Congressman Ron Paul U.S. House of Representatives February 13, 2002 So-Called "Campaign Finance Reform" is Unconstitutional

Mr. PAUL. Mr. Speaker, the Enron bankruptcy and the subsequent revelations regarding Enron's political influence have once again brought campaign finance to the forefront of the congressional agenda. Ironically, many of the strongest proponents of campaign finance reform are among those who receive the largest donations from special interests seeking state favors. In fact, some legislators who where involved in the government-created savings and loan scandal of the late eighties and early nineties today pose as born again advocates of "good government" via campaign finance reform!

Mr. Speaker, this so-called "reform" legislation is clearly unconstitutional. Many have pointed out that the First amendment unquestionably grants individuals and businesses the free and unfettered right to advertise, lobby, and contribute to politicians as they choose. Campaign reform legislation blows a huge hole in these First amendment protections by criminalizing criticism of elected officials. Thus, passage of this bill will import into American law the totalitarian concept that government officials should be able to use their power to silence their critics.

The case against this provision was best stated by Herb Titus, one of America's leading constitutional scholars, in his paper *Campaign-Finance Reform: A Constitutional Analysis*: "At the heart of the guarantee of the freedom of speech is the prohibition against any law designed to protect the reputation of the government to the end that the people have confidence in their current governors. As seditious libel laws protecting the reputation of the government unconstitutionally abridge the freedom of speech, so also do campaign-finance reform laws."

The damage this bill does to the First amendment is certainly a sufficient reason to oppose it. However, as Professor Titus demonstrates in his analysis of the bill, the most important reason to oppose this bill is that the Constitution does not grant Congress the power to regulate campaigns. In fact, article II expressly authorizes the regulation of elections, so the omission of campaigns is glaring.

This legislation thus represents an attempt by Congress to fix a problem created by excessive government intervention in the economy with another infringement on the people's constitutional

liberties. The real problem is not that government lacks power to control campaign financing, but that the federal government has excessive power over our economy and lives.

It is the power of the welfare-regulatory state which creates a tremendous incentive to protect one's own interests by "investing" in politicians. Since the problem is not a lack of federal laws, or rules regulating campaign spending, more laws won't help. We hardly suffer from too much freedom. Any effort to solve the campaign finance problem with more laws will only make things worse by further undermining the principles of liberty and private property ownership.

Attempts to address the problems of special interest influence through new unconstitutional rules and regulations address only the symptoms while ignoring the root cause of the problem. Tough enforcement of spending rules will merely drive the influence underground, since the stakes are too high and much is to be gained by exerting influence over government- legally or not. The more open and legal campaign expenditures are, the easier it is for voters to know who's buying influence from whom.

There is a tremendous incentive for every special interest group to influence government. Every individual, bank, or corporation that does business with government invests plenty in influencing government. Lobbyists spend over a hundred million dollars per month trying to influence Congress. Taxpayer dollars are endlessly spent by bureaucrats in their effort to convince Congress to protect their own empires. Government has tremendous influence over the economy and financial markets through interest rate controls, contracts, regulations, loans, and grants. Corporations and others are "forced" to participate in the process out of greed as well as self-defense- since that's the way the system works. Equalizing competition and balancing power- such as between labor and business- is a common practice. As long as this system remains in place, the incentive to buy influence will continue.

Many reformers recognize this, and either like the system or believe that it's futile to bring about changes. They argue that curtailing influence is the only option left, even if it involves compromising freedom of political speech by regulating political money.

It's naive to believe stricter rules will make a difference. If members of Congress resisted the temptation to support unconstitutional legislation to benefit special interests, this whole discussion would be unnecessary. Because members do yield to the pressure, the reformers believe that more rules regulating political speech will solve the problem.

The reformers argue that it's only the fault of those trying to influence government and not the fault of the members of Congress who yield to the pressure, or the system that generates the abuse. This allows members to avoid assuming responsibility for their own acts, and instead places the blame on those who exert pressure on Congress through the political process- which is a basic right bestowed on all Americans. The reformer's argument is "Stop us before we succumb to the special interest groups."

Politicians unable to accept this responsibility clamor for a system that diminishes the need for them to persuade individuals and groups to donate money to their campaigns. Instead of persuasion, they endorse coercing taxpayers to finance campaigns.

This only changes the special interest groups that control government policy. Instead of voluntary groups making their own decisions with their own money, politicians and bureaucrats dictate how political campaigns will be financed. Not only will politicians and bureaucrats gain influence over elections, other nondeserving people will benefit. Clearly, incumbents will greatly benefit by more controls over campaign spending- a benefit to which the reformers will never admit.

Mr. Speaker, the freedoms of the American people should not be restricted because some politicians cannot control themselves. We need to get money out of government. Only then will money not be important in politics. Campaign finance laws, such as those before us today, will not make politicians more ethical, but they will make it harder for average Americans to influence Washington.

The case against this bill was eloquently made by Herb Titus in the paper referenced above: ACampaign-finance reform is truly a wolf in sheep's clothing. Promising reform, it hides incumbent perquisites. Promising competition, it favors monopoly. Promising integrity, it fosters corruption. Real campaign-finance reform calls for a return to America's original constitutional principles of limited and decentralized governmental power, thereby preserving the power of the people."

I urge my colleagues to listen to Professor Titus and reject this unconstitutional proposal. Instead, I hope my colleagues will work to reduce special interest influence in Washington and restore integrity to politics by reducing the federal government to its constitutional limits. I would like to take this opportunity to introduce the excellent article by Mr. Titus into the record:

Campaign-Finance Reform

A Constitutional Analysis

by Herbert W. Titus

1. Introduction
2. Congress Has No Constitutional Authority to Pass Any Campaign-Finance

Reform Legislation

3. Campaign-Finance Reform Violates Separation of Powers and Federalism
4. Campaign-Finance Reform Abridges the Freedom of Speech and the Press
5. Campaign-Finance Reform Abridges the Right of the People to Assemble
6. Conclusion

I. Introduction

To date, the legislative debate over campaign-finance reform has focused upon the First Amendment guarantee of freedom of speech, as interpreted and applied by the courts. The constitutional issues, however, are not limited to the First Amendment, neither are they resolved by citation to *Buckley v. Valeo,* 424 U.S. 1 (1976) nor by the latest Supreme Court opinion, including the one handed down on June 25, 2001 in
FEC v
.
Colorado Republican Federal Campaign Committee
. To the contrary, pursuant to their oaths of office, members of Congress have an independent duty to determine the constitutionality of legislation before them and to decide, before ever

reaching the First Amendment, whether they have been vested by the Constitution with any authority, at all, to regulate federal election campaigns.

The original Constitution did not contain the Bill of Rights, including the First Amendment. Writing in *Federalist No. 84,* Alexander Hamilton defended this omission, claiming that a bill of rights was not needed in a republic with a written constitution expressly enumerating the powers of government. Indeed, Hamilton observed a bill of rights attached to such a constitution might well prove dangerous because placing express limits upon the exercise of a power might give rise to the assumption that such a power had been previously granted.

Hamilton's warning has proved prophetic in the case of campaign-finance reform. As the debate swirls around the impact of such reform measures on the freedom of speech and association, the question whether Congress has the constitutional authority to regulate federal election campaigns is being ignored. Yet, that question would have been hotly debated and quickly answered in America's founding era in light of the constitutional text carefully circumscribing Congress's authority in relation to federal elections. (See Article I, Section 4, Clause 1 and Article II, Section 1, Clause 4; *Federalist No. 60* and *Federalist No. 68,* I Story's Commentaries on the Constitution, Sections 814-826 and II Story's Commentaries, Sections 1453-75, 5th ed. 1891.)

Additionally, the issue of constitutional authority would have been examined, in the first instance, by Congress and the president without their being bound by previous court opinions. It had already been well established that each representative, each senator, and the president and his cabinet had a constitutional duty, independent of the judiciary, to determine the constitutionality of legislation before them. As President Andrew Jackson observed, in his 1832 veto message rejecting a bill extending the charter of the Bank of the United States:

It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority...[and] the opinion of the Supreme Court...ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by

others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill...presented to them for passage...as it is of the supreme judges when it may be brought before them for judicial decision.

It is in light of these principles, then, that the issue of constitutional authority to enact any campaign-finance reform bill is addressed in sections II and III below, before reaching the First Amendment issues raised by particular campaign-finance measures in sections IV and V. Furth ermore, those issues are examined in light of the constitutional duty of Congress to decide for itself whether it has the constitutional authority to enact campaign-finance reform legislation and whether any such legislation violates the First Amendment, regardless of the opinion of the United States Supreme Court in
Buckley v. Valeo,
424 U.S. 1 (1976) and its progeny, including the high court's most recent pronouncement on June 25, 2001.

II.Congress Has No Constitutional Authority to Pass Any Campaign-Finance Reform Legislation

According to Article I, Section 1 of the United States Constitution, Congress is a legislature of enumerated powers, having only those "powers herein granted." As a legislature of enumerated powers, Congress may enact laws only for constitutionally authorized purposes. (
McCulloch v. Maryland,
17 U.S., 4 Wheat. 316, 1819) ("Let the end be legitimate, and all means which are appropriate, which are plainly adapted to that end which are not prohibited, are constitutional.") The stated purpose of all campaign-finance reform legislation, like the Federal Election Campaign Act that it amends, is to "reform the financing of campaigns for election to Federal office," thereby preventing the "corruption and the appearance of corruption" in government and "equaliz[ing] the relative ability of all citizens to affect the outcomes of elections." (
Buckley v. Valeo,
424 U.S. 1, 25-26, 1976) Congress has been granted no such power.

The threshold question concerning any campaign-finance reform bill is whether the Constitution has conferred upon Congress any authority to regulate federal election campaigns. Such authority is not found among any enumerated power conferred upon Congress. Therefore, Congress may not justify any campaign-finance reform measure on the grounds that its purpose is to reform the financing of campaigns for federal office. Thus, campaign-finance reform laws may be constitutionally justified only if enacted as a means to achieve some other purpose that is constitutionally authorized. (

McCulloch v. Maryland,
17 U.S., 4 Wheat. 316, 1819)

The Federal Election Campaign Act of 1971, as amended in 1974, presumed that the Constitution authorized Congress to regulate federal election campaigns for the purposes of "the prevention of corruption and the appearance of corruption" in government and of the equalization of "the relative ability of all citizens to affect the outcome of elections." (*Buckley v. Valeo,* 424 U.S. 1, 25-26, 1976) According to the proponents of campaign-finance reform, both then and now, Congress has power to regulate federal election campaigns because it has the general power "to regulate federal elections...."
(
Id.,
424 U.S. at 13-14) A careful examination of the Constitution, as it is written, uncovers no such broad power, but only a carefully circumscribed one.

As for congressional elections, Article I, Section 4 limits Congress to the making of regulations prescribing the "times, places and manner of holding elections for senators and representatives." As for the election of the president and vice president Article II, Section 1 limits Congress only to "determin[ing] the time of choosing the [presidential] electors, and the day on which they shall give their votes; which day shall be the same throughout the United States." (Emphasis added.) As for the place and manner of the selection of the presidential electors, and hence the president and vice president of the United States, the Twelfth Amendment to the Constitution determines the place and, according to Article II, Section 1, the state legislatures choose the manner by which the electors are chosen. (
Bush v. Gore
, 531 U.S. --, 148 L.Ed.2d 388, 2000)

Given these express restrictions upon congressional power over federal elections, it was not until the 1930s that Congress, with court approval, began to assume broad powers over federal elections, including the regulation of campaigns for the office of the president. (*Burroughs v. United States,* 290 U.S. 534, 1934) At the time of America's founding, and extending for a period of nearly 135 years, such was not the case.

As for congressional elections, Alexander Hamilton observed, in *Federalist No. 60,* that congressional authority was "expressly restricted to the regulation of the *times,* the *places*, the *manner* of elections," and did not, for example, extend to the qualifications of voters. Likewise, Joseph Story noted that congressional authority over federal elections was explicitly confined to regulations concerning the mechanics and integrity of the election process itself, and did not extend to the integrity of government generally or the relative power of voters. (I Story's Commentaries on the Constitution, Section 826, 5th ed., 1891)

As for presidential elections, Hamilton noted that the detailed plan set forth in the original constitution was deliberately designed to ensure that the president would not be elected according to rules promulgated by Congress, lest the president be too dependent upon that body. (*Federalist No. 68*) Likewise, Justice Story asserted that both the original Constitution and the Twelfth Amendment immunized the "mode of election of the President and Vice-President" from congressional regulation, limiting congressional authority only to setting the "time" of the election. (II Story's Commentaries, Sections 1453-75, 5th ed., 1891)

In 1892, a unanimous Supreme Court rehearsed the history and text governing the election of the president and vice president, concluding that the manner of selection of presidential electors was "placed absolutely and wholly with the legislatures of the several states" and that this "power and jurisdiction of the State" was "so framed that congressional and Federal influence might be excluded." (*Mc Pherson v. Blacker,* 146 U.S. 1, 34-36, 1892) (See also *Bush v. Gore*, supra.) Because the Constitution grants to Congress no authority to regulate the "manner" of the election of the president and vice president, it follows that Congress has no authority over presidential and vice presidential election campaigns.

As for congressional regulation of the campaigns of candidates for the United States House of Representatives and United States Senate, four justices of the United States Supreme Court, in 1921, struck down a federal law limiting contributions and expenditures in congressional

elections, observing:

We find no support in reason or authority for the argument that because the offices were created by the Constitution, Congress has some indefinite, undefined power over elections for Senators and Representatives not derived from [Article I] Section 4. (*Newberry v. United States*, 256 U.S. 232, 249, 1921)

From this constitutional premise, these justices ruled that the "authority to regulate the manner of holding... [elections] gives no right to control" things that are "prerequisites to elections or [that] may affect their outcomes - voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate...." (*Id.,* 256 U.S. at 257 [emphasis added])
Therefore, they concluded that Congress had authority only to regulate congressional elections to protect voters from fraud {*Ex parte Siebold,* 100 U.S. 371, 382-88 (1880)}, from intimidation {*Ex Parte Yarbrough,* 110 U.S. 660-62 (1884)} and from other acts designed to protect the integrity of the election process, as such. (*Newberry v. United States, supra,* 256 U.S. at 255)

This was the original understanding, as set forth in the constitutional text and as stated by Hamilton and Story. Congressional regulation of political campaigns, beginning in the 1930's, disregards the founding principle of limited federal authority. Instead, such regulation is based upon the assumption that Congress is a legislature of plenary power, rather than enumerated powers as stated in Article I, Section 1.

(See *Burroughs v. United States, supra,* 290 U.S. at 545.) Such precedents as these should be rejected, lest Congress overstep the limited authority granted to it by the sovereign people of the United States.

III. Campaign-Finance Reform Violates Separation of Powers and Federalism

Under the Constitution, Congress has no role in the manner by which the president and vice president are selected. In order to ensure the independence of the president from Congress, the electors of the president and vice president are state officers, governed exclusively by the Constitution and by state law. (See *Bush v. Gore*, supra.) All current campaign-finance measures, such as the Federal Campaign Act of 1971, as amended in 1974, subvert these separation of powers and federalism principles by imposing a national uniform rule governing the conduct of election campaigns for president and vice-president. They also undermine the federalism principle underpinning the limited role of Congress in the governance of elections of representatives and senators.

According to Article II, Section 1, the state legislatures, not Congress, determine the "manner" of the election of presidential electors who, in turn, are governed by the Twelfth Amendment as to the "manner" of the election of the president and vice president of the United States. The only constitutionally prescribed role for the Senate in that election process is to serve as an objective observer of the final count of votes cast by the presidential electors. The House also is limited to the role of an objective observer, unless on final count of the electors' votes, no person achieves a majority of votes for president. Then, and only then, may the House intervene in the manner of electing a president, casting one vote per state until a candidate achieves a majority. As for the vice president, both houses of Congress are limited to serving as objective observers of the final tally of votes, except that the Senate plays the same role as the House if no candidate for vice president receives a majority.

This detailed scheme limiting the role of Congress in the manner of electing the president and the vice president of the United States was deliberately chosen by America's founders to insulate the federal executive branch from the legislative branch in order to ensure independence of the former from the latter. As Alexander Hamilton put it in *Federalist No. 68,* t he Constitution entrusts the selection of the president and vice president not to "any preestablished body, but to men chosen by the people for the special purpose...." The electoral college was designed, therefore, as a buffer between the people and Congress to guard against the risk of corruption of the presidency by congressional participation in the election process.

Thus, the electoral college system was designed to prevent corruption and the appearance of corruption of the offices of the president and the vice president. That system was set up in such a way as to deny to Congress any authority over the manner of selecting those two officers, leaving the selection process to be exclusively and absolutely determined by the legislatures of the several states. This delegation to the several state legislatures necessarily precludes Congress from imposing any uniform rule governing the election of the president and the vice

president. (See *McPherson v. Blacker,* 146 U.S. 1, 1892.) By continuing the regulation of presidential election campaigns as provided for in the Federal Election Campaign Act of 1971, as amended in 1974, and by adding new regulations that extend to candidates for the presidency and vice presidency, all current campaign-finance reform measures subvert the constitutionally prescribed decentralized manner by which the president and vice president of the United States are selected.

By design and effect, such measures perpetuate the current regulations governing the selection of presidential and vice presidential electors who are, according to the Constitution, state officers, and not federal ones. (*In re Green,* 134 U.S. 377, 1890) ("Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are... the people of the States when acting as electors of representatives in Congress."); *Ray v. Blair,* 343 U.S. 214, 224-25 (1952) ("The presidential electors exercise a federal function in balloting for President and Vice-President but they are not federal officers or agents any more than the state elector who votes for congressmen.") Thus, all current campaign-finance reform bills violate the principles of separation of powers and federalism protecting the independence of the federal executive branch.

Additionally, campaign-finance regulations applied to the election of members of Congress also intrude upon the power of their electors who, like presidential electors, are state officers. According to Article I, Section 2 and the Seventeenth Amendment, the qualifications of the electors of United States representatives and senators are set by state law, not by federal law. (*In re Green, supra,* 134 U.S. 379; *Ray v. Blair, supra,* 343 U.S. at 224-25) The Constitution did not grant to Congress any power to determine the eligibility of their electors, and thus insulated those electors from having their power reduced, or otherwise affected, by their representatives in Congress.

Although no current campaign-finance reform bill sets the qualifications of electors for Congress, each one does, like its predecessors, impose a uniform system of campaign rules designed to govern the power to be exercised by citizens at the voting booth. Some of the measures, like the McCain-Feingold bill passed in the Senate and Shays-Meehan bill pending before the House, extend that uniform system, exercising power over the state, district and local committees of political parties as well as the national committees of those parties. While such laws do not change state laws governing voter eligibility, as such, they do change the power exercised by those eligible voters. Indeed, one of the stated purposes of campaign reform legislation is to "equalize" the power of citizens "to affect the outcome of elections." (*Buckley v. Valeo, supra,* 424 U.S. at 25-26) Such a purpose, however, is illegitimate. It imposes a national uniform

standard limiting the power of voters to the detriment of a constitutionally prescribed system of state diversity.

In his Commentaries on the Constitution, Justice Story observed that the framers deliberately chose not to impose a standard of "equality" among the voters of the several states, but rather to accommodate a "mixed system, embracing and representing and combining distinct interests, classes and opinions." (I Story, Commentaries on the Constitution
Sections 583-84, 5th ed., 1891) More recently, in a column published in the September 5, 1999, issue of
The Washington Post,
columnist George Will reminded his fellow Americans that the Constitution does not authorize one
federal election, but many. All current campaign-finance reform measures disregard this decentralized federal structure governing elections to Congress and to the presidency and, for that reason, are unconstitutional.

IV. Campaign-Finance Reform Abridges the Freedom of Speech and the Press

At the heart of campaign-finance reform legislation, is the desire of Congress to eliminate even the "appearance of corruption" to the end that the people have confidence in the current system of representative government. (*Buckley v. Valeo,* 424 U.S. 1, 27, 1976) At the heart of the guarantee of the freedom of speech is the prohibition against any law designed to protect the reputation of the government to the end that the people have confidence in their current governors. As seditious libel laws protecting the reputation of the government unconstitutionally abridge the freedom of speech so also do campaign-finance reform laws.

In *Buckley v. Valeo,* 424 U.S. 1, 27-28 (1976), the Supreme Court recognized that the contribution and other limitations imposed by the Federal Election Campaign Act of 1971 could not
be justified on the grounds that they prevented only "the most blatant and specific attempts of those with money to influence governmental action." Rather, the court found, that such limitations served a much broader purpose, namely, the prevention of "the appearance of corruption" to the end that "confidence in the system of representative government is not to be eroded...." (
Id.,
424 U.S. at 27)

Since *Buckley,* the proponents of ever more stringent limits upon campaign contributions have emphasized that such laws are needed not to prevent actual government corruption, but to eliminate all appearances of such corruption. Indeed, these proponents have contended that the elimination of the appearance of corruption is compelling because, if the appearance is allowed to remain, people will lose faith in our current system of government and their confidence in their elected leaders, such faith and confidence lying at the heart of a healthy democracy.

This same theme has been struck by leading proponents of reform in the House of Representatives. Four years ago, House Minority Leader Richard Gephardt urged the adoption of more restrictive measures "for healthy campaigns in a healthy democracy" even at the expense of the freedom of speech. (Gibbs, "The Wake-Up Call," *Time,* p. 25, Feb. 3, 1997) Representative Gephardt has not changed his mind, continuing his adamant support of the speech-restrictive Shays-Meehan bill to this day. (Mitchell, "2 Election Bills Go to the House Floor," The New York Times , June 29, 2001) Indeed, Senator John McCain has not changed his mind either. Having urged in 1997 the enactment of a law placing limits on public policy organizations' political advertising in the waning days of an election campaign, and thus calling off the political "attack dogs" (NBC News, Meet the Press, Feb. 3, 1997), Senator McCain is waging an all-out war to make sure that his version of campaign-finance reform passes the House. (Shenon, "House Critics Call McCain a Bully on Campaign Bill," The New York Times, July 9, 2001) As McCain's Democrat colleague, Russell Feingold, put it upon the introduction of Shays-Meehan in the Senate in 1999: "The prevalence – no – the dominance of money in our system of elections and our legislature will…cause them to crumble." (Cong. Rec. S422, 423, daily ed., Jan. 19, 1999)

What these advocates of campaign-finance reform really want is to protect incumbent office holders from the people. Under the guise of preserving the present governmental structure, they support campaign-finance reform measures that are nothing more than "incumbent-protection" legislation that would make entrenched politicians even less responsive to the people. (See e.g., James C. Miller, *Monopoly Politics* 88-101, Hoover Inst. 1999.)

Such contentions and consequences as these undermine the foundation of America's constitutional republic. Our nation's continued existence - its sovereignty - is not embodied in its current system of government or in its current elected and appointed leaders. Instead, the civil sovereignty of the nation resides in the people. To preserve popular sovereignty, the First Amendment secures to the people the freedom of speech, which, in turn, protects the people from any legislation the purpose of which is to preserve the current government and its leaders.

Twice in America's history, the sovereignty of the people came under direct attack from Congress. Both times the attack came in the form of laws prohibiting "seditious libel" (writing or speaking in such a way as to bring the government into ridicule or disrepute), and thereby threatening the current system of government and its leaders. Finally, in 1964, the United States Supreme Court put an end to seditious libel, ruling that the freedom of speech guarantees a nation in which "debate on the public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (*New York Times v. Sullivan,* 376 U.S. 254, 270, 1964)

Had the court applied the same standard to the Campaign Reform Act of 1971, that law, too, would have been cast into the dustbin of history. For, campaign-finance reform laws - like seditious libel laws - exist solely to protect the present government and her leaders from the people. While this goal may be permissible in England where the Parliament embodies the sovereignty of the nation, it has no place in America where, as James Madison put it in the 1800 Virginia Resolutions in opposition to the Alien and Sedition Act of 1798, the "people, not the government, possess absolute sovereignty."

Campaign-finance reform also constitutes a direct attack on the First Amendment freedom of the press. By giving politicians and their appointed bureaucrats the right to decide what the people can say about them in the heat of an election campaign, as McCain-Feingold and Shays-Meehan do with respect to issue advertising in the closing weeks of a campaign, these so-called reformers reject the very idea of a republican form of government, granting to the government "censorial power over the people," instead of preserving the censorial power of the people over their government. (See New York Times v. Sullivan, supra, 376 U.S. at 275.)

Such intrusions into the campaign process put the government into the role of editor of campaign literature, a role that is absolutely forbidden to the government by the freedom of the press. (*Miami Herald Tribune v. Tornillo,* 418 U.S. 241, 258, 1974) Indeed, if the Supreme Court would apply the same principle to election-campaign literature that it has applied to election editorials and stories carried by newspapers, all campaign-finance reform legislation would be clearly unconstitutional. Not only do all campaign-finance reform measures transfer editorial control over an election campaign from the people to the government, but they also continue the unconstitutional licensing system of the Federal Election Commission established by the Federal Election Campaign Act of 1971. In order to engage in a campaign for federal office, a candidate must register and report to the commission. Anyone who does not meet the commission's registration and reporting rules is denied the right to participate and is subject not only to civil and criminal penalties, but to an injunction. Such a regulatory scheme strikes at the very heart of the freedom of the press which, as Sir William Blackstone wrote in 1769:

The liberty of the press...consists of laying...no previous restraints on publications.... Every freeman has the undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press.

(IV W. Blackstone, Commentaries on the Laws of England 151-52,1769 [emphasis added])

Campaign-finance reform, then, is not progressive, but reactive, turning the clock back to the days of the English Star Chamber that enforced the King's rules governing the conduct of elections for the ostensible purpose of keeping his realm free of moral and political corruption. (*Sources of Our Liberties* 130, 242, Perry, ed., American Bar Found., 1978) A free nation may only be preserved when the people have the liberty of the press to censor their own speech about the government and about candidates for governmental office, not when the government has censorship power of the people, as campaign-finance reform inevitably dictates.

V. Campaign-Finance Reform Abridges the Right of the People to Assemble

The right of the people to assemble is the right of the people to associate freely together to consult for the common good, subject only to the requirement that their association be "peaceable." Any law that is not designed to keep the physical peace of the community is, therefore, unconstitutional. No campaign-finance reform measure has ever been designed to keep the "physical peace"; rather, each is designed to keep the "political peace;" a constitutionally impermissible goal abridging the right of the people to assemble.

Since Watergate, Congress has been scrambling to "purify" the political process in order to restore public confidence in the federal government. Campaign-finance reform has been one of the centerpieces of this purification effort. Two central goals have dominated this reform effort: (1) to limit the amounts that any one person or entity may contribute to an election campaign; (2) to force disclosure of the identity of those contributors. Both of these aims violate the First Amendment right of the people to assemble.

At the heart of the right of the people to assemble is the right of the people to choose how they are going to associate with one another "for the 'common advancement of political beliefs.'" (*De*

mocratic Party v. Wisconsin,
450 U.S. 107, 121-22, 1981) This right extends to associations of people for the purpose of electing persons to federal office who share those political beliefs. (
Buckley v. Valeo,
424 U.S. 1, 57, 1976) Indeed, as Justice Clarence Thomas recently observed: "Political associations allow citizens to pool their resources and make their advocacy more effective and such efforts are fully protected by the First Amendment." (
Colo. Rep. Fed. Camp. Comm. v. FEC,
518 U.S. 604, 135 Led2d 795, 818, 1996, Thomas, J., concurring in the judgment and dissenting)

Had the Supreme Court applied this principle consistently in its review of the Federal Election Campaign Act of 1971, it would have held that the individual contribution limits of that act violated the constitutionally guaranteed freedom of association. As Justice Thomas has pointed out: "If an individual is limited in the amount of resources he can contribute to...a pool, he is certainly limited in his ability to associate for the purposes of effective advocacy." (*Id.,* 135 L.Ed.2d at 819) Instead, the court has attempted to distinguish between "issue advocacy" - where the right of the people to associate must remain unfettered - and "express advocacy" for or against individual candidates - where the right of the people to associate may be limited.

Both McCain-Feingold and Shays-Meehan exploit this distinction in their attempt to muzzle political advertisements in the final weeks of an election campaign, claiming that issue advocacy becomes express candidate advocacy when conducted during the crucial weeks before election day. In so doing, both bills seriously undermine the people’s right to choose for themselves how they will associate to advance or defeat certain measures or to promote specific principles of public policy. Constraining the people who speak out on the issues in conjunction with an election campaign may make for a more "orderly" political process, but people are not horses or mules to be hooked up to the political bandwagons of government-subsidized incumbent politicians. Additionally, limits on so-called "soft money" to political parties are really designed to place incumbent office holders in control of the political parties whose name they sport. By placing controls on how political parties may raise and spend money, "independent" politicians like John McCain seek to transmute America’s political parties into political eunuchs, impotent to affect the outcome of any election.

Compounding these intrusions upon the people’s right to choose how and with whom they will associate to advance their political agenda, all campaign-finance reform measures depend upon forced disclosure of the names and addresses of even the smallest contributor to an election campaign. Such required public disclosure hearkens back to the days when the English monarchy required the publication of the names and addresses of all printers of all publications circulated throughout the realm. Requiring disclosure of the names of contributors to federal

election campaigns departs from an American tradition and practice that dates back to the founding of the nation and from a long line of cases affording constitutional protection of anonymity in associative relationships. (*McIntyre v. Ohio,* 514 U.S. 334, 1995; *NAACP v. Alabama,* 357 U.S. 449, 1958)
Forced divulgence of the names of contributors to federal election campaigns exposes people not only to retaliation by employers and union leaders, whose political choices are not the same as their employees and their members, but it also exposes people who support challengers to the inevitable cold shoulder of a re-elected incumbent. (
Buckley v. Valeo, supra,
424 U.S. at 237,
Burger, C.J., dissenting)

Keeping the political peace, as campaign-finance reform is designed to do, exacts a high price, costing the people their precious liberty of choosing how much energy and resources they wish to devote to politics. While full freedom of association, including anonymity, risks corruption of the political process, nothing is more corrosive of that process than placing election campaigns in the discretionary hands of unelected bureaucrats. (Miller, *Monopoly Politics* 95-100, 1999)

VI. Conclusion

Campaign-finance reform is truly a wolf in sheep's clothing. Promising reform, it hides incumbent perquisites. Promising competition, it favors monopoly. Promising integrity, it fosters corruption. Real campaign-finance reform calls for a return to America's original constitutional principles of limited and decentralized governmental power, thereby preserving the power of the people.