State Campaign Finance Schemes and Equal Protection

INTRODUCTION

Since 1974, when Congress established public financing of United States presidential elections,[1] several states have chosen to subsidize various state campaign expenses.[2] These state schemes necessarily set forth criteria determining who shall receive how much support,[3] and such criteria inevitably exclude some aspiring candidates or parties from public subsidy.[4] This Note

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1. Federal Election Campaign Act, Pub. L. No. 93-443, 88 Stat. 1263 (1975) (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.), *amending* Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified in scattered sections of 2, 18, 47 U.S.C.). The specific financing provisions are found in Subtitle H of the Inter. Rev. Code of 1954, 26 U.S.C. §§ 9001 to 9012, 9031 to 9042 (1982).

2. *See* ALA. CODE § 17-16-2 (1975), § 40-18-146 (Supp. 1985); ALASKA STAT. § 43.20.013 (1983); ARIZ. REV. STAT. ANN. § 16-804(A) (1984), § 43-1059 (1980); ARK. STAT. ANN. § 84-2016.5 (1980); CAL. REV. & TAX CODE §§ 17245, 18701 to 18760 (West Supp. 1985), ELEC. CODE § 6430 (West 1977); D.C. CODE ANN. § 47-1806.5 (1981 & Supp. 1985); HAWAII REV. STAT. §§ 11-208 to -209, 11-217 to -229 (Supp. 1984), § 235-102.5 (Supp. 1984); IDAHO CODE §§ 34-501, 34-2501 to -2505 (1981 & Supp. 1984), § 63-3088 (1976 & Supp. 1985); IND. CODE §§ 9-7-5.5-1 to -10 (1982 & Supp. 1985); IOWA CODE ANN. § 43.2 (West 1973 & Supp. 1985), §§ 56.18 to .26 (West Supp. 1985); KY. REV. STAT. §§ 118.015, 121.230, 141.071 to .073 (1982 & Supp. 1984); ME. REV. STAT. ANN. tit. 21, § 1 (1983 & Supp. 1984), § 321 (1983), tit. 36, § 5283 (1978); MASS. ANN. LAWS ch. 10, §§ 43 to 45 (Michie/Law. Co-op. 1980), ch. 50, § 1, ch. 53, § 6, ch. 55A, §§ 1 to 12, ch. 62, § 6C (Michie/Law. Co-op. 1978 & Supp. 1985); MICH. COMP. LAWS ANN. §§ 169.271 to .281 (West Supp. 1985); MINN. STAT. ANN. §§ 10A.01, 10A.25, 10A.30 to .33 (West 1977 & Supp. 1985); MONT. CODE ANN. §§ 13-37-301 to -308 (1985); N.J. STAT. ANN. §§ 19:44A-7, 44A-27 to -44 (West Supp. 1985), § 54A:9-25.1 (West 1985); N.C. GEN. STAT. § 105-159.1 (1979 & Supp. 1985), §§ 163-96, 163-278.41 to .45, 163-278.6 (1982 & Supp. 1985); OKLA. STAT. ANN. tit. 26, §§ 1-107 to -109, 5-112 (West 1976 & Supp. 1984), §§ 18-101 to -113 (West Supp. 1984); OR. REV. STAT. §§ 248.008, 316.102 (1983); R.I. GEN. LAWS § 17-12.1-12 (1981), § 44-30-2(e) (1980 & Supp. 1985); UTAH CODE ANN. § 20-3-2(g) (1984), §§ 59-14A-99 to -100 (Supp. 1985); WIS. STAT. ANN. §§ 11.26, 11.50, 20.855 (West Supp. 1985).

The Indiana statute, IND. CODE §§ 9-7-5.5-1 to -10 (1982 & Supp. 1985), which prompted this Note, is not codified in either the election chapter or the taxation chapter of the code. It is generally not included in summaries of state campaign finance schemes, perhaps because it is part of the motor vehicles chapter. It is uncertain how many other states might similarly enact or codify their campaign finance schemes.

3. Every subsidy scheme will differentiate among potential recipients, and thus discriminate among them.

4. Any scheme that defines, by necessity, what "candidate" or "party" is worthy of public funding, will deny funds to some individuals or groups that claim a right to subsidy. This Note uses the term "nonmajor" to describe those parties and candidates (and their supporters) that receive a relatively small share of public support, and thus often a reduced share, or no share, of public subsidies.

examines whether or not particular states' exclusions of candidates or parties from public support violate the equal protection mandate of the fourteenth amendment. In *Buckley v. Valeo,*[5] the United States Supreme Court comprehensively reviewed the Federal Election Campaign Act (FECA),[6] and upheld its discriminatory financing provisions despite equal protection challenges brought by 'nonmajor' candidates, parties, and voters.[7] This Note construes *Buckley* to render several current state statutes unconstitutional as violative of equal protection requirements.[8]

Part I of this Note suggests that the *Buckley* Court validated FECA's discriminatory subsidy provisions by utilizing something less than strict scrutiny in its equal protection analysis.[9] Relaxed scrutiny was appropriate only because FECA imposed significant campaign expenditure ceilings on those candidates who accepted the federal subsidies. Most state schemes, however, do not impose significant expenditure ceilings upon subsidy recipients, and thus must undergo equal protection's strict scrutiny.

Unlike FECA, some state schemes emphasize subsidies to political parties rather than to candidates. FECA and the state schemes also differ in their subsidy mechanisms, which include tax checkoff options, tax credits, tax deductions, designatable tax checkoffs, and matching fund grants. Part II of this Note suggests that these differences between FECA and the state schemes should not alter the level of equal protection scrutiny.[10]

Finally, this Note discusses the various state campaign financing laws in existence, compares their provisions to the constitutional requirements framed

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5. 424 U.S. 1 (1976) (per curiam).

6. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2, 5, 18, 26, 47 U.S.C.).

7. 424 U.S. at 143-44.

8. Despite the many and varied state campaign finance schemes now in place, the courts have faced few challenges to the states' treatment of minor parties, candidates, or voters. *But see infra* notes 224-47 and accompanying text (discussing two federal court decisions).

At least one commentator has suggested that state schemes offer good "laboratories of reform" to evaluate different approaches to the complex issues of public campaign financing, and to help refine our analysis of these schemes. Jones, *State Public Financing and the State Parties,* in PARTIES, INTEREST GROUPS, AND CAMPAIGN FINANCE LAWS 283, 285-6 (M. Malbin ed. 1980). This Note contends that the state schemes developed after FECA and *Buckley* have gone in the wrong direction in treating minor parties, candidates, and voters, and require constitutional restraint. As one commentator, with misplaced optimism, noted: "Inasmuch as some state courts have interpreted their own equal protection provisions more expansively than has the Supreme Court . . . there is some slight hope that state statutes discriminating against nonmajor party candidates, such as those upheld in *Buckley,* will be invalidated." Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974,* 1977 WIS. L. REV. 323, 374 n.229 [hereinafter cited as Nicholson, *1974 Amendments*]. In fact, states seem to have performed exactly contrary to this expressed hope, even transgressing those boundaries established in *Buckley.*

9. *See infra* notes 12-62 and accompanying text.

10. *See infra* notes 63-145 and accompanying text.

in *Buckley,* and concludes that several schemes unconstitutionally discriminate against nonmajor parties or candidates.[11]

I. A RELAXED SCRUTINY IN *BUCKLEY V. VALEO*

The Supreme Court in *Buckley v. Valeo*[12] upheld against equal protection challenges a federal statute that grants campaign subsidies to some presidential candidates and denies them to others.[13] Having validated a particular scheme, *Buckley* establishes the foundation for analysis of similar state statutes. [14] The *Buckley* decision seems to establish the principle that the level of equal protection scrutiny invoked by a discriminatory subsidy scheme can be relaxed if that scheme imposes "countervailing denials"—specifically expenditure ceilings—on subsidy recipients.[15] To elicit this principle, the analysis must begin with an outline of the specific subsidy provisions (Subtitle H)[16] that the *Buckley* Court upheld.

Subtitle H provides for a public campaign finance fund[17] generated by voluntary taxpayer checkoffs of one or two dollars per tax return.[18] FECA dispenses this fund through three schemes. First, candidates for President in the general election may qualify for public subsidies in the form of block grants.[19] Second, political parties may qualify for block grants to subsidize the cost of their Presidential nominating conventions.[20] Third, candidates

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11. *See infra* notes 146-252 and accompanying text.

12. 424 U.S. 1 (1976) (per curiam).

13. *See infra* notes 17-35 and accompanying text.

14. Many prior cases faced the balancing required between efficient campaigns and equal protection rights of voters, candidates, or parties. *E.g.,* American Party of Texas v. White, 415 U.S. 767 (1974); Williams v. Rhodes, 393 U.S. 23 (1968); Smith v. Allwright, 321 U.S. 649 (1949). *Buckley* was the first case comprehensively to evaluate such a broad financing scheme as FECA, and the only such case to date, and so provides the logical source of constitutional doctrines. *See The Supreme Court, 1975 Term,* 90 HARV. L. REV. 56, 173 n.10 (1976); Comment, *Buckley v. Valeo: The Supreme Court and Federal Campaign Reform,* 76 COLUM. L. REV. 852, 853 (1976).

Because *Buckley* determined that its fifth amendment analysis was identical with what fourteenth amendment analysis would be, it establishes requirements for the state schemes as well as FECA. *Buckley,* 424 U.S. at 93, citing to Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975). *See also* Fleishman, *1974 FECA Amendments,* 1975 DUKE L.J. 851, 883 (1975) [hereinafter cited as Fleishman, *1974 FECA Amendments*]; Fleishman, *Public Financing of Election Campaigns: Constitutional Constraints on Steps Toward Equality of Political Influence of Citizens,* 52 N.C.L. REV. 349, 383 (1973) [hereinafter cited as Fleishman, *Equality of Influence*].

15. *See infra* notes 34-48 and accompanying text.

16. 26 U.S.C. §§ 9001 to 9012, 9031 to 9042 (1982). Subtitle H distributes funds generated by 26 U.S.C. § 6096 (1982), a dollar checkoff provision for income tax forms. This Note refers to Subtitle H as including this provision.

17. 26 U.S.C. § 9006 (1982).

18. 26 U.S.C. § 6096 (1982). Since 1976 this fund has proven more than adequate to cover all the expenses incurred by the operation of FECA.

19. § 9006(c).

20. § 9008(a).

seeking the Presidential nomination of a political party through primary elections may qualify for certain matching fund subsidies.[21] For purposes of allocating these subsidies, FECA divides political parties into three groups, based on their past vote totals. A "major party" is a political party whose candidate for President polled at least 25% of the total popular vote cast for President in the most recent election.[22] A "minor party" is a political party whose candidate for President polled at least 5% but less than 25% of the popular vote cast at the most recent election.[23] Other political parties are termed "new parties."[24]

Block grants to Presidential candidates in the general election campaign are disbursed only to candidates who agree to abide by an overall spending ceiling (equal to the grant given to a candidate from a major party).[25] A candidate who does not receive public funds is not subject to the spending ceiling.[26] Major party candidates who agree to the spending ceiling receive a subsidy to finance general election campaigning (set at twenty million dollars and indexed for inflation in 1974).[27] A minor party candidate receives a subsidy in proportion to the popular votes that party's candidate received compared to the average popular vote received by major party candidates in the most recent election.[28] A new party candidate receives no subsidy for the general election campaign. A post-election subsidy may be available to a candidate of a new or minor party who increases her vote total in the current election.[29]

Block grants to political parties holding nominating conventions are likewise based on past vote-getting of the party. A major party receives a certain amount for convention expenses (set at two million dollars and indexed for inflation in 1974), and must limit convention expenditures to that amount.[30] A minor party is also subject to the spending limit, and receives a proportion of that grant just as the minor party candidate did for the general election.[31] New parties and parties without conventions receive no subsidy and are not subject to the expenditure ceiling.

Congress provides matching funds to candidates seeking the Presidential nomination of a political party only if the candidate agrees to spending

21. § 9037(a).
22. § 9002(6).
23. § 9002(7).
24. § 9002(8). This Note, like *Buckley*, does not consider the specific issues that independent candidates would raise if they were treated differently merely because not affiliated with an official party.
25. § 9003.
26. 424 U.S. at 95.
27. § 9004(a)(1) (refers to 18 U.S.C. § 608(c)(1)(B) & 608(d) (1982)).
28. § 9004(a)(2).
29. § 9004(a)(3).
30. § 9008(b) & (d).
31. *Id.*

ceilings, and raises $5,000 in each of twenty states, counting only the first $250 of any individual contribution.[32] Qualifying candidates receive dollar-for-dollar matching grants up to the spending ceiling.[33]

The Supreme Court affirmed the constitutionality of Subtitle H in its entirety,[34] notwithstanding a multitude of precedents revealing an unwavering support of the rights to vote effectively and to run for public office.[35] Although the right to an effective vote is not explicitly stated in the Constitution, the Supreme Court has repeatedly held that a constitutional right to an effective vote does exist,[36] and that discriminatory restrictions of this right must undergo strict scrutiny in equal protection analysis.[37] The Court has also established that the right to run for public office, including gaining access to the electoral ballot, is a fundamental right derived from a citizen's right to vote effectively.[38] The appellants in *Buckley,* and many commentators on FECA, contended that these cases demanded strict scrutiny against Sub-

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32. § 9033(b).

33. § 9034 (18 U.S.C. § 608(c)(1)(A) establishes a $10 million ceiling, indexed for inflation).

34. 424 U.S. at 108-09. The Court found that Subtitle H was within the general welfare powers of Congress, *id.* at 90, was not an abridgement of the first amendment, *id.* at 93, and did not violate the equal protection guarantee of the fifth amendment, *id.* at 108. The Court did acknowledge that it only found Subtitle H was not *facially* invalid: "[F]actual proof that the scheme is discriminatory in its effect" could allow the Court to find that Subtitle H "invidiously discriminates against nonmajor parties." *Id.* at 97 n.131.

35. These precedents led many commentators to predict or urge that the Court strike down Subtitle H as unconstitutional. *See, e.g.,* Fleishman, *1974 FECA Amendments, supra* note 14, at 886-90; Rosenthal, *Campaign Financing and the Constitution,* 9 HARV. J. ON LEGIS. 359, 411-16 (1972); *see also* Casper, *Williams v. Rhodes and Public Financing of Political Parties Under the American and German Constitutions,* 1969 SUP. CT. REV. 271, 284 (1969).

36. *See* Dunn v. Blumstein, 405 U.S. 330, 336 (1972) ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."); Evans v. Cornman, 398 U.S. 419, 422 (1970); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) ("the right of suffrage is a fundamental matter in a free and democratic society . . . preservative of other basic civil and political rights"); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (the right to vote is a "fundamental political right, because preservative of all rights"). These cases concerned the constitutional right to vote in state elections. The right to vote in federal elections is understood to derive from Article 1, § 2 of the U.S. Constitution. United States v. Classic, 313 U.S. 299, 314-15 (1941).

37. Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969) (if a statute discriminates regarding the right to vote, "the Court must determine whether the exclusions are necessary to promote a compelling state interest"); Dunn v. Blumstein, 405 U.S. at 337; Evans v. Cornman, 398 U.S. at 422 (restriction "must meet close constitutional scrutiny"). *See* Bullock v. Carter, 405 U.S. 134, 143 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. at 667.

38. American Party of Texas v. White, 415 U.S. 767, 780-81 (1974); Storer v. Brown, 415 U.S. 724, 729 (1974); Bullock v. Carter, 405 U.S. at 144 (because the ballot restrictions had a "real and appreciable impact on the exercise of the franchise . . . related to the [financial] resources of the voters," the restrictions must be "closely scrutinized"); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (because ballot restrictions burdened the right to "vote effectively," the state must show a "compelling interest" to justify infringing these rights). *See* Manikas, *Campaign Finance, Public Contracts, and Equal Protection,* 59 CHI. KENT L. REV. 817, 818 (1983). *See generally* Jordine, *Ballot Access Rights: The Constitutional Status of the Right to Run for Office,* 1974 UTAH L. REV. 290 (1974).

title H because the law infringed fundamental rights of nonmajor voters, candidates, and parties.[39]

The *Buckley* Court certainly recognized the significance of the case law demanding strict scrutiny of statutes infringing the rights to vote effectively and to run for office:

> [R]estrictions on access to the electoral process must survive exacting scrutiny. The restriction can be sustained only if it furthers a "vital" governmental interest . . . that is "achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity."[40]

But the Court explicitly distinguished the ballot-access cases and their exacting scrutiny, emphasizing that those cases involved "direct burdens" on a candidate's opportunities to run for office, and on a voter's right to choose, while Subtitle H only denied nonmajor candidates and parties *equal* public financing.[41] The denial of funding, according to the Court, did not "prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice."[42]

The Court properly went on to acknowledge that nonmajor candidates and parties could claim a discriminatory "denial of the enhancement of the opportunity to communicate with the electorate" that Subtitle H provides to major candidates and parties.[43] Such a denial of enhancement, of course, would generally invoke the same equal protection analysis as would a direct restraint discriminatorily applied.[44] At this point the Court took a fundamental—and incompletely reasoned—logical step:

> But eligible candidates suffer a countervailing denial. . . . [A]cceptance of public financing entails voluntary acceptance of an expenditure ceiling. Non-eligible candidates are not subject to that limitation. Accordingly, we conclude that public financing is generally less restrictive of access to

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39. Reply Brief for Appellant at 55, Buckley v. Valeo, 424 U.S. 1 (1976); Fleishman, *1974 FECA Amendments, supra* note 14, at 884; Nicholson, *1974 Amendments, supra* note 8, at 348; Rosenthal, *supra* note 35, at 411-16. *But see* Fleishman, *Equality of Influence, supra* note 14, at 384-88.

40. 424 U.S. at 94 (citations omitted).

41. *Id.*

42. *Id.* Commentators have criticized the distinction between denying ballot access and denying public funds, *see, e.g.*, Fleishman, *1974 FECA Amendments, supra* note 14, at 889 ("[i]t is difficult to imagine . . . that the Court would choose to rest its decision on an extremely narrow and formalistic distinction between ballot access and public subsidy of campaigns"), but there is no hint that the Court intends to abandon the distinction.

43. 424 U.S. at 95.

44. The distinction between directly prohibiting the exercise of a right and conditioning a privilege on the sacrifice of a right has been generally dissolved. *See* Fleishman, *Equality of Influence, supra* note 14, at 383; Rosenthal, *supra* note 35, at 415.

> the electoral process than the ballot-access regulations dealt with in prior cases.[45]

Because denial of public subsidies was "generally less restrictive" than ballot regulations, the *Buckley* Court proceeded to evaluate the provisions of Subtitle H with a relaxed scrutiny,[46] revealing at times quite a deferential attitude toward Congress' discriminatory provisions.[47] The relaxed scrutiny was justifiable only because the Court found that, on its face, Subtitle H did not injure the relative ability of any party or candidate to compete for office.[48]

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45. 424 U.S. at 95 (footnotes omitted).

46. The *Buckley* Court held that FECA's mandatory ceilings on overall campaign expenditures and on independent campaign expenditures were unconstitutional because violative of fundamental first amendment rights of expression. 424 U.S. at 58. This holding seemed to frustrate Congressional attempts to halt the exploding costs of campaigns and rationalize the electoral process generally, but the Court made receipt of public subsidies under FECA contingent upon agreement to voluntary expenditure ceilings. 26 U.S.C. §§ 9003, 9008 & 9033. *See* Comment, *supra* note 14, at 883. While Congress may not always condition benefits on requirements that it cannot impose directly, this expenditure ceiling requirement is probably sufficiently related to the legitimate purposes of Congress to pass constitutional muster. *See The Supreme Court, 1975 Term, supra* note 14, at 182 n.80. The only valid way to enforce expenditure ceilings, thus, is to condition the granting of some related governmental benefit upon agreement to the ceilings.

Of course the *level* of scrutiny to be applied to schemes challenged as violative of equal protection is not normally understood to depend on the necessity or importance of the state interest motivating the statute. The mere fact that expenditure ceilings could only be encouraged, not mandated, would not relax equal protection scrutiny, despite the importance of the goal. Rather, the level of scrutiny is determined by evaluating the nature of the classification embodied in the statute, and then the state interest is measured against the discriminatory effects. The *Buckley* Court relaxed the scrutiny not because of the *importance* of achieving expenditure ceilings, but because the expenditure ceilings made the *effect* of the challenged classifications nondiscriminatory. *See infra* notes 49-57 and accompanying text.

An interesting question would arise if the Court found that mandatory ceilings were constitutional. This Note would still argue that scrutiny should be relaxed (because the effect of the scheme would still be nondiscriminatory), but the state interest in excluding minor parties would not be balanced by the sacrifice that the state elicits from subsidy recipients by agreement to ceilings—these ceilings could be imposed directly. Subtitle H might be found unconstitutional if expenditure ceilings could be mandated.

47. The Court upheld reliance on past vote totals to determine general election subsidy levels, stating that Congress could find vote totals "preferable" to the suggested alternatives, which "might be thought inappropriate." *Id.* at 106. The Court upheld the 5% threshold required to receive any subsidies as a valid accommodation of competing interests, within a "permissible range." *Id.* at 103-04. The Court found the requirement that a candidate qualify for 10 state ballots was "not unreasonable." *Id.* at 104 n.140. The Court also found that exclusive reliance on matching funds as a subsidy mechanism for primary elections was "not an unreasonable way to measure popular support." *Id.* at 106.

48. *See* 424 U.S. at 99 ("since any major-party candidate accepting public financing of a campaign voluntarily assents to a spending ceiling, other candidates will be able to spend more in relation to the major-party candidates"); *id.* at 104 (expenditure ceilings "enhance the ability of nonmajor parties to increase their spending relative to the major parties"); *id.* at 108 (expenditure ceilings let poorer candidates "increase their spending relative to [richer] candidates").

If a factual inquiry revealed that Subtitle H's ceilings are so high as to be ineffective, then

Although many commentators expected the Court to apply strict scrutiny and invalidate the discriminatory provisions,[49] the relaxation of scrutiny because of the countervailing denial imposed on subsidy recipients does have roots in earlier ballot-access cases.[50] These cases affirm the practice of considering in some detail the actual effect of the challenged discriminatory statutory scheme in order to determine what level of scrutiny equal protection demands.

In *Bullock v. Carter,* the Supreme Court evaluated a Texas scheme that required various filing fees before ostensible candidates would be placed on a ballot.[51] The unanimous Court recognized that the scheme "creates barriers to candidate access to the primary ballot," but cautioned that "[t]he existence of such barriers *does not of itself* compel close scrutiny. . . . In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their *impact* on voters."[52] Because the Court found a "real and appreciable" adverse impact on voters, the Texas laws had to be "closely scrutinized."[53] Similarly, in *Jenness v. Fortson,* the Court found that a realistic look at the challenged classification revealed that the nonmajor parties were not in fact injured, that to treat them as the major parties were treated would actually have been *more* damaging to their position.[54] The Court in *Storer v. Brown* cited *Williams v. Rhodes* to affirm the need to consider "the facts and circumstances behind the law" in order to evaluate the challenged election laws.[55]

These cases affirm the *Buckley* Court's consideration of the *effect* of FECA on parties discriminated against as an approach consistent with past reasoning. General principles underlying equal protection analysis also lend support to a relaxed scrutiny in light of the significant expenditure ceilings imposed. Principles introduced in *United States v. Carolene Products,*[56] and

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strict scrutiny would be appropriate just as if there were no ceilings. Commentators have generally agreed that specific attention to the effects of a campaign finance scheme is essential to determine its validity, *see, e.g.,* Manikas, *supra* note 38, at 842-43; Nicholson, *1974 Amendments, supra* note 8, at 362-63; Rosenthal, *supra* note 35, at 416, and some have suggested that attention to the effects of Subtitle H taken as a whole with FECA reveals unmistakeable injury to nonmajor parties and candidates, *e.g.,* Nicholson, *1974 Amendments, supra* note 8, at 362-63. The *Buckley* Court certainly left open the possibility that such a factual showing would render Subtitle H invalid. 424 U.S. at 97 n.131.

49. *See* sources cited *supra* note 39.

50. Storer v. Brown, 415 U.S. 724 (1974); Bullock v. Carter, 405 U.S. 134 (1972); Jenness v. Fortson, 403 U.S. 431 (1971).

51. 405 U.S. at 135-38. One candidate for county judge was assessed a filing fee of $6,300. Assessments exceeding $5,000 were typical for several offices in certain counties.

52. *Id.* at 143 (emphasis added; citations omitted). *See also* Fleishman, *Equality of Influence, supra* note 14, at 388-89.

53. 405 U.S. at 144.

54. 403 U.S. at 441.

55. 415 U.S. at 730 (citing Williams v. Rhodes, 393 U.S. 23, 30 (1968)).

56. 304 U.S. 144, 152 n.4 (1938).

elaborated by Professor J.H. Ely,[57] suggest that the presence of expenditure ceilings might justify a relaxed equal protection scrutiny.

In *Carolene Products,* Justice Stone offered that something more than merely 'rational review' may be required with regard to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," and with regard to legislation directed at "discrete and insular minorities."[58] Professor Ely, attempting to develop a workable theory of judicial revew, suggests that a 'representation-reinforcing' role is appropriate for the courts: the judiciary should be most active when the political process does not seem to respond democratically, when the "ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."[59] Stone and Ely would likely agree, as a general matter, that when a legislature subsidizes campaigns in a discriminatory way, strict scrutiny is proper, just as in poll-tax, residency-requirement, and ballot-access cases.[60]

Both ballot-access precedents and underlying equal protection principles suggest that a discriminatory campaign financing scheme should in general be subject to strict scrutiny, because of the burden it places on the fundamental rights to vote and to run for office, and because of the inherent tendency of such a scheme to "freeze" the political status quo. If Subtitle H contained no expenditure ceilings, therefore, it should undergo strict scrutiny, and it should fail. No "vital" government interest can justify requirements so burdensome as a 5% vote threshhold, or a $5,000 minimum to be raised in each of 20 states to qualify for matching funds; much lower threshholds would serve to exclude frivolous and hopeless candidacies and

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57. J.H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

58. 304 U.S. at 152 n.4.

59. ELY, *supra* note 57, at 103.

60. Discriminatory campaign schemes seem an archetypical example of legislation that both restricts normal political processes, and reflects the 'ins' ensuring that they stay in and that the 'outs' stay out. Strict scrutiny should apply without regard to whether or not a legislature states that the purpose of the legislation is to increase and further speech and political activities. The rationale of Katzenbach v. Morgan, 384 U.S. 641 (1966), that when a state is not denying fundamental rights but rather extending rights, a lesser scrutiny is proper, *id.* at 657, is not appropriate with regard to discriminatory campaign finance schemes. The decision to assist some voters, candidates, or parties and not others, should invoke strict scrutiny because of the unavoidable self-interest behind such legislative schemes:

> Because the latter [FECA Amendments of 1974] extensively regulates the financing of election campaigns . . . and because a sizable proportion of those who are regulated by the legislation are the same as those who wrote the legislation, the *Katzenbach* reform exception to meticulous scrutiny should not apply. Instead the Court, promptcd by the question "Quis Custodiet Ipsos Custodes," [Who shall guard the guards] should be moved by the patent congressional self-interest involved to examine the Amendments with the greatest care.

Fleishman, *1974 FECA Amendments, supra* note 14, at 885 (footnotes omitted). *See also* Kramer v. Union Free School Dist., 395 U.S. 621, 628 (1969); Jones, *supra* note 8, at 294; Nicholson, *1974 Amendments, supra* note 8, at 349.

parties.[61] No vital government interests would be abridged by providing minimal funds to many more candidates than the Subtitle H restrictions would allow.

If, on the other hand, a legislature conditions public subsidies on agreement to significant expenditure ceilings, the judicial role may properly be more limited. Effective spending limits tend to lessen the disparities in relative spending between the top and bottom candidates, and thus do not injure the unsupported candidate as unconditioned subsidies do. And a scheme that imposes restrictions on major candidates does not raise the same suspicions about self-interest and "freezing" the status quo that unconditioned subsidies do.[62] Because Subtitle H elicited agreements to significant expenditure ceilings from subsidy recipients, the *Buckley* Court found the scheme "less restrictive" of access to the political process than ballot-access restrictions, and the Court utilized a relaxed scrutiny to uphold the scheme despite equal protection challenges.

II. EQUAL PROTECTION CONSEQUENCES OF STATE VARIATIONS ON FECA

The several state schemes that provide subsidies to political parties and candidates[63] include significant variations on the FECA scheme, but these variations should not substantially alter the equal protection analysis *Buckley* requires. States employ several different means both to measure qualification for state subsidy and to distribute actual support. While these differences do have some effect on equal protection analysis, the essential *Buckley* framework should still apply to the various state schemes.

One issue arises because many states distribute their subsidies primarily through political parties rather than through candidates as FECA does.[64] A second issue arises because many states generate the subsidy revenue differently from FECA and Subtitle H.[65] The federal scheme employs an income tax checkoff that establishes a general campaign fund disbursed according to statute.[66] Most state schemes employ mechanisms that allow a taxpayer to designate directly the recipient of the public subsidy, through tax credits, tax deductions, or a designatable tax checkoff.[67] Neither the method of

61. See *infra* notes 167-201 and accompanying text for a discussion of what state interests might prevail under strict scrutiny.

62. This Note does not consider the significant claim that even restrictive ceilings should raise suspicions because of the inherent advantages of incumbents.

63. *See* sources cited *supra* note 2.

64. *See infra* notes 68-108 and accompanying text.

65. *See infra* notes 109-49 and accompanying text.

66. 26 U.S.C. §§ 6096, 9001 to 9012, 9031 to 9042 (1982).

67. *See infra* notes 150-252 and accompanying text.

distributing nor the mechanism of generating the subsidy serves to relax the equal protection scrutiny established by *Buckley*.

A. Subsidizing Political Parties

The fact that a state scheme channels public subsidies more to parties than to candidates might affect the proper equal protection analysis in three ways. First, it might have no effect. Equal protection analysis might evaluate discrimination against a political party exactly as it treats discrimination against a political candidate. Second, distribution of public subsidies to a party may 'deputize' the party such that its actions qualify as 'state action' subject to fourteenth amendment requirements. Third, otherwise proper subsidies may be invalid if they constitute a specialized support of a private organization that infringes the rights of other individuals.[68] This Note argues that in none of these analyses does the *Buckley* standard permit a more relaxed scrutiny.

1. Discriminatory Subsidies

Strong support indicates that, for equal protection purposes, whether the right to vote effectively is infringed by grants directly to candidates or rather by grants to political parties is irrelevant. The *Buckley* Court itself suggested this, citing *American Party of Texas v. White*[69] as support for the finding that campaign subsidies are "less restrictive" than ballot-access regulations,[70] and remarking: "That the aid in *American Party* was provided to parties and not to candidates, as is most of Subtitle H funding, is immaterial."[71] If equal protection finds insignificant the difference between funding candidates and funding parties, then strict scrutiny applies to any scheme subsidizing political parties unless that scheme contains a significant "countervailing denial" of some kind, to which subsidy recipients are subject. Without a countervailing denial, unfunded parties are injured, just as are unfunded candidates, and warrant the constitutional protection of strict scrutiny.[72]

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68. It might be argued that *any* unrestricted subsidies given to political parties would be invalid, as a special subsidy of only some groups exercising first amendment rights. Such subsidies would, perhaps, discriminate against groups such as the John Birch Society, the Teamsters Union, the American Civil Liberties Union, or the National Rifle Association, that also organize for political/ideological purposes, and often mobilize for candidates. See *infra* note 202 for a limited discussion of this issue.

69. 415 U.S. 767 (1974).

70. 424 U.S. at 95.

71. *Id.* at 95 n.130.

72. As outlined above, *see supra* note 36 and accompanying text, the right to an effective vote is the wellspring of the constitutional protections. This right is equally hampered by refusing to subsidize either a candidate or a party favored by a particular voter.

The Supreme Court has twice faced, and twice upheld, public subsidies to political parties despite equal protection challenges by nonmajor parties, candidates, or voters.[73] Significantly, both cases involved schemes with countervailing denials. In *American Party,* the Court considered a Texas statutory scheme that provided public subsidies only to major political parties to defray some of the cost of primary elections.[74] The state required a major party to hold primary elections to nominate a candidate for the ballot, and required no other political parties to do so.[75] In upholding the scheme the Court emphasized that Texas was merely subsidizing "in whole or in part," precisely those costs that the major parties uniquely had to bear.[76] The Court determined that the nonmajor parties failed to show that they were in fact discriminated against at all, inasmuch as Texas merely required more of major parties, and helped pay for that extra cost.[77]

In *Buckley* the Court validated Congress' financing of the convention expenses of major political parties, despite challenges by nonmajor parties that the scheme invidiously discriminated against them.[78] In so holding, the Court relied heavily on the reasoning with which it approved the general election funding provisions of Subtitle H. The Court specifically found that the "expenditure limitations on major parties participating in public financing *enhance* the ability of nonmajor parties to increase their spending relative to the major parties."[79] Nonmajor parties were actually helped by this scheme, according to the Court: expenditure ceilings increased the chances that a nonmajor party would improve its relative financial position.[80]

In a subsidy scheme that provides funds to parties without such a countervailing denial, strict scrutiny should be invoked to protect the rights to vote effectively and run for public office. The injury caused to a nonmajor voter or candidate is equally damaging regardless of whether the state funds the candidate's major party opponent directly, or channels funds to the major party itself. Either state scheme directly injures the unfunded candidate's chance of winning, and thus should undergo strict scrutiny.[81]

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73. *Buckley,* 424 U.S. 1 (1976); *American Party,* 415 U.S. 767 (1974).

74. 415 U.S. at 791-94.

75. Nonmajor political parties could choose to nominate a candidate through their conventions. *Id.* at 793.

76. *Id.*

77. *Id.* at 794 ("we are not persuaded that the State's refusal to reimburse for these [nonprimary related] expenses is any discrimination at all against the smaller parties").

78. 424 U.S. at 104-05.

79. *Id.* at 104 (emphasis added).

80. 424 U.S. at 99 (suggesting spending limits reduce some major-candidate spending and may thereby free up some contribution dollars to go to nonmajor candidates).

81. Special issues do arise when a subsidy scheme funds parties as well as, or instead of candidates, *see, e.g., infra* notes 201-04 and accompanying text, but the *level* of scrutiny is not lowered by this difference. *See supra* note 46. Strict scrutiny applies to discriminatory schemes unless they include significant expenditure ceilings, whether fund recipients are political candidates or parties, because the source of the constitutional protection—the right to vote effectively—is equally injured in both instances.

2. 'Deputizing' Subsidies

Apart from the question of whether a state might violate equal protection by providing subsidies to some parties and not to others, a state might, by directing a subsidy scheme toward parties, effectively "deputize" recipient parties such that party actions themselves become state actions subject to the fourteenth amendment. If a party's actions qualify as state actions under the fourteenth amendment, then disbursals by the party directly to candidates, or expenditures advocating election or defeat of a candidate, should be subject to the same scrutiny as that directed against FECA and Congress by *Buckley*.[82]

The fourteenth amendment's guarantee of equal protection protects only against action by a state,[83] but the concept of "state action" has undergone considerable evolution. The onetime requirement that the deprivation be done by the state government or its agents[84] has been expanded to include actions taken by a private individual or group with enough connection to the government to allow an imputation of state action.[85] The difficulty is what kind of "connection" is sufficient. Several cases have held that actions by a political party constitute state action,[86] and others have suggested that the allocation of funds to organizations may allocate state authority also, thus invoking the fourteenth amendment.[87] Each of these arguments bears significantly on the validity of present state campaign finance laws, many of which allocate funds to political parties.

The first line of cases derives from the concept that a state must control the electoral process, and that by delegating some such control, it may delegate state authority also. In 1927 the Supreme Court held that a Texas law prohibiting black residents from voting in Democratic Party primary elections was a violation of the fourteenth amendment.[88] Five years later the Court appraised a Texas law that delegated to the *state committees* of political parties the authority to determine primary election voter requirements.[89] The Court found that the law delegated state authority to the committee, in effect making it a state agent, such that its decision to exclude blacks from

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82. If the party's actions become state action, that is, they are *fully* subject to the fourteenth amendment. There does not seem to be any Supreme Court authority supporting a sliding scale—the closer to state action, the more complete fourteenth amendment analysis becomes. *But see* J. NOWAK, R. ROTUNDA, & J.N. YOUNG, CONSTITUTIONAL LAW, 523-25 (2d ed. 1983) [hereinafter cited as NOWAK].

83. This basic principle was first established in the Civil Rights Cases, 109 U.S. 3 (1883).

84. *Id.* at 11.

85. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 345 U.S. 461 (1953).

86. *See infra* notes 88-98 and accompanying text.

87. *See infra* notes 102-03 and accompanying text.

88. Nixon v. Herndon, 273 U.S. 536 (1927).

89. Nixon v. Condon, 286 U.S. 73 (1932).

Democratic primaries violated the fourteenth amendment.[90] Despite an intervening decision holding that a party convention vote to exclude blacks from the primaries was not unconstitutional because it did not qualify as state action,[91] the Court in *Smith v. Allwright* established that a decision by a political party to exclude blacks from participating in primaries constituted state action that violated the fifteenth amendment.[92] The Court reasoned that because the system of primaries was an "integral part of the entire election machinery,"[93] to entrust the party with authority to decide qualifications for primary voting was to delegate state authority, and racial discrimination by the party was thus unconstitutional state action.[94]

The Court subsequently faced a challenge to a Texas county organization called the "Jaybird Democratic Association."[95] Though outside any state legislative controls, the Jaybird Party essentially ran a private pre-primary election in which the members of the party—all white voters in the county—selected a candidate who then regularly ran for and won the Democratic Party nomination, and subsequently the general election.[96] Although there was no majority opinion, in striking down the election scheme as violative of the fifteenth amendment the Court revealed a flexible and pragmatic approach to the finding of state action. Justice Black wrote: "The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which all Negroes were excluded. . . . The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county."[97] In his concurring opinion, Justice Clark added: "when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play."[98]

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90. *Id.*

91. Grovey v. Townsend, 295 U.S. 45 (1935).

92. 321 U.S. 649 (1944). Requirements of "state action" seem identical under the fourteenth and fifteenth amendments. *See generally* NOWAK, *supra* note 82, at 497-502.

93. 321 U.S. at 660 (citing United States v. Classic, 313 U.S. 299, 318 (1941)).

94. 321 U.S. at 664. The Court also included a farsighted caveat:

> The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials. . . . This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.

Id.

95. Terry v. Adams, 345 U.S. 461 (1953).

96. *Id.* at 462-63.

97. *Id.* at 469 (Black, J., plurality opinion).

98. *Id.* at 484 (Clark, J., concurring).

These cases suggest that when a political party is directed by a state to control a process as integral to the overall electoral process as is a primary election, that party may be "deputized" such that its actions must conform to fourteenth amendment requirements.[99] State campaign finance laws are often not as specific in delegating authority to a party,[100] and campaign financing is different from primary election control. The state can, however, "deputize" a political party by delegating authority to it. Actual state schemes are considered below and involve the question of how much authority the state must delegate before the fourteenth amendment attaches to party action.[101]

A second group of cases suggests that state action may be imputed to private actors to whom the government has provided subsidies above the general level of government benefits.[102] The Supreme Court has held, for example, that the grant of free school books to all schools in a state was unconstitutional when the subsidy benefited a racially discriminatory school.[103] The crucial question in determining whether a public subsidy constitutes state action such that a private actor's actions are subject to equal protection analysis may be "whether the aid amounts to something more than generalized services."[104] The determination of whether or not a state campaign financing subsidy to political parties is more than a generalized service seems to be quite a fact-specific issue, depending largely on how the subsidy is structured. If the state subsidy operates through a tax-deduction scheme offered to all contributors to nonprofit organizations, then the state has probably not granted specialized services to the parties.[105] However, if the

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99. *See also* Moore v. Ogilvie, 394 U.S. 814, 818 (1969) (invalidating Illinois petition requirements for independent candidates: "All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote."); Gray v. Sanders, 372 U.S. 368, 374 (1963) ("the action of this party in the conduct of its primary constitutes state action within the meaning of the Fourteenth Amendment"); McKenna v. Reilly, 419 F. Supp. 1179, 1185 (D.R.I. 1976) ("In light of the extensive regulation and subsidization of the Democratic party in the case at bar, the court finds that the party is under the mandate of the Fourteenth Amendment insofar as it allocates public funds directly to certain of its candidates."); Nicholson, *Campaign Financing and Equal Protection,* 26 STAN. L. REV. 815, 831-32 (1974).

100. *See infra* notes 230-39 and accompanying text.

101. *See infra* notes 227-41 and accompanying text. Ultimately this Note argues that these details are not essential for a determination that a state scheme operates unconstitutionally. That determination can be supported with a finding either that party action is state action, or that the state cannot provide specialized subsidies to private organizations that are infringing individual rights.

102. *See generally* NOWAK, *supra* note 82, at 518-21.

103. Norwood v. Harrison, 413 U.S. 455 (1973). *But see* Board of Education v. Allen, 392 U.S. 236 (1968) (statute providing free books to all schools was not an unconstitutional subsidy of parochial schools that received the books).

104. NOWAK, *supra* note 82, at 519.

105. *See, e.g.,* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (liquor license and tax-exempt status did not constitute specialized support by the state such that fourteenth amendment applied to racial discrimination by a private club).

state provides direct lump-sum grants to certain political parties, it may well be providing more than generalized services.[106] The various statutes are discussed below.[107]

3. Discriminatory Party Action

Even in situations where the government subsidy is not sufficiently specialized or targeted to deputize the recipient party, equal protection may determine that the state action is an unconstitutional support of private discrimination. This issue is particularly significant when facing a state scheme whose mechanism of subsidy is unlikely to delegate state authority to a party, but whose specialized support to the parties nonetheless unconstitutionally finances discriminatory private action.[108]

B. Subsidy Mechanisms

The other issue implicated by the various state campaign finance schemes that must be considered before applying the *Buckley* standard concerns the mechanism of providing campaign subsidies. FECA generates funds for campaign financing by an income checkoff[109] that the *Buckley* Court found to be "like any other appropriation from the general revenue."[110] Only a minority of states, however, utilize such a tax checkoff or appropriation from the general revenue to finance campaigns.[111] Most states use provisions

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106. This is an issue the Supreme Court has not directly faced: what type of subsidy to a private group will subject the recipient's actions to fourteenth amendment review. For purposes of this Note this interesting issue need not be resolved. Given action by a political party that infringes on the fundamental rights to vote effectively and to run for office (i.e. actions that if taken by a state would constitute invidious discrimination against voters and candidates), which is considered *infra* notes 227-49 and accompanying text, a state cannot provide direct subsidies to that party, either as specialized tax subsidies or direct appropriations, because that would constitute state support of discriminatory activity, and a state cannot subsidize others to act in unconstitutional ways. *See* Falkenstein v. Department of Revenue, 350 F. Supp. 887 (D. Or. 1972) (three-judge district court), *appeal dismissed,* 409 U.S. 1099 (1973); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972) (three-judge district court); Pitts v. Department of Revenue, 333 F. Supp. 662 (E.D. Wis. 1971) (three-judge district court). All three cases found that private racially discriminatory organizations could not receive specialized subsidies from the government. *See also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (Court held that the "State has so far insinuated itself into a position of interdependence [with the private group] . . . that it must be recognized as a joint participant.").

107. *See infra* notes 201-49 and accompanying text.

108. *See supra* notes 105-06; *see also infra* notes 144-45 and accompanying text.

109. 26 U.S.C. § 6096 (1982).

110. 424 U.S. at 91. *See also* Fleishman, *Equality of Influence, supra* note 14, at 405.

111. Only six state schemes include a tax checkoff provision that generates a general campaign fund then disbursed according to statutory prescription. HAWAII REV. STAT. § 235-102.5 (Supp. 1984); MASS. ANN. LAWS ch. 62, § 6C (Michie/Law. Co-op. 1978 & Supp. 1985); MICH. COMP. LAWS ANN. § 169.261 (West Supp. 1985); MONT. CODE ANN. § 13-37-303 (1985); N.J. STAT.

such as income tax deductions available to contributors to certain political parties[112] or to certain candidates;[113] income tax credits for contributors to certain political parties[114] or candidates;[115] or income tax checkoffs with which a taxpayer may designate that a portion of his tax liability be distributed to a certain political party,[116] or by which he may increase his tax liability and designate that the increase be donated to a certain political party.[117] Despite these divergent mechanisms for generating and distributing subsidy revenues, all of the state schemes should be subject to the same level of equal protection scrutiny when challenged by nonmajor parties, candidates, or voters.[118]

The treatment that tax provisions receive under equal protection analysis is an obscure one. Courts generally appear to grant considerable latitude to state tax statutes when considering constitutional, specifically equal protection, infirmities. For example, in *Allied Stores of Ohio, Inc. v. Bowers,*[119] the Supreme Court rejected an equal protection challenge to an Ohio tax statute alleged to discriminate based on state residency.[120] Finding that the

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ANN. § 54A:9-25.1 (West 1985); OKLA. STAT. ANN. tit. 26, § 18-103 (West Supp. 1984). Two states include provisions for a general fund generated by other means. Indiana imposes a $30 surcharge tax on each personalized automobile license plate sold by the state, and then distributes the funds to eligible political parties. IND. CODE §§ 9-7-5.5-1 to -10 (1982 & Supp. 1985). Wisconsin subsidizes campaigns directly out of general revenue, combined with a tax checkoff. WIS. STAT. ANN. §§ 11.50, 20.855 (West Supp. 1985).

112. ARIZ. REV. STAT. ANN. § 43-1059 (1980); HAWAII REV. STAT. § 235-7(g)(1) (Supp. 1984).

113. ARIZ. REV. STAT. ANN. § 43-1059 (1980); ARK. STAT. ANN § 84-2016.5 (1980); HAWAII REV. STAT. § 235-7(g)(2) (Supp. 1984).

114. ALASKA STAT. § 43.20.013 (1983); IDAHO CODE § 63-3088 (1976 & Supp. 1985); OR. REV. STAT. § 316.102 (1983).

115. ALASKA STAT. § 43.20.013 (1983); D.C. CODE ANN. § 47-1806.5 (1981 & Supp. 1985): OR. REV. STAT. § 316.102 (1983).

116. IOWA CODE ANN. §§ 56.18 to -.26 (West Supp. 1985); KY. REV. STAT. § 141.071 (1982 & Supp. 1984); MINN. STAT. ANN. § 10A.31 (West 1977 & Supp. 1985); N.C. GEN. STAT. § 105-159.1 (1979 & Supp. 1985); OKLA. STAT. ANN. tit. 26, § 18-103 (West Supp. 1984); R.I. GEN. LAWS § 44-30-2(e) (1980 & Supp. 1985); UTAH CODE ANN. §§ 59-14A-99 to -100 (Supp. 1985).

117. ALA. CODE § 40-18-146 (Supp. 1985); CAL. REV. & TAX. CODE § 18720 (West Supp. 1985); ME. REV. STAT. ANN. tit. 36, § 5283 (1978).

118. *See* Fleishman, *Equality of Influence, supra* note 14, at 403. Some commentators have suggested that tax mechanisms avoid equal protection problems by putting the responsibility for dispensing public funds on the many individual decisions made by taxpaying contributors to campaigns. *E.g.,* Rosenthal, *supra* note 35, at 417. This might be so if the private contributor/taxpayer has full discretion to direct the subsidy to this or that recipient (disregarding other problems with requiring private money to qualify for public money), but tax mechanisms invariably define which candidates and parties do or do not qualify to receive tax deductible contributions. This state decision—which parties and candidates qualify—is the state decision equivalent to deciding who should receive direct public grants, and is subject to equivalent equal protection scrutiny.

119. 358 U.S. 522 (1959).

120. *Id.* at 529.

tax law could not be deemed "unreasonable," the Court expounded on how state tax laws in general ought to be regarded:

> The States have a very wide discretion in the laying of their taxes. . . . Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation.[121]

But a broad statement that "reasonable" tax laws should be upheld cannot go unqualified.

Some state tax laws do unconstitutionally infringe federal rights. In *Speiser v. Randall,*[122] the Supreme Court struck down as violative of fourteenth amendment due process a California statute that conditioned the granting of a veterans' property tax exemption on the property owner signing a loyalty oath. Though decided on procedural due process grounds,[123] *Speiser* suggests that tax statutes should be subject to evaluation much like any other statute that infringes speech:

> To deny . . . [a tax] exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. . . . [T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech.[124]

In evaluating the due process claim the Court further held that because the "transcendent value" of speech was implicated, the traditional tax procedures that placed the burden of proof on the taxpayer were invalid.[125] *Speiser* and *Allied Stores* thus leave uncertain the status of discriminatory tax provisions.[126]

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121. *Id.* at 526. *See also* Madden v. Kentucky, 309 U.S. 83 (1940). The *Madden* Court held that

> in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. . . . [T]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

Id. at 88. *And see* Commissioner v. Sullivan, 356 U.S. 27, 28 (1958) (tax exemptions and deductions are "a matter of grace [that] Congress can, of course, disallow . . . as it chooses").

122. 357 U.S. 513 (1958).

123. *Id.* at 529.

124. *Id.* at 518-19 (citations omitted).

125. *Id.* at 526.

126. In Cammarano v. United States, 358 U.S. 498 (1959), the Court upheld a federal tax regulation that provided that lobbying expenses could not be deducted as business expenses. Although the regulation clearly infringed on speech, the Court distinguished *Speiser,* noting that the regulation merely put everyone "on the same footing" with regard to "purchased publicity," rather than discriminating among different speakers. *Id.* at 513.

Two more recent Supreme Court decisions only help to muddy the already murky waters.[127] In *Regan v. Taxation with Representation of Washington,* the Court validated federal tax provisions that prohibited "substantial lobbying" by most tax-exempt organizations, but permitted unlimited lobbying by tax-exempt veterans' organizations.[128] Though Justice Rehnquist, for the Court, acknowledged that "tax exemptions and tax-deductibility are a *form of subsidy* that is administered through the tax system,"[129] he also suggested that "legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."[130] The Court found that the mere refusal to subsidize speech did not violate the first amendment, and that the discriminatory classifications were not content based—the veterans' groups could lobby whatever position they chose.[131] Therefore, the Court found, strict scrutiny was inappropriate, and rational basis scrutiny was satisfied by the government's interest in rewarding veterans for their special services.[132]

In *Bob Jones University v. United States,* the Court found that a tax statute and regulation that excluded a racially discriminatory school from tax-exempt status did not violate the free exercise clause of the first amendment.[133] In contrast to *Taxation with Representation,* the *Bob Jones University* Court did not suggest that a lower standard of review should apply against the tax statutes than would apply against other statutes.[134] In finding the statute valid, the Court found a "compelling" government interest in ending racial discrimination in schools, and that no "less restrictive means" could accommodate that interest.[135]

These two recent cases upholding tax exemptions and deductions still leave uncertainty about what constitutional treatment is due a discriminatory tax subsidy versus a direct subsidy. In the area of public campaign financing, basing the scrutiny-level decision on whether the revenue mechanism is a tax-based or a general appropriation scheme seems incorrect. Public subsidy schemes must incorporate some method of measuring the popular support for a party or candidate in order to determine qualification for subsidy or to disburse payments in proportion to support. FECA utilizes past vote totals of a party, and private contribution amounts, to assess the popular support

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127. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983).
128. *Taxation with Representation,* 461 U.S. 540.
129. *Id.* at 544 (emphasis added).
130. *Id.* at 547.
131. *Id.* at 548.
132. *Id.* at 548-51.
133. *Bob Jones Univ.,* 461 U.S. at 604.
134. While the Court did not explicitly reject a lower standard of review for tax statutes, its analysis utilized traditional strict scrutiny language and logic, suggesting relaxed scrutiny was not appropriate. *See id.*
135. *Id.*

of candidates and parties.[136] Most state schemes utilize some or both of these methods.[137] Others, by using a designatable tax checkoff, allow the class of taxpayers to indicate their support on tax returns.[138]

That a state chooses to utilize past vote totals rather than current private donations to determine the proportions of public subsidies should not affect the level of equal protection scrutiny. If one state enacts a matching fund system to subsidize candidates, and another enacts a tax deduction scheme for contributors to candidates, the net result might be exactly the same—the same public money subsidizing the same candidates.[139] Equal protection scrutiny should not depend on how a state structures its subsidy mechanisms. This argument suggests that given the Supreme Court decisions in *Bob Jones University* and *Taxation with Representation,*[140] which upheld discriminatory tax provisions, the same classifications accompanying direct expenditures must also be upheld as constitutional. Congress could provide direct subsidies to all schools except Bob Jones University and other racially discriminatory schools without violating equal protection.[141] Similarly, Congress could grant direct subsidies exclusively to veterans' groups, and allow them to use the funds for lobbying purposes. Justice Rehnquist suggested as much in a hypothetical posed in *Taxation with Representation:* Congress could establish an organization to fight alcohol abuse, and allow funds to go for lobbying expenses, and simultaneously establish an organization to fight drug abuse, and prohibit lobbying expenditures by that group with public funds.[142] These hypotheticals based on the two recent cases seem to approve an analysis that regards the level of equal protection scrutiny as independent from the structuring of a state subsidy scheme as a tax plan or direct expenditures.[143]

For purposes of determining whether or not political party action is "state action," on the other hand, the difference between a tax scheme and a direct payment scheme may be significant. A tax subsidy scheme that lowers the

136. To determine subsidy levels for general election candidates, Subtitle H uses a political party's past vote totals. *See supra* notes 22-29 and accompanying text. To determine subsidy levels for primary election candidates, Subtitle H includes a matching-funds provision. *See supra* notes 30-33 and accompanying text.

137. *See, e.g., supra* notes 112-15.

138. *See supra* notes 116-17.

139. A tax scheme which provided a credit for 50% of political contributions up to a maximum of $50 credit could result in an identical distribution of money as a matching-funds scheme whereby the state provided political parties or candidates dollar-for-dollar matching subsidies for private donations of $50 or less. The same result could also obtain if the state employed a 'voucher' system by which every U.S. citizen received a coupon for $50 redeemable by a party or candidate that received it as a donation.

140. 461 U.S. 574 (1983); 461 U.S. 540 (1983).

141. This is confirmed by Norwood v. Harrison, 413 U.S. 455 (1973). *See supra* note 103 and accompanying text.

142. 461 U.S. at 548-49.

143. *See* Fleishman, *Equality of Influence, supra* note 14, at 403.

tax base of a contributor to a certain organization does not delegate state authority or resources to that organization such that its actions are now "state actions."[144] When the government provides direct grants to the organiztion, however, it may thereby delegate state authority also.[145] The *remedy* may vary according to the structure of the subsidy program, but the equal protection analysis, like the position of the challenging nonmajor voter, remains the same.

III. Appraising Current State Campaign Laws

Current state campaign laws vary widely with regard to their treatment of nonmajor parties, candidates, and voters, and equal protection analysis should recognize these differences. The first section of this part evaluates state schemes that provide subsidies to candidates. Several of these schemes, like FECA, elicit significant expenditure ceilings from subsidy recipients, thereby avoiding strict scrutiny;[146] most schemes, however, are subject to strict scrutiny.[147] The second section evaluates schemes that provide subsidies to political parties, considering two potential equal protection shortcomings. First, some schemes may unconstitutionally discriminate against nonmajor voters, candidates, and parties by providing funds to some parties and not to others.[148] Second, some schemes may result in unconstitutional discrimination by the actions of a "deputized" party, or by the state supporting private discrimination by subsidizing a party's actions.[149]

A. Subsidies to Candidates

Twelve states and the District of Columbia provide for public subsidies to certain candidates for public office.[150] Five of the states avoid strict scrutiny for discriminatory funding by conditioning the subsidies upon agreement to significant expenditure ceilings.[151] Seven states and the District of Columbia do not condition subsidies on agreement to spending limits,[152] and

144. There are instances when direct financial assistance by a state can delegate state action to the recipient of the funds. *See supra* note 103 and accompanying text. Very different is a state scheme that provides *direct* benefits only to individual contributors; it seems improbable that an organization would be 'deputized' as a state agent by such a circuitous route through its contributors. *See supra* note 106.

145. *See, e.g., supra* note 103 and accompanying text.

146. *See infra* notes 153-66 and accompanying text.

147. *See e.g., infra* notes 167-79 and accompanying text.

148. *See infra* notes 201-26 and accompanying text.

149. *See infra* notes 233-41 and accompanying text.

150. See *supra* note 2 for citations to statutes from Alaska, Arizona, Arkansas, District of Columbia, Hawaii, Massachusetts, Michigan, Minnesota, Montana, New Jersey, Oklahoma, Oregon, and Wisconsin.

151. *See infra* note 153.

152. *See infra* notes 167-200.

the resultant strict scrutiny requires that some of these schemes be deemed unconstitutional. Other schemes reveal compelling justifications for their discriminatory requirements.

The five states that condition subsidies on expenditure ceilings utilize different methods to define those ceilings, and utilize different mechanisms to raise and distribute the subsidy revenue.[153] As long as the expenditure ceiling is a significant one, the method of calculating it should be irrelevant.[154] The differing subsidy mechanisms should affect only the issue of whether or not a candidate's actions might be "state action."[155] All five state schemes should be subject only to the relaxed scrutiny the *Buckley* Court applied to Subtitle H. All five should survive this scrutiny.[156]

In Hawaii any candidate qualified for an election ballot who agrees to expenditure ceilings and reporting requirements, and who has received a certain minimum amount of private contributions, qualifies to receive dollar-for-dollar matching funds up to a certain maximum.[157] A contribution to a political candidate is tax-deductible only if that candidate has agreed to the statutory expenditure limits.[158] The position of nonmajor voters, candidates, and parties in Hawaii seems at least as favorable as that of those under the

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153. HAWAII REV. STAT. §§ 11-208, -209, -218 (Supp. 1984) (sets per-voter ceilings on candidates who accept public funds; gubernatorial candidates, for example, limited to $1.25 per voter at last election), §§ 235-7(g)(2), 235-102.5 (Supp. 1984) (income tax checkoff clause, and income tax deduction for political contributions); MICH. COMP. LAWS ANN. § 169.267 (West Supp. 1985) (gubernatorial candidates limited to $1 million in overall expenditures), § 169.261 (West Supp. 1985) (income tax checkoff); MINN. STAT. ANN. § 10A.25 (gubernatorial candidates limited to the larger of $600,000 or 12.5 cents per state resident), § 10A.31 (income tax checkoff which taxpayer can designate to particular parties) (West 1977 & Supp. 1985); N.J. STAT. ANN. § 19:44A-7 (West Supp. 1985) (gubernatorial candidates limited to $1.05 per voter at last election), § 54A:9-25.1 (West 1985) (income tax checkoff); WIS. STAT. ANN. § 11.31 (West Supp. 1985) (gubernatorial candidates limited to $500,000), § 20.855 (West Supp. 1985) (income tax checkoff).

154. The importance of an expenditure ceiling is its effect. *See supra* notes 59-60 and accompanying text. This Note does not undertake a factual inquiry into the significance of the five ceilings imposed here—it assumes that they in fact do restrict some overall spending. To the extent that this factual assumption is incorrect, then the method of calculating the ceiling is relevant, because if not effective, then strict scrutiny must be applied.

155. *See supra* notes 144-45 and accompanying text.

156. Some states require minimum levels of private contributions before allowing public subsidies. *See* HAWAII REV. STAT. § 11-219 (Supp. 1984) (gubernatorial candidate must raise $25,000 privately before receiving public money); MICH. COMP. LAWS ANN. § 169.264 (West Supp. 1985) (candidate must raise 5% of spending limit before receiving public money); N.J. STAT. ANN. § 19:44A-33 (West Supp. 1985) (the first $50,000 raised is not matched by public money); WIS. STAT. ANN. § 11.50 (West Supp. 1985) (5% or 10% of spending limit must be raised privately before receiving public money). These levels may operate to exclude some legitimate candidates from public subsidy. But given the relaxed scrutiny, and *Buckley*'s upholding of private contribution floors, it seems unlikely that these provisions are invalid. To the extent that the minimums *inhibit* political parties or candidates from achieving popular support, the levels should be struck down. *See Buckley,* 424 U.S. at 96.

157. HAWAII REV. STAT. §§ 11-208 to -209, 11-217 to -229 (Supp. 1984), § 235-102.5 (Supp. 1984).

158. HAWAII REV. STAT. § 235-7(g)(2) (Supp. 1984).

federal scheme: public funds are available to any candidate on the ballot, without a minimum vote percentage required, and tax deductions are permitted only for contributions to candidates subject to expenditure ceilings.[159] These public subsidies seem to meet a relaxed scrutiny under equal protection analysis.

Michigan and New Jersey both provide matching funds to any candidate for Governor in the general election who receives certain private contributions and who agrees to expenditure ceilings.[160] These state schemes treat nonmajor voters as well as FECA does, and seem to meet a relaxed equal protection scrutiny.

Wisconsin goes even further in protecting nonmajor voters from discriminatory treatment. To qualify for public subsidy, a candidate must agree to expenditure ceilings and must have raised a certain amount in private contributions, after which all qualifying candidates receive equal amounts from the general fund, up to a maximum of 45% of the overall expenditure limit.[161] This money may only be used in the general election, and only to purchase media communications services, office supplies, or postage.[162] A nonmajor candidate is not injured by this scheme which provides all qualifying candidates with *equal* subsidies.

Minnesota seems to have based its scheme on FECA—dividing candidates according to major and minor political parties and distributing funds based on the parties' past vote totals[163]—but it utilizes more lenient qualification requirements: any party that had a candidate who *filed* for statewide office in the preceding election, or received greater than 10% of the vote in a local race, or obtains 2,000 signatures on a petition for the current election, is deemed to qualify for public subsidies.[164] Given these more lenient standards, and the mandatory agreement to expenditure ceilings before receipt of any public subsidies, the scheme does not invidiously discriminate against nonmajor voters. Minnesota does employ a curious wrinkle of FECA's post-election subsidy. After an election, any money remaining in the subsidy fund is distributed to those statewide candidates who received more than 5% of the vote, and to those legislative candidates who received more than 10% of the vote.[165] The validity of this scheme is more suspect because the vote limits required to receive funding are higher than pre-election requirements,

159. *Cf.* 26 U.S.C. § 41 (1982) (permits tax deductions regardless of whether or not an expenditure ceiling is agreed to).

160. MICH. COMP. LAWS ANN. §§ 169.262, 169.267 (West Supp. 1985); N.J. STAT. ANN. §§ 19:44A-7, -29 (West Supp. 1985).

161. WIS. STAT. ANN. § 11.50 (West Supp. 1985).

162. *Id.*

163. MINN. STAT. ANN. § 10A.31 (West 1977 & Supp. 1985).

164. *Id.* at § 10A.01(13).

165. *Id.* at § 10A.31(7).

and the state interest in excluding candidates from the funding is unclear.[166]

The five state schemes that undergo a relaxed scrutiny beeause they elicit significant expenditure ceilings from subsidy recipients thus probably survive that scrutiny. Although their treatments of nonmajor candidates are not ideal, they compare favorably overall with FECA.

Seven states and the District of Columbia provide public subsidies to candidates without eliciting agreements to expenditure ceilings.[167] These schemes must be strictly scrutinized because of discriminatory classifications that infringe the fundamental rights to vote effectively and to run for public office. Despite strict scrutiny, five schemes seem to be constitutional, because any discriminatory aspects are slight, and outweighed by a vital government interest. The distinguishing feature of these schemes is the leniency of the qualifications needed to receive public subsidy.[168]

Alaska provides a tax credit of up to $100 for a contribution to the political campaign of virtually any candidate for federal, state, or local office.[169] Arizona allows tax deductions of up to $100 for contributions to any political candidate.[170] Arkansas provides for tax deductions of up to $25 for contributions to any political campaigns in the state.[171] Oregon gives a tax credit of up to $25 for contributions to any candidate listed on the ballot or who has merely filed a declaration of candidacy.[172] The District of Columbia, "to encourage citizen participation" in the electoral process, allows a tax credit of up to $50 for contributions to the campaign of a candidate for any D.C. office.[173] Although strict scrutiny should apply to these schemes, this scrutiny is not fatal in fact in these instances. A state has a compelling interest in putting some restrictions on who may receive tax-reduced contributions. If a state did not establish such criteria, the scheme would no

166. The provision probably is valid, however, given relaxed scrutiny and that *Buckley* upheld a similar 5% post-election funding provision. 424 U.S. at 102.

167. See *supra* note 2 for citations to statutes of Alaska, Arizona, Arkansas, District of Columbia, Massachusetts, Montana, Oklahoma, and Oregon.

168. It has been suggested that any subsidy scheme which requires a candidate to receive private money before she receives public money should fail equal protection scrutiny. The argument analogizes matching-fund schemes to filing fees for ballot access, which have been struck down if prohibitively high. *See* Fleishman, *1974 FECA Amendments, supra* note 14, at 886-90, 894; Fleishman, *Equality of Influence, supra* note 14, at 405-06. Of course *Buckley* upheld the requirement of $5,000 raised in each of 20 states before receiving matching primary funds, but that was under a relaxed scrutiny. 424 U.S. at 106. Powerful arguments suggest that money should be discouraged as a criterion for measuring public support of a candidate. This Note does not consider whether the mere use of a matching fund mechanism might violate equal protection under strict scrutiny.

169. ALASKA STAT. § 43.20.013 (1983).

170. ARIZ. REV. STAT. ANN. § 43-1059 (1980).

171. ARK. STAT. ANN. 84-2016.5 (1980).

172. OR. REV. STAT. § 316.102 (1983).

173. D.C. CODE ANN. § 47-1806.5 (1981 & Supp. 1985).

longer just finance campaigns; it would also provide a tax shelter.[174] These statutes seem to require only a minimum showing of a bona fide candidacy in order to receive the subsidy, and this should pass constitutional standards.[175]

In contrast, three states that do not elicit expenditure ceilings do require that a candidate actually appear on a ballot in order to qualify for public subsidy.[176] This raises the issue of whether qualifications required for ballot access that are found constitutional are necessarily valid criteria for determining access to public subsidies. That is, does equal protection demand different standards for access to a ballot than for access to a public subsidy? *Buckley* upheld qualifications for public subsidies that were more stringent than those for ballot access,[177] but only in the context of expenditure ceilings that relaxed the judicial scrutiny.[178] When strict scrutiny applies to public subsidy schemes, it may demand that qualifications for subsidies be more lenient than those for ballot access.

A hint of this distinction is found in Justice Rehnquist's dissent in *Buckley*.[179] Rehnquist suggests that because a state *must* limit access to a ballot, while it merely *opts* to provide public subsidies, a stronger case must be made to justify discriminatory treatment regarding subsidies than regarding ballot access:

> [Congress,] while undoubtedly possessing the legislative authority to undertake the task if it wished, is not obliged to address the question of public financing of Presidential elections at all. When it chooses to legislate in this area, so much of its action as may arguably impair First Amendment rights lacks the same sort of mandate of necessity as does a State's regulation of ballot access.[180]

In a subsidy scheme without expenditure ceilings, nonmajor voters can actually be injured by the relative *decline* in their candidates' abilities to finance a campaign.[181] While this injury is different from the injury suffered by

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174. Without limiting "candidate," any gift to an individual could be dubbed a political contribution and exempted from taxation.

175. Of course a showing that the *effect* of the statutes excludes any bona fide candidates should invalidate these statutes, as violative of equal protection.

176. See *supra* note 2 for citations to statutes of Massachusetts, Montana, and Oklahoma.

177. A state could not, for example, use past vote totals as the sole means to gain ballot access. A more exclusive self-perpetuating system would be difficult to find. *See* 424 U.S. 99-102.

178. 424 U.S. at 95.

179. *Id.* at 290 (Rehnquist, J., dissenting).

180. *Id.* at 293.

181. Of course, in campaigning and elections, all measures must be relative, because the final result is always an election victory or loss relative to opponents. The failure to qualify for public funds may itself also damage the image of a candidate or party.

denial of ballot access, it is arguably no less serious.[182] Equal protection analysis recognizes the financial injury,[183] and requires a compelling government interest when no expenditure ceilings accompany the public funds.[184] The fact, therefore, that Massachusetts, Montana, and Oklahoma incorporate valid ballot qualification requirements into public campaign subsidy requirements should not innoculate the subsidy programs from equal protection infirmities.[185] An exacting review of the statutes shows that two should fail because no compelling interest justifies the discrimination,[186] and that the third might survive, because the qualifications for subsidy are carefully drawn.[187]

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182. The *Buckley* plaintiffs suggested that it is more difficult to win without money than without ballot access, because write-in candidates can win elections. Appellants Brief at 158, Buckley v. Valeo, 424 U.S. 1 (1976). But the *Buckley* Court was correct to say that FECA does not eliminate private funding, and the fact that a candidate has failed to attract any private money is at least one reason not to fund him with public money. 424 U.S. at 94 n.128.

183. 424 U.S. at 95 ("denial of the enhancement of opportunity to communicate with the electorate" is the injury considered).

184. *See supra* note 46 and accompanying text. Whereas in ballot-access cases the state legitimately offers the practical necessity of a comprehensible ballot and an election that will produce a substantial victor, *see* 424 U.S. at 96, in public subsidy cases the state can offer only the interest in not funding "hopeless candidacies" and in avoiding "unrestrained factionalism" and the "artificial splintering" of political parties. *Id.* Some commentators have urged that the rationale that defends discriminatory ballot-access schemes cannot be transplanted to defend public subsidy schemes—different interests are involved. *E.g., The Supreme Court, 1975 Term, supra* note 14, at 186 n.103; Comment, *supra* note 14, at 887-88. In any event, to the extent that an individual qualifies as a legitimate "candidate," a subsidy neither funds a *hopeless* candidate, *artificially* splinters a party, nor causes *unrestrained* factionalism. Most jurisdictions require some showing of support or real intention to run for office before bestowing an official status of "candidate" on an individual. Merely proportional public financial support is appropriate for candidates with relatively little popular support. This would seem to answer the concerns with encouraging splinter parties. *See* 424 U.S. 97-98. Indeed, it has been suggested that FECA actually creates artificial *disincentives* to normal factionalism. Nicholson, *1974 Amendments, supra* note 8, at 364.

In ballot-access cases the government properly presents the compelling need to keep ballots workable—to keep the number of names to a relative few, both so voters can comprehend the choices, and to avoid the expensive and time-consuming prospect of frequent run-off elections to achieve a victor with a substantial plurality. But when a government refuses to fund a legitimate candidate, it cannot proffer such compelling justifications. There should be no fear of providing voters with information about too many candidates. Indeed the first amendment is better served by encouraging a lively debate and numerous challenges than by limiting support to the majorities. There are no doubt practical limits to how many relatively unsupported candidates a state should subsidize—restrictions excluding "frivolous" candidacies seem proper—but strict scrutiny demands that since the state is muting the relative voices of such candidates, it must show a compelling interest that cannot be less injuriously achieved. The ballot-access standards serve very different interests, and should not be incorporated into public subsidy qualifications. *See* Fleishman, *Equality of Influence, supra* note 14, at 398; Note, *Equalizing Candidates' Opportunities for Expression*, 51 GEO. WASH. L. REV. 113, 128 (1982).

185. See *supra* note 2 for citations to statutes of Massachusetts, Montana, and Oklahoma.

186. *See infra* notes 188-95 and accompanying text.

187. *See infra* notes 196-200 and accompanying text.

Massachusetts subsidizes statewide candidates in both primary and general elections.[188] The state provides matching funds to candidates certified to be qualified for either ballot.[189] A candidate not affiliated with a political party[190] can gain access to the general ballot only with a petition signed by at least 2% of the last total vote for the office sought.[191] Strict scrutiny requires a compelling reason for excluding a candidate with less than this 2% from all public subsidy,[192] and no such reason appears forthcoming. Legitimate candidates and political parties may be seeking to build statewide support, beginning with local write-in campaigns. The state scheme harms these efforts by amplifying the relative voices of other candidates. Any interest in not funding hopeless or artificial organizations or candidates could be met with less restrictive requirements.[193]

Montana subsidizes in equal shares the general election campaigns of all candidates for governor-lieutenant governor nominated by political parties.[194] A "political party" is defined as "a party whose candidate for governor in the last general election received 5% or more of the total votes cast for that office."[195] Thus, a candidate whose party either did not run a gubernatorial candidate, or whose candidate received less than 5% of the total vote in the last election, is entirely excluded from public subsidy, regardless of popular support now. No compelling state interest can sustain this severe discrimination. At the least, the scheme must permit a petition to show current support and qualify for public funds, allow more "local" parties, and lower the 5% figure.

Oklahoma provides money directly to candidates only after the campaign commissioner certifies those statewide candidates that will be on the ballot.[196] Certified candidates can receive dollar-for-dollar matching grants.[197] Strict scrutiny must protect legitimate candidates from discrimination, but an examination of ballot requirements suggests equal protection may be satisfied. Apart from a party nomination, an individual can gain ballot access with

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188. MASS. ANN. LAWS ch. 10, §§ 43 to 45 (Michie/Law. Co-op. 1980), ch. 50, § 1, ch. 53, § 6, ch. 55A §§ 1 to 12, ch. 62, § 6C (Michie/Law. Co-op. 1978 & Supp. 1985).

189. *Id.* ch. 55A, §§ 2 to 7.

190. *Id.* ch. 50, § 1 (defines a political party as a political organization that received at least 3% of the most recent gubernatorial vote).

191. *Id.* ch. 53, § 6.

192. Massachusetts also requires minimum private contributions before receiving public funding, which likewise may violate equal protection. *See id.*, ch. 55A, § 4.

193. A simple change would be to measure support in smaller units—counties for example—and fund local nascent organizations proportionately. *See* Nicholson, *1974 Amendments, supra* note 8, at 353.

194. MONT. CODE ANN. §§ 13-37-301 to -308 (1985).

195. *Id.* § 13-37-302.

196. OKLA. STAT. ANN. tit. 26, §§ 18-101 to -113 (West Supp. 1984).

197. *Id.* tit. 26, § 18-109. (Oklahoma has no minimum threshold for its matching grants, apparently recognizing the interests of nonmajor candidates).

either a petition signed by 5% of eligible voters or by paying a filing fee.[198] Given filing fees that are merely high enough to avoid frivolous candidacies,[199] Oklahoma may meet strict scrutiny with its subsidy scheme.[200]

The validity of campaign finance schemes that discriminatorily provide subsidies to some candidates and not to others, and that do not elicit agreements to significant expenditure ceilings, seems to be determined by whether or not the qualifications for receipt of a subsidy are anything more than minimal. If the qualifications require something more than a bare showing of the legitimacy of a candidacy—i.e. a candidate with some modicum of support however humble—then the scheme must fail strict scrutiny analysis because it lessens a legitimate candidate's chances of winning the public's attention and support. If, however, the qualifications do no more than ensure that public money does not inspire frivolous candidacies or offer tax shelters, then they should survive the strict scrutiny because a state must put some limits on who will receive public support as a "candidate."

B. Subsidies to Parties

Many states provide public subsidies to political parties rather than (or in addition to) candidates.[201] Because FECA emphasizes subsidies to candidates, these state schemes are more difficult to assess against *Buckley* standards.[202]

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198. *Id.* tit. 26, § 5-112. This provision was affirmed in Arutunoff v. Oklahoma State Election Bd., 687 F.2d 1375 (10th Cir. 1982) *cert. denied,* 461 U.S. 913 (1983).

199. The fees prescribed are not negligible: candidates for governor must pay $1,500; U.S. Congress - $500. This raises a factual issue about whether these figures raise barriers to legitimate candidates.

200. Oklahoma does also provide money directly to political parties. This provision is considered below. *See infra* note 220.

201. See *supra* note 2 for citations of statutes from Alabama, Alaska, Arizona, California, Hawaii, Idaho, Indiana, Iowa, Kentucky, Maine, North Carolina, Oklahoma, Oregon, Rhode Island, and Utah.

202. The fact that many states orient their subsidy programs toward political parties rather than candidates raises a host of difficult issues. This Note approaches these issues only in a limited way, by focusing on the position of nonmajor voters, candidates, and parties that have been injured by heing denied public subsidy. A nonmajor voter is injured similarly by denial of funds to her favored candidate or to her favored party. Thus party subsidies may be subject to a review similar to that attending candidate subsidies. A nonmajor voter may also be injured by actions taken by a political party itself, such as a targeted spending effort against the voter's preferred candidate. This and other such party actions are considered below. But other profound issues arise when a state subsidizes a political party; issues which are apparently relatively unaddressed in the literature, despite the many state schemes embracing parties.

A state certainly can integrate political parties into the strncture of the electoral process by allowing primaries as a road to ballot access, extensively regulating the entire mechanism, and building the process of electing an official on the fact of party organizations. *Buckley* and *American Party* upheld schemes that did this. *See infra* note 205 and accompanying text. In these instances the party seems actually an arm of the state, operating part of the essential electoral process, permissible because traditional parties have garnered widespread public support and can accomplish primary election decisions that enable the state to avoid costly run-off

Subsidies to parties must undergo two separate equal protection analyses. First, a state might unconstitutionally discriminate against nonmajor voters by the mere subsidization of some parties and not others.[203] Second, the manner in which a party disburses public funds may itself violate constitutional rights of a nonmajor voter, either as state action by the party or by the state subsidization of private party action that discriminates against nonmajor voters.[204]

1. Discriminatory State Actions

When the Supreme Court twice upheld the constitutionality of public subsidies given to some political parties and not others, it emphasized that the funds went for specific purposes that helped achieve a manageable ballot.[205] None of the state statutes discussed here limits in such a way the public subsidies to the parties.[206] Because no expenditure ceilings are elicited, strict scrutiny must be applied to these schemes.[207] Any discriminatory classifications thus must serve a compelling government purpose and use the

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elections. Most current state schemes, however, do not limit their subsidies to such purposes. Rather, public funds are normally provided relatively unrestricted to these organizations of individuals. The party is funded not as an agent of the state to assist in the mechanism of election, but as a collection of individual voters, an organization that plays an advocacy role in the political arena.

It is plausible to argue that political parties are a special, even essential, component of constitutional democracy in the United States, and that state support of parties is different from state support of other ideological, quasi-party entities such as the American Civil Liberties Union, the National Organization of Women, or the National Rifle Association. This Note does not attempt to define any special constitutional status for political parties as ideological collectives. Instead, it works from an assumption that as an ideological group a political party should be treated equally with other ideological groups. A political party can be special because of its integral role in the electoral machinery itself—earned by garnering sufficient public support to warrant state-sanctioned primary elections. Perhaps public funds must be limited to subsidizing that specific role.

The Supreme Court's only relevant treatment of the status of political parties occurred in patronage cases. *See* Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976). Even in these cases in which the Court disallowed the firings of certain public employees based on their political affiliations, the Court did not establish a clear sense of the role parties play in the public sector. *See* Freeman, *Political Party Contributions and Expenditures Under FECA*, 4 PACE L. REV. 267, 268 (1984); *see also* Casper, *supra* note 35, at 277-78. The cases do unequivocally establish that it is a limited role that parties play. A considered treatment of the fundamental issues raised by a state funding political parties as mere collections of individual voters organized to promote certain vague principles, must be accomplished elsewhere.

203. See *supra* notes 69-81 and accompanying text for a discussion of this constitutional issue.

204. *See supra* notes 82-108 and accompanying text.

205. *Buckley*, 424 U.S. at 104-08; *American Party*, 415 U.S. at 793.

206. Rhode Island does prohibit a party from spending the public subsidy on any candidate, but it does not otherwise limit the party. It is unclear in any event how effective subsidy restrictions are, given the ability of a party to shuffle funds among different accounts. *See* Jones, *supra* note 8, at 297-98.

207. *See supra* notes 34-62 and accompanying text.

least restrictive means possible to achieve that purpose. Most of these states incorporate the ballot-access requirements for a party into the public subsidy requirements,[208] but this should not guarantee equal protection validity.[209] When political parties rather than candidates are the excluded entity, this imperative is even stronger. A political party that itself might not appear on the ballot can still sponsor and assist candidates to gain ballot access as independents. The state's interest in restricting parties from ballot listing is to delegate some of the electoral process to primaries run by political parties—this can be done only for a few parties without threatening to expand the ballot to an unmanageable size.[210] The state's interest in restricting party access to the ballot is thus intimately related to the interest in running an efficient electoral system. Such a state interest cannot justify excluding a political association from public subsidy. Just as with a candidate's ballot access, merely by incorporating valid ballot access restrictions for political parties into subsidy qualifications, a state does not avoid equal protection infirmities.

Conspicuous discrimination occurs when a state plan includes exceedingly high standards for receipt of subsidies. Alabama and Kentucky have state income tax checkoffs by which a taxpayer may designate a political party to receive a public subsidy.[211] Both states define a political party as an organization whose candidates received at least 20% of the popular vote at the most recent election for certain offices.[212] Kentucky allows a taxpayer to designate only those political parties that received at least 20% of the total vote cast in the last general election.[213] This statute fails strict scrutiny; it appears to fail even a relaxed scrutiny.[214] Kentucky not only requires that a party undertake a statewide campaign, it also mandates the very substantial overall showing of 20%. No compelling interest of the state can justify excluding from public subsidy parties that garner 15% of the statewide popular vote (that may even be a majority party in some areas).[215] The need to avoid funding "hopeless candidacies" or causing "unrestrained factionalism" could be far less intrusively served.[216]

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208. *E.g.*, Alabama, Kentucky, Hawaii, Idaho, and Utah all utilize ballot standards. See *supra* note 2 for statutory citations.

209. *See supra* notes 177-84 and accompanying text.

210. If the state permits too many primaries, then it may not achieve the goal of avoiding too many run-off elections.

211. ALA. CODE § 40-18-146 (Supp. 1985); KY. REV. STAT. §§ 141.071 to .072 (1982 & Supp. 1984).

212. ALA. CODE § 17-16-2 (1975); KY. REV. STAT. § 118.015 (1982 & Supp. 1984).

213. KY. REV. STAT. § 118.015.

214. Even a 'relaxed' scrutiny should require a figure lower than 20% statewide. Such a high figure must place significant barriers before new parties trying to gain popularity.

215. Parties with actual majority support in some areas nonetheless might be denied public subsidy. Such inhibitions on emerging parties must be struck down. *See* Fleishman, *1974 FECA Amendments, supra* note 14, at 897.

216. For example, by lower thresholds measured in more loeal areas.

Alabama measures the 20% standard both statewide and county wide.[217] A taxpayer in a given county may only designate her tax checkoff to go to those political organizations that received at least 20% of any statewide vote, or at least 20% of a county-wide vote.[218] This standard must also fail strict scrutiny. The figure of 20% is simply too high to meet any vital government interest in a least restrictive manner. By including countywide showings Alabama improves over Kentucky's scheme, but the 20% requirement will exclude legitimate parties, and thus unconstitutionally infringe on the rights of nonmajor voters.[219]

Other states utilize standards lower than 20% to determine subsidy qualification,[220] but strict scrutiny analysis strikes down as unconstitutional most of these limits also. Both Rhode Island and Indiana, for example, allow subsidies to support only those political parties whose gubernatorial candidate at the last election received at least 5% of the popular vote.[221] These schemes must also fail exacting scrutiny; a party that enjoys significant popular support may not qualify for public subsidies if it did not run a gubernatorial candidate, or if its support is still relatively local rather than statewide, or if its popularity has grown only since the last election.[222] Strict scrutiny demands that the state show a compelling interest in refusing to provide at least proportional support to political organizations that receive even the barest modicum of public support.[223]

Requirements that are minimal enough, of course, might survive even exacting scrutiny, in light of the state's interest in not funding sham or hopeless parties. Utah, for example, allows a political party to receive tax-

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217. ALA. CODE §§ 17-16-2, 40-18-146.

218. *Id.*

219. It can hardly be denied that a party with the support of 15% of the electorate is a legitimate political party.

220. See *supra* note 2 for citations to statutes of California (requires a showing of greater than 2% of past vote to receive subsidies), Idaho (requires greater than 3%), Indiana (greater than 5%), Iowa (greater than 2%), Maine (grcater than 5%), North Carolina (greater than 10% of vote or signatures from 5,000 voters), Oklahoma (10%, signatures, or a filing fee), Rhode Island (greater than 5%), and Utah (2% or signatures of 500 voters).

221. IND. CODE §§ 9-7-5.5-1 to -10 (1982 & Supp. 1985); R.I. GEN. LAWS §§ 17-12.1-12 (1981), 44-30-2(e) (1980 & Supp. 1985).

222. Indiana's statute was upheld despite equal protection challenge in Libertarian Party of Indiana v. Packard, 741 F.2d 981 (7th Cir. 1984). The court rejected the equal protection challenges that the plaintiffs urged were distinguishable from *Buckley* inasmuch as no expenditure ceilings were imposed in the Indiana scheme. The court stated:

> In view of the discussion in Buckley about the strong governmental interest in public financing of political parties, we find that the lack of any restrictions on political parties' use of public funds under Indiana law does not render the Indiana statutory scheme on its face violative of the plaintiffs' first amendmcnt rights.

Id. at 988 n.4. The court treated this issue as a first amendment claim, but it was inextricably connected to the equal protection claim. The court did remand to allow a factual showing of discriminatory effect if possible. *Id.* at 991.

223. Even the barest support, so long as it is legitimate support, requires constitutional protection as a component of the fundamental right to vote effectively.

payer-designated subsidies if it either received 2% of the most recent vote for a statewide candidate, or files a petition with signatures of 500 voters, and holds a statewide convention.[224] A petition of only 500 signatures seems a minimal requirement (even in Utah), and may well pass strict scrutiny.[225] Most states subsidizing parties fall between the extremes of Utah and Kentucky. Strict scrutiny must proceed with attention to the effects of the classifications, and strike down those schemes that cause relative injury to any legitimate political parties.[226]

2. Discriminatory Party Actions

A second type of equal protection infirmity can emerge in what a political party does with public funds after it receives them. Any state scheme that provides funds to political parties is subject to this infirmity, even if the distribution to qualifying parties is itself constitutionally valid.[227] This constitutional infirmity may arise in one of two ways.[228] The public subsidy may delegate state authority and support such that in disbursing the funds the party performs "state actions" subject to the fourteenth amendment, or the party's private actions may infringe on constitutional rights of other private parties such that a state subsidy would constitute an invalid support of private discrimination.[229]

Several state schemes may deputize political parties by detailing how the public subsidies shall be used.[230] The more specific and comprehensive the criteria controlling the subsidies, the more likely it is that the state has delegated authority to the party, effectively deputizing it as a state agent.[231] California and North Carolina, for example, both establish special committees to oversee the distribution of the public funds given to parties.[232]

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224. UTAH CODE ANN. § 20-3-2(g) (1984).

225. This presumes that a statewide convention is not a burdensome requirement, a fact-specific assumption.

226. A caution must be added about using statewide measurements for subsidies to parties. When candidate-oriented schemes use statewide measures to evaluate statewide candidates, there is an obvious rationale. Funding is for statewide campaigns and for statewide offices, so support can be measured statewide. This rationale is lacking when subsidies are given to parties. Parties need not be statewide, and funding cannot constitutionally mandate this result. Loeal parties must have access to funds in proportion to their state opponents. *See* Fleishman, *Equality of Influence, supra* note 14, at 393-94.

227. A subsidy scheme that does not invidiously discriminate among parties can nevertheless result in invidious discrimination that flows from actions taken by individual parties.

228. *See supra* notes 203-04 and accompanying text.

229. *Id.*

230. For example, see *supra* note 2 for citations to statutes of Alaska, California, Iowa, Kentucky, North Carolina, Oklahoma, Rhode Island, and Utah.

231. *See supra* notes 82-107 and accompanying text.

232. CAL. REV. & TAX. CODE § 18760 (West Supp. 1985) (establishes committee composed of party chairman and highest ranking party member in the state legislatures); N.C. GEN. STAT. § 163-278.42 (1982 & Supp. 1985) (establishes committee of party chairman, treasurer, and local chairman, and two appointed by these members). *See also* IOWA CODE ANN. § 56.21 (West Supp. 1985) (names state central committee to allocate funds).

The Texas statute reviewed by the Supreme Court in *Nixon v. Condon*[233] contained similar provisions; it established that the state central committees of political parties would determine primary voter qualifications.[234] The Court determined that such committees were subject to the fourteenth amendment for purposes of determining those qualifications, because they were acting as agents of the state.[235] California and North Carolina, by establishing committees to dispense the funds, may have likewise delegated state authority such that the fourteenth amendment applies directly to those committees' actions.[236] Thus, a party committee in California or North Carolina would face strict scrutiny in its decisions about who should receive what funds.

Several other states place no restrictions on how or by whom public subsidies are to be spent.[237] Once the subsidy is disbursed, the party is free to spend the money as it chooses. A subsidy to an organization may invoke the fourteenth amendment against that organization by establishing specialized state support for a "private" entity.[238] This connection between state and political party seems more tenuous than when the state also prescribes committees and regulations by which the party must dispense the funds, but a United States District Court in Rhode Island has determined that when the state subsidized a party with public funds it "deputized" the party chairman such that his actions were "state actions" subject to the fourteenth amendment.[239]

Even when public subsidies do not deputize a party, equal protection can be violated by state support of a private entity that infringes the constitutional rights of individuals.[240] The importance of this proposition is that the equal protection analysis can focus on *party* actions. Once enough state support is demonstrated to show either that the party is effectively deputized as a state agent, or that the state support is specialized and targeted such that

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233. 286 U.S. 73 (1932).

234. *Id.* at 82.

235. *Id.* at 88.

236. Several states prescribe how public funds are to be spent, though not indicating a special committee or individual to manage the funds. Requirements such as limiting spending to the general election, see *supra* note 2 for citations to statutes of California, Iowa, Kentucky; or limiting spending to *candidate* spending, not general party expenses, Alaska, North Carolina; or prohibiting expenses for any particular candidate, Oklahoma, Rhode Island; may all establish enough delegation of state authority to subject the disbursals of the money to the requirements of the fourteenth amendment. *See* McKenna v. Reilly, 419 F. Supp. 1179, 1184 (D.R.I. 1976) (court found state action in party chairman's disbursal of public funds, due to the integration of the party and the state).

237. See *supra* note 2 for citations to statutes of Alabama, Arizona, Hawaii, Idaho, Indiana, Maine, and Oregon.

238. *See supra* notes 102-06 and accompanying text.

239. McKenna v. Reilly, 419 F. Supp. at 1184. The court also determined that the statute then in effect was silent as to how the party was to spend the public funds. *Id.* at 1181.

240. *See supra* notes 102-06 and accompanying text.

its validity depends on the actions of the recipient, equal protection analysis examines the *party* action for constitutional infirmities.[241]

The remaining issue is to suggest some party actions that might infringe on equal protection rights of nonmajor voters, candidates, or parties. That is, apart from issues of discriminatory funding *to* parties, there may be discriminatory funding *by* parties. The analysis must focus on the rights being protected against discrimination—the right to vote effectively, and the derivative right to run for public office—and on the state interest in financing political campaigns in the first place. Because unconstitutional aspects of party actions would arise, if at all, in operation, with a factual record, this Note can only suggest scenarios in which the voters may have been denied equal protection.[242] These scenarios assume that the fourteenth amendment is invoked either by the delegation of state authority to the political party, or by a state subsidy subject as a specialized support of private party action.[243]

The most interesting and common scenarios involve *strategic* decisions by a political party on how best to utilize the public funds it receives. A subsidized party may opt to provide greater support to certain of its adherents—candidates or local branches—that will cause other of its adherents to lose a proportional share of support. A subsidized party often may also opt to funnel resources into campaigns that are particularly important, or close, in order to get the most effect out of limited financial resources. Both of these aspects raise difficult issues.

In *McKenna v. Reilly,*[244] the court found unconstitutional a subsidized party's financial support of one candidate for the party nomination over another candidate. The unfunded candidate certainly was injured by the party decision to spend public money in support of his opponent, and if the state itself made the decision, it would violate his equal protection rights.[245] To hold the party to this standard would be to restrict its use of money to very basic, evenhanded distribution to all candidates, and to prohibit a party from using public funds to influence its own nominations.

A second federal court has faced a case implicating the second scenario.[246] *Bang v. Chase* involved a Minnesota statutory scheme that subsidized parties

241. This was suggested *supra* notes 82-107 and accompanying text, and lets analysis disregard, for most purposes, the intricacies of particular statutory relationships between party and state, and instead focus on the actions taken by a party that receives public subsidies.

242. Other equal protection infirmities may be manifest on the face of a subsidy statute—exceedingly high vote requirements for receipt of subsidies, for example—but discrimination by party action can only occur in practice, by acts of a party.

243. *See supra* note 241 and accompanying text.

244. 419 F. Supp. 1179 (D.R.I. 1976).

245. No rationale could permit a state to pick favorites in various races and provide them with extra state support.

246. Bang v. Chase, 442 F. Supp. 758 (D. Minn. 1977), *aff'd,* 436 U.S. 941 (1978).

in proportion to their statewide vote totals; the funds, however, were disbursed *equally* to all candidates of a given party, regardless of their level of party support in their own district. The court found no rational basis for this scheme and deemed it unconstitutional.[247] The rationale of this holding would seem to prohibit a party from focusing its funds on a few strategic contests, to the detriment of other contests.

Both cases suggest a very limited role for political parties in subsidy schemes—they serve only as conduits for public money, and cannot interject traditional strategic concerns in diverting money to particular contests or regions. Although the effect of limiting parties to this role is uncertain, it would seem to lessen the power of parties in the general electoral process.[248] But most state schemes impose few restrictions on how a party may use funds. One would suppose that parties commonly do focus funds into certain strategic areas. The validity of public campaign finance schemes that permit a political party to dispense funds in ways that would be unconstitutional if done by the state itself, is doubtful. The fundamental rights that must be protected from invidious discrimination are equally abridged by unequal funding of candidates, whether the actual disbursement of funds ultimately is accomplished by party action or state action. Party decisions to focus public funds to a few contests or areas thus should be deemed unconstitutional infringements of the rights of unfunded candidates and their supporters.[249]

CONCLUSION

Nearly half of the states in the United States employ some form of public campaign financing for local elections.[250] Most of these schemes were enacted

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247. 442 F. Supp. at 758. The three-judge district court held:

> the aggregate political party preferences expressed by all the state taxpayers in Minnesota have no rational relation to the support for particular parties or for particular candidates within legislative districts. Under this distribution scheme, a party with state-wide plurality can unfairly disadvantage its opponents in those districts where it enjoys little district support. Accordingly, we find that the method of distribution of public campaign funds required by section 10A.31(5)(f) invidiously discriminates between candidates of different political parties and abridges the First Amendment right of political association.

Id.

248. *See generally* Jones, *supra* at 8.

249. This suggests that any public funding of political parties that is not highly structured and restricted, and that does not elicit some kind of 'countervailing denial' may be invalid. Given the flexibility of political party accounting procedures, *see supra* note 206, it may be impossible to distinguish public funds from private funds, and therefore any public subsidies would subject much of a party's expenditures to fourteenth amendment scrutiny. Strategic targeting of funds seems to violate this scrutiny. *But see supra* note 202 (discussing possible special status of political parties).

250. *See* sources cited *supra* note 2.

in the last decade, after Congress amended the Federal Election Campaign Act (FECA) and established public subsidies for presidential campaigns.[251] The Supreme Court in *Buckley v. Valeo*[252] comprehensively reviewed FECA, but similar state provisions subsidizing political campaigns have not generated substantial case law. This Note has construed the *Buckley* decision, which upheld the public financing of federal elections, and has applied that holding to current state campaign financing schemes. The *Buckley* Court rejected equal protection claims of discrimination against nonmajor parties and candidates, upholding a complex scheme that elicits a quid pro quo from those parties and candidates that receive a subsidy, in order to impose some restraint on the rising costs of political campaigns. State schemes that have proliferated in the last decade unfortunately have not generally followed the approach of injecting some public money into political campaigns in order to rein in increasing overall expenditures, and to help reduce the significance of wealth disparities among candidates and voters. Rather, most states distribute public subsidies as bonuses to political candidates and parties. When states supplement private campaign funds with public funds, merely adding public fuel to the private fire, equal protection demands that strict scrutiny protect any candidates or parties who are excluded from public subsidy.

Discriminatory campaign finance schemes offer current major parties seductive means to accumulate and maintain political power. Equal protection scrutiny is essential to restrict such discrimination in the political arena. When exacting attention is turned to the majority of the state schemes, far too many embody unconstitutionally burdensome requirements for receipt of public funds. At the least these state schemes must follow the principles embodied in *Buckley*. One would hope state legislatures might go even further—recognizing the special fluidity of American politics at the state and local levels—and amend campaign subsidy schemes to operate evenhandedly toward all legitimate parties and candidates who gain even modest public support.

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251. *See* sources cited *supra* note 1.
252. 424 U.S. 1 (1976) (per curiam).