *supra* note 72.

ernment funding includes Rose Perot in 1992, Steve Forbes in 1996, and George W. Bush and Steve Forbes (again) in 2000.⁷⁶ Experience with state government financing schemes displays a similar ambivalence. Between 1993 and 1996, two-thirds of the gubernatorial candidates in states with government funding schemes accepted the money; one-third declined.⁷⁷ The failure of prominent—and successful—candidates to participate in the presidential program has prompted Richard Briffault to ask, “Can it be said that public funding works if, notwithstanding the availability of public funding, a growing number of major candidates prefer to rely on private funds?”⁷⁸

There are several reasons why candidates decline government funds. Professor Briffault observes that “[p]residential public funding is in trouble because public funds are provided at inadequate levels.”⁷⁹ Challengers are especially leery of agreeing to campaign restrictions when their incumbent opponents already enjoy much greater recognition among the voters.⁸⁰ The failure to regulate spending by outside groups prompted several candidates for San Francisco’s Board of Supervisors to decline government money because of the conditions attached to it.⁸¹ Concerns about the timeliness of gov-

76. Briffault, *supra* note 17, at 584.

77. MICHAEL J. MALBIN & THOMAS L. GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* 62 (1998).

78. Briffault, *supra* note 17, at 586.

79. *Id.*; accord Smith, *supra* note 8, at 596 (explaining that “[w]hen subsidies are set too low, many candidates will be reluctant to join voluntary government financing schemes, figuring that they can raise more money and run a more effective campaign on private contributions”).

80. See *Campaign Finance Revision: Soft Money: Hearing Before the Senate Rules and Admin. Comm.*, 105th Cong., (May 14, 1997) (testimony of Lamar Alexander) (asserting that government financing “creates an unlevel playing field by favoring incumbents”); Smith, *supra* note 8, at 608 (explaining why “low spending tends to penalize challengers”). But see Patrick D. Donnay & Graham P. Ramsden, *Public Financing of Legislative Elections: Lessons from Minnesota*, 20 LEGIS. STUD. Q. 351, 362-63 (1995) (empirical study rejecting the claim that government funding helped incumbents). Additionally, Professor Smith has observed that “spending caps will likely be set too low” in government funding schemes because “incumbents, who want to be reelected, will set the levels of the caps.” Smith, *supra* note 8, at 606. This has been true historically, but the increasing number of ballot initiatives that establish government funding schemes offers some solace for challengers.

81. See Edward Epstein, *Spending Cap Lifted in Second S.F. Race: Supervisor Candidate Won’t Abide by Limits*, S.F. CHRON., Aug. 26, 2000, at A15.

ernment funds has also led some candidates to turn to alternative sources of private funding.⁸²

The lesson is that government funding schemes can be made to work, but it remains questionable whether the public, legislators, and reformers are willing to take the steps that would make such programs more successful. The two ways of encouraging participation in government campaign funding schemes are obvious: provide more money or impose fewer conditions. It is much more questionable, though, whether taxpayers will provide more money or whether reformers will agree to fewer conditions. And even if that occurred, the initial tension between a program that is appealing to candidates but not so appealing to become involuntary looms as a threat to any plan. There is a balance that is both attractive to candidates and voluntary, but that balance is quite delicate, and it will not be easily achieved.

B. PURELY VOLUNTARY CAMPAIGN FINANCE REFORM

Candidates, political parties, and other interested groups routinely agree not to engage in certain activities that the law permits. No candidate wants to be accused of receiving funds from an unpopular source. The ad hoc decisions refusing such funds reflect the power that voluntary decisions can have in responding to campaign finance concerns. But those concerns demand more than isolated actions affecting only a few of the countless possible campaigning decisions available to candidates and others. Thus any claim that voluntary measures can substitute for legal regulation demands a more systematic approach. The kinds of voluntary actions that would be necessary are illustrated by three recent campaigns for the United States Senate, a White House advisory committee's recommendation directed at television coverage of elections, and a comprehensive effort to secure better election campaigns in Minnesota. The lessons of these efforts show both the promise and the limitations of purely voluntary campaign finance reform agreements.

82. See Patrick McGreevy & Sue Fox, *Hayden Takes Heat for Turning Down City's Match*, L.A. TIMES, Jan. 18, 2001, at B1 (reporting that Tom Hayden rejected city funds in his upcoming bid for the Los Angeles city council because "[i]t was a nightmare to get matching funds turned around in time to pay for [his] mail in 1997").

1. 1996 Massachusetts Campaign Between John Kerry and William Weld

The 1996 senate race in Massachusetts pitted incumbent Democratic Senator John Kerry against Republican Governor William Weld. In August 1996, the two candidates entered into an agreement to limit spending in their race.⁸³ The agreement capped total campaign spending after July 1 at \$6.9 million.⁸⁴ Of that total, media spending could only constitute \$5 million and the candidates could only use \$500,000 of their personal funds.⁸⁵ Spending by outside groups such as unions, businesses, and other advocacy groups counted against the total cap.⁸⁶ Additionally, the political parties were limited to spending \$600,000 on behalf of their candidates, and \$2 million in soft money spending in the race.⁸⁷

The agreement broke down in the closing days of the campaign because of a disagreement about the application of the \$5 million cap on media spending.⁸⁸ Kerry insisted that the media spending cap included the standard fifteen percent buyer's fee, so that the amount spent on advertisements themselves was only \$4.25 million.⁸⁹ Weld, who had negotiated buyer's fees at half the standard rate, disagreed that the cap included the standard fee.⁹⁰ Kerry treated the agreement as breached when Weld continued to spend money pursuant to Weld's understanding of the agreement.⁹¹ Weld then brought an unsuccessful suit in federal court to prevent Kerry from spending the

83. Alliance for Better Campaigns, *Case Study: The 1996 Massachusetts Senate Race*, available at <http://www.bettercampaigns.org/documents/mass.htm> (last visited Mar. 3, 2001).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* Another version of that study has been cited as DOUGLAS G. RIVLIN, DEBATES AND THE CANDIDATE AGREEMENT IN THE 1996 SENATE RACE IN MASSACHUSETTS: A REPORT OF THE ANNENBERG PUBLIC POLICY CENTER OF THE UNIVERSITY OF PENNSYLVANIA (1998) (unpublished manuscript, on file with the North Carolina Law Review). Michael L. Berry, Note, *Arkansas Educational Television Commission v. Forbes: Independent Candidate Access to Public Television Debates*, 77 N.C. L. REV. 1223, 1253 n.252 (1999).

88. Meg Vaillancourt, *Kerry-Weld Spending Cap Might Shatter Ceiling*, BOSTON GLOBE, Oct. 18, 1996, at B4.

89. Frank Phillips, *Deal to Limit Spending Breaks Down*, BOSTON GLOBE, Oct. 24, 1996, at A1.

90. *Id.*

91. Meg Vaillancourt, *Foe Ignores Spending Cap, Says Kerry Aide*, BOSTON GLOBE, Oct. 17, 1996, at B6.

proceeds of a \$400,000 loan that Kerry obtained using his home as collateral, noting that Kerry had already spent the \$500,000 of his own money permitted by their agreement.⁹² The candidates blamed each other for breaking the agreement.⁹³ The part of the agreement that included money spent by outside groups was more effective.⁹⁴ After all of the campaigning, Kerry defeated Weld on election day to retain his seat.⁹⁵

2. 1998 Wisconsin Campaign Between Russell Feingold and Mark Neumann

Two years later, incumbent Democratic Senator Russell Feingold (a champion of campaign finance reform) and Republican Representative Mark Neumann entered into a broader voluntary agreement in their Senate race in Wisconsin.⁹⁶ The candidates agreed to campaign promises, including a one-dollar per-voter spending cap, a limit of ten percent of their funds raised from political action committees, a requirement that at least seventy-five percent of their contributions come from within Wisconsin, a prohibition on using more than \$2000 of their personal funds on the campaign, the reporting of all contributions, and an agreement not to raise soft money.⁹⁷ Neumann allowed his party to spend soft money on his behalf; Feingold did not, much to the consternation of Democratic Party officials.⁹⁸ Both candidates were aided by television advertisements paid for by outside groups advocating positions on the environment, abortion and other issues.⁹⁹ Neumann also spent somewhat more than Feingold during 1998 because

92. Phillips, *supra* note 89, at A1.

93. *Id.*

94. See Alliance for Better Campaigns, *supra* note 83 (reporting that issue advertising was marginalized).

95. MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS 2000*, at 774 (1999) (describing the outcome of the race between Kerry and Weld).

96. Daniel Bice, *Limits May Be Set in Senate Campaign*, MILWAUKEE J. SENTINEL, Feb. 8, 1998, at 1.

97. Feingold Senate Comm. 98, *Ten Campaign Finance Promises from Russ Feingold to the People of Wisconsin* (letter detailing the promises that had been posted on the campaign's web site) (on file with the author); Bice, *supra* note 96, at 1; Alan J. Borsuk & Richard P. Jones, *Senate Rivals Offer Restraint in Campaign Spending*, MILWAUKEE J. SENTINEL, Jan. 27, 1998, at 1.

98. Alan J. Borsuk, *Soft Money Floods TV in Feingold-Neumann Race*, MILWAUKEE J. SENTINEL, Oct. 16, 1998, at 1.

99. *Id.*

Neumann matched what Feingold had spent campaigning in the past two years.¹⁰⁰ The candidates abided by their agreement without incident, and Wisconsin voters reelected Feingold in a close race in November.¹⁰¹

3. 2000 New York Campaign Between Hillary Rodham Clinton and Rick Lazio

Most recently, and most famously, First Lady Hillary Rodham Clinton and Representative Rick Lazio agreed to several spending restrictions in their Senate campaign.¹⁰² The agreement was only reached after Lazio strode across the stage during a debate and demanded that Clinton sign the agreement that he was holding, which itself occurred months after Clinton had proposed a voluntary agreement with her anticipated Republican opponent Mayor Rudolph Giuliani.¹⁰³ After much editorial pressure and negotiation, Clinton and Lazio agreed that they would not spend soft money on campaign advertisements.¹⁰⁴ They also agreed to request twenty-six named outside groups not to use soft money for advertisements for or against their preferred candidates.¹⁰⁵ Lazio had proposed that any disputes about the agreement be arbitrated by campaign finance leaders Senators McCain and Feingold, but Clinton insisted that the public was capable of determining compliance

100. See Alan J. Borsuk, *Neumann Outspent Feingold: Challenger and Incumbent Switched Expected Roles in Campaign for U.S. Senate*, MILWAUKEE J. SENTINEL, Dec. 8, 1998, at 3.

101. *Id.*

102. Dean E. Murphy, *Candidates Back 'Soft Money' Ban in New York Race*, N.Y. TIMES, Sept. 24, 2000, § 1, at 1.

103. Jim Drinkard & Kathy Kiely, *Revolts Threaten Clinton-Lazio Cease-Fire on Ads*, USA TODAY, Sept. 26, 2000, at 6A.

104. *Id.*

105. The groups supporting Clinton were the AFL-CIO, American Federation of Teachers, Association of Trial Lawyers of America, Democratic National Committee, Democratic Senatorial Campaign Committee, Democratic Congressional Campaign Committee, Liberal Party of New York, National Abortion and Reproductive Rights Action League, National Education Association, New York State Democratic Party, Planned Parenthood, Sierra Club, and Working Families Party. See Drinkard & Kiely, *supra* note 103, at 6A. The groups supporting Lazio were The American Conservative Union, AmeriPAC, Citizens for a Sound Economy, Coalition for a Better America, The Conservative Campaign Fund, The Conservative Leadership PAC, Conservatives for Effective Leadership, ConserveAmerica, National Conservative Campaign Fund, The Republican Jewish Coalition, The Republican National Committee, The Republican Leadership Council, RuffPAC, and Save Our Senate. See *id.*

with the agreement.¹⁰⁶ The candidates agreed that the remedy for any violations of the agreement was to permit a proportionate response by the aggrieved candidate.¹⁰⁷

Initially, the targeted interest groups reacted negatively. The Emergency Committee to Stop Hillary Rodham Clinton protested that “[n]o campaign or party committee can direct us”;¹⁰⁸ abortion rights activists were unwilling to “participate in a campaign of silence.”¹⁰⁹ But soon all of the groups acquiesced and agreed to abide by the agreement between Clinton and Lazio.¹¹⁰ The candidates engaged in a brief dispute about the Republican Party’s placing of an advertisement supporting Lazio,¹¹¹ but otherwise they adhered to their agreement throughout the campaign. A study conducted by the Brennan Center for Justice “found that the agreement . . . was, in fact, obeyed by both the Clinton and Lazio camps.”¹¹² Critics of the agreement, however, described it as a “big-money shell game” that allowed the candidates to spend their campaign funds on television advertising while their political parties and other groups used soft money to pay consultants and other election expenses.¹¹³ They also complained that the candidates, especially Clinton, spent lots of soft money just before reaching the

106. Murphy, *supra* note 102, § 1, at 1.

107. *Id.*

108. Drinkard & Kiely, *supra* note 105, at 6A (quoting Morton Blackwell, Chairman of the Committee).

109. Juliet Eilperin, *Clinton, Lazio Agree to Ban ‘Soft Money’ Ads*, WASH. POST, Sept. 25, 2000, at A5 (quoting Kate Michelman, President, National Abortion and Reproductive Rights Action League); accord William Goldschlag & Joel Siegel, *Soft Money Deal in Doubt: Anti-Hil Group Derides Ban, Vows to Run Ads Anyway*, N.Y. DAILY NEWS, Sept. 26, 2000, at 5 (quoting Kelli Conlin, Executive Director, NARAL’s New York branch, who described her organization as “very conflicted” because “[i]ssues of protecting reproductive freedom and choice are equally [as] important as campaign finance reform”). For similar objections voiced by other listed groups, see Jay Gallagher, *Reservations on the Lazio-Clinton Soft-Money Pact*, GANNETT NEWS SERV., Sept. 27, 2000, at ARC.

110. *Brennan Center: Sen.-Elect Clinton Benefited From Huge Soft Money Edge in NY Senate Campaign*, U.S. NEWSWIRE, Dec. 14, 2000, available at 2000 WL 26852150.

111. Adam Nagourney & Edward Wong, *Lazio Denies Ad Violated Campaign-Financing Deal*, N.Y. TIMES, Oct. 8, 2000, § 1, at 40.

112. *Brennan Center*, *supra* note 110; see also *Hard Gains From Soft Money*, N.Y. DAILY NEWS, Dec. 27, 2000, at 34 (concluding that “[e]ven in the final, desperate hours of the campaign—with both sides exchanging wild charges—the candidates refrained from breaking their pledge”).

113. Robert Hardt, Jr., *Clinton and Lazio Skirted Soft-\$ Ban Here*, N.Y. POST, Jan. 4, 2001, at 9 (quoting a “Democrat, who asked not to be named”).

agreement.¹¹⁴ In any event, Clinton won the election handily.¹¹⁵

4. The 1998 White House Advisory Committee's Call for Five Minutes of Daily Television Election Coverage

Candidates are not the only actors capable of addressing common concerns about political campaigns. The cost and quality of campaign advertisements has prompted numerous campaign proposals addressed at television broadcasters. Most recently, the 1998 report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters contained three recommendations aimed at "improving the quality of political discourse."¹¹⁶ Two of those recommendations anticipated legislative or regulatory action.¹¹⁷ The third recommendation, though, stated that "[t]he television broadcasting industry should voluntarily provide 5 minutes each night for candidate-centered discourse in the thirty days before an election."¹¹⁸

That recommendation was seized upon by the Alliance for Better Campaigns, which established "GreedyTV.org" in September 2000 in an effort to shame television broadcasters into improving their election coverage.¹¹⁹ NBC, CBS, and several

114. *E.g.*, Bob Port, *She Spent Plenty Before Soft-Money Ban*, N.Y. DAILY NEWS, Nov. 1, 2000, at 4.

115. *The Senate; Results by State*, NAT'L J., Nov. 11, 2000, at 3620.

116. Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Recommendation 6: Improving the Quality of Political Discourse* (1998), available at <http://www.benton.org/PIAC/rec6/html> (last visited Mar. 3, 2001) [hereinafter *Recommendation 6*]. Several committee members, including Professor Cass Sunstein, argued against the effectiveness of voluntary standards, recommending instead that the Federal Communications Commission should require television broadcasters to provide free time to political candidates. See Advisory Council on Public Interest Obligations of Digital Television Broadcasters, *Statement of Charles Benton et al.* (1998), available at <http://www.benton.org/PIAC/piltr.html> (last visited Mar. 3, 2001).

117. *Recommendation 6, supra* note 116 (asking broadcasters to "do their part to reform the role of television in campaigns" if Congress enacts campaign finance reform, and recommending a legal prohibition on the refusal of broadcasters to sell air time to state and local political candidates).

118. *Id.* (referring to Recommendation 6b).

119. See Alliance for Better Campaigns, News Release, *National Grassroots Coalition Launches GREEDYTV.ORG Campaign* (Sept. 14, 2000), available at <http://www.bettercampaigns.org/documents/rele91400.htm>. See generally Alliance for Better Campaigns, <http://greedytv.org> (last visited Mar. 3, 2001) (providing information on, "How TV Profiteers On Democracy—And What You Can Do About It!").

other broadcasters agreed to provide the requested five minutes per night of candidate-centered election coverage.¹²⁰ Their commitment, however, only applied to the stations that the networks owned themselves, not to the network's affiliates throughout the country.¹²¹ ABC refused to make even that commitment, thus prompting an exchange of nasty letters between the network and the Alliance for Better Campaigns.¹²² The upshot was that only ninety-three of the nation's 1300 television stations agreed to the five minute recommendation.¹²³ And the stations that promised to provide the requested five minutes often failed to do so. An Annenberg Public Policy Center study conducted after the election found that "[n]one of the networks provided the recommended five minutes a night of candidate-centered discourse during the 30 days before the primary and general elections."¹²⁴

5. The 1996 Minnesota Compact

The most comprehensive effort to promote voluntary campaign finance reform efforts occurred in Minnesota in 1996. The Minnesota Compact asked candidates, the media, and the public to abide by several specific principles guiding their campaign activities.¹²⁵ The compact contained provisions for clean campaign advertisements, frequent debates, media coverage emphasizing substantive issues instead of portraying the campaign as a "horse race," and the active participation of interested citizens.¹²⁶ The compact was agreed to by 283 candidates for elective offices throughout the state, though neither incumbent Senator Paul Wellstone nor his unsuccessful challenger

120. See Alliance for Better Campaigns, News Release, *NBC Stations Join CBS in Nightly Commitment to Candidate Discourse* (Oct. 4, 2000), available at <http://www.bettercampaigns.org/documents/rele10400.htm>.

121. See *id.* (listing NBC's "13 owned-and-operated" stations).

122. See Alliance for Better Campaigns, <http://greedytv.org> (last visited Mar. 3, 2001) (providing a link to the letters).

123. Alliance for Better Campaigns, News Release, *TV Broadcasters Have Ignored Voluntary Standard to Provide Viewers with Candidate Issue Discussion*, Taylor Says at FCC Hearing (Oct. 16, 2000), available at <http://www.bettercampaigns.org/documents/rele101600.htm>.

124. Erika Falk & Sean Aday, Annenberg Public Policy Center, *Are Voluntary Standards Working? Candidate Discourse on Network Evening News Programs* (Dec. 20, 2000), available at http://www.appcpenn.org/Candidate_Discourse/2000-general-report-final.htm.

125. JOSEPH N. CAPPELLA & MARK BREWIN, *THE MINNESOTA COMPACT AND THE ELECTION OF 1996*, at 3 (1998).

126. *Id.* at 27-29 (reproducing the provisions of the Compact).

Rudy Boschwitz signed onto the compact.¹²⁷ A subsequent Annenberg Center evaluation of the compact concluded that the candidates who agreed to the Compact generally adhered to its terms.¹²⁸ The study also complimented the state's media both for its substantive coverage and for its critical appraisal of the campaign advertisements aired by the candidates.¹²⁹

Of course, these are not the only five attempts at voluntary campaign finance reform. Other candidates, interest groups, and media outlets have reached a variety of similar agreements.¹³⁰ But the obvious fact remains that such agreements are the exception, not the rule. For each of the Senate races in the past three election years in which the candidates and their supporters entered into a voluntary agreement, there were more than thirty other Senate races in which no agreement was reached.

Remember, though, that a candidate or television station need not wait for a competitor to restrict spending, provide free air time, or engage in other desired reforms. Senator Feingold showed in 1998 that a candidate can win even if he refuses his party's soft money while his opponent accepts such funds. Likewise, in 1997 the Democratic National Committee decided not to accept soft money contributions of more than \$100,000 or to accept any contributions from permanent resident aliens, though both restrictions lasted less than two years.¹³¹ But the specter of such "unilateral disarmament" in the fundraising wars has scared off other candidates and groups from repeating Feingold's feat.¹³² Even Senator Wellstone, the sponsor of a

127. *Id.* at 6.

128. *Id.* at 9 (indicating that there were only five or six violations among the 283 signatories of the compact).

129. *Id.* at 17-23 (noting specific instances of state media coverage).

130. See, e.g., NATIONAL CIVIL LEAGUE, THE NEW POLITICS PROGRAM: RECOGNIZING AND PROMOTING INNOVATIVE POLITICAL REFORM (2001), available at <http://www.ncl.org/NCL/nppsum.htm> (Mar. 3, 2001) (describing a voluntary reform program instituted for municipal elections in Chapel Hill); Todd C. Frankel, *Hunt, Sprouse Pledge Truce After 'One Day of Crazy': Negative Ads by Both Candidates To Be Taken Off TV*, CHARLESTON DAILY MAIL, Nov. 2, 2000, at 7A (describing an agreement between two candidates for the county commission not to spend more than \$135,000).

131. See *DNC Lifts Ban on Noncitizens' Donations*, FACTS ON FILE, WORLD NEWS DIGEST, Mar. 26, 1998, at 190.

132. See, e.g., Epstein, *supra* note 81, at A15 (reporting that a candidate for a city office in San Francisco "doesn't believe in unilateral disarmament"); *Gore Offers to Abandon "Soft Money," U.P.I.*, Sept. 27, 2000 (quoting Vice President Gore's spokesman Chris Lehane's insistence that "[w]e're not going

clean elections bill to replace private campaign funding with government financing,¹³³ had declined to heed calls to voluntarily forego soft money during his 1996 race.¹³⁴

The experience with purely voluntary agreements to date suggests several lessons for the efficacy of that approach to the many concerns about political campaigns and campaign finance. First, candidates will not enter into agreements that they regard as a ploy advanced by desperate challengers. Indiana Senator Richard Lugar never bothered to respond to his opponent's proposed voluntary fundraising agreement in 2000,¹³⁵ presumably because Lugar correctly realized that his reelection was in little doubt. Nor did wealthy New Jersey Senate candidate Jon Corzine accept his Republican challenger Bob Franks's call for a voluntary spending limit of \$1.5 million on election day alone.¹³⁶ Second, candidates must believe that they retain adequate funding before they will enter into an agreement restricting the fundraising or spending. Third, any agreements must be precise. The breakdown of the Kerry-Weld agreement illustrates the consequences of imprecise agreements. Fourth, and perhaps most importantly, the consequences of breaking an agreement—or of failing to enter into an agreement in the first place—must be sufficiently compelling to persuade candidates, interest groups, television broadcasters, and others to abide campaign restrictions even when the law does not require it. Those are the circumstances in which purely voluntary agreements can offer a helpful contribution to the ongoing debate about campaign finance.

CONCLUSION

Optimism abounds among traditional campaign finance reformers at the beginning of the 107th Congress. The results of

to disarm unilaterally”).

133. Clean Money, Clean Elections Act, S. 982, 106th Cong. (1999).

134. See Craig Gilbert, *Feingold-Neumann Race Looks Like a Campaign Classic*, MILWAUKEE J. SENTINEL, Oct. 25, 1998, at 1 (reporting that Wellstone “rejected the Feingold path of ‘unilateral disarmament’ in his own re-election bid, shaking the money tree for more than \$7 million despite his longtime reformist stance”).

135. See Campaign Press Release, *Johnson Campaign Surpasses Million-Dollar Mark* (July 10, 2000), available at <http://www.davidjohnson2000.com/page42.html> (noting that Senator Lugar never replied to Democratic candidate David Johnson's challenge to limit campaign spending to \$2.5 million).

136. See Maria Newman & Robert Hanley, *Election Day Spending Cap at Issue in Tight Senate Race*, N.Y. TIMES, Nov. 1, 2000, at B6.

the 2000 Senate election provide hope to supporters of the McCain-Feingold bill—now the McCain-Feingold-Cochran bill—and states continue to push ahead of the federal government in adopting sweeping reform measures. The history of the past thirty years teaches, however, that the enactment of campaign finance reforms, and the approval of any such legislation by the courts, should not be casually assumed to be inevitable. The history also shows that every law has yielded unintended consequences that keep reformers always a step behind in their battle against monetary influence and other campaign tactics. In short, do not expect the law to make this problem go away.

Voluntary campaign finance reform offers a useful alternative. It does not need to survive the many obstacles to the enactment of legislation. It is more flexible than legal regulations because voluntary agreements can be adapted to the specific circumstances of any particular campaign. It treats changed campaigns as an immediate possibility rather than a distant goal. The obstacles to relying upon voluntary agreements instead of the threat of legal sanction should not be minimized, but the obstacles to the enactment and enforcement of campaign finance laws must be remembered as well. Fear of electoral retribution might even be a stronger incentive for candidate compliance than the threat of enforcement of campaign finance laws by the FEC.

But voluntary reform, like campaign finance legislation, will only occur if people want it. After Clinton and Lazio reached their agreement, Senator McCain proclaimed that the agreement “should be followed by every federal campaign in America.”¹³⁷ None did. And the New York Times editorialized that “[o]f course if voters did not care, Mr. Lazio and Mrs. Clinton would not have done this deal.”¹³⁸ Perhaps so, although Clinton’s own remark that “there are not many New York voters who believe [soft money] is an important issue” raises questions about the reasons why the candidates struck their agreement.¹³⁹ But if the existence of the agreement demonstrates that voters in New York do in fact care enough about campaign finance reform to demand such action, what does that say

137. *Senate Report New York: Vegas Odds on the Ban Lasting*, AMERICAN POLITICAL NETWORK, THE HOTLINE, Sept. 26, 2000, at 2.

138. *A Soft-Money Treaty*, N.Y. TIMES, Sept. 26, 2000, at A22.

139. *Lazio, Hillary Evaluate Fund-Raising Deal* (ABC news broadcast, Sept., 25, 2000) (quoting Clinton’s remarks at a press conference).

about the voters in other states where no such agreements materialized? Likewise, the lack of public support for governmentally induced campaign finance agreements is demonstrated by the fact that only one in eight taxpayers commit to paying three dollars annually for the presidential campaign fund.¹⁴⁰ Such facts remind us that voluntary campaign finance reform, like campaign finance legislation, will occur only when the People really want it.

140. See John M. Broder & James Dao, *Donors Wary of Gore's Plan on Financing*, N.Y. TIMES, Mar. 28, 2000, at A1; see also NEUBORNE, *supra* note 42, at 14 (lamenting that only eight percent of Wisconsin residents participate in the state's campaign financing scheme).