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In an attempt to regulate and control electioneering and campaigning in California, the voters on June 4, 1974, passed, by approximately a 70 percent vote,[1] Proposition 9, an initiative measure entitled "Political Reform Act of 1974."[2] The Act's provisions, which cover a broad range of subjects, principally relate to the organization of the new Fair Political Practices Commission, the requirement of campaign disclosures, the limitation of campaign expenditures, the control of lobbyists, the regulation of conflicts of interests, and the preparation of state ballot pamphlets. The creation of the Fair Political Practices Commission (hereinafter referred to as FPPC, and the limitations on expenditures which may be made for campaigns of statewide candidates and for ballot measures are two entirely new elements added to existing law in California.

Pursuant to chapter 3 of the Act, a five member, multi-partisan, independent FPPC has been created to administer the provisions of the Act, to adopt necessary regulations, to investigate possible violations of the Act, and to order compliance therewith.[3] The FPPC is required to investigate possible violations of the Act either on its own initiative or on receipt of a sworn complaint, and to give any complainant timely notice of the disposition of his complaint.[4] It is also empowered to: hold hearings; subpoena witnesses and documents; grant witnesses immunity from penalty, forfeiture, or criminal prosecution (other than perjury) after timely notice to the Attorney General; issue cease and desist orders; and impose penalties of up to $2,000 for each violation.[5] Any person may request the FPPC to give an advisory opinion with respect to his duties under the Act.[6]

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1. Salzman, *Complete Primary Election Analysis*, 5 CAL. J. 231 (1974).
2. Government Code Section 81000 provides that Title 9 shall be known as the Political Reform Act of 1974.
3. CAL. GOV'T CODE §83100 *et seq.*
4. CAL. GOV'T CODE §83115.
5. CAL. GOV'T CODE §§83116, 83118, 83119.
6. Government Code Section 83114 explicitly provides that the FPPC is required to either issue an opinion or notify the person who made the request whether an opinion will be issued within 14 days. No person who acts in good faith reliance upon an opinion issued to him shall be subject to civil or criminal liability under the Act, so long as the individual properly relates the material facts. The advisory opinions are declared to be public records by section 83114.

Chapter 5 imposes separate ceilings on the amount of expenditures which may be incurred by statewide candidates, state central committees of political parties, and independent committees during the five month period immediately preceding a statewide election.[7] Limitations are also imposed on the amount which may be spent in furtherance of the circulation or qualification of a statewide petition for an election ballot[8] and on the amount which may be spent for or against a statewide measure that has qualified to appear on a ballot.[9] The purposes of these limitations are to make government more responsive to the needs of the people by reducing the excessive influence of money on the political process[10] and to abolish laws and practices unduly favoring incumbents in order that elections may be conducted more fairly.[11]

Despite these laudatory purposes, serious constitutional questions arise as to whether these spending restrictions unconstitutionally abridge the rights protected by the first amendment to the United States Constitution. One of the primary purposes of the first amendment has been to protect the integrity of the democratic process.[12] Expenditure ceilings clearly affect the amount of money which may be spent on political advertisements. Since advertising is inherently a part of election campaigns, these limitations will inhibit to some degree political discussions and debate on issues of public importance.[13] While the United States Supreme Court has ruled that commercial advertising is a form of speech which is not protected by the first amendment freedoms of speech and press,[14] a distinction has been drawn between speech made for a purpose which is substantially profit motivated and speech made for a purpose which is largely informational or noncommercial, the latter type of speech being entitled to first amendment protection.[15] Thus,

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7. CAL. GOV'T CODE §85100 *et seq.*
8. CAL. GOV'T CODE §85200 *et seq.*
9. CAL. GOV'T CODE §85301 *et seq.*
10. CAL. GOV'T CODE §81002(b).
11. CAL. GOV'T CODE §81002(f).
12. New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964); *cf.* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970) [hereinafter cited as EMERSON].
13. *Cf.* Curtis Publishing Co. v. Butts, 388 U.S. 130, 147 (1967); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 270-71 (1964).
14. Valentine v. Chrestensen, 316 U.S. 52 (1942).
15. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964) the Court stated that the holding in *Chrestensen* was based on the fact that the handbills were "purely commercial advertising" and refused to apply the commercial speech doctrine to a paid editorial advertisement which "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." *Id.* at 266. *See* Comment, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 214 (1972).

political advertisements, being primarily aimed at *informing* the public rather than at insuring commercial success are entitled to some first amendment protection.

This comment will examine the potential first amendment challenges to the validity of limitations on expenditures made for the campaigns of statewide candidates. As a preface to this discussion, it will be of assistance to review the substantive provisions of chapter 5 of the Act which govern the expenditures which may be made during the elections of statewide candidates and to examine some practical problems raised in their application and interpretation.[16]

Campaign Expenditure Limitations Under the Political Reform Act of 1974

California's Political Reform Act of 1974 imposes separate ceilings on the amount of expenditures which may be incurred during the five months prior to a statewide election by the following three distinct groups: candidates for statewide office, state central committees of the political parties, and independent committees supporting or opposing statewide candidates.[17] "Statewide candidates" include candidates for the offices of Governor, Lieutenant Governor, Attorney General, Controller, Secretary of State, Treasurer, and Superintendent of Public Instruction.[18] Under the Act an "expenditure" is broadly defined as "a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, unless it is clear from the surrounding circumstances that it is not made for political purposes."[19] For purposes of chapter 5 of the Act, the time of the expenditure is either the time of receipt of consideration or the time of payment.[20] However, in the event that receipt of the consideration occurs prior to the primary election and payment occurs subsequent thereto, the value does not accrue toward the general election expenditure limitation but instead is charged only to the primary election.[21] Payments made for the purposes of registering voters or bringing voters to the polling places are not considered expenditures under chapter 5

16. The discussion will be limited to the provisions in article 1 of chapter 5 (commencing with §85100) of the Government Code which deal with statewide candidates. The comment will not examine the provisions dealing with limitations on the circulation of statewide petitions or measures.

17. Cal. Gov't Code §§85100, 85102, 85103.

18. Cal. Gov't Code §§82052, 82053.

19. Cal. Gov't Code §82025.

20. Cal. Gov't Code §85107.

21. *Id.* This could occur if, for example, an enforceable promise to pay were received prior to the primary but the payment did not occur until after the primary. *See* Cal. Gov't Code §§82025, 82044.

and thus are not subject to limitation.[22] Since the spending ceiling placed upon candidates applies only to those seeking statewide elective office,[23] the expenditures incurred by candidates in city, county, special district, Board of Equalization, legislative, and judicial elections are not subject to any limitation under the Act.[24] While spending restrictions are imposed only during the five months immediately preceding a primary, general, or special election, the practical effect of these provisions is to prevent unchecked spending during the five months prior to a special or primary election and during the entire period between a primary and general election since the time between these two elections never exceeds five months.[25]

A. Limits on Expenditures by Statewide Candidates

Under section 85100 of the Government Code, the aggregate expenditures which may be incurred by a statewide candidate, his agents, and "controlled committees"[26] are determined by multiplying a specified amount by the voting age population with an adjustment for cost of living changes in years after 1974. In the gubernatorial campaign a candidate and the committees he controls may spend seven cents per voting age citizen in the primary election and up to nine cents per voting age citizen in the general election.[27] Candidates for the other six statewide offices may spend up to three cents per voting age citizen in both the primary and general elections.[28]

In determining what expenditures will be charged to the candidate's aggregate in computing whether his limitation has been reached, sec-

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22. CAL. GOV'T CODE §85108.
23. CAL. GOV'T CODE §§85100, 82052, 82053.
24. CAL. ELECTIONS CODE §§22004, 22808, *as added by* CAL. STATS. 1974, c. 954. These two provisions authorize cities and counties to limit campaign expenditures in municipal or county elections. Pending legislation, for example, A.B. 4, 1975-76 Regular Session (proposed addition of section 85120 *et seq.* to the Government Code), would impose monetary ceilings on the amount of expenditures which could be incurred during the five months prior to an election by candidates for legislative office, state central committees of political parties, and independent committees supporting or opposing such candidates.
25. CAL. ELECTIONS CODE §§2500, 2501.
26. Section 82016 of the California Government Code defines a "controlled committee" as one which is controlled directly or indirectly by a candidate or which acts jointly with a candidate or controlled committee in connection with the making of expenditures. A candidate is deemed to control a committee under this section if he, his agent, or any other committee he controls has a significant influence on the actions or decisions of the committee.
27. CAL. GOV'T CODE §85100.
28. *Id.* According to the Office of the Secretary of State, the voting age population as of January 1, 1974, was about 13.6 million; based upon this estimate, each gubernatorial candidate would be permitted to spend about $952,000 for the primary election and $1,224,000 for the general election. All other candidates for statewide elective office would be limited to an expenditure per election of approximately $408,000 each. Legislative Analyst, State of California, *Statement of Cost Effect of Propositions on the June 4, 1974 Primary Election Ballot* 11-12 (Apr. 29, 1974).

tion 85106 provides that the *entire* amount of an expenditure made by a candidate in support of two or more candidates is to be charged to *each* benefited candidate for purposes of section 85100. Under this section a question arises as to whether a candidate's aggregate includes only those expenditures made on behalf of statewide candidates, or whether it should include all sums spent which fall within the definition of an expenditure.[29] A literal reading of section 85100 in conjunction with section 82025 would seem to include within a statewide candidate's aggregate expenditures all sums spent by a candidate for any political purpose, regardless of whether it was spent for the purpose of electing a statewide candidate.

In addition to the spending limitation imposed on candidates under section 85100, an incumbent candidate is subject to a further limitation since he usually has many advantages over his challengers, such as name identification, free publicity in news programs not subject to equal time provisions, and use of government facilities such as staff, office space, and mail privileges.[30] Under section 85101 a statewide incumbent who seeks reelection to the same statewide office which he or she presently holds is subject to a ten percent reduction in the amount which may be spent in the campaign. To further neutralize the incumbent's advantage, the Act also prohibits the mailing of legislative newsletters or other mass mailings at public expense by or on behalf of any elected state officer after he or she has filed as a candidate for an office.[31]

B. Limits on Expenditures by State Central Committees

Under section 85102 of the Government Code the aggregate expenditure which may be incurred by the state central committee of a political party during the five months prior to a statewide election may not exceed one cent multiplied by the voting age population with an adjustment for cost of living changes in years after 1974. The expenditures of committees and subcommittees controlled by a state central committee are included within this ceiling, but county central committees are considered independent for purposes of this provision.[32]

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29. See text accompanying note 19 *supra.*

30. *See, e.g.*, Winter, *Money, Politics and the First Amendment*, in H. PENNIMAN & R. WINTER, JR., CAMPAIGN FINANCES, TWO VIEWS OF THE POLITICAL AND CONSTITUTIONAL IMPLICATIONS 43 (1971) [hereinafter cited as Winter] for a critique of some reforms in campaign financing on the basis that they would make it more difficult to unseat incumbents.

31. CAL. GOV'T CODE §89001.

32. CAL. GOV'T CODE §85102. Generally the expenditures of a state central committee would not be charged to the candidate's aggregate under section 85100, but if the state central committee and the candidate act jointly, then apparently the state central

The language of section 85102 is unclear as to whether the limitations apply only to expenditures made by the state central committee in support of statewide candidates or to all expenditures incurred, including, for example, those made to support legislative candidates. A literal reading of the provision would indicate that the state central committee may spend no more than one cent times the voting age population, or about $140,000, for *any* purpose. However, because the provision falls under article 1, entitled "Statewide Candidates," it could be argued that the limitations apply only to those expenditures relating to elections for statewide candidates. On the other hand, the language of section 85103, which limits the expenditures of independent committees, specifies that the limit applies to statewide candidates. The absence of this specificity in sections 85100 and 85102 may indicate that the drafters intended to include as part of the limitations on state central committees, as well as on statewide candidates, all sums spent for a political purpose.[33]

C. *Limits on Expenditures by Independent Committees*

Under section 85103 of the Government Code, independent committees[34] supporting or opposing statewide candidates are limited to expenditures aggregating not more than $10,000 per candidate,[35] but this limit may be increased if the FPPC approves a committee's statement of intent to exceed.[36] If two or more independent committees act jointly in making expenditures, they are considered as one independent committee and are thus subject to a single $10,000 expenditure ceiling.[37] If an expenditure is incurred in support of more than one candidate by one independent committee, section 85106 provides that "a proportionate amount is charged to each candidate"[38] for purposes of determining when the independent committee has reached its $10,000 per candidate limit. Independent committees desiring to

committee's expenses could be charged to the candidate since the committee could then be deemed a "controlled committee" under section 82016 of the Government Code.

33. See text accompanying notes 19 and 29 *supra*.

34. Government Code Section 82031 defines an "independent committee" as a committee which is not controlled either directly or indirectly by a candidate or controlled committee, and which does not act jointly with a candidate or controlled committee in connection with the making of expenditures. Under this provision a committee may be controlled with respect to one or more candidates and independent with respect to other candidates.

35. Under section 85105 expenditures incurred by independent committees for the purposes of communication directed to their own members or employees are excluded from the limitation.

36. CAL. GOV'T CODE §85104.

37. CAL. GOV'T CODE §85103.

38. CAL. GOV'T CODE §85106.

spend more than $10,000 *in support*[39] of a candidate are required to file with the FPPC a statement of intent to exceed the limit, not less than 60 days prior to the election.[40] The FPPC must approve the statement of intent to exceed if it determines the following: the committee is independent, the committee is supporting in good faith, the committee intends to spend the money requested, and the committee has the ability to pay.[41] No excess expenditure can be made until there has been approval by the FPPC. Additional expenditures by all of the independent committees supporting one statewide candidate may not exceed one cent per voting age citizen.[42] If statements of intent to exceed filed in support of the same candidate aggregate more than one cent per voting age citizen, an amount within this maximum is to be apportioned among the filing committees on the basis of an arithmetic formula to be prescribed by regulation.[43] It is important to recognize that the Act does not impose an overall ceiling on expenditures made by all independent committees supporting or opposing a candidate; rather it imposes an overall limitation only on the total amount of additional expenditures above the $10,000 limit incurred by each committee supporting a candidate.

Once the statement of intent is approved, the Act provides that:

> The Commission shall notify each candidate for the nomination or office in question other than the candidate supported by the independent committee that the limits contained in Section 85100 may be increased by the amount in the statement of intent filed by the independent committee, except to the extent that statements of intent to make expenditures in support of such candidates are also approved.[44]

This provision means that spending limitations imposed on the candidate under section 85100 will be increased if independent committees supporting the candidate do not receive approval for additional expenditures in amounts equal to the amounts approved for independent committees supporting other candidates for the same office.

D. Sanctions

Any person who knowingly or willfully violates the expenditure limitation provisions of the Act is subject to criminal prosecution as a

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39. Committees opposing candidates are not permitted to request such increases in their expenditures, and they do not benefit from the operation of the equalizer provision discussed in the text accompanying notes 44-45 *infra*.

40. CAL. GOV'T CODE §85104.

41. *Id.* Whether the determination of these factors relates to the time at which the request was filed or at some other time is not clear.

42. CAL. GOV'T CODE §85104. This would be approximately $140,000.

43. *Id.*

44. *Id.*

misdemeanant.[45] In addition, a fine of up to the greater of $10,000 or three times the amount unlawfully expended may be imposed for each violation.[46] A person convicted of a violation cannot be a candidate for elective office or act as a lobbyist for four years, unless the court, at the time of sentencing, provides otherwise.[47] The Attorney General is given the primary responsibility for enforcement of these provisions.[48]

Civil liability may also be imposed on any person who makes an expenditure in violation of the Act. A civil action may be brought by the civil prosecutor[49] or by any resident for up to the greater of $500 or three times the amount unlawfully spent.[50] The Act does not specify whether proof of intent or negligence is essential to the plaintiff's case. Aside from criminal and civil liability, a violator may be enjoined and may be subject to disciplinary action by the FPPC.[51] The Franchise Tax Board is required to report to the FPPC and the Attorney General any apparent violation of these provisions which the Board discovers as a result of its audits and investigations of campaign statements.[52]

THE CONSTITUTIONALITY OF CALIFORNIA'S SPENDING LIMITATIONS

Both the federal and California constitutions contain guarantees of freedom of speech.[53] Although the first amendment to the United States Constitution, by its terms, is a limitation only upon Congress, it is now settled that the guarantees contained within that amendment are fundamental rights incorporated within the due process clause of the fourteenth amendment and are thereby protected against state infringement.[54] It has been said that "there is practically universal agreement that a major purpose of [the first] amendment [is] to protect free discussion of governmental affairs,"[55] and that there is a "profound

45. CAL. GOV'T CODE §91000.
46. *Id.*
47. CAL. GOV'T CODE §91002.
48. CAL. GOV'T CODE §91001(a); the city and district attorneys of any city or county in which a violation occurs have concurrent powers and responsibilities with the Attorney General.
49. Under section 91001(b) of the Government Code, the civil prosecutor is the FPPC with respect to the state or any state agency, the city attorney with respect to a city or city agency, and the district attorney with respect to any other agency.
50. CAL. GOV'T CODE §91005.
51. CAL. GOVT CODE §§83116, 91003(a).
52. CAL. GOV'T CODE §90002(c).
53. U.S. CONST. amend. I; CAL. CONST. art. I, §§2, 9.
54. *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931); Fiske v. Kansas, 274 U.S. 380 (1927); Sun Co. v. Supreme Court, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (1973).
55. Mills v. Alabama, 384 U.S. 214, 218-19 (1966).

national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[56] The right of free speech, however, is not absolute, and certain forms of expression have been subjected to regulation.[57] Although first amendment freedoms are vital, their exercise must be compatible with the preservation of the essential rights of a free society which enjoys competing interests,[58] and thus even the right of free expression in political matters cannot exist absolutely.[59]

While the total scope of the first amendment is still unclear, the Supreme Court in formulating constitutional tests has continually stressed the necessity of examining the nature of the speech as well as the nature of the disability imposed.[60] This comment will examine the various tests used by the Court and will analyze their application to the expenditure limitations imposed on statewide campaigns by the Political Reform Act of 1974. In this regard it should be noted that while one test may be more appropriate than another in analyzing the constitutionality of a statute, several tests may be applicable in scrutinizing the validity of a particular provision.

A. Clear and Present Danger

The modern criterion for determining the validity of laws *absolutely or directly restricting the freedom of speech* is the "clear and present danger" test.[61] This test has usually been applied to laws which attempt to control the content of speech.[62] To uphold the validity of

56. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

57. *See, e.g.*, Konigsberg v. State Bar of California, 366 U.S. 36, 49-51 (1961). There are two primary schools of interpretation of the first amendment—one that holds the freedoms to be absolute and self-defining, and one that balances them with any governmental, societal, or other individual interest involved. *See* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 4-6 (1965). While a majority of the United States Supreme Court has never adhered to the absolute interpretation, the Court has failed over the years to develop a comprehensive, coherent theory to judge the constitutionality of a statute. *See* EMERSON, *supra* note 12, at 717.

58. *See, e.g.*, Pennekamp v. Florida, 328 U.S. 331, 352-55 (1946) (Frankfurter, J., concurring).

59. *See, e.g.*, United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

60. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 341-42 (1974); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564 (1973); United States v. O'Brien, 391 U.S. 367, 377 (1968); Konigsberg v. State Bar of California, 366 U.S. 36, 50-51 (1961); Barenblatt v. United States, 360 U.S. 109, 126 (1959).

61. As originally stated by Mr. Justice Holmes, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." Schenck v. United States, 249 U.S. 47, 52 (1919). For the modern formulation of this test see Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

62. See authority note 61 *supra*.

such a law, a court generally must find that there is a clear and present danger of a substantive evil which is created by a particular form of speech and that the gravity of any such evil justifies prohibition of the speech to avoid the danger.[63] The substantive evil must be extremely serious and the degree of imminence extremely high before an individual can be subjected to punishment for an utterance.[64] To warrant the imposition of an absolute prohibition of speech with regard to campaign spending regulations, the state has the onerous burden of showing that the evil resulting from the uncontrolled disbursements of campaign funds is substantial.

While the United States Supreme Court has never been faced with a case dealing with campaign financing limitations, there are recent cases in state and lower federal courts which have ruled on the constitutionality of provisions imposing campaign spending ceilings. In a recent Washington case, *Bare v. Gorton*,[65] a state statute[66] imposing limitations on expenditures in any election for public office was declared unconstitutional by the Supreme Court of Washington on the grounds that it potentially constituted an *absolute prohibition* of speech and that it was impermissibly vague and overbroad. The statute provided for a single limitation on total expenditures made in any election campaign in connection with any public office. The court raised a number of problems relating to the statute's meaning and operation, including the problem of whether one group or individual could expend to the limit and thereby *preclude* others, including the candidate, from making further expenditures.[67] While the court acknowledged the state's compelling interest in promoting an open, honest, and effective electoral process, it questioned whether the particular provision served the desired goal especially in light of the possible absolute prohibition of speech.[68]

Although the specific provisions of California's Act differ from Washington's, the same prohibitory effect may be present. The Washington statute allowed for the possibility of absolutely prohibiting any individual from spending on behalf of a candidate if the total ceiling was reached. The limitations in California, which impose separate ceilings on candidates, state central committees, and independent commit-

63. *E.g.*, Weaver v. Jordan, 64 Cal. 2d 235, 411 P.2d 289, 49 Cal. Rptr. 537 (1966); First Unitarian Church v. Los Angeles County, 48 Cal. 2d 419, 311 P.2d 508 (1957).

64. *E.g.*, Bridges v. California, 314 U.S. 252, 263 (1941); Crosswhite v. Municipal Court, 260 Cal. App. 2d 428, 432, 67 Cal. Rptr. 216, 218 (1968).

65. 84 Wash. 2d 380, 526 P.2d 379 (1974).

66. WASH. REV. CODE §42.17.140 (Supp. 1974).

67. 84 Wash. 2d at —, 526 P.2d at 381.

68. *Id.* at —, 526 P.2d at 383.

tees, preclude the result that any one of these distinct groups could prevent the other from spending in support of or in opposition to a candidate by its own expenditure. However, in California, when a statewide candidate makes an expenditure in support of himself and another candidate, the entire amount of the sum spent is charged to both benefited candidates.[69] One candidate could thus expend funds on himself and another candidate to the maximum allowable amount and thereby preclude the supported candidate from making further expenditures on his own behalf. This extreme situation can be illustrated by posing a hypothetical of a candidate for Governor utilizing the following slogan: "Vote for me and John Doe—I know John Doe has been a crook, but he's the best candidate running for Treasurer." A candidate should have the right to communicate effectively with his constituency, but it would appear that he could be silenced altogether if another statewide candidate over whom he has no control has spent the maximum on his behalf. It is possible to assert, then, that this California provision, as in *Bare*, is susceptible to challenge on the basis of being a *direct prohibition of speech*, and could be invalid if the stringent clear and present danger test were used.

Another provision also subject to the challenge that it directly restricts the freedom of speech is section 85104, which requires an independent committee to get FPPC approval to make expenditures exceeding the $10,000 limit. The fact that the FPPC approval of statements of intent to exceed is predicated on a finding that the independent committee *supports* a candidate raises the question as to whether this provision, which draws a distinction on the basis of the *content* of the expression, should be scrutinized by the clear and present danger test. Classifications based on the content of speech have long been disfavored and must be viewed with the gravest suspicion.[70] Since committees opposing candidates are not allowed to exceed the $10,000 limit, section 85104 discriminates between otherwise indistinguishable parties on the basis of the content of their speech or expression. Whether the proper inquiry is derived from equal protection analysis[71] or directly from the first amendment[72] is unclear, but the result has traditionally been the same: in order for the statute to be valid, the discrimination must be necessary to further a compelling governmental

69. CAL. GOV'T CODE § 85106.

70. *See, e.g.*, Papish v. University of Missouri, 410 U.S. 667, 670 (1973); Cohen v. California, 403 U.S. 15, 24 (1971); Cox v. Louisiana, 379 U.S. 536, 556-58 (1965).

71. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99-102 (1972); Niemotko v. Maryland, 340 U.S. 268, 273 (1951).

72. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 557 (1965); Schneider v. State (Town of Irvington), 308 U.S. 147, 164 (1939).

interest, and the regulation imposing the discrimination must be narrowly tailored to promote that interest.[73] Except for the state's interest in preventing smear-type campaigns, there appears to be no substantial justification for discriminating against independent committees opposing candidates. Thus, if the state is unable to show that the discriminatory provision is imposed to remedy a *substantial evil*, the statute could be unconstitutional if measured against the clear and present danger standard.

B. *Balancing Approach*

Even though a statute may not constitute an absolute prohibition of speech, it may still be deemed unconstitutional as an indirect or incidental restriction upon expression. While the United States Supreme Court has at times expressly disclaimed the use of a balancing test,[74] in a recent case, *United States Civil Service Commission v. National Association of Letter Carriers*,[75] the Court expressly endorsed a "balancing" approach to the first amendment's protection of political activity.[76] In upholding the constitutionality of a federal law prohibiting federal employees from taking "an active part in political management or in political campaigns,"[77] the Court stated that: "[N]either the right to associate nor the right to participate in political activities is absolute in any event. Nor are the management, financing, and conduct of political campaigns wholly free from governmental regulation."[78]

In determining the validity of laws abridging speech indirectly, the Court has generally balanced two factors: the type and strength of the particular governmental interest and the type of disability imposed on the individual.[79] In the usual case the interests in free expression,

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73. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 98-99 (1972).
74. *E.g.*, United States v. Robel, 389 U.S. 258, 268 n.20 (1967).
75. 413 U.S. 548 (1973).
76. *Id.* at 564. In a number of other cases the United States Supreme Court also explicitly adopted a balancing approach to deal with first amendment issues. *E.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 341-42 (1974); Konigsberg v. State Bar of California, 366 U.S. 36, 49-56 (1961); Barenblatt v. United States, 360 U.S. 109, 126 (1959); Schneider v. State (Town of Irvington), 308 U.S. 147, 161 (1939). The balancing test has been criticized by free speech "absolutists" on the ground that it provides insufficient protection for first amendment values. *See* Konigsberg v. State Bar of California, 366 U.S. 36, 60-71 (1961) (Black, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 140-54 (1959) (Black, J., dissenting). However, with speech which contains elements of conduct or "speech plus," even absolutists have been forced to recognize that a balancing of interests is necessary to assure that such conduct does not impinge upon some legitimate governmental interest. *See* Cox v. Louisiana, 379 U.S. 559, 578 (1965) (Black, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 141-42 (1959) (Black, J., dissenting).
77. 5 U.S.C. §7324(a)(2) (1970).
78. 413 U.S. at 567 (citations omitted).
79. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Konigsberg v.

which derive to a large extent from the needs of an effective democracy, are balanced against a competing, totally distinct state interest such as the desire to compensate an individual for damage to his reputation caused by defamatory statements.[80] In the case of campaign spending ceilings, individuals and groups clearly have an interest in speaking freely, but the government also has first amendment interests since such regulations serve the purpose of developing an effective democracy by keeping it accessible to as many persons as possible.[81] It can be seen that the courts in this situation are confronted with the difficult task of balancing conflicting interests, both of which are within the purview of the first amendment.

Two underlying principles emerge in assessing the burden placed on first amendment rights by the spending limitations. First, the individual, in order to actively participate in self-government, has a right to communicate his political preferences.[82] Secondly, the public, in order to exercise this function intelligently, has a right to be informed about political matters by receiving an adequate flow of information.[83] The extent to which these rights may be circumscribed by the spending ceilings is the problem inherent in the Act.

Although most of the provisions of the Act do not appear to regulate the content or quality of the speech,[84] they do regulate the amount of "paid for" speech which an individual or group can make by prohibiting expenditures beyond a certain amount. While the Act plainly curtails the volume of campaign expenditures, it in no way prohibits an individual or group from expressing its point of view within the limitations. It may be argued that the infringement on the individual's rights are minimal if it is determined that the spending limits are sufficiently liberal to allow anyone who desires to voice his support of or opposition to any candidate the full opportunity to do so.[85] In this regard,

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State Bar of California, 366 U.S. 36 (1961); Barenblatt v. United States, 360 U.S. 109 (1959).

80. *E.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 341, 348-49 (1974); Rosenblatt v. Baer, 383 U.S. 75, 92-93 (1963) (Stewart, J., concurring).

81. Professor Emerson states that such "purification" measures are imposed to promote the goals of a system of free government—to introduce honesty, decency, and openness into it—and thereby to improve the quality and meaningfulness of expression. EMERSON, *supra* note 12, at 633.

82. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Mills v. Alabama, 384 U.S. 214 (1966); Thornhill v. Alabama, 310 U.S. 88 (1940).

83. *Cf.* Kleindienst v. Mandell, 408 U.S. 753, 762 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389-90 (1969); Virginia Citizens Consumer Council v. State Bd. of Pharmacy, 373 F. Supp. 683 (E.D. Va. 1974).

84. But, the right of an independent committee to exceed the $10,000 limit is predicated on the expenditure being in support of a candidate. See text accompanying note 41 *supra*.

85. Professor Rosenthal states that the validity of any expenditure limitation may turn on the size of the limitation. He states that "a figure so low as to deny the candi-

a $10,000 limitation placed on independent committees may be too low a figure in light of the ever-increasing costs of communication via the media, and thus such a limitation may constitute an unwarranted disability.[86] Further, the disability imposed on independent committees opposing a candidate may be particularly burdensome since such committees cannot get FPPC approval to make additional expenditures. In addition, the fact that under section 85106 a candidate can be charged the full amount of another's candidate's expenditure if made in support of both candidates may make the candidate limitation under section 85100 particularly burdensome. In all these situations an argument can be made that the regulation prevents effective dissemination of ideas and thus constitutes an unconstitutional restriction upon expression.[87]

In support of the argument that the limitations impose only a minimal disability on the individual's rights and are thereby constitutional given the state's interest in regulating such speech, it could be asserted that the regulations do not unduly restrain individuals from actively participating in the political process. While the limitations may curtail the amount of expenditures for such things as paid campaign workers, professional management, mailings, brochures, and opinion polls, they do not restrict participation in activities requiring very little money such as public speeches, doorbell ringing, and debates, which can be just as effective in disseminating an individual's views. Spending limitations

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date as [sic] reasonable opportunity to get his message across to the voters would be hard to defend." Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. LEGIS. 359, 388 (1972) [hereinafter cited as Rosenthal]. In this regard, People's Lobby, a cosponsor of Proposition 9, claims that the formulae for the expenditure limitations are based on the amount of money spent in past statewide races and on the amount of money required to effectively reach all registered voters with a significant amount of information on the issues. PEOPLE'S LOBBY, PROPOSITION 9, THE POLITICAL REFORM ACT, A FACT FOR CALIFORNIA, A PROPOSAL FOR AMERICA 79 (1st ed. 1974). If this assertion is true, an argument can be made that the regulations in the Act do allow effective dissemination of ideas and are therefore constitutional.

86. The cost of purchasing local television broadcast time prior to the November 1974 general election in the Sacramento area during network prime time was approximately $250 to $900 for a single 30-second spot. Interview with Bruce Hancock, Advertising Salesman, Television Station KXTV, Sacramento, Cal., Apr. 25, 1975. These figures do not include production costs. For local production this would probably average $100 per spot. *Id.* In the 1968 presidential campaign, the production cost for a package of ten spots ranged from $25,000 to $75,000. DUNN, FINANCING PRESIDENTIAL CAMPAIGNS 42 (1972). With these approximate figures on broadcast expenses, it is questionable whether $10,000 would be an adequate sum to spend for effective communication.

87. In United States v. O'Brien, 391 U.S. 367 (1968), Mr. Justice Harlan in his concurring opinion stated that the Court should consider

> First Amendment claims in those rare instances when an "incidental" restriction upon expression, imposed by a regulation which furthers an "important or substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a "speaker" from reaching a significant audience with whom he could not otherwise lawfully communicate.

Id. at 388-89.

may, in fact, increase the importance of such activities in future elections which would indicate that the regulations will have a positive effect on some activities associated with the first amendment.

Three cases suggest another approach in the examination of the burden placed on the first amendment freedoms by the spending ceilings. In *New York Times Co. v. Sullivan*,[88] *Red Lion Broadcasting Co. v. FCC*,[89] and *Mills v. Alabama*[90] the United States Supreme Court, in interpreting restrictions on freedom of speech, attached primary importance to the necessity of an informed public capable of conducting its own affairs. It has been suggested that these cases indicate that the proper inquiry as to whether the first amendment is abridged may be to ask whether the law tends to decrease the overall flow of ideas to the community.[91] With regard to spending ceilings, it has been argued that if a candidate's expenditures are restricted there will be a commensurate reduction in his ability to convey information to the public, with the result that the public will have less exposure to the person it is asked to choose as its representative.[92] Under the Act this problem is compounded by virtue of the fact that the entire amount of a candidate's expenditure made in support of more than one candidate is charged to both candidates.

This contention, that the public will be less informed if limitations on spending are imposed, deserves closer scrutiny. Reasonable limitations may act, in some respects, as an inducement for a candidate to more forcefully project his views, since he might of necessity become more actively involved in the campaign if the amount of money available for such things as "spot" advertisements is limited.[93] For example, a candidate may be induced to participate in television and radio debates, whereas before the imposition of spending restrictions he was willing and able to rely on a public relations or sell-type campaign. The candidate may make himself more accessible to newspapers and magazines for in depth question and answer interviews which may elicit more

88. 376 U.S. 254 (1964).

89. 395 U.S. 367, 390 (1969). The "fairness doctrine" was upheld as promoting an "uninhibited marketplace of ideas in which truth will ultimately prevail." *Id.*

90. 384 U.S. 214 (1966) (upheld the right of a newspaper editor to publish a political editorial on election day).

91. Comment, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 214, 225-29 (1972); *contra* Miami Herald v. Tornillo, 418 U.S. 241 (1974), in which the Court unanimously invalidated a Florida statute which granted political candidates a right of reply to adverse editorials.

92. Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U.L. REV. 900, 910-11 (1971).

93. "Spot" advertising usually emphasizes "selling" the candidate without a rational discussion of the issues. *See* J. MCGINNISS, THE SELLING OF THE PRESIDENT 1968 (1969); MCCARTHY, ELECTIONS FOR SALE (1972).

information than do "canned" press releases. It is plausible to assert, then, that reasonable limitations may actually promote society's interest in the free flow of meaningful information and fair elections.

The extent to which free speech is circumscribed by spending limitation laws is not, however, the only inquiry in the balancing approach; the validity of the Act also depends on the nature of the public interest involved.[94] While freedom of political speech constitutes perhaps the most preferred right, the government's obligation to maintain the purity of the election process has perhaps an equally elevated status.[95] Campaign spending limitations are generally adopted to mitigate many modern electoral evils, particularly the spiraling campaign costs[96] which threaten to destroy the equal access of rich and poor to political office.[97]

The state's interest in regulating campaign expenditures may vary, however, according to the entity being regulated. The limitations on expenditures imposed by the Act are particularly designed to reduce the considerable advantage that the candidate with personal and contributed wealth has over an opponent who lacks such resources; in addition, they attempt to deter the exertion of improper influences on candidates by contributed wealth. The dangers of unequal access and improper influence are directly curbed by the imposition of limitations on candidate expenditures. On the other hand, these same evils are only indirectly affected by the imposition of spending restrictions on truly independent committees who desire to spend time, effort, and money in support of or in opposition to a candidate, and therefore the

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94. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564 (1973); Konigsberg v. State Bar of California, 366 U.S. 36, 50-51 (1961); Barenblatt v. United States, 360 U.S. 109, 126-27 (1959).

95. The importance of the governmental interest in protecting the electoral process was stressed in Storer v. Brown, 415 U.S. 724 (1974), United States v. UAW, 352 U.S. 567 (1957), and Burroughs & Cannon v. United States, 290 U.S. 534 (1934).

96. Political spending has risen faster than the consumer price index and has increased considerably more than the rise in the voting age population. D. DUNN, FINANCING PRESIDENTIAL CAMPAIGNS 43 (1972).

97. CAL. GOV'T CODE §81002(b) expressly states that the amounts that may be expended in statewide elections should be limited in order that the importance of money in such elections may be reduced. High campaign costs may tend to deter able and willing individuals from seeking office which would have the deleterious effect of denying the public the services of talented, qualified servants. Spending restrictions may imbue the election process with equal opportunity by reducing the economic barriers. Promoting equal political opportunity may also generate a greater diversity of views which would be responsive to the public need of hearing a full debate of political views. *Cf.* Bullock v. Carter, 405 U.S. 134 (1972). However, in a very recent decision the Oregon Supreme Court held that Oregon campaign expenditure limitation laws violated Oregon constitutional provisions guaranteeing freedoms of expression and association. Upon consideration of the "balancing test" and the "compelling interest" test, the court questioned whether a limit on campaign spending would serve in any significant way to eliminate the alleged evil that unrestricted campaign spending permits candidates to "buy" an election. Deras v. Myers, — Ore. —, 535 P.2d 541 (1975).

state's interest in regulating independent committees may not be as great. Admittedly, these regulations are enacted to prevent the use of committees as a means of avoiding spending limitations, but this justification is questionable if the committee is truly independent of the candidate. The limitations on independent committees do serve the state's overall interest in reducing the importance of money in elections.[98] The fact that the state may not have as strong an interest in regulating independent committees may have been recognized by the drafters of the Act since it does allow independent committees supporting a candidate the opportunity to make additional expenditures.

Some commentators have questioned the effectiveness of expenditure limitations as a means of providing for greater equality in political opportunity.[99] One argument is that expenditure limitations favor incumbents, who are already well known, over challengers, who need to publicize their candidacies. The Act attempts to deal with this problem, at least in part, by further limiting an incumbent's expenditures by ten percent[100] and by preventing the incumbent from using some of his privileges as an elected office holder while a candidate.[101]

The campaign spending ceilings also serve the purpose of advancing public confidence in the political process. Confidence in our public institutions and the electoral process has eroded over the years, as evidenced by the low figures on voter turnout in recent elections.[102] Effectively enforced spending restrictions may aid in the restoration of public confidence and integrity in the political process by shifting the public's opinion away from the idea that elective office is the exclusive preserve of candidates with personal and contributed wealth. That such an interest deserves the dignity of judicial consideration was stressed in the *Letter Carriers*[103] case, in which the Court considered the public's confidence in the system of representative government a primary factor in its decision upholding the constitutionality of the Hatch Act.[104]

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98. CAL. GOV'T CODE §81002(b).
99. *E.g.*, Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C.L. REV. 389, 455-71 (1973); Winter, *supra* note 30, at 61.
100. CAL. GOV'T CODE §85101.
101. CAL. GOV'T CODE §89001.
102. A record 3.5 million California voters have been dropped from the voting rolls, in most cases because they did not cast ballots in the November 1974 election. The cut amounts to 36 percent of the voters who were eligible to vote in that election. By contrast, only 2 million voters or 23 percent of the total registered were dropped from the voting rolls in the "purging" process that followed the 1970 election for governor. San Francisco Chronicle, Jan. 28, 1975, at 1, col. 7.
103. 413 U.S. 548 (1973).
104. *Id.* at 565.

It is plausible to assert, generally, that the imposition of reasonable campaign expenditure limitations may not present an extreme burden on the first amendment right of free speech since reasonable regulations may actually have positive effects on certain campaign activities by increasing the overall flow of meaningful information. However, after careful consideration of the multiple competing factors involved, it would appear that particular provisions of the Act may, on balance, be unconstitutional despite the strong state interest in preventing campaign abuse. The limitation on candidate expenditures would appear to impose too severe a burden on the candidate's ability to effectively communicate his ideas in light of the requirements of section 85106 which charge to a candidate's aggregate the entire amount of another candidate's expenditure when made in support of both candidates. The limitation on independent committee expenditures would also appear to result in too severe a disability on the right of free speech; the size of the independent committee expenditure limitation may be so low as to deny groups a reasonable opportunity to get their messages across; the state's interest in restricting independent committee spending may not be considered strong enough, especially when compared with the state's stronger interest in regulating candidate expenditures; finally, the inability of independent committees opposing candidates to make additional expenditures, while those committees supporting candidates have the opportunity, may be too restrictive. While the ultimate decision as to whether the burden on the right of free speech resulting from the imposition of the limitations outweighs the legitimate governmental interest in "purifying" the electoral process is one for authoritative judicial determination, it would appear from the foregoing considerations that certain provisions of the Act may impose an unconstitutional indirect infringement on the right of free speech.

C. Symbolic Speech

Conduct undertaken to communicate an idea may be given protection under the first amendment, but generally the government's power to regulate speech becomes greater when conduct is involved, as opposed to a situation involving "pure speech."[105] When "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in controlling the non-

105. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (upholding the constitutionality of a statute prohibiting the destruction or mutilation of a selective service system certificate); People v. Lindenbaum, 11 Cal. App. 3d Supp. 1, 90 Cal. Rptr. 340 (1970). See authorities cited note 135 *infra*.

speech element can justify incidental limitations on first amendment freedoms.[106]

A campaign expenditure may itself be considered a form of expression, regardless of what it buys, inasmuch as the act of spending in itself is often a means of communicating political expression. Such a view was recently adopted by a federal court in Hawaii. In *Abercrombie v. Burns*,[107] a federal district court ruled that a Hawaii statute[108] which imposed a limitation on the amount of money a candidate could expend in the news media was an unjustifiable infringement of the first amendment freedom of speech. The court held that the statute was unconstitutional in view of the fact that an overall expenditure limitation was already imposed[109] and that the additional limitation was unnecessary to carry out the governmental interest in promoting the principle of equality of opportunity to participate in the political process.[110] The *Abercrombie* court, in coming to this result, applied the "speech plus conduct" test enunciated by the United States Supreme Court in *United States v. O'Brien*.[111] The Court in *O'Brien* did not balance or weigh the competing interests, but instead held that the regulation of speech plus conduct would be constitutional if the regulation is within the constitutional power of the government and serves an important state interest that is independent of the speech aspects of the conduct, provided that the state does not have narrower means available to accomplish its regulatory purpose.[112]

The California campaign expenditure provisions ostensibly satisfy the first three criteria set out in *O'Brien*: the California Constitution permits electors to propose and enact statutes regulating elections by initiative;[113] the reduction of the importance of money in elections and the accessibility of political channels to people of limited means are legitimate governmental interests disassociated from the speech aspects of the regulation; and the Act is not aimed at the suppression of free expression. Whether the Act's incidental restrictions on speech are greater than necessary to further the state's interest is debatable. Some commentators have suggested that subsidies, tax incentives and credits, direct financial assistance, and disclosure requirements are less restrictive alternatives to achieve the desired goal of equal political opportu-

106. See note 105 *supra*.
107. 377 F. Supp. 1400 (D.C. Hawaii 1974).
108. HAWAII REV. STAT. §§11-206(b)(1)(E), 11-206(b)(2)(E) (Supp. 1974).
109. HAWAII REV. STAT. §11-206(a) (Supp. 1974).
110. 377 F. Supp. at 1402.
111. 391 U.S. 367 (1968).
112. *Id.* at 377.
113. CAL. CONST. art. 4, § 22.

nity.[114] However, the fact that the court in *Abercrombie* struck down the media restriction because the existing overall limitation was deemed to achieve the same legitimate public interest in a less restrictive manner may indicate that an overall limitation, as enacted in California, is sufficiently tailored to promote the state interest to withstand first amendment challenge.

While campaign expenditures could arguably qualify as "speech-plus" inasmuch as the act of spending is a means of communication in itself, the propriety of applying this test to campaign expenditure limitations is questionable. The Court in *O'Brien* suggested that the extent to which "conduct" was protected by the first amendment depended on the presence of a "communicative element."[115] Given the present trend to use the mass media extensively in political campaigns, it may be argued that expenditures are closely tied to political communication, particularly in statewide campaigns covering a large physical area. For this reason campaign expenditures could be deemed closer to speech on a continuum from speech to conduct and therefore more clearly within the protection of the first amendment. Therefore it is submitted that the balancing approach is a more appropriate means of testing whether the Act imposes an unconstitutional indirect infringement on speech.

D. Prior Restraints

The constitutional guarantees of freedom of speech and press were primarily enacted to put an end to restraints and limitations which at one time in English history had been imposed on individuals seeking to speak and write publicly.[116] An essential element of free speech is its freedom from censorship prior to publication, and from other forms of prior restraints.[117] Improper prior restraints on communication may vary in form and degree, but all have the effect of restricting the dissemination of ideas. The forms which have been subject to judicial scrutiny include licensing statutes,[118] injunctions,[119] and governmental

114. *E.g.*, Rosenthal, *supra* note 85, at 423; Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C.L. REV. 389, 479-82 (1973).

115. 391 U.S. 367, 376 (1968).

116. The purpose of safeguarding the rights of free speech is to allow individuals to speak as they think on matters vital to them and to expose falsehoods through the processes of education and discussion which is essential to a free government. Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

117. *E.g.*, Near v. Minnesota, 283 U.S. 697 (1931).

118. *E.g.*, Staub v. City of Baxley, 355 U.S. 313 (1958); Saia v. New York, 334 U.S. 558 (1948); Lovell v. City of Griffin, 303 U.S. 444 (1938).

119. *E.g.*, Near v. Minnesota, 283 U.S. 697 (1931).

orders.[120] Since the very heart of the first amendment is its protection against prior restraints, the courts have traditionally closely scrutinized the constitutionality of such restraints.[121] As the United States Supreme Court held in *New York Times Co. v. United States*,[122] "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[123] This stringent test has been justified on the grounds that prior restraints restrict the free flow of information[124] and eliminate the safeguards of judicial proceedings.[125]

In a recent case dealing with a prior restraint, *ACLU v. Jennings*,[126] a three judge federal district court ruled that section 104b of title I of the Federal Election Campaign Act of 1971,[127] which imposed campaign expenditure limitations on spending for newspaper, magazine, and outdoor advertisements, was unconstitutional on its face because it was vague and overbroad, and imposed an impermissible prior restraint.[128] The Federal Act required any communications medium which accepted advertisements from any person supporting a federal candidate to obtain a written certification from the candidate that the cost of the advertisement would not exceed the candidate's limitation.[129] Since certification had to come from the candidate, he, in effect, could prevent individuals or groups who desired to express their support for him from making expenditure. Thus the candidate could have imposed a prior restraint upon both the advertiser and the medium whenever he feared that the public would draw undesirable implications from that particular group or individual's support. Further, when an individual desired to make an expenditure on behalf of a candidate, but could not get certification, and also disclaimed the consent of the candidate, the news medium was required to verify the disclaimer with the candidate.[130] This requirement was deemed by the *Jennings* court

120. *E.g.*, Winters v. New York, 333 U.S. 507 (1948); Schneider v. New Jersey, 308 U.S. 147 (1939).
121. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Staub v. City of Baxley, 355 U.S. 313, 321 (1958); Lovell v. City of Griffin, 303 U.S. 444, 451 (1938); Near v. Minnesota, 283 U.S. 697, 713 (1931).
122. 403 U.S. 713 (1971).
123. *Id.* at 714, *quoting* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).
124. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). *See* Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 657-60 (1955).
125. New York Times Co. v. United States, 403 U.S. 713 (1971).
126. 366 F. Supp. 1041 (D.D.C. 1973).
127. 47 U.S.C. §803(b) (Supp. II 1972).
128. 366 F. Supp. at 1049-54.
129. 47 U.S.C. §803(b) (Supp. II 1972). The Federal Act requires certification for expenditures by or on behalf of any candidate. Thus, the charge to the candidate cannot be circumvented by independent committees.
130. 11 C.F.R. §4.5 (1973).

to be so burdensome that the news media would probably refuse to print any individual advertisement.[131] The court concluded that the procedures for both the media and the advertiser, considered in conjunction with the relative ease with which a candidate could prevent publication, created a prohibited prior restraint.[132]

The California Act does not present the same type of problem as that created by the federal statute because there are separate limitations imposed upon candidates, central committees, and independent committees. Thus, under the California law no individual or committee is empowered to prevent another from expending funds to communicate political ideas. The California provisions may, though, pose some of the dangers of prior restraints.[133] A prior restraint exists when one's ability to give expression to his thoughts is made dependent on prior authorization, the expression being permitted only after a permit or license has been obtained.[134] Laws subjecting the exercise of speech to the prior restraint of a license without narrow, objective, and definitive standards to guide the licensing authority have been ruled unconstitutional.[135] The fact that the FPPC is authorized to withhold approval of independent committee expenditures above $10,000, if it determines that the committee is not bona fide, lacks the intention and ability to incur the added expense, or is not acting in good faith,[136] raises the question as to whether such a procedure sets forth standards "susceptible of objective measurement."[137]

While the Act's scheme is distinguishable from the typical licensing case involving parades and meetings, since an independent committee must get permission only after it has already spent $10,000, the same

131. 366 F. Supp. at 1053.

132. *Id.*

133. The fact that under Government Code Section 91003(a) any person residing in the jurisdiction may sue to enjoin violations of the Act may give rise to a prior restraint challenge; further, constitutional problems may be raised by Government Code Section 91002 which provides that violators shall be forbidden to run for any elective office for a period of four years following the date of conviction. *See generally* Annot., 45 A.L.R.3d 1022 (1972).

134. First amendment protection exists only when prior authorization involves state action. In *Jennings*, although the prior restraints were not imposed by the government directly, the court found that state action existed by the imposition of an indirect system of censorship accomplished by means of criminal sanctions directed at the media. 366 F. Supp. 1041, 1051 (D.D.C. 1973).

135. A long line of decisions has held that statutes governing the issuance of licenses to conduct first amendment activities where administrative officials were granted excessive discretion in determining whether to grant or deny the license are unconstitutional. These cases usually deal with statutes which require licenses for parades and demonstrations, and courts have allowed regulation only as to time, place, manner, and duration if the statutes are fairly administered by officials within the range of narrowly limited discretion. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969); Cox v. Louisiana, 379 U.S. 536, 558 (1965); Burton v. Municipal Court, 68 Cal. 2d 684, 690-92, 441 P.2d 281, 285, 68 Cal. Rptr. 721, 725 (1968).

136. CAL. GOVT CODE §85104.

137. Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967).

judicial scrutiny would appear proper since both involve the licensing or approval of an activity within the purview of the first amendment's protection. Since the Act imposes a licensing-type procedure when an independent committee desires to exceed the $10,000 limit, the Act's criteria for review should be sufficiently definite to give reasonable notice to regulated persons of how to comply, and to apprise the FPPC, judges, and juries of the standards used for determining whether to grant or deny the request for additional expenditures.[138] The standards set forth in section 85104 are arguably too broad and indefinite and are thus inherently susceptible to arbitrary application.[139] Whether an independent committee has the ability, and possibly the intention, to spend can be objectively determined by a showing of present possession of either funds or pledges. The FPPC does have definite guidelines for determining whether a committee is truly independent, since the Act requires the supported candidate to verify whether the committee is independent of him,[140] and specifically sets out the definition of both independent and controlled committees.[141] As to whether the committee supports the candidate in good faith, the FPPC could establish regulations which would evaluate the committee's prior conduct. However, without carefully drafted regulations this particular factor appears to be highly subjective and thus susceptible to challenge on the basis that it confers on the FPPC "virtually unbridled and absolute power"[142] to deny the approval of the request.

E. Vagueness and Overbreadth

Even when the speech in question may be constitutionally regulated,

138. In Dillon v. Municipal Court, 4 Cal. 3d 860, 869, 484 P.2d 945, 951, 94 Cal. Rptr. 777, 783 (1971) the court said: "[A]ny procedure which allows licensing officials wide or unbounded discretion in granting or denying permits is constitutionally infirm because it permits them to base their determination on the content of the ideas sought to be expressed."

139. It is clear that an ordinance or statute is unconstitutional if no standards whatever are set forth to circumscribe the discretion of officials in granting or denying licenses. Burton v. Municipal Court, 68 Cal. 2d 684, 690-92, 441 P.2d 281, 285, 68 Cal. Rptr. 721, 725-26 (1968). But, the degree of specificity required to sustain a law is unclear.

140. CAL. GOV'T CODE §85104. The verification procedure in section 85104 is distinguishable from the certification requirement in *Jennings* on several grounds. In *Jennings* the candidate's failure to certify resulted in nonpublication, whereas under section 85104 if a candidate refuses to verify that a committee is independent, the committee will be deemed controlled, and thus any of the committee's expenditures will be charged to the candidate's aggregate under section 85100. The candidate's refusal will not necessarily prevent the publication or expenditure but will only determine who will be charged the sums spent for purposes of the limitations. If a candidate is near or has reached his limitation and wants to prevent a committee from spending on his behalf by refusing to verify their independence, he runs the risk of incurring possible criminal and civil liability for exceeding his limitation when the committee makes the expenditure without FPPC approval.

141. CAL. GOV'T CODE §§82016, 82031.

142. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969).

the character of the first amendment itself mandates that the regulation be carefully drawn so that the deterrent effect on free speech is no greater than absolutely necessary to foster the public interest necessitating the statute.[143] In some cases, therefore, the United States Supreme Court has found a statute unconstitutional on the basis that it was either overbroad in scope or vague in meaning.[144] Overbreadth review requires analysis of the degree to which legislation unnecessarily restricts protected conduct and speech beyond the level required to achieve the valid governmental objectives which it furthers.[145] An important function of the doctrine is to allow a plaintiff to assert the unconstitutionality of a regulation, even if his conduct might legitimately have been proscribed, on the ground that a regulation too sweeping in its coverage could deter others from pursuing expression not validly subject to the regulation.[146] Thus statutes touching on first amendment freedoms have traditionally been judged "void on their face" without regard to evidence of abuse in the application of the statute.[147] Recent decisions of the Supreme Court, however, have severely limited the scope and application of the overbreadth doctrine.[148] In *Broadrick v. Oklahoma*[149] the Court stated that if a statute was clearly constitutional as applied to activities of the individual appellants, and if it applied to "conduct" rather than "pure speech," the appellants would not be allowed to challenge the provision on the ground that it might be unconstitutional as applied to others, unless it was "substantially over-

143. *E.g.*, Ginsberg v. New York, 390 U.S. 629, 643 (1968); United States v. Robel, 389 U.S. 258, 268 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

144. For an analysis of the development of the constitutional doctrines of vagueness and overbreadth see Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

145. Baird v. State Bar of Alabama, 401 U.S. 1 (1971); Zwickler v. Koota, 389 U.S. 241 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960).

146. Dombrowski v. Pfister, 380 U.S. 479, 487-89 (1965).

147. *E.g.*, United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Thornhill v. Alabama, 310 U.S. 88 (1940).

148. A limitation to the scope of the overbreadth doctrine was announced in the *Letter Carriers* case when the Court upheld the "active part" prohibition of the Hatch Act against an overbreadth challenge in spite of the fact that the governmental interests involved did not require that all partisan political activities of every governmental employee be proscribed. The Court failed to consider fully the provision's potential applications and the narrower alternatives available. Thus the Court's measure of lawfully prohibited expression in relation to the interests of the government was substantially greater than that allowed in the past. *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 148-49 (1973). An overbreadth challenge to any of the California campaign expenditure limitations could arguably be unsuccessful if similar judicial scrutiny is applied, despite the apparent potential unlawful applications and less restrictive alternatives.

149. 413 U.S. 601 (1973) (involving a state statute restricting political activities of state employees).

broad."[150] The Court in *Broadrick* preferred to deal with allegedly invalid applications of the statute or regulation in question on a case-by-case basis.[151] It also stated that the facial overbreadth doctrine would not be invoked when a limiting construction could be placed on the challenged statute.[152]

The fact that all sums spent for political purposes may be considered expenditures for purposes of the limitation on candidate and central committee spending may present the "substantial overbreadth" required to sustain challenges of facial invalidity, since expenditures for activities other than those directly affecting the election of a statewide candidate would seem to fall within the scope of the California regulations.[153] While a limitation on expenditures relating to the election of statewide candidates may be deemed constitutional under a balancing analysis, expenditures made for any other political purpose should still be protected by the first amendment since the alleged state interest of reducing the importance of money in elections is not being furthered by controlling expenditures for other political purposes.

Another potential overbreadth problem arises when a candidate under section 85106 is charged the full amount of another candidate's expenditure if made in support of both benefited candidates. It is clear that the state has a legitimate interest in regulating sums spent by a candidate in furtherence of both his own election and another's candidacy. The duplication of charges to both benefited candidates may be justified as a means of preventing candidates from acting jointly for the purpose of circumventing the limitation. However, where there is no joint action, charges to a non-spending candidate arguably do not serve a legitimate state interest. Thus, section 85106 could be unconstitutionally overbroad since it is not limited to situations where the candidates are acting in concert, but instead imposes a regulation on the non-spending candidate without any qualification. Facial overbreadth may not exist in these situations, in light of *Broadrick*, if a court decides to impose a limiting construction on the challenged statute. The *Letter Carriers* and *Broadrick* cases have caused much uncertainty in the law in this area, and in light of these precedents and the strong state interest in preventing campaign abuse it is difficult to accurately predict the outcome of an overbreadth

150. *Id.* at 615.
151. *Id.* at 615-16. The California Supreme Court in County of Nevada v. MacMillen, 11 Cal. 3d 662, 522 P.2d 1345, 114 Cal. Rptr. 345 (1974) recently applied this rationale in upholding the Governmental Conflict of Interest Act in the face of an overbreadth challenge.
152. 413 U.S. 601, 613 (1973).
153. See text accompanying notes 34-35 *supra.*

challenge. The doctrine of statutory vagueness stems from the due process clause of the fifth and fourteenth amendments and applies when a law or regulation restricts or prohibits conduct in such vague terms that persons of common intelligence must necessarily guess at its meaning and application.[154] Where a vague statute operates to inhibit first amendment rights, a stringent standard has been required to prevent a "chilling effect" on those who desire to speak but who are uncertain whether their message falls within the statute's scope.[155]

Applying this doctrine to the expenditure provisions,[156] a vagueness problem may exist in determining the extent to which "issue" advertising falls within the purview of the expenditure limitations. The statute specifically states that "no independent committee shall make expenditures aggregating more than ten thousand dollars . . . in support of or in opposition to the candidate . . . ."[157] The crucial question in interpreting the language of the statute is whether advertisements that advocate policies, for example anti-busing legislation, and identify the positions of candidates on these issues, but do not advocate election or defeat of the candidates, are within the expenditure limitation. The federal court in *Jennings* faced the "issue" advertising problem and found the Federal Act to be unconstitutionally vague due to Congressional failure to define clearly the crucial phrase "on behalf of a candidate" so as to exclude from the statute's coverage expressions of opinion unintended and incapable of regulation.[158] It would appear that section 85104 is vulnerable to challenge on a similar ambiguity.

A similar problem exists in determining what actually constitutes a committee which is "directly or indirectly" controlled by a candidate for purposes of ascertaining whether a committee is independent, since the Act provides no standards or guidelines for the interpretation of such terms. In *United States v. Harriss*[159] the United States Supreme Court held that similar language in the Federal Regulation of Lobbying Act[160] met the constitutional requirement of definiteness.[161] Coverage of the Federal Act was partially limited to those persons who in-

154. Grayned v. City of Rockford, 408 U.S. 104, 108, 114 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).
155. Ashton v. Kentucky, 384 U.S. 195 (1966); Smith v. California, 361 U.S. 147 (1959).
156. It may be claimed that the criteria set forth in section 85104 for FPPC review of requests to exceed is unconstitutionally vague. The vagueness of the enunciated standards for review has been discussed as constituting a potential prior restraint in text accompanying notes 133-142 *supra.*
157. CAL. GOV'T CODE §85103.
158. 366 F. Supp. 1041, 1052 (D.D.C. 1973).
159. 347 U.S. 612 (1954).
160. 2 U.S.C. §§261-270 (1964).
161. 347 U.S. at 623-24.

fluence directly or indirectly the passage or defeat of any legislation in Congress.[162] The Court construed the phrase "directly or indirectly" to mean "direct communication with members of Congress."[163] In the light of the *Harriss* case, the California provision may similarly be limited to require that controlled committees are only those committees directly controlled by a candidate. This narrow construction would be consistent with the additional language in section 82016 which reads that "a candidate controls a committee if he, his agent or any other committee he controls has a significant influence on the actions or decisions of the committee."[164] Therefore, if the California courts follow the lead of *Harriss*, it would appear that this provision of the Act would be constitutional.

Even though the provisions hereinabove discussed might fall under the traditional vagueness test, the recent *Letters Carriers* case[165] may have relaxed this standard. The Court upheld the Hatch Act's prohibition on federal employees taking "an active part in political management and in political campaigns" against a vagueness attack. The Court found that sufficient clarity was given to the "active part" phrase by some 3,000 rulings of the Civil Service Commission so that guidance for federal employees as to what was prohibited had been provided. Any employee could also obtain an advisory opinion from the Commission concerning any activity he wished to pursue. The *Letters Carriers* holding indicates that limiting constructions in the form of rulings and regulations in conjunction with an advisory procedure could render a statute valid even though it would otherwise be unconstitutionally vague. The act contains provisions similar to those discussed in *Letter Carriers*, such as those dealing with the FPPC's power to implement rules and regulations in accord with the Act's purpose[166] and to issue advisory opinions regarding any individual's duties under the Act.[167] Because the vagueness of legislation must ultimately be judged by the degree of uncertainty it creates, it is plausible to conclude that with the FPPC's duties, powers, and pronouncements, a person of ordinary intelligence would be able to understand sufficiently and comply with the provisions of the Act, especially since these provisions apply only during the five months prior to an election, which should allow ample time for any individual or group to obtain advice from the FPPC.

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162. 2 U.S.C. §266(b) (1970).
163. 347 U.S. at 620.
164. CAL. GOV'T CODE §82016.
165. 413 U.S. 548 (1973).
166. CAL. GOVT CODE §83112.
167. CAL. GOV'T CODE §83114.

CONCLUSION

Unlike many states plagued by ineffective legislation in the form of vague, unenforceable, and loophole ridden campaign financing laws, the Political Reform Act of 1974 provides California with the necessary machinery for controlling and enforcing the new campaign expenditure limitations. The provisions of the Act nonetheless present several troublesome first amendment questions. Many of the problems presented by the Act may be cured by the promulgation of administrative regulations. For example, the problems of vagueness, overbreadth, and even the potential prior restraint could be cured by the implementation of regulations which clearly delineate whether advertisements that advocate policies or issues and identify the positions of candidates are within the independent committee expenditure limitation and whether sums spent by candidates and central committees for political purposes other than those relating to the election of a statewide candidate are subject to limitation under the Act. The standards for reviewing requests to make additional expenditures by independent committees supporting a candidate could also be so delineated. In regard to the last suggested administrative act, perhaps a filing procedure could be established whereby those committees seeking approval would be required to attest in writing to their good faith; upon receipt of the sworn affidavit the FPPC would be required to accept it as meeting the good faith requirement in the absence of countervailing evidence.[168] Other potential constitutional problems with provisions of the Act, such as the duplication of charges under section 85106 and the discrimination on the basis of the content of the speech under section 85104, can only be cured through legislative amendment. In this regard, the Act provides two methods for amendment. One permits the provisions of the Act to be amended by statute by the legislature when approved by the electors.[169] The other method requires that a bill in its final form be delivered to the FPPC for public distribution at least 40 days before it is passed by a two-thirds roll call vote of the membership of each house.[170] The potential direct prohibition of speech and overbreadth problem created by section 85106 could be alleviated by including as part of the candidate's aggregate only those sums spent on his behalf by individuals or groups with whom he acts in concert; candidate expenditures made by one candidate on behalf of other candidates should fall under the separate provisions controlling expenditures made

168. *Cf.* Bond v. Floyd, 385 U.S. 116 (1966).
169. CAL. GOV'T CODE §81012(b).
170. CAL. GOV'T CODE §81012(a).

by independent committees, provided that the two candidates are not acting jointly. Since other individuals and groups can be subject to more than one limitation under the Act depending on the purpose of the particular expenditure and the relationship of the candidate and the spender,[171] it would appear that no rational justification exists for not likewise subjecting a candidate to more than one limitation in the absence of joint action. It is further suggested that section 85104 be amended to allow all independent committees the opportunity to get FPPC approval to make additional expenditures. The implementation of the foregoing recommendations would eliminate many of the constitutional questions raised by the Act and would thus strike a more favorable balance between the government's interest in "purifying" the electoral process and the individual's interest in free speech.

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171. Government Code Section 82031 explicitly states that "a committee may be controlled with respect to one or more candidates and independent with respect to other candidates."