

1992

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Recommended Citation

Lisa Babish Forbes, *Federal Election Regulation and the States: An Analysis of the Minnesota and New Hampshire Attempts to Regulate Congressional Elections*, 42 Case W. Rsr. L. Rev. 509 (1992)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol42/iss2/5>

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FEDERAL ELECTION REGULATION AND THE STATES: AN ANALYSIS OF THE MINNESOTA AND NEW HAMPSHIRE ATTEMPTS TO REGULATE CONGRESSIONAL ELECTIONS

Despite recent scandals tainting the reputation of Congress and the men and women who serve there, efforts to reform the process by which federal legislators attain their positions remain mired by political and ideological differences. In the face of inaction by the federal government, two states, Minnesota and New Hampshire, have taken the lead and enacted laws to entice congressional candidates to adhere to voluntary spending limits. The author considers whether or not the Federal Election Campaign Act leaves room for states to legislate such campaign programs and proposes an amendment to the federal law explicitly authorizing them to do so. The author also evaluates the Minnesota and New Hampshire plans as models for state action and concludes they are constitutionally infirm.

I. INTRODUCTION

On January 29, 1991, President Bush addressed the nation reporting on the State of the Union. Amid rousing rhetoric supporting the brave men and women fighting in the Persian Gulf, Bush took the opportunity to call for the abolition of political action committees ("PACs").¹ By including in the State of the Union address a proposal for reform of campaign finance regulation, the President signaled the importance this issue has achieved in the

1. Address Before a Joint Session of the Congress on the State of the Union, 27 WEEKLY COMP. PRES. DOC. 90, 93 (Jan. 29, 1991). For a discussion of PACs, see generally Edwin M. Epstein, *The PAC Phenomenon: An Overview*, 22 ARIZ. L. REV. 355, 358 (1980) (defining political action committee as a "separate segregated fund" established and administered by a group, such as a corporation, for political purposes).

minds of Americans and, consequently, on the agendas of politicians.

The 1990 Keating Five scandal has fueled the fire of the public's concern over the spiraling costs of political campaigns² and the manner in which members of Congress satisfy those expenses. Charles Keating, then owner of the Lincoln Savings and Loan Association, gave exorbitant sums of money to five U.S. Senators, allegedly in exchange for their influence and assistance in curbing federal investigation of his thrifts.³ Since 1907, campaign regulations have been designed to protect against precisely this type of corruption.⁴ The Watergate scandal⁵ preceded enactment of the Federal Election Campaign Act Amendments of 1974,⁶ the last

2. See generally Chuck Alston, *The Maze of Spending Limits: An Election Field Guide*, 48 CONG. Q. 1621 (1990). In 1972, general election campaigns for U.S. Senate seats cost a total of \$26 million. In 1988, candidates who made it to the general election spent \$185 million. When measured in constant 1972 dollars, the 1988 campaigns cost \$65 million, an increase of 127 percent from the 1972 figure. *Id.*

3. See Chuck Alston, *Common Cause Seeks Inquiry Concerning Five Senators*, 47 CONG. Q. 2683 (1989). The five Senators who were involved with Keating are Alan Cranston (D-CA), Dennis DeConcini (D-AZ), John Glenn (D-OH), Donald Riegle (D-MI) and John McCain (R-AZ). Cranston solicited Keating for \$850,000 in contributions made during the 1988 election cycle. Keating also raised \$39,000 for Cranston in 1986 and contributed \$85,000 for a get-out-the-vote drive in California. DeConcini received \$48,100 raised by Keating for the 1988 election, but DeConcini returned the funds once investigation of Keating was undertaken. A PAC associated with Glenn received \$200,000 through Keating. In addition, Keating raised \$34,000 for Glenn's own campaign committee. McCain collected a total of \$112,000 for his campaigns in 1982, 1984 and 1986. Keating also paid \$13,433 for airfare for McCain's family trips to the Bahamas between 1984 and 1986; McCain claims to have repaid Keating the value of that airfare. Finally, Riegle returned \$76,100 Keating raised for his 1988 election campaign. *Id.*

Of the five, only Senator Cranston was found by the Senate Ethics Committee to have engaged in "an impermissible pattern of conduct." Richard L. Berke, *Ethics Unit Singles Out Cranston, Chides 4 Others in S. & L. Inquiry*, N.Y. TIMES, Feb. 28, 1991, at A1. The Committee recommended that the full Senate reprimand him. The other four were rebuked by the Committee for behavior that "reflected poor judgment at the very least," but received no further discipline. *Id.*

4. See, e.g., Act of Jan. 26, 1907, ch. 420, 34 Stat. 864, *repealed by* Federal Election Campaign Act Amendments of 1976, § 201(a), 90 Stat. 475, 496 (prohibiting corporations from making money contributions in connection with political elections). See *infra* text accompanying notes 59-71.

5. The Watergate Scandal erupted in June 1972 with the arrest of five men caught inside the Democratic National Committee's headquarters in the Watergate office building in Washington, D.C. The scandal involved a series of illegal activities and cover-up by the Nixon Administration and led ultimately to Nixon's resignation from the presidency. For a full account written by the presiding district court judge, see JOHN R. SIRICA, *TO SET THE RECORD STRAIGHT: THE BREAK-IN, THE TAPES, THE CONSPIRATORS, THE PARDON* (1979).

6. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended 2 U.S.C. §§ 431-

major overhaul of campaign regulations. This pattern raised hopes that the Keating Five scandal would induce another round of reform.

In spite of public and Presidential support in favor of campaign finance reform and the urgency produced by the Keating Five scandal, it remains unlikely that a comprehensive package of new federal campaign regulations will be enacted in the foreseeable future.⁷ Both partisan differences⁸ and intra-party disputes stand in the way of effective reform.⁹ Differing approaches to reform divide the House and Senate from each other and from the President as well.¹⁰

While the President and Members of Congress continue to wring their hands over campaign finance reform, two states have pioneered in the field of congressional campaign regulation. In New Hampshire, current law provides for the waiver of a \$5000 filing fee if congressional candidates agree to abide by campaign spending limits; the law allows \$400,000 for each election (primary and general) for United States Senator and \$200,000 for House candidates for each election.¹¹ In addition, any Senate candidate

455 (1988)).

7. Chuck Alston, *Finding an Acceptable Deal Nearly Impossible Mission*, 48 CONG. Q. 2581 (1990). The Senate passed S. 137 on August 1, 1990 and the House passed H.R. 5400 on August 3, 1990. However, the two packages were dramatically different, and, as predicted, no compromise was reached before Congress adjourned in November. In addition to the problems of reconciling the House and Senate versions, President Bush has vowed to veto any legislation that includes spending limits and public financing. *Id.*

See also Chuck Alston, *A Wide Gulf Still Separates Parties on Election Laws*, 48 CONG. Q. 517 (1990) (reporting that the odds of passing broad campaign finance legislation in 1990 were only 50-50 notwithstanding the outcry produced by the Keating Five scandal).

8. Generally speaking, the GOP prefers enhancing the role of parties and individual contributors while the Democrats advocate using public financing to hold candidates to spending limits. Chuck Alston, *Party Fights on Election Laws Still Permit Compromises*, 47 CONG. Q., 2439, 2440 (1989).

9. On Sept. 21, 1989, the House Republican conference adopted a compromise proposal, the product of the GOP's "Old Bulls and Young Turks," stating that "the older faction had advocated the financial protection of the status quo while the latter had sought to overthrow a system they consider the bulwark of the House's Democratic majority." *Id.* at 2439.

10. For a discussion of the different proposals, see Richard E. Cohen, *PAC Paranoia: Congress Faces Campaign Spending*, L.A. TIMES, Aug. 12, 1990, at M4; Chuck Alston, *Showdown on Spending Limits Moves Toward White House*, 48 CONG. Q. 2478 (1990) (discussing steps taken within the House and Senate to revise campaign finance laws, goals of the legislation, and tensions caused by the differing goals).

11. N.H. REV. STAT. ANN. § 655:19 (Supp. 1991) establishes a \$5000 filing fee for candidates for United States Senator and Representative to Congress. Section 655:19-b

who does not accept the voluntary expenditure limits must collect 2000 notarized signatures of voters.¹² Any House candidate who chooses not to follow the spending limits must collect 1000 signatures.¹³

Minnesota offers public financing in exchange for candidates' decisions to abide by spending limits voluntarily.¹⁴ The Federal Election Commission ("FEC") has issued an advisory opinion in which it concludes that the Federal Election Campaign Act ("FECA") preempts the Minnesota statute.¹⁵ The FEC advisory opinion is not final or binding and Minnesota could attempt to enforce its public financing scheme notwithstanding the FEC opinion.¹⁶ On December 18, 1991, Congressmen Vin Weber and James Ramstad and Senator David Durenberger filed a complaint in the United States District Court for the District of Minnesota

provides for a waiver or refund of the filing fee if the candidate voluntarily accepts the expenditure limit set forth in § 664:5-b. To qualify for the waiver or refund, the candidate must file an affidavit at the time he files his declaration of candidacy. The affidavit, pursuant to § 664:5-a, must state that the candidate acknowledges the expenditure limitations and voluntarily agrees to limit her expenditures and those made on her behalf by committees, the party and immediate family members.

12. *Id.* § 655:20(II).

13. *Id.* § 655:22. The procedure for collecting the signatures is set out in § 655:21. Each petition must state the name, address and party affiliation of the signer and be notarized. In addition, the signer must declare that he or she is not signing any other candidate's petition. *Id.*

14. Ethics in Government Act, Congressional Campaign Reform, MINN. STAT. ANN. §§ 10A.40 - 10A.51 (West Supp. 1992).

15. States Limits on Campaign Expenditures, FEC Adv. Op. 1991-22 (Oct. 7, 1991).

16. United States Defense Comm. v. FEC, 861 F.2d 765, 772 (2d Cir. 1988). In *U.S. Defense Comm.*, the Second Circuit was asked to consider the validity of an FEC advisory opinion, but declined to do so on the grounds that the case was not ripe for court adjudication. *Id.* at 766. The court proceeded to explain the applicable administrative procedures and the binding effect of FEC advisory opinions. *Id.* at 770-71.

Advisory opinions are binding only in the sense that they may be relied on affirmatively by any person involved in the specific transaction or activity discussed in the opinion or in any materially indistinguishable transaction or activity. Any person who in good faith acts in accordance with an advisory opinion shall not be subject to any sanction, notwithstanding any other provision of law. 2 U.S.C. § 437f(c). *On the other hand, to the extent that the advisory opinion does not affirmatively approve a proposed transaction or activity, it is binding on no one — not the Commission, the requesting party, or third parties.*

Id. at 771 (emphasis added).

The court also explained that an advisory opinion is not reviewable on its merits. *Id.* at 772. Compare National Conservative Political Action Comm. v. FEC, 626 F.2d 953, 959 (D.C. Cir. 1980) (holding advisory opinion "without force and effect" due to FEC's failure to comply with procedures for issuing such opinions).

challenging the Minnesota statute. The complaint alleges that the statute violates the First Amendment and that it is preempted by FECA and, thus, violates the Supremacy Clause.¹⁷ As of this time, no decision has been rendered in the case.

Under the Minnesota law, if a candidate agrees to expenditure limits, the state will provide funding of up to twenty-five percent of the limit for congressional candidates for either the House or Senate.¹⁸ The limits are set at \$3,400,000 for Senate candidates and \$425,000 for House of Representatives candidates.¹⁹ If all of the candidates in a particular race agree to the spending limits, no candidate would receive the public financing, but all would be bound by the spending limits.²⁰ If one candidate agrees to the limit, but his opponent (who is a member of a major party) does not, the candidate who agrees to the limit would receive public financing and be freed from the limit.²¹

These state regulations raise at least two significant questions. First, may states impose any regulations, voluntary or mandatory, on candidates for federal office or are they precluded from doing so by the Federal Election Campaign Act? While the FEC has concluded that the Minnesota Statute is, in fact, preempted by FECA,²² the preemption question has not been resolved by the courts. The FEC's interpretation will be accorded great weight by courts,²³ but an alternative reading of FECA preemption provision is also plausible.²⁴ Second, if states' efforts to regulate campaigns for federal office are determined not to be preempted, are the New Hampshire and Minnesota acts constitutional?²⁵

17. Complaint, Civil Action 4-19-1009 (Dec. 18, 1991), at 8-9. In addition, the complaint charges that the statute violates the Privileges and Immunities Clause.

18. MINN. STAT. ANN. § 10A.43.

19. *Id.* § 10A.44.

20. *Id.*

21. *Id.*

22. FEC Adv. Op. 1991-22.

23. See *infra* note 87 and accompanying text.

24. See *infra* text accompanying notes 96-98.

25. 2 U.S.C. §§ 431-55.

An additional preemption question arises with respect to states making payments to candidates in excess of the contribution limitations set forth in FECA. See Memorandum from Alan C. Williams to Minnesota State Senator William Luther (June 8, 1981) (on file with *Case Western Reserve Law Review*) (discussing state public financing and expenditure limits for congressional candidates). Under FECA, a person is limited to contributing \$1000 per candidate during any given election. 2 U.S.C. § 441a(a)(1)(A). Total contributions from an individual in any one year are not to exceed \$25,000. *Id.* § 441a(a)(3). A multicandidate political committee may contribute up to \$5000 per candidate, with aggre-

While this note advocates a narrow reading of FECA's preemptive authority, it acknowledges that the likely outcome of a preemption challenge in the courts would find the states preempted.²⁶ This note proposes that FECA be amended to state clearly that the states are permitted to regulate federal elections as long as the state regulations do not directly conflict with or frustrate the purposes of FECA. However, even if the preemption provision is clarified to permit states to act, the laws formulated by Minnesota and New Hampshire would not likely survive constitutional challenge. The Minnesota scheme creates a series of unconstitutional conditions.²⁷ The New Hampshire statute also can be viewed as establishing unconstitutional conditions in addition to imposing obstacles to ballot access.²⁸

gate expenditures not to exceed \$15,000 in a given year. *Id.* § 441a(a)(2)(A)-(B). A multicandidate political committee is:

a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

Id. § 441a(a)(4).

In Minnesota, the state may be obligated under the statute to pay a candidate as much as \$850,000, representing twenty-five percent of the voluntarily accepted \$3.4 million spending limit allotted to a Senate candidate. MINN. STAT. ANN. § 10A.44. The New Hampshire statute calls for the state to waive a \$5,000 filing fee, in effect giving a contribution in that amount. N.H. REV. STAT. ANN. § 655:19. A state is clearly not a multicandidate political committee. Thus, the question becomes whether a state qualifies as a "person" for the purpose of contribution limitations. FECA defines "person" as "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government." 2 U.S.C. § 431(11). A "State" is defined separately as "a State of the United States, District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States," implying that a state is not a person. *Id.* § 431(12). It therefore appears that FECA has not addressed contributions, or payments to candidates, made by the states.

Arguably, state public financing serves the same purpose of protecting against quid pro quo corruption as the contribution limitations. Contribution limitations were held constitutional as a valid means to accomplish the compelling state interest of controlling corruption. *Buckley v. Valeo*, 424 U.S. 1, 29 (1975). State public financing might be upheld on the same grounds. However, it is unclear whether a court would find that states may donate sums in excess of the contribution limits to federal candidates even though the definitions seem to indicate that a state is not a person and, thus, not covered by the contribution limitation.

26. See *infra* text accompanying notes 153-56.

27. See *infra* text accompanying notes 188-235.

28. See *infra* text accompanying notes 236-75.

II. ARE THE STATES' EFFORTS TO REGULATE FEDERAL CAMPAIGNS PREEMPTED BY FECA?

The recent history of federal campaign regulation began with passage of the Federal Election Campaign Act in 1972.²⁹ In 1974, Congress made extensive changes to the 1972 measure.³⁰ The 1974 amendments to FECA limited campaign contributions by individuals and PACs, imposed expenditure limits on individuals, groups and candidates, required political committees to keep detailed records of contributions and expenditures and established the Federal Election Commission.³¹ In addition, FECA Amendments included an express preemption provision which may have rendered congressional regulation of federal elections exclusive.³²

Section 453 of the FECA Amendments declared that "[t]he provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office."³³ On its face, the provision seems clear and expansive. The legislative history, FEC interpretation and judicial analysis of section 453 also suggest that preemption is virtually absolute. However, some arguments in favor of state activity are available.

A. BACKGROUND

The preemption doctrine is based on Article VI, Clause 2 of the U.S. Constitution, the Supremacy Clause.³⁴ Although there is

29. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-55). See *infra* notes 67-69 and accompanying text.

30. Pub. L. No. 93-443, 88 Stat. 1263.

31. *Id.* In *Buckley v. Valeo*, 424 U.S. 1, 7 (1976), the Supreme Court found a number of the provisions of the 1974 amendments unconstitutional. In *Buckley*, the Court upheld limitations on contributions from individuals and PACs, public disclosure requirements, and the public financing mechanism for Presidential elections. *Id.* at 35-36, 84, and 108-109. However, expenditure limitations and the method of appointing Federal Elections Commissioners were struck down. *Id.* at 140. In particular, the Court found that the expenditure ceilings were not sufficiently tailored to satisfy a compelling state interest justifying the infringement on free speech and association. *Id.* at 23.

32. See Pub. L. No. 93-443 § 301, 88 Stat. at 1289 (current version at 2 U.S.C. § 453).

33. *Id.*

34. Art. VI, cl. 2 provides "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

a general presumption against preemption,³⁵ federal law may preempt state statutes in three ways. First, a statute or administrative regulation³⁶ may expressly state that federal law preempts state law.³⁷ Second, when express language is not present, federal law may supersede state law if the "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."³⁸ This type of preemption is often referred to as "occupying the field." Federal laws that occupy the field preempt state law even if the federal regulations do not conflict with a specific state regulation.³⁹ Finally, state law is preempted if it "actually conflicts . . . [with federal law]; such a conflict arises when compliance with both federal and state regulations is a physical impossibility,"⁴⁰ or when the state statute frustrates the purpose of the federal law.⁴¹ In addition to Congress'

35. See Ronald D. Rotunda, *Sheathing the Sword of Federal Preemption*, 5 CONST. COMMENTARY 311, 311 (1988) (quoting, Executive Order No. 12,612, §§ 4(a), (c), 52 Fed. Reg. 41,685 (1987)). President Reagan issued an Executive Order directing agencies to construe federal statutes as preempting states statutes

only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of state law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

Id. See also Gary V. Weeks, *Preemption: Breathing New Life into an Old Giant*, 11 U. ARK. LITTLE ROCK L.J. 669, 674 (1988) (stating that preemption of state law by federal statute or regulation is not preferred absent persuasive reasons for it (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981))).

But see Deborah A. Ballam, *Federalism's Re-birth: Illusion or Reality?*, 68 OR. L. REV. 925, 930 (1989) (discussing the theory that application of the preemption doctrine swings like a pendulum back and forth from favor to disfavor over time).

36. See *Fidelity Fed. Sav. & Loan Ass'n. v. De la Cuesta*, 458 U.S. 141 (1982). Federal regulations have the same preemptive effect as federal statutes. Where Congress has directed an agency to exercise its discretion, the agency's judgments are subject to judicial review only to the extent that it exceeded its statutory authority or acted arbitrarily. *Id.* at 153.

37. Even when a federal statute expressly declares that it preempts state law, as is the case with § 453 of FECA, the extent of that preemption may be questioned to determine whether the categories of law that are preempted encompass the state law at issue. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 319 (1986).

38. *Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 204 (1983) (quoting *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 153).

39. STONE et al., *supra* note 38, at 318.

40. *Pacific Gas & Elec.*, 461 U.S. at 204 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

41. *Id.*

ability to preempt state law, Congress may expressly cede power to the states.⁴²

In the field of campaign regulation, the states' and Congress have historically shared responsibility. Authority to regulate federal elections comes from the U.S. Constitution: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."⁴³ Under this system, Congress can either assume the entire regulation of elections of Members of Congress, regulate a discrete portion of the election process or impose partial regulations to be carried out in conjunction with regulations made by the states.⁴⁴ Regulation of elections has been compared to the regulation of interstate commerce. In *Ex Parte Siebold*, the Court stated that the authority to regulate elections is not expressly taken away from the states.⁴⁵ The power of Congress is exclusive, however, where the subject matter is one of national character or requires a uniform rule.⁴⁶ If neither of these circumstances exists, state regulation of elections is not unconstitutional. Such regulations are valid and binding absent congressional regulation.⁴⁷

The *Siebold* Court went on to clarify that congressional regulations supersede state regulations, only to the extent that the two are inconsistent.⁴⁸ The idea of a "harmonious system" in which the states and Congress worked in tandem to regulate elections⁴⁹ was reiterated in *Newberry v. United States*.⁵⁰ In *Newberry*, the Court held that states had the power to regulate "purely domestic affairs" such as party primaries or conventions for designating candidates.⁵¹ Congress' authority to regulate the time, place and

42. *Pacific Gas and Elec.*, 461 U.S. at 212.

43. U.S. CONST. art. I, § 4, cl. 1. This clause represents a compromise between those who favored state control over the election of all state and federal officers and those who preferred congressional regulation of national elections. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 812-13, 824 (1st ed. 1833).

44. 29 C.J.S. *Elections* § 190 (1965); 25 AM. JUR. 2D *Elections* § 8 (1966); see also *Ex Parte Siebold*, 100 U.S. 371, 384 (1879) (stating that the actions of Congress exercising its authority to regulate any portion of the federal election process supersede actions by states to the extent that they conflict).

45. *Siebold*, 100 U.S. at 385.

46. *Id.*

47. *Id.*

48. *Id.* at 386.

49. *Id.*

50. 256 U.S. 232 (1927).

51. *Id.* at 258.

manner of holding elections reserved sufficient authority for the national government to protect against "corruption, fraud or other malign influences."⁵²

B. THE CURRENT STATE OF FEDERAL ELECTION LAW — SECTION 453

In 1974, Congress enacted the FECA Amendments and, along with them, section 453 which proclaims that FECA and its regulations preempt state laws with regard to election to federal office.⁵³ Although the language of section 453 appears broad on its face, the exact scope of the preemptive authority has yet to be ascertained.⁵⁴ The plain language of the statute allows two distinct interpretations. First, section 453 may merely confirm the supremacy of federal legislation when in conflict with state measures, leaving the states free to act in areas not covered by the Act. Alternatively, Congress' goal may have been to occupy the field, leaving the states no room whatsoever to regulate federal elections.

Whether FECA "occupies the field" of federal election regulation is of particular importance with regard to the regulation of campaign expenditures. In *Buckley v. Valeo*,⁵⁵ the Supreme Court ruled that the provisions of the 1974 Act regulating congressional campaign expenditures were unconstitutional.⁵⁶ Consequently, there is currently no federal regulation of expenditures in congressional elections. If FECA "occupies the field" of campaign regulation, the states would not be permitted to regulate campaign expenditures, even though FECA does not.⁵⁷ If FECA does not "occupy the field," states would be permitted to fill gaps in the federal scheme so long as the state regulations do not conflict with the provisions or purpose of FECA.⁵⁸

To determine the meaning, and therefore the preemptive effect, of section 453, it is necessary to look beyond the plain language of the statute to discern congressional intent. The history of the states'

52. *Id.*

53. "The provisions of [FECA], and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. § 453.

54. See *supra* note 38.

55. 424 U.S. 1 (1976).

56. *Id.* at 58-59. See *infra* note 167 and accompanying text.

57. See *supra* text accompanying note 40.

58. See *supra* text accompanying notes 41-42.

role in regulating federal elections is helpful for understanding what was happening in the field of campaign regulation prior to the enactment of section 453. The legislative history of section 453 and the FEC's interpretation of the provision also provide insight into the intended purpose of section 453.

1. The History of the Role of the States in Regulating Federal Elections

Historically, federal statutes regulating federal elections have left room for state action. Since 1907, Congress has regulated federal elections in an effort to curb the influence of money and preserve the integrity of the electoral process.⁵⁹ In 1911, Congress provided for the public disclosure of contributions and expenditures and attempted to curb influence peddling by congressional candidates.⁶⁰ The 1911 Act included an express provision that states were not preempted by federal law from regulating campaigns for federal office.⁶¹ Congress recognized the vital role the states played in regulating elections by expressly stating that the Act superseded state regulations only to the extent that a direct conflict arose. Otherwise states were free to act.⁶²

In 1925, Congress enacted a comprehensive overhaul of election law. The Federal Corrupt Practices Act⁶³ represented another attempt to respond to concern about the hold "business interests

59. See Act of Jan. 26, 1907, ch. 420, 34 Stat. 864 (repealed 1976) (prohibiting corporations from making contributions in political elections); see also *United States v. UAW*, 352 U.S. 567 (1957) (discussing the history of the social and political events leading to the enactment of the 1907 statute and the legislature's goals in enacting it).

60. Act of Aug. 19, 1911, ch. 33, 37 Stat. 25, 28 (providing that no candidate should make promises to any contributor that the candidate, if elected, would assist in being appointed to any office or would use the influence of the congressional office on behalf of the contributor in exchange for contributions), *repealed by* Federal Corrupt Practices Act, 1925, § 318, 43 Stat. 1070, 1074.

61. "This Act shall not be construed to annul or vitiate the laws of any State, not directly in conflict herewith, relating to the nomination or election of candidates for the offices herein named, or to exempt any such candidate from complying with such State laws." *Id.* at 29.

62. *Id.* at 29. This provision may seem irrelevant in light of the Supremacy Clause, art. VI, cl. 2. However, it is an important indication of Congressional intent to preserve a role for the states in regulating federal elections.

63. The Federal Corrupt Practices Act, 43 Stat. 1070 (1925), *repealed by* Federal Election Campaign Act of 1971, § 405, 86 Stat. 3, 20 (1972)); see also *UAW*, 352 U.S. at 577 (finding that the Corrupt Practices Act strengthened the 1907 Act by broadening the definition of contribution, by extending the prohibition on corporate contributions and by sanctioning the contributor and recipient of a forbidden contribution).

and certain organizations" had on politicians, thanks to large campaign contributions.⁶⁴ Like the 1911 statute, the Federal Corrupt Practices Act contained a provision announcing that state laws not "directly inconsistent" with the act remained in effect.⁶⁵

The next major revision of federal election law did not occur until early 1972 when Congress enacted the Federal Election Campaign Act of 1971.⁶⁶ In addition to provisions imposing contribution limits, establishing public disclosure requirements and providing for public financing of Presidential elections, the 1971 FECA included section 403, a provision strikingly similar to those in the 1911 and 1925 acts regarding their effect on state laws.⁶⁷ Although somewhat confusing, the gist of section 403 seems consistent with earlier provisions — states were permitted to continue operating in the field of federal election law so long as state law was not in direct contravention of FECA.⁶⁸

64. *UAW*, 352 U.S. at 576 (quoting 65 CONG. REC. 9507 (1924) (statement of Sen. Robinson)).

65. Corrupt Practices Act § 316, 43 Stat. at 1074 ("This title shall not be construed to annul the laws of any State relating to the nomination or election of candidates, unless directly inconsistent with the provisions of this title, or to exempt any candidate from complying with such State laws.") In addition, § 309(a) of the Act provided:

A candidate, in his campaign for election, shall not make expenditures in excess of the amount which he may lawfully make under the laws of the State in which he is a candidate, nor in excess of the amount which he may lawfully make under the provisions of this title.

43 Stat. at 1073.

66. Pub. L. No. 92-225, 86 Stat. 3.

67. Section 403 of FECA provided:

(a) Nothing in this Act shall be deemed to invalidate or make inapplicable any provision of any State law, except where compliance with such provision of law would result in a violation of a provision of this Act.

(b) Notwithstanding subsection (a), no provision of State law shall be construed to prohibit any person from taking any action authorized by this Act or from making any expenditure (as such term is defined in section 301(f) of this Act) which he could lawfully make under this Act.

86 Stat. at 20, amended by 2 U.S.C. § 453.

The Senate version of FECA preempted state law only with respect to the disclosure of Federal campaign funds, providing that state laws were not invalidated by FECA unless compliance with the state disclosure requirements would result in a violation of FECA. S. CONF. REP. NO. 580, 92d Cong., 1st Sess. 36 (1972), reprinted in 1972 U.S.C.A.N. 1866, 1881. According to general principles of preemption as dictated by the Supremacy Clause, states would have been free to act in all other areas of election regulation as long as their laws did not directly conflict with other provisions in FECA.

The House version of the preemption language applied to the entire act and was adopted as the conference substitute. *Id.*

68. Pub. L. No. 92-225, § 403, 86 Stat. at 20.

Subsection (a) of section 403 simply signaled that the Supremacy Clause was in effect.⁶⁹ Subsection (b) announced that states could not prohibit any act or expenditure authorized by the act, leaving open the possibility for state action.⁷⁰ For example, although states were barred from enacting a contribution limit lower than the federal limit (because such a limit would prohibit a contribution permitted under FECA), states would have been free to enact a program that exchanged public financing for voluntary agreement to expenditure limits. The latter type of program would have involved no prohibition of activities authorized under FECA.

The history of campaign regulations prior to 1974, coupled with the constitutional provision authorizing regulation of federal elections,⁷¹ demonstrate an inclination to favor joint state and federal regulation of federal elections. Although Congress has the authority to assume the entire responsibility for regulating federal elections, historically it has chosen not to do so.

2. Legislative History of Section 453

Legislative history is important to help clarify the meaning of section 453 because conflicting interpretations of the plain language of the statute are equally plausible. To reiterate, section 453 states, "[t]he provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office."⁷² Although Congress amended FECA extensively in 1974 in response to *Buckley*, the amendments did not affect section 453. The legislative history of the 1974 amendments did not address the impact of *Buckley* or the amendments on section 453.⁷³

An expansive interpretation of section 453 is supported by a passage from the report of the Committee on House Administration which drafted section 453. The report declares that the committee intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated."⁷⁴ This passage states even more strongly

69. *Id.*

70. *Id.*

71. See *supra* text accompanying note 43.

72. 2 U.S.C. § 453.

73. S. REP. NO. 677, 94th Cong., 2d Sess. 1, reprinted in 1976 U.S.C.C.A.N. 929.

74. H. REP. NO. 1239, 93d Cong., 2d Sess. 10 (1974).

than section 453 itself that the House Administration Committee intended FECA to occupy the entire field of regulating federal elections, leaving no room for state action on any matter related to such elections.

An expansive reading of section 453 finds additional support in the Senate report's announcement of the overall purpose of the 1974 Amendments.⁷⁵ The report declares that this "comprehensive and far-reaching measure" was enacted for the purpose of "providing complete control over and disclosure of campaign contributions and expenditures in campaigns for Federal elective office, including all public funds which any candidate may be entitled to receive prior to or after the date of any election."⁷⁶

The Conference Report indicates that Congress adopted provisions included in the House version to the effect that both criminal sanctions and disclosure requirements relating to campaign financing would be governed by federal rather than state law. The Conference Report provides the following explanation of section 453 as it applies to Title I of the Act, addressing criminal sanctions:

The provisions of the conference substitute make it clear that the Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights to prohibit false registration, voting fraud, theft of ballots, and similar offenses under State law.⁷⁷

Under this construction of the section, only federally imposed sanctions, which follow from the violation of a federal regulation, would be permissible. If states were to issue regulations affecting campaign expenditures, the states would be powerless to enforce them with criminal penalties. As a result, the states would be effectively precluded from enacting any regulations covering federal elections with regard to expenditures, the source of campaign funds and the conduct of federal elections.

Regarding the reporting and disclosure requirements, the Con-

75. S. REP. NO. 689, 93rd. Cong., 2d Sess. 2, *reprinted in* 1974 U.S.C.C.A.N. 5587, 5587-88.

76. *Id.*

77. S. CONF. REP. NO. 1237, 93rd Cong., 2d Sess. 1, 69, *reprinted in* 1974 U.S.C.C.A.N. 5618, 5638.

ference Report announced that,

[i]t is clear that the Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, but does not affect State laws as to the manner of qualifying as a candidate, or the dates and places of elections.⁷⁸

The "field" that this section clearly preempts, then, is reporting and disclosure requirements. Thus, states are prohibited from establishing such requirements. Similarly, it is clear that states are free to act with respect to qualifying candidates and scheduling elections. However, it is unclear whether states may regulate in areas other than reporting and disclosure.

Less evidence is found in the legislative history to support a narrow interpretation of section 453. A passage in the Senate Conference report⁷⁹ and a colloquy on the floor of the Senate⁸⁰ clarified that section 453 does not apply to state little Hatch Acts, which restrict the political activities of state employees during federal elections. The special treatment of state little Hatch Acts contradicts the committee and conference reports' pronouncements that FECA occupies the field of federal election regulation. Those reports did not make an exception for the regulation of state employees during federal elections — their language was sweeping.⁸¹ The state little Hatch Act exception leaves open the possibility that other areas are not covered by the blanket of section 453. There is little other discussion of the preemption provisions from the floor debate in either house.⁸²

78. *Id.* at 100-101, reprinted in 1974 U.S.C.C.A.N. at 5668.

79. *Id.* at 101, reprinted in 1974 U.S.C.C.A.N. at 5669.

80. 120 CONG. REC. 34,386 (1974) (statement of Sen. Cannon) (referring to the intent of the conferees not to preempt state law regulating state employees' political activity). See *infra* text accompanying notes 104-10.

81. See *supra* text accompanying notes 74-78.

82. During the floor debate in the House, Rep. Frenzel (D-MN), floor manager of the bill, listed the "numerous strengths and few weaknesses" of the 1974 FECA Amendments. Among the strengths, he spoke of the bill's preemption provision, announcing that "[c]andidates will no longer have to worry about complying with 51 different sets of standards and reporting requirements." 120 CONG. REC. 34,135-36 (1974).

In another brief exchange, Rep. Adams of Washington inquired whether or not there was a preemption clause. Rep. Hays, one of the bill's sponsors, responded that a preemption clause existed but was not included in information sheets on the bill distributed to the Members. No explanation of the operation of the clause or its scope was given. *Id.* at 35,131. This exchange may indicate an intent to continue the status quo, a dual system of

It is remarkable that a provision which appears to represent a break from nearly seventy years of joint state and federal regulation would have received so little discussion before its passage. The committee reports are written in a conclusory fashion and offer little understanding of the policy behind section 453. Yet, to the extent it considers the section, the legislative history appears to indicate that section 453, as enacted, was intended to occupy the field of federal election regulation. While other interpretations are plausible, the FEC has advocated a broad construction of section 453.

3. *FEC Interpretation of Section 453.*

The FEC published its interpretation of section 453 in 1976 when it promulgated FEC regulation 108.7 delineating the few areas in which states are permitted to act.⁸³ According to the regulation, "Federal law supersedes State law" regarding "limitation[s]

regulation under the 1972 FECA. If states were being kept out of the regulatory scheme completely for the first time in the history of campaign regulation, one would think the diminution of state power would be worthy of mention in a summary of the bill.

83. Under FECA, the FEC is empowered to make such rules "as are necessary to carry out the provisions of this Act." 2 U.S.C. § 437d(a)(8). FEC Reg. 108.7(b) provides in pertinent part:

- (b) Federal law supersedes State law concerning the —
 - (1) Organization and registration of political committees supporting Federal candidates;
 - (2) Disclosure of receipts and expenditures by Federal candidates and political committees; and
 - (3) *Limitation on contributions and expenditures regarding Federal candidates and political committees.*
- (c) The Act does not supersede State laws which provide for the —
 - (1) Manner of qualifying as a candidate or political party organization;
 - (2) Dates and places of elections;
 - (3) Voter registration;
 - (4) Prohibition of false registration, voting fraud, theft of ballots, and similar offenses; or
 - (5) Candidate's personal financial disclosure.

Effect on State Law, 11 C.F.R. § 108.7(b) (1991) (emphasis added).

FEC Reg. 108.7 was promulgated with the original round of regulations created pursuant to the 1974 amendments. The only history of its enactment is the "Explanation and Justification" issued by the FEC, which does nothing more than restate the language of the regulation. FEDERAL ELECTIONS COMMISSION, FEDERAL ELECTIONS REGULATION, COMMUNICATION FROM THE CHAIRMAN, H.R. DOC. NO. 44, 95th Cong., 1st Sess. 51 (1977); Conversation with Dorothy Hutcheon, FEC Public Affairs Specialist, Feb. 22, 1991.

on contributions and expenditures" for federal candidates.⁸⁴ The FEC's interpretation carries great weight because section 453 explicitly provides that "[t]he provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law"⁸⁵ Federal regulations are accorded the same respect as statutes with regard to their preemptive authority.⁸⁶ Furthermore, the courts show great deference to an agency's interpretation of statutes the agency is responsible for implementing.⁸⁷

The FEC has primary jurisdiction in all matters involving the enforcement of FECA.⁸⁸ A person who believes that FECA has been violated may file a complaint with the FEC.⁸⁹ Questions about the application of FECA or a rule or regulation promulgated under the Act are typically resolved through advisory opinions.⁹⁰

84. 11 C.F.R. § 108.7(b)(3).

85. 2 U.S.C. § 453 (emphasis added).

86. See *supra* note 36 and accompanying text.

87. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844-45 (1984); see also *Nat'l Republican Cong. Comm. v. Legi-Tech Corp.*, 795 F.2d 190, 193 (D.C. Cir. 1986) (noting that courts will uphold any reasonable agency determination rather than substitute their own construction of the statute).

88. 2 U.S.C. § 437c(b)(1). See also *id.* § 437d(e) (establishing that the FEC alone has the power to initiate civil actions to enforce the provisions of FECA).

89. *Id.* § 437g(a)(1).

If, after a complaint is filed, the FEC has reason to believe that a person has violated FECA, the Commission must notify the person involved and must investigate the alleged violation. *Id.* § 437g(a)(2). The FEC is directed to attempt conciliation before bringing an enforcement action against the alleged violator. *Id.* § 437g(a)(4)(A)(i).

90. *Id.* § 437f. Pursuant to 11 C.F.R. § 112.1, any person may request an advisory opinion with respect to transactions or activities in which the person is engaged or intends to engage. However, "[r]equests presenting a general question of interpretation, or posing a hypothetical situation, or regarding the activities of third parties, do not qualify as advisory opinion requests. *Id.* § 112.1(b).

This restrictive agency standing requirement allows only the candidates to challenge state voluntary spending limits under FECA § 453 because they are the only parties who can request an advisory opinion without encountering the above-stated restrictions. However, in light of the overwhelming public support for limits on exorbitant campaign spending, any candidate who challenges state regulations risks being viewed as opposing reform. Glen Craney, *Unusual New Spending Law Frustrates Candidates*, 47 CONG. Q. 1498 (1989). "'The GOP wanted a Democrat to challenge the New Hampshire bill to put us behind the eight ball — that we're trying to preserve a corrupt system,' [former New Hampshire Senator and candidate] Durkin said. 'No one wants to follow the law, but everyone wants someone else to challenge it.'" *Id.* See also Glen Craney, *States Filling the Void*, 48 CONG. Q. 1626 (1990) [hereinafter Craney, *States*] ("National GOP officials have vowed that they will fight the Minnesota law. But there is no Senate race in Minnesota between 1991 and 1994, and a legal challenge will likely await a 1992 House candidate willing to risk the label of a spendthrift.").

Despite the political risks, Minnesota Representatives Jim Ranstad and Vin Weber joined Senator David Durenberger in requesting an FEC advisory opinion as to whether or

With respect to preemption questions, the FEC has relied upon the plain language of the statute and regulations to rule consistently in favor of broad preemption by FECA.⁹¹ Advisory opinions considering the preemption issue routinely quote the House Committee Report and the Conference Committee Report to support the conclusion that FECA does indeed occupy the field, leaving no room for states to regulate federal campaigns. Applying this analysis to the Minnesota statute, the FEC has taken the position that "Minnesota's statute is not within the type of State laws Congress stated were outside the realm of Federal preemption."⁹² In a footnote, the FEC acknowledged that under the 1972 preemption provision, states would have had greater latitude to apply their laws to federal candidates.⁹³ Although the FEC has not ruled on the New Hampshire provisions pertaining to candidates,⁹⁴ the advisory opinion regarding the Minnesota Statute indicates that a challenge to the New Hampshire statute would probably have the same result.⁹⁵

Even under the FEC's expansive reading of the statute, there is an argument supporting the states' authority to enact voluntary expenditure limits applicable to congressional candidates. FEC

not the Minnesota law was preempted by FECA. FEC Adv. Op. 1991-22.

91. See, e.g., FEC Adv. Op. 1991-22 (opining that the Minnesota Campaign finance scheme was preempted by FECA in that it provided funds directly to federal candidates and enforced expenditure limits on those candidates); FEC Adv. Op. 1990-6 (May 21, 1990) (quoting H.R. REP. NO. 1239, 93d Cong., 2d Sess. 10 (1974)) ("Since Federal law occupies the field with respect to limitations and prohibitions of Federal campaign contributions and expenditures, and the sources of funds used in Federal campaigns, . . . [FECA] preempts any State law . . . prohibiting the use of a charitable matching plan by a political committee to raise funds for use in Federal elections only."); FEC Adv. Op. 1989-27 (Dec. 11, 1989) (concluding that a Massachusetts statute was preempted by FECA because the statute "extend[ed] beyond regulation of the political activities of the state employee into the conduct of his or her campaign"); FEC Adv. Op. 1989-25 (Nov. 30, 1989) (ruling, in response to challenge of entire New Hampshire statute by state Republican party, that those provisions regarding party spending in congressional elections were preempted by § 453 but declining to address provisions not relating directly to the party); FEC Adv. Op. 1989-12 (July 31, 1989) (deciding that an Indiana act prohibiting contributions to a candidate for state-wide elected office, including Senate candidates, by vendors with the Lottery Commission was preempted by FECA).

92. FEC Adv. Op. 1991-22. The FEC relied on the conference report for the activities which would be outside the realm of Federal preemption. *Id.* See *supra* text accompanying notes 77-78.

93. FEC Adv. Op. 1991-22, at n.9.

94. See FEC Adv. Op. 1989-25.

95. FEC Adv. Op. 1991-22 (ruling on party questions only).

regulation 108.7(b)(3),⁹⁶ states that "[f]ederal law supersedes State law concerning the . . . [l]imitation on . . . expenditures regarding Federal candidates" Because there is no applicable federal law regarding the expenditures of congressional candidates after *Buckley v. Valeo*, it could be argued that state law on the matter is not superseded.⁹⁷ However, the likelihood that this argument would succeed at the agency level is slim, given the history of the FEC's broad reading of the preemption provision. Furthermore, regulation 108.7(b)(3) makes no mention of the special consideration afforded state little Hatch Acts, as acknowledged in the Senate debate.⁹⁸ One might argue that this oversight suggests that the FEC substituted its own interpretation of section 453 instead of merely clarifying Congress' directives.

Once the FEC issues a final binding opinion or order, the FEC's action may be challenged in federal district court.⁹⁹ On the few occasions the judiciary has had to interpret section 453, the courts, in contrast to the FEC, have exhibited an inclination to construe the preemptive authority of FECA more narrowly.

4. Judicial Interpretation of Section 453

The few cases interpreting section 453 have found its preemptive effect more narrow than the FEC.¹⁰⁰ Most recently, the Second Circuit addressed the question of whether section 453 preempts a suit brought in state court alleging corporate waste resulting from

96. 11 C.F.R. § 108.7(b)(3).

97. See *supra* text accompanying notes 55-58.

98. See *supra* text accompanying notes 79-81.

99. See, e.g., *Nat'l. Republican Cong. Comm. v. Legi-Tech Corp.*, 795 F.2d 190 (D.C. Cir. 1986) (holding case in abeyance until the FEC had an opportunity to interpret the provision of FECA in question); *Faucher v. FEC*, 708 F. Supp. 9 (D. Me. 1989) (dismissing claim as not ripe for adjudication because plaintiff had not first requested an advisory opinion from the FEC).

100. See, e.g., *Stern v. General Elec. Co.*, 924 F.2d 472, 476 (2nd Cir. 1991) (holding state laws prohibiting waste of corporate assets by directors not preempted by FECA when invoked with respect to corporation's support of political action committee); *Reeder v. Kansas City Bd. of Police Comm'rs*, 733 F.2d 543, 546 (8th Cir. 1984) (holding Missouri statute prohibiting political contributions by members of the Kansas City Police Department not preempted by FECA), *cert. denied*, 479 U.S. 1065 (1987); *Friends of Phil Gramm v. Americans for Phil Gramm* in '84, 587 F. Supp. 769, 773 (1984) (concluding that state law restricting unauthorized use of a candidate's name would be preempted by overlapping federal regulations, but deferring to primary jurisdiction of FEC to construe the federal law on this issue); *Gifford v. Congress*, 452 F. Supp. 802, 813 (E.D. CA 1978) (using the legislative history of § 453 to clarify Congressional intent not to exempt state candidate qualification laws from federal preemption).

the corporation's PAC expenditures.¹⁰¹ The District Court in *Stern* followed the FEC in holding that the allegations of corporate waste, which were based on a state common law theory, were preempted by FECA, which regulates PACs.¹⁰² The Second Circuit disagreed, adopting a narrow reading of the preemptive impact of FECA. The circuit court interpreted the "with respect to election to Federal office" clause of section 453 to mean that Congress did not intend to preempt state regulation of non-election activities.¹⁰³ In a footnote, the court opined, "even with respect to election-related activities, courts have given section 453 a narrow preemptive effect in light of its legislative history."¹⁰⁴

In a thorough analysis of the preemption doctrine as it applies to FECA, the Second Circuit stated that, "in the present case, if Congress has occupied the field of corporate political activity at all, it has done so only to prevent the corruption of the political process."¹⁰⁵ Rather than looking at whether FECA occupied the field of federal election activity, including the regulation of PACs, the court found no preemption by taking a narrow construction of "corporate political activity." Following the rationale of the Second Circuit, the Minnesota and New Hampshire statutes present even stronger cases against preemption. FECA regulates corporate political activity extensively, but does not regulate congressional expenditures in any manner.¹⁰⁶

The *Stern* court relied on a 1984 case, *Reeder v. Kansas City Board of Police Commissioners*, for the opinion it expressed in footnote three.¹⁰⁷ In *Reeder*, the Eighth Circuit Court of Appeals upheld a Missouri statute prohibiting officers or employees of the Kansas City Police Department from contributing to political campaigns, including federal campaigns.¹⁰⁸ The court conceded that "prohibiting certain people from contributing to campaigns . . . can be considered a 'law with respect to election to Federal office.'"¹⁰⁹ However, ruling on this state little Hatch Act, the court

101. *Stern*, 924 F.2d at 474.

102. *Stern v. General Elec. Co.*, No. 86 Civ. 4055 (MJL), 1987 U.S. Dist. LEXIS 3880, at *10; 1987 WL 11,166, at *3 (S.D.N.Y. May 14, 1987).

103. *Stern*, 924 F.2d at 475.

104. *Id.* at 475 n.3 (citing *Reeder*, 793 F.2d at 545-46).

105. *Id.* at 475.

106. See *supra* text accompanying notes 55-58.

107. 733 F.2d 543 (1984).

108. *Id.* at 545.

109. *Id.*

ultimately concluded that the preemption provision applied “primarily to the behavior of [the] candidates — including, for example, the filing of reports, . . . and . . . superseded state laws on permissible contributions only to the extent that federal law expressly forbids certain kinds of contributions”¹¹⁰ To clarify the meaning of section 453, the court consulted the Act’s legislative history and relied on the colloquy in the Senate during consideration of the final measure which indicated that the “any provision of state law” language was not intended to include state laws regulating the political activity of state or local employees or officers.¹¹¹ The Eighth Circuit reached this conclusion notwithstanding FEC advisory opinions interpreting section 453 to preempt such state laws.¹¹²

The Supreme Court of Missouri reached the same conclusion in *Pollard v. Board of Police Commissioners*.¹¹³ In finding that section 453 did not apply to state little Hatch Acts, the court looked to FECA Conference Report indicating that states retained the authority to regulate state and local employees.¹¹⁴ Even without the explicit legislative history exempting state regulation of state employees from preemption, courts generally give special treatment to state efforts to regulate state employees because of the compelling interest in controlling graft and in achieving efficient administration.¹¹⁵

Unlike the broad question of whether New Hampshire and Minnesota may regulate expenditures in congressional elections, the issues presented in these cases, which confronted section 453 directly, were narrow and on the periphery of FECA. Yet, it is reasonable to assume that a court presented with the New Hampshire or Minnesota voluntary spending limitations would apply the same

110. *Id.*

111. *Id.* at 546. See *supra* text accompanying notes 79-81.

112. See, e.g., FEC Adv. Op. 1989-27 (Dec. 11, 1989); FEC Adv. Op. 1989-12 (July 31, 1989).

113. 665 S.W.2d 333 (Mo. 1984) (en banc) (involving a police officer who was terminated from his employment for contributing to a congressional campaign), *cert. denied*, 473 U.S. 907 (1985).

114. *Id.* at 337. “The [conference] report stated: ‘It is the intent of the conferees that any State law regulating the political activities of State and local officers and employees is not preempted or superseded by the amendments . . . made by this legislation.’” *Id.* (quoting S. CONF. REP. NO. 1237, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 5618, 5669).

115. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Bauers v. Cornet*, 865 F.2d 1517, 1525 & n.9 (8th Cir. 1989).

analytic technique of delving into the legislative history to discern whether section 453 was intended to preempt state voluntary expenditure limits. It is possible that a court would find that section 453 does not preempt state expenditure limits. However, as discussed earlier, it is probable that a court would focus instead on the "occupies the field" language in the reports that is relied on by the FEC. Because of the centrality of the issues addressed in the New Hampshire and Minnesota acts to federal campaigns and therefore to FECA, it is unlikely, though not certain, that New Hampshire and Minnesota would survive a preemption challenge in the lower courts. An additional indication of how preemption doctrine would be applied to the New Hampshire and Minnesota laws may be gleaned from the recent trends in the Supreme Court's treatment of preemption issues.

C. RECENT HISTORY OF PREEMPTION DOCTRINE AND THE SUPREME COURT

Preemption law has evolved in a series of Supreme Court cases. The recent history begins in 1976 with the *National League of Cities v. Usery*¹¹⁶ decision. Although *National League of Cities* was not a preemption case, it was a significant step toward reinvigorating states' rights. In *National League of Cities*, the Court held that the states were immune from federal attempts to regulate the states as states, addressing matters that are indisputably attributes of state sovereignty or traditional state government functions.¹¹⁷ This decision represented a good faith effort by the Court to draw lines indicating where state sovereignty ended, and it was hailed as a victory for states' rights.¹¹⁸

National League of Cities was overruled, however, only nine years later by *Garcia v. San Antonio Metropolitan Transit Authority*.¹¹⁹ In *Garcia*, the Supreme Court held that the federal Fair Labor Standards Act applied to state and local government employees in areas of traditional governmental functions.¹²⁰ The *Garcia* decision was premised on the idea that the federal political process provides a sufficient avenue for states to protect their interests.¹²¹

116. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

117. *Id.* at 855.

118. Ballam, *supra* note 36, at 927.

119. 469 U.S. 528 (1985).

120. *Id.* at 554.

121. *Id.* at 556 (reasoning that because members of Congress are elected from the

Although both *National League of Cities* and *Garcia* revolve around questions of the dormant commerce clause rather than pure preemption issues, each case provides some indication of the role the Supreme Court sees for states in the federal system. Some commentators have interpreted *Garcia* to mean that the Court would not intervene on behalf of states and that Congress was given a wide berth to enact legislation preempting state authority.¹²² These commentators' fears have not been realized to date in the preemption field, as is shown in the following four examples.

In 1983, the Supreme Court carved a niche for states to get involved in nuclear energy regulation in *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*.¹²³ The State of California had enacted a statute imposing a moratorium on certification of new nuclear power plants until the Energy Commission was able to demonstrate that the plant had the technology to dispose of high-level nuclear waste.¹²⁴ The federal Atomic Energy Act contained no express preemption provision, leaving the Court to look at its history to assess whether state actions in the field of nuclear energy regulation were impliedly preempted.¹²⁵ The Court ruled that Congress intended to regulate "the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns."¹²⁶ Because the federal government occupied the field with regard to safety regulation, the only way to uphold the statute was to find a non-safety basis for the California statute. The legislative history provided the necessary non-safety peg on which to hang the disposal law — a committee report characterized the waste disposal problem as "largely eco-

states, the states' interests are represented in the Congress and laws that unduly burden them will not be enacted).

122. See, e.g., Ballam, *supra* note 36, at 929 (suggesting that the practical effect of *Garcia* was to leave Congress with the ultimate authority to decide how far its own power under the commerce clause should extend).

123. 461 U.S. 190 (1983).

124. CAL. PUB. RES. CODE § 25,524.2 (West 1986).

125. The United States asserted that the California statute was preempted by the Atomic Energy Act because Congress occupied the field of nuclear power safety regulation, and it argued that the state regulation conflicted with decisions made by Congress and the Nuclear Regulatory Commission to encourage development of nuclear energy. *Id.* at 204.

126. *Id.* at 205.

nostic or the result of poor planning, *not* safety related.”¹²⁷ Based on this non-safety rationale, the Court upheld the statute in spite of pervasive congressional regulation in the field and an equally plausible explanation that the regulation of nuclear waste reflects concern with safety more than with economics.¹²⁸

Two years later, in *Silkwood v. Kerr-McGee*,¹²⁹ the Supreme Court expanded the states' role in regulating nuclear power by further limiting state actions which would be deemed to constitute a safety concern. In *Silkwood*, the state authorized punitive damages against Kerr-McGee for the release of plutonium, a radiation hazard.¹³⁰ Kerr-McGee contended that punitive damages were intended to deter unsafe conduct and, therefore, fell within the federally preempted field of safety regulation.¹³¹ Relying on *Pacific Gas & Electric*, the Court agreed that the federal government “occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.”¹³² However, the Court held that the preempted field did not extend to cover state-authorized punitive damages.¹³³

The Court framed the question in *Silkwood* not as whether Congress had expressly allowed punitive damage awards, but whether Congress intended to preclude punitive damages, a traditional principle of state tort law.

[P]reemption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objective of the federal law.¹³⁴

127. *Id.* at 213.

128. *Id.*

129. 464 U.S. 238 (1984).

130. *Id.*

131. *Id.* at 249.

132. *Id.* (quoting *Pacific Gas & Elec.*, 461 U.S. at 212).

133. *Id.*

134. *Id.* at 258. By classifying the test in this fashion, the Court seems to have confused the two types of implied preemption. First, if a federal statute is deemed to occupy the field, it does not necessarily involve a direct conflict with state law. Instead, it is deemed so pervasive as not to leave room for state action. Second, federal law preempts state actions that directly conflict with federal regulations or frustrate the purpose of federal regulations whether or not federal regulations occupy the field.

In *Fort Halifax Packing Co. v. Coyne*,¹³⁵ the Court held that the broad express preemption provision of the Employee Retirement Income Security Act (ERISA) did not apply to a Maine statute requiring employers to make a one-time severance payment to employees upon a plant closing.¹³⁶ ERISA's preemption clause applies to state laws that "relate to any employee benefit plan."¹³⁷ The Court distinguished the Maine statute, which provided a one-time employee benefit, from the language of the preemption clause, which referred to employee benefit plans.¹³⁸ In doing so, the Court diverged from its prior interpretation of the ERISA preemption clause.¹³⁹ Previously, the Court had held that "Congress used the words 'relate to' in [ERISA] § 514(a) in their broad sense,"¹⁴⁰ and specified that a state law "which requires employers to pay employees specific benefits, clearly 'relate[s] to' benefit plans."¹⁴¹ According to one commentator, after *Fort Halifax* "there can be no dispute that the Court veered from its previous approach to ERISA preemption. The new approach appears to reinstate the states' significant authority in the area of employee benefits."¹⁴²

In another display of hostility toward preemption, the Supreme Court held in *California Coastal Commission v. Granite Rock Co.*,¹⁴³ that a state permit requirement to mine in a national forest was not preempted by federal law.¹⁴⁴ The Court decided that none of the applicable federal statutes expressly preempted state authority. It assumed, but did not decide, that state regulation of land use planning on federal lands was preempted by federal

135. 482 U.S. 1 (1987). For a discussion of the case, see Ballam, *supra* note 36, at 943-47.

136. *Fort Halifax*, 482 U.S. at 23.

137. Employee Retirement Income Security Act (ERISA) § 514(a), 29 U.S.C. § 1144(a).

138. *Fort Halifax*, 482 U.S. at 8, 12.

139. Ballam, *supra* note 36, at 947.

140. *Shaw v. Delta Airlines*, 463 U.S. 85, 98 (quoting ERISA, § 514(a), 29 U.S.C. § 1144(a)).

141. *Id.* at 97. See also *Holland v. Burlington Indus.*, 772 F.2d 1140 (4th Cir. 1985), *summarily aff'd*, 477 U.S. 901 (1986); *Gilbert v. Burlington Indus.*, 765 F.2d 320 (2d Cir. 1985), *summarily aff'd*, 477 U.S. 901 (1986). Both *Holland* and *Gilbert* involved severance pay issues in which state regulations were deemed preempted by the broad language of ERISA.

142. Ballam, *supra* note 36, at 947. While the ruling in *Fort Halifax* may signal a general hostility to preemption, the Court's analysis may have been targeted at the specific issue and not transferrable to the field of election regulation.

143. 480 U.S. 572 (1987).

144. *Id.* at 594.

statute, but concluded that environmental regulation of the same lands was not preempted.¹⁴⁵ The Court classified the California Coastal Commission's permit requirements as environmental and, therefore, not preempted.¹⁴⁶

In addition, the Court analyzed the language of the Coastal Zone Management Act (CZMA)¹⁴⁷ under which the state permit requirement was promulgated.¹⁴⁸ The CZMA defines the coastal zone of a state to exclude "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government"¹⁴⁹ The Department of Commerce interpreted this provision "to exclude all federally owned land from the CZMA definition of a State's coastal zone."¹⁵⁰ In spite of this relatively clear statutory language excluding federal lands from a state's coastal zone, the Court found that CZMA did not have an independent preemptive effect regarding state permit requirements for activities on federal lands unless there was an actual conflict between the state CZMA program and federal law.¹⁵¹ The Court emphasized the fact that once a state coastal zone management program has been accepted by the Secretary of Commerce, "any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone . . . shall provide . . . a certification that the proposed activity complies with the states's approved program"¹⁵² By focusing on this provision along with sections of legislative history, the Court strayed from the real preemption issue before it. The Court discussed the authority of the state plans over federal activities, but failed to address the central question of what constituted the coastal zone. Thus, the Court avoided preemption.

Armed with these four Supreme Court cases, New Hampshire and Minnesota may mount persuasive campaigns to defeat preemption challenges. Applying to section 453 the fine tuning of the term "occupies the field" illustrated in *Pacific Gas & Electric*, the

145. *Id.* at 588.

146. *Id.* at 587.

147. 16 U.S.C. § 1454 (providing financial assistance to states for developing coastal zone management programs).

148. *California Coastal Comm'n*, 480 U.S. at 589-93.

149. 16 U.S.C. § 1453(1).

150. *California Coastal Comm'n*, 480 U.S. at 589 (citing Coastal Zone Management Program Development and Approval Regulations, 15 C.F.R. § 923.33(a) (1986)).

151. *Id.* at 591.

152. *Id.* at 590 (quoting 16 U.S.C. § 1456(c)(3)(A)).

states can argue that, even if FECA occupies the field of federal campaign regulation with regard to its particular provisions, the state regulations do not enter that field. Since *Buckley v. Valeo*, FECA does not address congressional campaign expenditure limits; therefore, the "field" that is occupied by FECA does not include those areas addressed by the state laws. If a court were to apply the analytic framework developed in *Silkwood* to the Minnesota and New Hampshire laws, the court's focus would be on the fact that neither statute is in conflict with a federal regulation and both state measures work toward the same goal as FECA — reducing the influence of big money on congressional elections and guarding against corruption. Opponents of state action would argue that *Pacific Gas & Electric* and *Silkwood* do not apply outside the realm of regulation of nuclear power, limiting those holdings to their respective facts.

Similarly, under the analysis of *Fort Halifax* and *Granite Rock*, section 453 may be interpreted to apply preemption only to state regulations that address behavior dealt with in FECA. In both *Fort Halifax* and *Granite Rock*, the Court looked to the legislative history and other provisions of the federal statute to interpret the state regulations as not in conflict with the federal statutes, despite the initial appearance of preemption. Again, a narrow reading of section 453, combined with the absence of federal regulation of expenditures in congressional elections, may permit states to act to fill the gap as long as the purpose and provisions of FECA are not frustrated by the state measures. It is difficult to predict how the Supreme Court would receive these arguments, even though a pattern of hostility to preemption is demonstrated by the preceding cases.

D. PROPOSAL

Examining the plain language of section 453, its legislative history, the FEC's advisory opinions and interpretation in its regulations, and court cases involving section 453 specifically and preemption in general, at least two distinct plausible interpretations of section 453 emerge. First, it can be argued that section 453 has broad preemptive authority, with FECA occupying the field and leaving no room for state regulation of federal elections. This version of section 453, espoused by the FEC, is supported by one reading of the provision's plain language in conjunction with FEC

regulation 108.7.¹⁵³ Additionally, the Conference Report and House Committee Report on section 453 specifically and Conference Report on the purposes of the 1974 amendments generally support the FEC's interpretation.¹⁵⁴

The second interpretation highlights the general presumption against preemption,¹⁵⁵ which would favor reading section 453's preemptive authority narrowly. Applying the analysis of the Supreme Court cases on preemption, even a broad express preemption clause could be interpreted narrowly to allow the states room to act. In the case of section 453, a narrow interpretation would permit states to act in areas not expressly addressed under FECA. This analysis flows from the history of the regulation of federal campaigns which permitted state action and from a literal reading of the language of section 453 and FEC regulation 108.7, which may allow state action in areas not addressed by the statute or regulation. Notwithstanding this alternate interpretation, the former is likely to prevail should courts consider the issue.¹⁵⁶

The Constitution grants Congress the authority either to take complete control of federal election regulation or to cede some power to the states.¹⁵⁷ Throughout the history of federal election regulation, Congress has granted some regulatory power to the states. This note proposes that Congress enact the simplest form of campaign finance reform available and amend section 453 to clarify that states may act in the areas not expressly addressed by or in conflict with FECA.

States should be permitted to act as the testing ground of democracy in the field of federal election regulation, at least in areas not directly in conflict with either the provisions of FECA or its purposes. State programs could provide Congress a base of information about the effectiveness of different approaches to the problems arising in campaign regulation before it enacts "solutions" on a nationwide basis. Problems like the astronomical growth of PACs

153. See *supra* text accompanying notes 33, 83-87.

154. See *supra* text accompanying notes 72-82.

155. See *supra* note 35.

156. See *supra* text accompanying notes 59-71 and note 83.

157. U.S. CONST. art. I, § 4. See *Oregon v. Mitchell*, 400 U.S. 112, 123 (1970) ("[T]he Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them."); Francine Miller, Note, *Fairness in the Election Arena: Congressional Regulation of Federal Ballot Access*, 32 N.Y.L. SCH. L. REV. 903, 925 (1987) (stating that Congress has final authority over national elections).

in response to the Federal Election Campaign Act of 1971 could be averted.¹⁵⁸ While states already regulate their own elections,¹⁵⁹ their experiences are not directly applicable to congressional elections. Congressional races attract the attention of the national and local press, involve high media costs and are financed by sources, such as PACs, which do not play as significant a role in state legislative elections. While state regulation of state campaigns is not without value as a testing ground for federal election rules, too many variables exist to apply state measures to federal campaigns directly.

Opponents of state regulation of congressional campaigns might argue that there should be uniform national campaign rules. Members of Congress sit together as one body and should be subject to the same requirements in elections so that they are on equal footing in their positions on Capitol Hill. This argument is countered by the reality that under the present system, Members of Congress, though presently subject to the same campaign laws, do not experience the same electoral pressures. A Senator from South Dakota has little common campaign experience with a Senator from California. Allowing the individual states to regulate portions of federal elections would provide for rules tailored to meet the needs of a particular locale without significantly altering the relationships of Members of Congress to one another.

Moreover, state regulations of campaigns would not alter the balance of power among candidates during a campaign. Opponents in a given race would be subject to the same regulations, providing a level playing field within each contest. That the candidates in the next state are not playing by the same rules is irrelevant. Furthermore, the Members of Congress are not only members of a national body, they are representatives of the citizens of their states as well. Having states regulate limited portions of the campaign process would not encourage Members to lose their national perspective. The heart of campaigning is, and has always been, within the home state. This fact has not diminished the national perspective of Congress, nor would some degree of state control over the election process.

There is no reason to believe that allowing states to regulate

158. See *infra* note 160.

159. See John M. Hamilton, Note, *State Campaign Finance Schemes and Equal Protection*, 61 IND. L.J. 251 (1986) (at least 22 states subsidize state campaign expenses in some way).

some aspects of federal elections will dramatically alter the balance of congressional attention to state and national matters. In fact, in an age when federal candidates are increasingly financed by national PACs, members of Congress owe larger shares of loyalty to special interest groups than to their constituents.¹⁶⁰ In fact, increased congressional attention on the home state may simply bring the scale back into balance, not skew it in favor of the states. Rather than detracting from the national scene, state regulations may reinvigorate the state perspective of federal legislators at a time when it is waning. Furthermore, states are better able to address the unique problems experienced by their representatives during the election process than the federal government, which may not be attuned to the special problems confronting a particular state.

Finally, the American public is experiencing a crisis of confidence in Congress brought about by scandals and congressional inaction on a important issues.¹⁶¹ Congressman Mike Synar (D-Okla) commented that "Americans have a high disgust for [Members of Congress]."¹⁶² Moving campaign regulation to the states may help bring renewed legitimacy to elected federal officials who currently regulate their own elections.

By expressly stating in section 453 that states are permitted to act in areas not directly addressed in, or in conflict with FECA, no question would remain as to whether the states were preempted.¹⁶³ When Congress is able to overcome the political hurdles

160. Ballam, *supra* note 36, at 975.

In the first six months of 1991, candidates for reelection in 1992 raised \$35.8 million; PACs contributed \$17.6 million, 49.2% of the total. Edward Zuckerman, *House Candidates Collect \$35.8 Million for '92 Elections During First Six Months of Non-Election Year*, PACS & LOBBIES, Sept. 18, 1991. In 1974, PAC contributions to congressional candidates totaled \$12 million. Letter from Archibald Cox, Chairman of Common Cause to Organization Members (January, 1990) (on file with the *Case Western Reserve Law Review*) (requesting voters to write Members of Congress in support of campaign finance reform). See also *supra* notes 2-3 and accompanying text.

161. Richard E. Cohen, *Congress in Distress*, 24 NAT'L J. 118 (1992) (noting that public opinion of Congress at the end of 1991 threatened to "drop off the charts" in response to scandal surrounding the House's Members-only bank and the Senate Ethics Committee's lenient treatment of the Keating Five); David E. Rosenbaum, *Public Calls Lawmakers Corrupt and Pampered*, N.Y. TIMES, Oct. 10, 1991, at 1317 (reporting that 27 percent of people surveyed disapprove of their congressional representatives' performance).

162. NEWSDAY, Aug. 5, 1990, at 15.

163. See *Pacific Gas & Elec. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 212 (1983) (stating that Congress can expressly cede power to the states).

that have stymied campaign regulation reform¹⁶⁴ and address the problems associated with the high costs of campaigns, the federal provisions it enacts would preempt state rules. Preemption would be based on the fact that the state regulations would then cover an area addressed by FECA.¹⁶⁵ Until that time, the states should be permitted to regulate federal elections to the extent FECA fails to do so as long as the states regulate in a manner consistent with the purposes of FECA.

III. IF THE NEW HAMPSHIRE AND MINNESOTA STATUTES SURVIVE A PREEMPTION CHALLENGE, ARE THESE SCHEMES CONSTITUTIONALLY VALID?

The seminal case on the constitutionality of campaign regulations is *Buckley v. Valeo*.¹⁶⁶ In *Buckley*, the Supreme Court held mandatory expenditure limitations applicable to congressional candidates unconstitutional,¹⁶⁷ but upheld voluntary expenditure limitations included in the presidential campaign financing program.¹⁶⁸

164. See *supra* notes 7-10 and accompanying text.

165. See *supra* text accompanying notes 41-42.

166. 424 U.S. 1 (1976).

For discussion of *Buckley* and campaign regulations generally, see Herbert E. Alexander, *The Future of Election Reform*, 10 HASTINGS CONST. L.Q. 721 (1983) (stating that the Supreme Court in *Buckley* tried to balance the First Amendment rights of candidates with the power of Congress to protect the integrity of federal elections.); K.D. Ewing, *The Legal Regulation of Campaign Financing in American Federal Elections*, 1988 CAMBRIDGE L.J. 371; Marlene A. Nicholson, *Basic Principles or Theoretical Tangles: Analyzing the Constitutionality of Government Regulation of Campaign Finance*, 38 CASE W. RES. L. REV. 589 (1988); Daniel D. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1.

For discussion of state campaign finance regulations applicable to state candidates, see generally Christopher Cherry, Note, *State Campaign Finance Laws: The Necessity and Efficacy of Reform*, 3 J.L. & POL. 567 (1987) (discussing and suggesting reforms for problems which render state campaign finance laws only partially successful); Hamilton, *supra* note 159, at 251 (asserting that many state campaign financing schemes could not withstand scrutiny under the *Buckley* equal protection analysis).

167. *Buckley*, 424 U.S. at 58. The FECA Amendments of 1974 limited to \$1,000 expenditures by individuals or groups "relative to a clearly identified candidate." *Id.* at 39. In addition, spending by a candidate from his personal or family funds was limited based on the office sought, *id.* at 51, and overall spending limits applicable to general and primary elections were established based on the office sought. *Id.* at 54.

168. The presidential campaign funding system is codified in Subtitle H of the Internal Revenue Code of 1954, as amended. 26 U.S.C. §§ 9001-13. It established a fund, 26 U.S.C. § 9006(a), financed by general tax revenues via a \$1 check-off, *id.* § 6096, which provides financing for three phases of a presidential campaign. First, the Act calls for major parties to receive \$4,000,000 (adjusted for inflation since 1974) to assist with the cost of nominating conventions; the parties must agree to limit their expenses to that

Discussing the congressional expenditure limits, the Court stated, "[t]he Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech The restrictions, while neutral as to the ideas expressed, limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'"¹⁶⁹ In striking down limits on candidates' spending¹⁷⁰ and on independent expenditures by non-candidates,¹⁷¹ the Court declared that such limits abridged First Amendment rights and were not narrowly tailored to further a compelling state interest in preventing corruption or the appearance of corruption.

In *Buckley*, the Court also upheld the presidential campaign financing scheme, which included voluntary spending limits, against an equal protection challenge.¹⁷² Rejecting the view that Subtitle H abridges, restricts or censors speech, the Court instead characterized the presidential financing scheme as a congressional effort to use public money to facilitate public discussion and participation in the electoral process.¹⁷³ Although *Buckley* did not present a direct

amount. *Id.* § 9008(b)(1). Minor parties receive a proportion of the figure provided to major parties. *Id.* § 9008(b)(2).

Second, the fund provides financing for the general election. To be eligible for public financing, a candidate must pledge that he will not spend in excess of the federal monies he is entitled to receive. *Id.* §§ 9003(b), (c), 9004(a).

Third, the fund created a Presidential Primary Matching Payment Account to assist candidates with the cost of primary campaigning. *Id.* § 9037(a). To be eligible, a candidate must raise at least \$5,000 in contributions of less than \$250 in each of 20 states. A candidate must also agree to limit spending. *Id.* § 9033(b). If eligible, a candidate receives 50 percent of the limit in public monies. *Id.* §§ 9035, 9037.

169. *Buckley*, 424 U.S. at 39 (citing *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

170. *Id.* at 44-45. In upholding contribution limits, the Court found only the primary objective of limiting the actuality and appearance of corruption a constitutionally sufficient justification for the restrictions. *Id.* at 26. The Court dismissed the ancillary goals of "equaliz[ing] the relative ability of all citizens to affect the outcome of elections" and reducing "the skyrocketing cost of political campaigns" which would serve to "open the political system more widely to candidates without access to sources of large amount of money." *Id.* (footnotes omitted).

171. *Id.* at 47. The Court gave two reasons for this holding. First, independent persons could still pool their individual resources to make a significant expenditure on behalf of a candidate. Second, unlike contributions, independent expenditures may not assist the campaign. *Id.* Limiting personal or family expenditures of a candidate was also not deemed to further the primary goal of the Act. *Id.* at 53. In fact, the Court found that such limitations may have been counterproductive because a candidate who spends her own money will not be vulnerable to the quid pro quo that may attach when raising funds. *Id.*

172. *Buckley*, 424 U.S. at 92-93.

173. *Id.* The Court made this statement in the context of a challenge to Subtitle H as being "contrary to the general welfare" . . . because any scheme of public financing of election campaigns is inconsistent with the First Amendment." *Id.* at 90.

challenge to the validity of a scheme exchanging First Amendment rights for public funding, the Court nevertheless seemed to anticipate and dispose of the question in a footnote:

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.¹⁷⁴

When the government, federal or state, grants a benefit restricted by certain conditions, as in the case of Subtitle H and both the Minnesota and New Hampshire provisions, the range of permissible conditions is limited by the doctrine of unconstitutional conditions.¹⁷⁵ Generally, the state may not impose as a condition on the receipt of a benefit any restriction that would be unconstitutional if enacted as an outright ban.¹⁷⁶ In *Buckley*, the Court was not confronted with the issue of unconstitutional conditions in the presidential funding system. However, four years later, the District Court for the Southern District of New York addressed this question directly.

In *Republican National Committee v. FEC*,¹⁷⁷ the court re-

174. *Id.* at 57 n.65.

A lower court speculated that "[i]t was because of the expenditure limitations that the Court upheld the campaign fund against the constitutional challenge" *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 284 n.6 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980).

The Court's acceptance of conditional public financing has been both criticized, Edward J. Furf, *The Doctrine of Unconstitutional Conditions*, 39 CASE W. RES. L. REV. 97, 141 (1988) (condition unconstitutional) and concurred with, Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1376-78 (1984).

175. For discussion of unconstitutional conditions, see generally Laura B. Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308 (1990); Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 201 HARV. L. REV. 1 (1987); Kreimer, *supra* note 174 at 1293; Symposium on Unconstitutional Conditions, 26 SAN DIEGO L. REV. 175 (1990).

176. See *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 545 (1983) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)) ("the government may not deny a benefit to a person because he exercises a constitutional right"). But see *Harris v. McRae*, 448 U.S. 297 (1980) (acknowledging a Constitutional right to abortion, but upholding a statute barring use of federal Medicaid money to pay for the procedure).

177. 487 F. Supp. 280 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980). The fact that the Supreme Court affirmed the District Court's decision summarily without opinion, "do[es]

sponded to two causes of action alleging violations of First Amendment rights.¹⁷⁸ The court cast the plaintiffs' claims as "the contention that a presidential candidate is somehow or other forced as a practical matter to accept public funding in lieu of unlimited private funding and spending, and that this deprives the candidate and supporters of their First Amendment rights."¹⁷⁹ Essentially, the *Republican National Committee* analysis follows the theory that acceptance of a condition which infringes a constitutional right must be voluntary. If acceptance is not voluntary, the government program is tantamount to an outright prohibition on the exercise of a constitutional right and is, therefore, unconstitutional unless it is narrowly tailored to accomplish a compelling state interest.¹⁸⁰

Applying this analysis, the court determined that the presidential funding program was not so coercive that the conditions imposed in exchange for public financing infringed on the First Amendment rights of candidates.¹⁸¹ Moreover, the court found that even if the First Amendment rights of candidates were implicated by the program, the expenditure limits were "fully justified" by compelling state interests.¹⁸² The court listed the following objectives as "significant state interests" furthered by the funding scheme: "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising."¹⁸³

not render later challenges useless . . . [A]lthough 'summary affirmances obviously are of precedential value, "they are" . . . not of the same precedential value as would be an opinion of [the] Court treating the question on the merits.'" Furh, *supra* note 174, at 120 (citing *Edelman v. Jordan*, 415 U.S. 651, 671 (1974)) (footnotes omitted).

178. First, the plaintiffs alleged that the presidential funding mechanism violated their First Amendment rights "by conditioning eligibility for public campaign funds upon compliance with expenditure limitations." *Id.* at 283. The second cause of action charged that the plaintiffs' First Amendment rights were infringed because "the Republican presidential candidate in 1980 will be forced, because of 'legal and practical factors' to opt in favor of public funding." *Id.*

179. *Id.*

180. See *Republican Nat'l Comm.*, 487 F. Supp. at 284 (assessing the validity of the spending limit condition in exchange for financing after determining the program was voluntary).

181. *Id.* at 285.

182. *Id.*

183. *Id.* (quoting *Buckley*, 424 U.S. at 91).

The *Republican Nat'l Comm.* court refers to these goals as the significant state interests furthered by Subtitle H. In *Buckley*, the Supreme Court discussed these goals when it considered whether Congress had authority to legislate funding for campaigns under the General Welfare clause of the Constitution, Article I, § 8. The Court held that "Congress has concluded that the means are 'necessary and proper' to promote the general welfare,

While the court's analysis is consistent with early unconstitutional conditions doctrine,¹⁸⁴ courts and commentators generally agree that additional analysis is necessary to determine if a condition is constitutional. However, these commentators are by no means of one mind as to the essential characteristics of such additional analysis.¹⁸⁵ A common view held by courts and commentators indicates that even if a condition is voluntary, it may still be unconstitutional if it is not germane to the purposes of the benefit to which the condition is attached.¹⁸⁶

and . . . thus [the Court] decline[d] to find this legislation without the grant of power in Art. I, § 8." *Buckley*, 424 U.S. at 91.

Although *Republican Nat'l Comm.* was summarily affirmed, it is not clear that the Supreme Court would accept any state interest other than controlling corruption or the appearance of corruption as compelling enough to justify the substantial infringement on speech that the Court has characterized expenditure limitations to be. See *supra* notes 170-71 and accompanying text.

In *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985), the Supreme Court announced that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Id.* at 496-97. However in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), the Supreme Court upheld a Michigan statute which imposed significant burdens on a corporation's ability to establish a separate fund from which to make independent expenditures to political causes. While the Court recognized that the stringent requirements burdened the expressive activity of the corporation, it held that the burden was justified by a compelling state interest. *Id.* at 660. Even though the Michigan statute was not aimed at controlling quid pro quo corruption, as was accepted in *Buckley*, the act "aim[ed] at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* While this compelling state interest is still framed in the corruption language, the crux of the state's rationale seems to be eliminating the distortion that comes from one independent funding source having the ability to spend large sums to advocate its position. However, the Court expressly states that it is not accepting "'equalizing the relative influence of speakers on elections'" as a justification for restrictions. *Id.* at 1398 (quoting Kennedy, J., dissenting). Whether or not *Austin* has opened the door for other compelling state interests is uncertain.

184. See Marlene A. Nicholson, *Political Campaign Expenditure Limitations and the Unconstitutional Condition Doctrine*, 10 HASTINGS CONST. L.Q. 601, 614 (1983).

185. See, e.g., Furf, *supra* note 174, at 116 (proposing a four part test whereby a condition is unconstitutional (1) if it is not germane to a legitimate government interest, (2) if similarly situated people are not treated similarly, (3) if the condition is not a significant part of the benefit program, or (4) if participation is compelled); Kreimer, *supra* note 174, at 1300; Epstein, *supra* note 175, at 14 (viewing the process of government imposing conditions in exchange for receipt of a benefit as a "bargain" between individual and state that should be enforced only when it creates joint gains for the contracting parties and respects the interests of third persons who are not parties to the bargain).

186. Furf, *supra* note 174, at 121. "If the condition which requires the waiver of a constitutional right is unrelated to the program, then there is no reason why the required waiver of the constitutional right should be constitutional, because it is attached to a

Analyzing the Minnesota and New Hampshire statutes under the basic principles of the doctrine of unconstitutional conditions, these statutes appear to infringe impermissibly on the First Amendment rights of candidates. Determining whether the conditions in these statutes are unconstitutional requires the following analysis. Is acceptance of the spending limits voluntary? If not, the condition is no different than a direct restriction upon protected speech, and it must be justified by a compelling state interest and narrowly tailored to survive a constitutional challenge.¹⁸⁷ If acceptance of the spending limits is voluntary, is the condition germane to the purposes of the public funding program?

The analysis that follows concludes that the campaign funding scheme established by the Minnesota statute may not, in fact, be voluntary and is not supported by compelling interests necessary to sustain it. The New Hampshire scheme probably is voluntary, but the spending limits imposed are not sufficiently germane to the benefit scheme for the statute to survive a constitutional challenge. In addition, the New Hampshire statute presents an impermissible obstacle to ballot access.

A. MINNESOTA

At first blush, the Minnesota statute seems to emulate the presidential fund. However, on closer inspection, it becomes apparent that the Minnesota system has imposed additional conditions on the receipt of public funding which render the entire scheme unconstitutional. The Minnesota act provides up to twenty-five percent of the prescribed spending limit in public funds to a candidate who agrees to limit campaign spending to a statutorily established level.¹⁸⁸ A candidate who agrees to limit spending, but later permits spending in excess of the limit "is subject to a civil fine of up to four times the amount by which the expenditures exceed the limit."¹⁸⁹ If one candidate agrees to abide by the spending limits while other opposing candidates do not, the one who agrees to the

government program, when it would be unconstitutional otherwise." *Id.* at 115. *But see* Kreimer, *supra* note 174, at 1351 (questioning whether the validity of a condition attached to a government benefit should be limited by the particular purposes underlying the benefit).

187. *See supra* text accompanying notes 170-71 and note 183.

188. MINN. STAT. ANN. § 10A.43(1)(b). The limits are set at \$3.4 million for Senate races and \$425,000 for House campaigns. *See supra* text accompanying notes 18-21.

189. *Id.* § 10A.47(1).

limits is not actually bound by the limits and receives a public subsidy anyway.¹⁹⁰ If all candidates for a given congressional office agree to the spending limits, no candidate may receive the incentive payment. Yet, all continue to be bound by the limits and are subject to a penalty for exceeding them.¹⁹¹

In the case where only one candidate agrees to the limits, the unconstitutional conditions argument can be raised by the candidate who has not agreed to curtail campaign spending.¹⁹² Arguably, the candidate was coerced into accepting the spending limits, and those limits are not narrowly tailored to meet a compelling state interest. Where both candidates agree to limit spending and, as a result, neither receive public funding, the program looks alarmingly like the congressional expenditure limits struck down in *Buckley*.¹⁹³

1. Is the program voluntary?

It could be argued that a Minnesota candidate's decision to limit spending is wholly voluntary because each candidate is free to decide whether he believes he will need more funds to mount a successful campaign than the spending limits allow. If he decides he needs more money, or simply that he is able to raise more money than the statutory limit, he is free to pursue private funds. However, the interplay between the two provisions in the Minnesota statute governing the effect of a candidate's choice leads to the inescapable conclusion that the program is not voluntary.

The Minnesota statute establishes a program whereby a candidate can receive public funding if he agrees to limit spending. If a candidate chooses to exercise his First Amendment rights, he not only passes up public funding, he may face a publicly subsidized opponent with theoretically unlimited fundraising ability. The Minnesota system thereby coerces candidates to agree to limit the exercise of their First Amendment rights or face opponents who have received a fundraising head start from the state. In addition, the Minnesota system entices candidates to agree to spending limits in exchange for a chance to win a campaign finance lottery. If his

190. *Id.* § 10A.44(5)(d).

191. *Id.* § 10A.43(5)(b).

192. For ease of analysis, this note assumes that only two candidates are running in the campaign. The analysis would be substantially the same if more candidates entered the race.

193. See *supra* text accompanying notes 170-71.

opponent refuses to follow suit, the complying candidate will be the only one who receives the state subsidy.

The Minnesota system does not equate with the Presidential Fund Act. The Presidential Fund

merely provides a presidential candidate with an *additional* funding alternative which he or she would not otherwise have and does not deprive the candidate of other methods of funding which may be thought to provide greater or more effective exercise of rights of communication or association than would public funding. Since the candidate remains free to choose between funding alternatives, he or she will opt for public funding only if, in the candidate's view, it will *enhance* the candidate's powers of communication and association.¹⁹⁴

Individual candidates' freedom to assess whether public or private funding will yield the maximum communication is absent in the Minnesota statute. Most candidates lack full information when faced with the decision to agree or not agree to the spending limits.¹⁹⁵ If a candidate had full knowledge of his opponent's decision and the opponent declined to adhere to the spending limits, then the candidate certainly would agree to them. He would be assured of receiving a public subsidy and be free from any spending restrictions; the candidate would enjoy the presumably maximum fundraising and communicating position. However, a candidate may not have full knowledge of his opponent's decision when he is forced to make a choice. He can either exercise his full constitutional rights and risk a publicly subsidized opponent, or he can agree to limit his First Amendment rights and hope that he will not have to deliver on the promise. Thus, the Minnesota system appears to be designed to coerce both candidates into accepting the spending limits,¹⁹⁶ rather than a voluntary program in which each candidate may decide for himself whether to enter into an exchange with the state.

194. *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 285 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980).

195. See Furr, *supra* note 174, at 132-135 (discussing how imperfect knowledge impacts the decision to take part in the presidential funding scheme); see Epstein, *supra* note 175, at 20 n.38 (discussing the problems of collective decision-making and the prisoner's dilemma).

196. For the ramifications if both candidates accept the spending limits, see *infra* text accompanying notes 201-31.

2. Assuming the program is not voluntary, is the condition narrowly tailored to accomplish a compelling governmental interest?

If the Minnesota system is indeed coercive, and therefore tantamount to a direct infringement on a candidate's First Amendment rights, the condition for funding must be narrowly tailored to accomplish a compelling state interest in order for the system to withstand constitutional challenge.¹⁹⁷ In upholding the Presidential funding scheme, the *Republican National Committee* court accepted the following three state interests as justification for the right-benefit exchange: (1) reducing the deleterious influence of large contributions on the political process, (2) facilitating communication by candidates with the electorate; and (3) freeing of candidates from the rigors of fundraising.¹⁹⁸ The *Republican National Committee* court ruled that even if the Presidential Fund Act infringed the First Amendment rights of candidate, it would survive strict scrutiny analysis because the condition of limited speech was narrowly tailored to accomplish the aforementioned compelling state interests.¹⁹⁹ In support of the spending limits, the court stated, "[i]f a candidate were permitted, in addition to receipt of public funds, to raise and expend unlimited private funds, the purpose of public financing would be defeated."²⁰⁰

The purposes of the Minnesota statute, however, differ from the acceptable state interests cited in *Republican National Committee*. The goals of the Minnesota public funding scheme are the following: (1) to discourage candidates from "escalating campaign spending through the current means of financing campaigns;"²⁰¹ (2) to provide "an alternate source of financing, [so that] congressional candidates will be less susceptible to political corruption and less dependent on special interests, which will enhance the public's confidence in their congressional representative;"²⁰² and (3) to allow "candidates to focus on public issues rather than

197. The *Buckley* Court announced that "expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." 424 U.S. 1, 14 (1976).

198. *Republican Nat'l Comm.*, 487 F. Supp. at 285 (quoting *Buckley*, 424 U.S. at 91).

199. *Id.* at 289.

200. *Id.* at 285.

201. MINN. STAT. ANN. § 10A.40(2)(b)(1).

202. *Id.* § 10A.40(2)(b)(2).

fundraising²⁰³

First, curtailing the cost of campaigning has not been accepted as a compelling state interest.²⁰⁴ Even if this state interest were accepted, the conditions imposed in the Minnesota statute are not narrowly tailored to accomplish this purpose. If only one candidate agrees to limit his spending, he will receive public money and be free to spend as much as he can raise.²⁰⁵ Presumably, the amount the candidate will be able to spend will be increased by virtue of the public subsidy he receives. Under this scenario, the candidate has no incentive to curtail expenses, thus, the condition is not narrowly tailored to accomplish the objective of holding down campaign costs. Should both candidates agree to the spending limits, those limits would be enforced and would, arguably, control the cost of campaigning.²⁰⁶ However, it is equally likely that only one or no candidate would accept the limits. Thus, the Minnesota scheme, taken as a whole, is not narrowly tailored to accomplish the goal of controlling campaign costs.

Second, reducing quid pro quo corruption has been accepted as a compelling state interest.²⁰⁷ However, the candidate who agrees to limit spending, receives a public subsidy and escapes the limits is no less susceptible to political corruption than a candidate who does not receive the public funding.²⁰⁸ The former candidate will continue to hustle for every \$1,000 check²⁰⁹ he can get, using the same tactics employed by candidates without a spending limit. The total amount of money raised from private sources may be reduced by the amount of public subsidy received, but this result is uncertain and the condition therefore, is not narrowly tailored. Similarly, other candidates subject to limited overall spending but without fundraising assistance are free to employ whatever means possible,

203. *Id.* § 10A.40(2)(b)(3).

204. In *Buckley*, the Court rejected controlling the skyrocketing cost of campaigns as a compelling interest to justify overall expenditure limitations. *See supra* notes 170, 183. Controlling the overall costs of campaigns was not advanced as a justification for the presidential funding scheme in *Republican National Committee*.

205. *See supra* text accompanying note 190.

206. *See supra* text accompanying note 190.

207. *See supra* note 183.

208. The system of partial funding for presidential candidates in the primaries was upheld against an equal protection challenge in *Buckley v. Valeo*, 424 U.S. 1, 105-108 (1976). As with the general election financing scheme, the system of providing up to 50% of the spending limits in matching grants was not directly challenged. For an explanation of the primary funding scheme, *see Buckley*, 424 U.S. at 89-90.

209. *See supra* note 167.

within the bounds of FECA, to meet their spending limits.

In addition, public support for the electoral system may not be fostered by the Minnesota program as its objectives imply. Taxpayers may not be pleased to learn that a portion of their tax dollars is slated to augment the fundraising capacity of a candidate they would not support. Furthermore, candidates will continue to employ old fundraising tactics²¹⁰ to finance their campaigns whether none, one or both candidates agree to spending limits. Thus, the Minnesota program is not sufficiently narrowly tailored to accomplish the second objective of providing alternative funding to reduce corruption and increase public confidence.²¹¹

Third, while it is possible that the candidate receiving the public money will not need to spend as much time fundraising, it is equally plausible that this candidate would engage in the same amount of fundraising anyway. The public money may simply constitute a bonus, giving the candidate a competitive edge over his opponent. Because the system does little to encourage a single candidate to reduce overall spending, this provision is not narrowly tailored to the stated goal of reducing time spent fundraising. In the case where both candidates agree to limit spending, neither will receive public money. As a result, both candidates will spend considerable time raising money to reach the spending limits. Therefore, the third avowed goal is not narrowly tailored to the scheme.

Enforcement of the spending limit without the state providing a monetary benefit raises an additional constitutional concern. Specifically, absent public support, is the Minnesota system a right-benefit exchange at all or simply a state enforced restriction on free speech? If Minnesota provided the twenty-five percent incentive payment in exchange for a candidate agreeing to restrict his First Amendment rights, section 10A.44 might be sufficiently similar to Subtitle H to pass constitutional muster.²¹² However, under the

210. See *supra* note 159 and accompanying text.

211. See MINN. STAT. ANN. §§ 10A.43(5)(b), (d).

212. The condition that a candidate limit his spending in exchange for public financing was upheld in *Republican National Committee*. See *supra* text accompanying notes 177-84.

The presidential scheme provides full funding, whereas the Minnesota program offers only up to 25% of the spending limit if one candidate agrees to the limit but the other does not. Whether 25% funding would be found to be sufficient benefit is uncertain, although the *Buckley* Court upheld the presidential primary financing scheme providing 50% of the spending limit in public money against an equal protection challenge. See *supra* note 208 and accompanying text.

Minnesota statute, if both candidates agree to limit spending, the state does not provide any public monies to either candidate.²¹³ The program becomes the functional equivalent of mandatory spending limits enforced by the state, especially if agreeing to abide by the spending limits is not voluntary.²¹⁴

If the Minnesota statute is analyzed in a fashion similar to the Congressional spending limits imposed by the FECA Amendments of 1974, the spending limit provision will likely be stricken. In *Buckley*, the Court held that "[n]o governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by § 608(c)'s campaign expenditure limitations. The major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions"²¹⁵ addressed by the contribution limitations and disclosure requirements of the Act. Regarding the interest in equalizing financial resources of candidates, the Court held that expenditure limits "might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign."²¹⁶ The Court then concluded that the primary purpose of the expenditure limits was to "reduce[] the allegedly skyrocketing costs of political campaigns,"²¹⁷ and it rejected out of hand that justification for governmental restrictions on campaign spending.²¹⁸ Because the Minnesota scheme includes the possibility that neither candidate will receive public funding while being held to spending limits, it is likely that the *Buckley* analysis of the stricken congressional expenditure limitations would apply. The Minnesota statute would not be found to impose conditions sufficiently tailored to justify their intrusion on candidates' First Amendment rights.

213. It may be argued that the candidates do receive a benefit, albeit not in the form of public financing. Each candidate knows that his opponent will be constrained by the same spending limit.

214. In support of this being a real benefit even without the provision of public financing, see Furh, *supra* note 174, at 123 n.137 (quoting Jon Margolis, *When More Isn't Necessarily Better*, CHICAGO TRIBUNE, Jan. 13, 1987, § 1, at 15).

215. *Buckley v. Valeo*, 424 U.S. 1, 55 (1976).

216. *Id.* at 57.

217. *Id.*

218. *Id.* (footnote omitted).

3. Assuming that the program is found to be voluntary, is the condition germane?

Assuming that a condition is voluntary, and thus not an infringement on a fundamental right, the condition must still relate to a legitimate governmental interest in at least some minimal way. First, while limiting spending in exchange for financing is rationally related to the goal of discouraging the escalating cost of campaigns,²¹⁹ under the Minnesota system the only way that skyrocketing costs are kept in check is if both candidates agree to the spending limits. If only one candidate agrees to the limits, both candidates can spend unlimited amounts.²²⁰ While state legislatures have broad discretion to determine methods to be used in accomplishing a legitimate goal,²²¹ the Minnesota program could operate in a manner not even rationally related to the goal of controlling the escalating costs of campaigns. Granting a subsidy, but not holding a candidate to spending limits is not rationally related to the goal of controlling the high cost of campaigning.²²² Enforcing spending limits without providing public financing accomplishes the goal of reducing overall spending, but it is uncertain whether that goal will be accepted by a court as a legitimate state interest.²²³

The second goal, providing an alternative source of funding to reduce corruption and increase public confidence, and the third goal, reducing time spent fundraising and increasing discussion of issues, are rationally related to the statutory means of providing public funding for a candidate, even if the spending limit is not actually enforced.²²⁴ A candidate receiving public funding may seek fewer private dollars, thanks to the fundraising head start from the state. This head start may reduce the corruption that accompa-

219. In striking down the overall expenditure limits, the *Buckley* Court rejected control of campaign spending as a compelling governmental interest that would justify infringing First Amendment rights. *Id.* Whether a court would accept controlling costs as a legitimate state interest is uncertain.

220. See *supra* text accompanying note 190.

221. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 326 (1819) (concluding that it is the province of the legislature to establish the means by which to execute its powers).

222. In *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 285 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980), the Court found that spending limits attached to public financing were necessary to accomplish the goals of reducing corruption, decreasing time spent fundraising and increasing communication with electorate.

223. See *supra* note 170.

224. See *supra* text accompanying note 183.

nies the desire to amass campaign funds and decrease time spent fundraising. In addition, it is rational to assume that once a candidate is freed from the rigors of fundraising, he will be able to devote more time to the discussion and development of issues.

Arguably, however, if a candidate receiving public money is allowed to raise unlimited private funds, corruption will still not be checked and fundraising will not be limited. The competitive pressures of the race will encourage the candidate to raise funds with the same vigor he would have displayed without the public subsidy, using the state funds as a margin of safety over his opponent's fundraising ability. In fact, the incentive to fundraise vigorously still prevails — the more money a candidate has, the more political expression he is able to engage in and the greater his chance of victory. Yet, it is rational for the legislature to assume that some corruption and some time spent fundraising will be reduced if either both or only one candidate receives some state funding.²²⁵ The Minnesota program, then, is rationally related to the purposes of providing alternative funding to curb corruption and reduce time spent fundraising.

If both candidates have agreed to limit spending so that neither party is in fact receiving a subsidy, the statute looks like the provisions struck down by the Supreme Court in *Buckley*.²²⁶ Under *Buckley*, expenditure limits are not sufficiently tailored to the goal of reducing corruption in the political process.²²⁷ On a more basic level, the Minnesota program does not fulfill its purpose of providing alternative financing as a means of diminishing political corruption because no alternative financing is available if both candidates agree to spending limits.²²⁸

On the other hand, even if no public financing is provided, political corruption may be diminished in spite of the fact that the candidates are left to their old tactics to raise the full amount permitted — \$3.4 million in a Senate race or \$425,000 in a House election. The spending limits obligate candidates to raise smaller sums of money overall, which may reduce corruption, dependence on special interests and time spent fundraising. A state is not required to accomplish fully its goals with every legislative enactment, as long as the program moves towards the realization of the

225. See *infra* text accompanying note 229.

226. See *supra* text accompanying notes 169-71 and note 183.

227. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

228. MINN. STAT. ANN. § 10A.43(5)(b).

purposes of the statute.²²⁹ Ultimately, however, the Minnesota scheme is not germane to its stated goal of providing an alternative means of financing to reduce corruption because no alternative means of financing is available under section 10A.43(5)(b).

Finally, although spending limits are one way to begin reducing the importance of fundraising, it is unclear whether the correlative goal of increasing discussion of public issues is accomplished by spending limits. On one hand, spending limits restrict political discourse.²³⁰ On the other, reducing time spent fundraising frees a candidate to spend more time discussing issues. Whether or not the spending limits chosen by the legislature are ideal for accomplishing these goals is a question which must be left to the legislature.²³¹ Courts may only determine whether the espoused purposes of the statute are legitimate state interests furthered through means rationally related to that interest. It appears that the Minnesota system, taken as a whole, is rationally related to the goals of reducing corruption and decreasing time spent fundraising to increase time spent discussing issues. However, the Minnesota scheme is not rationally related to the goal of controlling overall campaign costs.

4. Results

When the Minnesota program is compared to the Presidential Fund Act, a critical difference is apparent. In Minnesota, the candidates are coerced into accepting spending limits and then, once both candidates have agreed to limit spending, neither receives public assistance. In contrast, the Presidential Fund Act "use[s] public money to facilitate and enlarge public discussion and participation in the electoral process. Thus, Subtitle H furthers, not abridges, pertinent First Amendment values."²³² Minnesota provides no means for expanding the political discourse. Rather, it restricts the total quantity of discussion by enforcing spending limits that candidates involuntarily accept.²³³ This contradicts the

229. *Buckley*, 424 U.S. at 105.

230. See *supra* text accompanying note 169.

231. See *Buckley*, 424 U.S. at 30 (stating that it is not the role of the courts to set the limit for allowable contributions).

232. *Id.* at 92-93.

233. The chilling effect of decreased spending on political discourse may be disputed. In 1988, Senator David Durenberger (R) spent \$5.4 million. In 1984, Sen. Rudy Boschwitz (R) spent more than \$6 million. Craney, *States, supra* note 90, at 1626. The statute limits spending for a Senate race to \$3.4 million. MINN. STAT. ANN. § 10A.44. Based on these

Buckley admonition regarding government imposed restrictions on political expression.²³⁴ The only argument that supports the Minnesota spending limitations as expanding public discourse contends that some candidates who would not have entered the race for office absent the level playing field provided by statutorily imposed spending limits will choose to run under the state financing scheme. Whether this speculative expansion of the field of candidates justifies restricting the quantity of speech by any given candidate is doubtful.²³⁵ In the final analysis, the Minnesota statute establishes a series of unconstitutional conditions and should not withstand scrutiny, even if it survives the preemption challenge.

B. NEW HAMPSHIRE

The New Hampshire campaign spending limitation statute regulates in a manner different from either the Presidential Fund Act or the Minnesota statute. The New Hampshire statute offers to waive a \$5000 filing fee in exchange for a candidate's agreement to limit spending.²³⁶ If a candidate refuses the fee waiver and chooses instead to spend unlimited funds, the candidate must collect 2000 notarized petitions to qualify to have his name on the ballot for a Senate seat and 1000 petitions for a House campaign.²³⁷ In addition to the unconstitutional conditions analysis, the New Hampshire statute's petition requirement raises ballot access concerns.

Before determining whether the New Hampshire statute imposes unconstitutional conditions or hinders ballot access, the question of whether the New Hampshire fee waiver amounts to a public financing program must be addressed. In *Buckley* and *Republican National Committee*, the courts focused on the fact that the candidate was free to choose the method by which to finance his campaign.²³⁸ If a candidate felt he could raise an amount in excess

statistics, it can be argued that the statute would limit political speech to less than would be engaged in without the limits.

However, in 1990, challenger Paul Wellstone spent just \$1.5 million to capture the seat from incumbent Rudy Boschwitz who spent \$6.5 million. Telephone interview with Linda Scheid, state Representative and sponsor of the Minnesota legislation, Feb. 15, 1991. This may indicate that more than \$3.4 million worth of political speech is not necessary to present a political message to the electorate effectively.

234. *Buckley*, 424 U.S. at 19.

235. See *supra* text accompanying notes 169-71 and note 183.

236. N.H. REV. STAT. ANN. § 655:19. See *supra* text accompanying notes 11-13.

237. N.H. REV. STAT. ANN. §§ 655:20, :22.

238. *Buckley*, 424 U.S. at 187; *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 284

of the amount available through public financing, he was free to pursue private monies.²³⁹ In New Hampshire, the most a candidate can hope to receive from the state is \$5000 in the form of a fee waiver. The candidate's choice is to accept spending limits in exchange for \$5000 and be freed from the signature collection requirement, or to fund his campaign wholly from private sources, collect the requisite signatures and pay the \$5000 filing fee. Arguably, this does not amount to a public financing scheme. If the New Hampshire program is not tantamount to public financing, the system is more like straight expenditure limits rejected in *Buckley*.²⁴⁰

1. Unconstitutional Conditions

Under the New Hampshire statute, the government extracts a penalty if a candidate decides not to relinquish his First Amendment rights. The penalty comes in the form of having to collect 1000 or 2000 voter signatures.²⁴¹ Furthermore, every candidate must pay the \$5000 filing fee unless he agrees to restrict his First Amendment rights and limit spending.²⁴² If he does so, the fee is waived.²⁴³

a. Is acceptance of the condition voluntary?

If filing fee and waiver provision represented the full extent of the system, a candidate would be free to decide whether to accept the public funding in the form of the fee waiver or to pursue private financing to fund his campaign.²⁴⁴ Under *Republican National Committee*, this program would qualify as voluntary, although it is unlikely that any candidate would be willing to relinquish his First Amendment rights for so little public assistance.²⁴⁵ Howev-

(S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980).

239. *Buckley*, 424 U.S. at 187; *Republican Nat'l Comm.*, 487 F. Supp. at 284.

240. See *supra* text accompanying notes 169-71.

241. See *supra* text accompanying note 237.

242. N.H. REV. STAT. ANN. § 655:19.

243. *Id.*

244. The fee waiver is similar to the system by which the federal government agrees to waive tax liability if a charitable organization is willing to limit its speech by not lobbying. See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983).

245. See *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 285 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980) (analyzing voluntariness of presidential campaign funding scheme).

er, the New Hampshire legislature went further, requiring candidates who opt for full private financing with no spending limits to collect signatures before they qualify as candidates for federal office. While this requirement will be analyzed more fully as an obstacle to ballot access, in the context of state's regulatory scheme the signature requirement appears to be intended as a penalty to discourage candidates from fully exercising their First Amendment rights.

It is uncertain whether collecting 1000 or 2000 notarized petitions is onerous enough to coerce a candidate into accepting the spending limits. Collecting 1000 or 2000 signatures is not so monumental a feat that a candidate would be all but required to accept the spending limit to get on the ballot. While the purpose behind the signature requirements may have been to encourage candidates to opt for the spending limit and fee waiver option, the signature collection requirement does not appear to be so stringent as to force candidates into accepting the spending limits as the only way to get on the ballot. If the signature requirement amounts to a penalty, it seems to be an ineffective one. Therefore, this condition arguably does not significantly effect the voluntariness of the New Hampshire program.

- b. Is the condition narrowly tailored to meet a compelling state interest?

Assuming the \$5000 fee waiver does amount to public financing and the conditions are not voluntarily accepted, the conditions must be narrowly tailored to further compelling state interests to survive a constitutional challenge.²⁴⁶ The New Hampshire statute does not declare its purposes. Borrowing from *Republican National Committee*, permissible state interests furthered by a public financing system include reducing the influence of large contributions on the political process, facilitating communication with the electorate and freeing candidates from the rigors of fundraising.²⁴⁷

While the New Hampshire statute, through the spending limits, moves toward the compelling state interests of reducing corruption and minimizing time spent fundraising, the statute may not go far enough to constitute means sufficiently tailored to accomplish those

246. See *supra* text accompanying note 180.

247. *Republican Nat'l Comm.*, 487 F. Supp. at 285.

compelling state interests. As a result, the New Hampshire scheme will not withstand the strict scrutiny analysis triggered by infringement of a fundamental right.²⁴⁸ The goal of increasing communication with the electorate is, arguably, not rationally related to the condition of limiting campaign spending. Hence, the condition is not narrowly tailored to the goal. Similarly, the signature requirements are not narrowly tailored to any supposed goal of the statute and, thus, are not rationally related to its purpose. While the spending limits may withstand a constitutional challenge if deemed voluntary, this note contends that the New Hampshire program to limit spending will crumble under the weight of strict scrutiny.

c. If the condition is voluntary, is it germane?

If the program is deemed to provide public financing and found to be voluntary, the condition of relinquishing First Amendment rights in exchange for the fee waiver and release from collecting signatures must be assessed for its germaneness to the purposes of the statute. Spending limits may reduce corruption and free candidates from fundraising. Admittedly, candidates will need to solicit fewer dollars overall under the spending limits, reducing the potential for corruption and candidates' time spent fundraising. On the other hand, because virtually no public funding is available, the campaign financing undertaken is as susceptible to corrupting influences as if the spending limit did not exist. Candidates will still be required to raise funds through the usual channels of soliciting contributions up to the spending limit level — \$200,000 for a House candidate in each election and \$400,000 for a Senate candidate in each election.²⁴⁹

However, a statute need not resolve every aspect of a problem, and a step in the direction of resolution may be sufficient to sustain a statute if a condition and a legitimate state purpose are rationally related.²⁵⁰ Under the New Hampshire program, a rational relationship between the spending limits and the goals of controlling corruption and reducing time spent fundraising is arguably present. The statutory scheme is unlikely to increase communica-

248. Furthermore, because the "public funding" amounts to a \$5000 fee waiver, the New Hampshire system looks more like the congressional expenditure limitations stricken in *Buckley* than a permissible right-benefit exchange.

249. N.H. REV. STAT. ANN. § 664:5-b.

250. See *supra* text accompanying note 229.

tion between the candidates and the electorate, however, because the spending caps to which candidates are subject restrict their ability to communicate.²⁵¹ Because the total amount of public discourse will not be augmented by imposing spending limits, the condition of spending limits is not germane to this third goal.

Furthermore, the signature requirement is wholly unrelated to accomplishing any of the aforementioned purposes. While it may be necessary for a candidate to speak with the voters to collect signatures, that communication will not likely be the type of discussion, i.e., of issues and candidate qualifications, that the Presidential Funding Act and the First Amendment were designed to foster. The signature requirement acts as an obstacle to the exercise of free speech. For a candidate to forgo the fee waiver and spend unlimited amounts on a political campaign, the state of New Hampshire requires that he collect signatures.²⁵² It seems clear that the signature requirement is not even remotely related to controlling corruption, reducing time spent fundraising or increasing communication with the electorate.

2. Ballot Access

Unlike the Presidential Fund Act, which "does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice, . . ."²⁵³ the New Hampshire program does potentially prevent a candidate from getting on the ballot.²⁵⁴ When access to the ballot is limited, two important rights are implicated — "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."²⁵⁵ Although the Constitution does not explicitly protect the right to vote, it has been recognized as a fundamental right, warranting strict scrutiny when infringed by either the federal or state government.²⁵⁶ While there is no correlative fundamental

251. The spending limits would undoubtedly have a chilling effect on political discourse. In the 1984 New Hampshire Senate race, Senator Gordon Humphrey spent \$1.7 million. Craney, *States*, *supra* note 90, at 1626. The statute would limit total spending in a Senate bid to \$800,000, \$400,000 in the primary and \$400,000 in the general election. N.H. REV. STAT. ANN. § 664:5-b(I)(a)-(5).

252. N.H. REV. STAT. ANN. §§ 655:20, :22.

253. *Buckley v. Valeo*, 424 U.S. 1, 94 (1976).

254. The write-in option is available.

255. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

256. *Id.* at 31; *see also*, Case Note, *Constitutional Law — Candidate Filing Fees* —

right to candidacy,²⁵⁷ "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters."²⁵⁸ Ballot access²⁵⁹ questions are typically determined under either the framework of due process²⁶⁰ or equal protection.²⁶¹

a. Due Process

The New Hampshire statute poses the following obstacles to ballot access: if a candidate refuses to limit his campaign spending, he must pay \$5000 and collect either 1000 or 2000 notarized petitions from voters.²⁶² Both restrictions on candidacy arguably have a significant impact on the voters and, therefore, should be analyzed under strict scrutiny.²⁶³ Access to the ballot conditioned on paying a filing fee was struck down in *Bullock v. Carter* when no alternative procedure was available by which indigent candidates could get on the ballot.²⁶⁴ The New Hampshire statute, however, provides two alternate routes to the ballot. A candidate may agree to limit spending and the state will waive the fee, or a candidate

Excessive Filing Fees with No Alternative Means of Ballot Access Held Violative of Equal Protection Clause, 1 FORDHAM URB. L. J. 266 (1972) ("[T]he right to vote freely for the candidate of one's choice [is] 'the essence of a democratic society' . . . [r]estrictions on the right to vote 'strike at the heart of representative government.'" (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964))).

257. See *Bullock v. Carter*, 405 U.S. 135, 143 (1971) ("[T]he Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review.").

258. *Id.* at 143.

259. Typically ballot access challenges are brought by members of minor or new parties. See, e.g., cases cited *infra* notes 260-61.

260. See *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986) (upholding state requirement that minority candidates receive 1% of primary votes to be placed on the ballot); *American Party of Texas v. White*, 415 U.S. 767, 787-88 (1974) (holding constitutional a state law denying ballot access to minority candidates who could not obtain 1% of the electorate's signatures on a petition); *Jenness v. Fortson*, 403 U.S. 431, 440 (1971) (holding constitutional a provision allowing minority party nominees' names on ballot only after filing a petition signed by 5% of registered voters).

261. See *White*, 415 U.S. at 793-94 (holding exclusion of minority parties from statute providing for public financing of majority parties' primaries not discriminatory); *Bullock*, 405 U.S. at 149 (invalidating filing fee system charging fees so high that some candidates were precluded from filing); *Jenness*, 403 U.S. at 440-41; *Williams v. Rhodes*, 393 U.S. 23, 34 (1968) (invalidating state law which partially denied access to all minority parties).

262. See *supra* text accompanying notes 241-43.

263. See *Williams*, 393 U.S. at 30 ("Restrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively . . .").

264. *Bullock*, 405 U.S. at 149.

unable to pay the initial fee may collect the requisite number of voter's signatures and remain free to raise and spend unlimited amounts during the campaign.²⁶⁵ Under the *Bullock* criteria, imposition of the fee may not be deemed an imposition on the candidate's or voter's rights.

The requirement that a candidate collect signatures to qualify for a place on the ballot is not automatically suspect. In *American Party of Texas v. White*, the Court upheld a requirement that minor party candidates collect signatures equaling one percent of the vote in the preceding general election for governor, a 22,000 notarized signature requirement.²⁶⁶ In *Jenness v. Fortson*, the Court sustained a Georgia statute calling for minor party and independent candidates to collect signatures of five percent of the number of voters registered at the last general election and to pay a filing fee of five percent of the annual salary of the office being sought.²⁶⁷

In both *White* and *Jenness*, the Court acknowledged that the rights of voters may be infringed unless the imposition is justified. Generally, "[s]tates may condition access to the general election ballot . . . upon a showing of a modicum of support among the potential voters"²⁶⁸ The state interests acknowledged by the Court in *White* were "preservation of the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion."²⁶⁹ In *Jenness*, it was the "important state interest . . . in avoiding confusion, deception, and even frustration of the democratic process at the general election."²⁷⁰

The restrictions on access to the ballot imposed by New Hampshire do not appear to be offensive when compared with more onerous conditions that have been upheld. However, acknowledging that the restrictions limit the expression of fundamental rights, the purposes behind the conditions which have been historically accepted differ greatly from the goals sought to be accomplished by the New Hampshire statute.

If New Hampshire's purpose were to keep the ballot uncluttered, it makes no sense to require only certain candidates who do not subscribe to spending limits to pay a fee and collect signatures.

265. N.H. REV. STAT. ANN. § 655:19-b

266. 415 U.S. 767, 781 (1974).

267. 403 U.S. 431, 442 (1971).

268. *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) (citing *Jenness*).

269. *White*, 415 U.S. at 782 n.14.

270. *Jenness*, 403 U.S. at 442.

All candidates should be subjected to the ballot access requirements in order to further the objective of an uncluttered ballot. However, New Hampshire's signature requirement is almost assuredly not aimed at preventing voter confusion or deception. Rather, the state's apparent purpose is to provide an incentive to candidates to "voluntarily" limit campaign spending. Therefore, although the New Hampshire burden may be less onerous than others upheld against attack as obstacles to the ballot, the lack of even a rational basis between the statute's apparent purpose and its effect as an impediment to voter choice suggests the statute must fail a due process challenge.

b. Equal Protection

The question raised by a candidate advancing an equal protection challenge asks: "does different treatment of candidates agreeing to spending limits compared with candidates not agreeing to the limits amount to invidious discrimination in violation of the 14th Amendment?" The plaintiffs in this case, candidates running for public office, do not qualify as suspect classes. As a result, rational basis analysis for the disparate treatment would normally suffice to uphold the statute.²⁷¹ However, in ballot access cases involving major party candidates as distinguished from minor party or independent candidates, the Court has applied both mid-level scrutiny²⁷² and strict scrutiny.²⁷³

Regardless of the level of scrutiny, the New Hampshire statute invidiously discriminates between candidates willing to accept spending limits and those who are not. Based on whether a candidate agrees to relinquish his First Amendment rights, the state either requires a payment and collection of signatures, or waives a

271. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (declaring that the Court will uphold a statute that does not burden a suspect class or infringe upon a fundamental right "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational").

272. *Jenness*, 403 U.S. at 442.

273. See *Bullock v. Carter*, 405 U.S. 135, 144 (1971) ("Because the Texas filing-fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, we conclude . . . that the laws must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster.")

fee and requires no signatures.²⁷⁴ The state is providing a benefit to a class of people willing to forgo their constitutional right while denying the benefit of the fee waiver and imposing a penalty of signature collection on those who wish to exercise their First Amendment rights. The supposed purpose sought to be accomplished by the creation of these classes is to limit campaign spending and thus control corruption, decrease candidate time fundraising and increase candidate communication with the electorate. It is difficult to see how the classification of candidates rationally relates to the purposes of the statute.²⁷⁵ Whether a candidate is unwilling to relinquish his First Amendment rights is irrelevant to whether he should be required to pay a filing fee and collect signatures to be included on the ballot. Thus, even under the most minimal level of scrutiny, the New Hampshire statute must fail.

IV. CONCLUSION

It is uncertain whether a court would analyze section 453 of FECA as preempting states from enacting legislation regulating areas not covered by that statute. This note suggests that Minnesota and New Hampshire could mount plausible defenses in court to a preemption challenge given the general reluctance of the courts to find preemption and the lack of a clear mandate from the language or legislative history of section 453. However, it will be difficult for the states to overcome the presumption of validity accorded administrative agency rulings to the contrary. This note advocates a legislative solution to the uncertainty. Congress should amend section 453 to state unequivocally that the states may regulate federal elections as long as the state regulations do not conflict with or frustrate the purposes of FECA.

Should the states survive a preemption challenge in the courts or should Congress amend section 453 as proposed here, neither the Minnesota nor the New Hampshire statute would withstand

274. N.H. REV. STAT. ANN. §§ 655:19, :19-b, :20.

275. Both the paying of a fee and the collection of signatures have been upheld as furthering the goals of keeping the ballot uncluttered and minimizing voter confusion. For example, in *Jenness*, the Court upheld a requirement that non-major party candidates gather signatures equalling five percent of the total eligible electorate while major party candidate could appear on the ballot simply by winning the primary. 403 U.S. at 442. The *Jenness* Court focused on the fact that treating major party candidates differently from new or small political organizations was simply treating different candidates differently while furthering the goals of "avoiding confusion, deception and even frustration of the democratic process at the general election." *Id.* at 442.

constitutional scrutiny of their provisions. The Minnesota statute is unacceptably coercive and not narrowly tailored to accomplish compelling state interests. With respect to the New Hampshire law, it is uncertain whether that state's system would be found to be voluntary. Moreover, the scheme fails to create a real right-benefit exchange, transforming the system into the functional equivalent of straight spending limits. In addition, that statute does not bear a rational relationship to the goals of public financing, nor are its conditions narrowly tailored to accomplish a compelling state interest. Furthermore, the statute imposes restrictions on ballot access that offend both due process and equal protection.

While this note advocates permitting the states to enter the realm of regulating federal elections, it does not endorse the methods chosen by Minnesota and New Hampshire. Rather, state regulation should mirror more closely the right-benefit exchange embodied in the Presidential Fund Act, where significant public financing is provided to candidates who agree to limit their spending.

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* The author would like to thank Professor Laura Chisolm of the Case Western Reserve University School of Law for her advice and assistance in writing this note and the author's husband, Steven Forbes, for his support and patience.

