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TIME TO DEVELOP A POST-*BUCKLEY* APPROACH TO
REGULATING THE CONTRIBUTIONS AND
EXPENDITURES OF POLITICAL PARTIES: *FEDERAL
ELECTION COMMISSION V. COLORADO REPUBLICAN
FEDERAL CAMPAIGN COMMITTEE*

The American governmental structure is known to all graduates of ninth grade civics or social studies classes as a three branch system of checks and balances. This model is generally accurate. However, it has broken down in the regulation of federal campaigns. The federal courts should take an aggressive approach to the regulation of political committees, elections, and campaigns. As the non-political actor in the equation, it may be up to the courts to rectify and overcome the failures and problems of the campaign finance system.

Campaign finance regulation presents the problem of who will be responsible for ensuring that the American public is protected from the potential abuses that exist where the only entities who are subject to federal campaign finance regulations, the Congress and the President, are the entities responsible for regulating. Congress has little incentive to reform the status quo even if its members were to benefit from increased party contributions in the form of direct expenditures. Conflicts exist not only between the parties, but also between the houses of Congress as to what reform is appropriate, thus preventing any reform at all.¹ Comprehensive reform has not occurred since *Buckley* because the Congress and the President have little incentive to modify the current system.

There has been a general failure to protect the public interest in the area of campaign finance. The legislature and executive branches have an interest in ensuring their own political preserva-

1. See David B. Magleby, *Prospects for Reform*, in *MONEY, ELECTIONS, AND DEMOCRACY: REFORMING CONGRESSIONAL CAMPAIGN FINANCE* 245, 250-55 (Margaret L. Nugent & John R. Johannes eds., 1990).

tion. Because of these inherent structural self-interests, courts must approach the regulation of federal elections in an activist manner. The courts must address the problems that have arisen as a result of prior judicial decisions and legislative or regulatory inaction.

The recent decision of the Tenth Circuit Court of Appeals in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*² (CRFCC) illustrates the need for a new approach to the campaign finance regulation of political parties. The results of the decision in CRFCC provide a strong argument to move beyond *Buckley v. Valeo*.³

In *Buckley*, the Supreme Court addressed the constitutionality of the Federal Election Campaign Act (FECA) and its 1974 amendments.⁴ While the Court struck down certain limits on expenditures in federal campaigns as an impermissible restraint on the First Amendment political expression rights of candidates, citizens, and associations, it upheld contribution limits as serving the governmental interest of preventing "corruption" or the "appearance of corruption."⁵ The Court stated,

The contribution ceilings . . . serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion. By contrast, the First Amendment requires the invalidation of the Act's independent expenditure ceiling These provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.⁶

In spite of this relatively clear statement, the application of *Buckley* in subsequent cases has resulted in vastly different treatment of political parties and independent political committees.⁷

2. 59 F.3d 1015 (10th Cir. 1995), cert. granted, 116 S. Ct. 689 (1996).

3. 424 U.S. 1 (1976).

4. *Id.* at 58-59.

5. *Id.* at 25.

6. *Id.* at 58-59.

7. Political committees are statutorily defined in 2 U.S.C. § 431(4) (1994). The definition includes committees, clubs, associations, other groups of individuals, separate segregated funds, and local party committees that have met the requisite contribution or expenditure threshold to be regulated by the FECA. As used in this Comment, the term "independent political committee" includes any political entity that is not directly affiliated or

After twenty years, the time has arrived for a new campaign jurisprudence that treats parties and independent political committees equally. Moreover, such a change can occur without abandoning precedent. Courts must act aggressively in the area of campaign finance. Neither the legislature nor the executive branch has effectively dealt with the “nonsensical, loopholeridden patchwork”⁸ that has emerged in the wake of *Buckley* and its progeny. The federal courts can and must develop a cogent, coherent, and consistent approach to regulating all entities participating in the political arena.

Specifically, the courts must seek to rectify the inequities that exist between the First Amendment rights of political parties and independent political committees. The current system fosters an inequality in the First Amendment rights of parties and independent political committees by allowing the latter to make independent expenditures. The courts must end this prohibition on independent political expenditures by political parties. The reliance on the fear that independent expenditures by parties may result in corruption is no longer tenable and must be abandoned. This can be accomplished without deviating from prior precedent if courts enter the void of campaign finance regulation and actively seek to remedy the inequities, abuses, and loopholes that have emerged since *Buckley*.

I. THE NEED FOR A PRAGMATIC VIEW OF CAMPAIGN FINANCE, THE FIRST AMENDMENT, AND THE POLITICAL PARTIES

To place this Comment’s thesis in proper context, it is important to address two issues at the outset: the First Amendment interests of political parties and the role of the courts in regulating federal campaign finance in light of the failure of Congress to effectuate reform. It is clear that political parties have two essential interests under the First Amendment. First, political parties have a free speech interest.⁹ It has long been recognized that citizens,

controlled by a political party, excluding entities defined as political committees by 2 U.S.C. § 431(4)(C) (1994). Additionally, “independent political committee” will also be used to describe individuals making independent political expenditures similar in nature to those of the committees.

8. *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U.S. 480, 518 (1985) (White, J., dissenting).

9. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (“Indeed the First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.”).

candidates, and associations have a right to engage in protected political speech.¹⁰ Campaign expenditures made in the process of direct political speech are also constitutionally protected.¹¹ However, the Supreme Court has refused to find that direct campaign contributions are entitled to unlimited protection as “speech by proxy,”¹² even though the independent or personal expenditure of funds in support of a political candidate constitutes protected speech.¹³ Independent campaign expenditures are “political expression ‘at the core of our electoral process and of the First Amendment freedoms.’”¹⁴

Additionally, political parties have an associational interest arising from the First Amendment. In addressing the rights of organizations engaging in political speech, the Supreme Court has repeatedly held that the freedom of association is inherently connected with the advancement of beliefs, ideas, and speech.¹⁵ This freedom of association protection also applies to partisan political organizations.¹⁶

The associational rights of political parties are derived from the rights of its members to act independently as individuals when engaging in political expression. Individuals have the right to organize with other individuals who share common political views and ideas.¹⁷ Because a party’s rights are an amalgamation of the individual rights of party members, “interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.”¹⁸

The Supreme Court has stated that “the First Amendment right to ‘speak one’s mind . . . on all public institutions’ includes the right to engage in ‘vigorous advocacy’ no less than ‘abstract dis-

10. See *California Medical Ass’n v. Federal Election Comm’n*, 453 U.S. 182, 194 (1981) (noting that *Buckley* recognized that limitations placed upon campaign expenditures by the FECA directly infringed upon political speech).

11. *Id.* at 195 (quoting *Buckley*, 424 U.S. at 44-48).

12. *Id.* at 196.

13. See *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990).

14. *Id.* (citing *Buckley*, 424 U.S. at 39 and quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

15. See, e.g., *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958), which discusses the application of the First Amendment to states).

16. *Id.*; see also *Buckley*, 424 U.S. at 15; *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973).

17. *Tashjian*, 479 U.S. at 215.

18. *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981).

cussion.”¹⁹ With respect to political expression, the Court noted, “In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.”²⁰ When the First Amendment rights of speech and association are restricted in a political setting, the Court will only uphold limitations that are designed to combat corruption or the perception of corruption.²¹ When a campaign regulation burdens the rights of free speech and free association, it will only be upheld “if it serves a compelling governmental interest.”²² However, given this framework for the protection of political speech, the Supreme Court has not directly addressed the issue of limitations on expenditures by political parties under the First Amendment.

II. THE HISTORY OF CRFCC

The Tenth Circuit addressed the role and activities of political parties during federal elections in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*.²³ The case came to the court of appeals after the district court dismissed an action brought against the Colorado Republican Federal Campaign Committee (Colorado Republicans) and its treasurer.²⁴ The FEC brought suit after the Colorado Democratic Party alleged that the Colorado Republicans had violated the spending limits established in 2 U.S.C. § 441a(d)(3).²⁵ The Colorado Republicans spent

19. *Buckley*, 424 U.S. at 48 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Bridges v. California*, 314 U.S. 252, 270 (1941) and *NAACP v. Button*, 371 U.S. 415, 429 (1963))).

20. *Id.* at 57.

21. *Buckley*, 424 U.S. at 58.

22. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 225 (1989).

23. 59 F.3d 1015 (10th Cir. 1995).

24. *Id.* at 1017.

25. Under 2 U.S.C. § 441a(d) (1994), contributions by state and national political party committees in federal elections are limited. The statute reads as follows:

(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make

\$15,000 on radio advertisements in early 1986 opposing the Senate candidacy of Timothy E. Wirth, a Democrat who eventually won the election later that year.²⁶ At the time of the ads, Wirth had not officially become a candidate and the Republicans had yet to nominate their candidate for the Senate.²⁷

The dispute arose because the Colorado Republicans assigned its right to make expenditures for the 1986 senatorial campaign to the National Republican Senatorial Committee (NRSC).²⁸ The Colorado Democratic Party claimed that the \$15,000 expenditure by the Colorado Republicans violated the spending limit established in 2 U.S.C. § 441a(d)(3) because it was made in addition to coordi-

expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitation contained in paragraphs (2) and (3) of this subsection.

. . . .

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is a affiliated with such a party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

- (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) or this section); or
- (ii) \$20,000.

26. *CRFCC*, 59 F.3d at 1017-18.

27. *Id.* The ads claimed that Wirth had been less than honest in presenting his ideological position on issues seemingly important to Coloradans. The advertisement, "Wirth Facts #1," read,

"Paid for by the Colorado Republican State Central Committee.

Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.

Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts."

Id. at 1018 n.1.

28. *Id.* at 1019. The ability to assign the right to make contributions allowed under 2 U.S.C. § 441a(d)(3) was validated in the Supreme Court's decision in *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 41-43 (1981) (*DSCC*). The Court stated, "Obviously, § 441a(d)(3) does not permit the NRSC to make expenditures in its own right. But, contrary to the Court of Appeals, it does not follow that the NRSC may not act as an agent of a committee that is expressly authorized to make expenditures." *Id.* at 33.

nated expenditures by the NRSC.²⁹ The case therefore centered on whether running the anti-Wirth ads constituted an "expenditure in connection with the general election campaign" of the Republican nominee.³⁰

Political parties are prohibited from making independent expenditures by regulation.³¹ Thus, the Democrats claimed that the advertisements constituted a coordinated expenditure made in cooperation with the Republicans' candidates,³² which violated the limitations imposed by 2 U.S.C. § 441a(d)(3).³³ The Colorado Republicans counterclaimed that 2 U.S.C. § 441a(d)(3) unconstitutionally limited expenditures.³⁴ The district court found that the expenditure by the Colorado Republicans was a coordinated expenditure but was not limited by § 441a(d)(3) because it "was not made in connection with the 1986 Colorado senatorial campaign" and dismissed the FEC's complaint.³⁵ The Tenth Circuit rejected the district court's analysis. It reversed and remanded the decision to the district court to enter judgment in favor of the FEC.³⁶ The court also rejected the Republicans' counterclaim that the statute was an unconstitutional limitation on their First Amendment rights.³⁷ Recently, the Supreme Court granted certiorari on the issues of (1) whether the statute in question violates the First Amendment, (2) whether the statute precludes advertising made when general election candidates have not yet been chosen, and (3) whether the Tenth Circuit properly deferred to the FEC when the FEC failed to follow proper rule-making procedures and failed to explain its

29. *CRFCC*, 59 F.3d at 1019. The Republicans were statutorily allowed to make \$103,248 in expenditures under 2 U.S.C. § 441a(d)(3). *Id.*

30. *Id.* at 1018-19.

31. *Id.* at 1019. The Supreme Court noted in *DSCC* that under 11 C.F.R. § 110.7(B)(4) (1981), the FEC had forbidden state and national party committees from making "independent expenditures." *DSCC*, 454 U.S. at 29 n.1. An independent expenditure is one "made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17) (1994).

32. The Supreme Court in *Buckley* identified coordinated expenditures as those made "in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." 424 U.S. at 46 n.53.

33. *CRFCC*, 59 F.3d at 1019.

34. *Id.* at 1017.

35. *Id.* at 1019.

36. *Id.* at 1024.

37. *Id.*

decision to depart from an earlier conflicting position.³⁸

III. REGULATION OF CAMPAIGN FINANCE FOLLOWING *BUCKLEY*

Although the Tenth Circuit Court of Appeals arguably followed precedent in deciding *CRFCC*, the decision illustrates several reasons justifying a new approach to regulating campaign finance and political parties. The decision in *CRFCC* manifests the weaknesses that have come to exist in the regulation of campaigns and elections since *Buckley*. The Tenth Circuit's decision, like that of other courts addressing campaign finance issues, is molded by three separate influences: judicial precedent, congressional action, and FEC actions. The manner in which this decision addresses each of these influences exhibits many of the problems that have emerged in this area of the law after *Buckley*.

First, the Tenth Circuit relied on precedent emerging from *Buckley*. Judicial decisions following *Buckley* have often limited their analysis to the Court's textual discussion in *Buckley* without analyzing its applicability to situations that have emerged as a result of the decision. Additionally, many courts, including the Tenth Circuit, have shown deference to Congress in issues relating to its legislation regulating federal elections. Congress clearly has experience in the areas of elections and legislation. However, it is precisely this interest and experience that ought to render Congress subject to stricter scrutiny since it is responsible for regulating itself in this area. Finally, the Tenth Circuit exhibited significant deference to the FEC. Although deference to a regulatory agency is appropriate when the agency has followed proper administrative procedure, deference to decisions and regulations by the FEC is problematic due to the politicized nature of the Commission and its regulatory weaknesses. This is especially true where the Commission fails to address an apparently unexplained modification of agency position.

A. *Judicial Decisions After Buckley and the Current View of Campaign Finance*

The current federal campaign finance structure exists in a world where, as a result of *Buckley*, large institutional contributors have proliferated.³⁹ The rise of non-individual and non-party

38. 64 U.S.L.W. 3447 (U.S. Jan. 9, 1996) (No. 95-489).

39. FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* 241 (1992)

sources of support, be it direct in the form of contributions or indirect in the form of independent expenditures, results from *Buckley* and subsequent decisions.⁴⁰ Congress has failed in its attempts at reforming campaign finance laws because true reform requires a fundamental motivation for change.⁴¹ It is in this post-*Buckley* world that the current problems of campaign finance reside and develop.

The decision in *CRFCC*, like most decisions in the area of federal elections, relied heavily upon the Supreme Court's decision in *Buckley* and its progeny. The Tenth Circuit recognized that the Republicans' First Amendment claim had not been addressed in *Buckley*.⁴² However, it did not acknowledge the lack of precedent that exists with respect to the claims of political parties, or claims that limitations on independent expenditures by parties are an unconstitutional limitation. Furthermore, the Tenth Circuit relied on *Buckley's* analysis⁴³ without addressing the post-*Buckley* political world that exists today.

The Tenth Circuit relied on the Supreme Court's decision in *Federal Election Commission v. Massachusetts Citizens For Life*⁴⁴ (*MCFL*), noting that even though *Buckley* did not address a political party's claim that limitations on independent expenditures impermissibly violate the First Amendment, "*MCFL* adopted much of the reasoning in *Buckley* in analyzing the First Amendment challenges"⁴⁵ However, this reliance on *MCFL* was mis-

(noting that organized giving dominates the current system of campaign finance).

40. See *infra* notes 92-100 and accompanying text (discussing the effects of *Buckley* and *Federal Elections Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985), on the practices of independent political committees).

41. Magleby, *supra* note 1, at 256 ("It is typically easier to build a legislative majority to change a few things than to revamp the entire system. Comprehensive reform requires a deeper commitment to change and a perception that something is seriously wrong.").

42. *CRFCC*, 59 F.3d at 1020-21. Specifically, the court cited the footnote in *Buckley* where the Supreme Court answered certified constitutional questions relating to the Federal Election Campaign Act of 1971: "Does 18 U.S.C. § 608(f) (1970 ed., Supp. IV) violate [constitutional] rights, in that it limits the expenditures of national or state committees of political parties in connection with general election campaigns for federal office? Answer: NO, as to the Fifth Amendment challenge advanced by appellants." *Id.* (quoting *Buckley*, 424 U.S. at 59 n.67).

43. *Id.* at 1024. Indeed, the court's analysis of corruption, as applied specifically to parties, consisted of a discussion of the treatment of coordinated expenditures as contributions and independent expenditures as expenditures. *Id.* Although it cites *NCPAC*, the court makes no mention of the emergence and rise of independent expenditures in the wake of *Buckley* and *NCPAC*.

44. 479 U.S. 238 (1986).

45. 59 F.3d at 1024 n.11.

placed because *MCFL* presented factual and legal issues clearly distinguishable from those presented in *CRFCC*.

In *MCFL*, a "nonprofit, nonstock corporation"⁴⁶ allegedly "violated the restriction on independent spending contained in § 441b,"⁴⁷ by spending treasury funds on a federal campaign.⁴⁸ However, the Supreme Court rejected a prohibition on independent expenditures by such entities, noting that "government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation."⁴⁹ In light of this admonition by the Court in *MCFL*, it is not clear whether the analysis addressing campaign expenditures and contributions by corporations, labor unions, or banks under 2 U.S.C. § 441b is applicable to a claim arising under the regulation of campaign activities of political parties and other committees governed by 2 U.S.C. § 441a. The basis for the difference between § 441a and § 441b is the nature of the entities involved: political committees, which arise from political affiliation, compared to corporations, labor unions, and banks, which have specific economic interests and may participate in political activity only through the formation of separate segregated funds. The resources of political committees are directly tied to their popularity and representation of an identifiable political view. The resources of entities regulated under § 441b are derived from sources potentially unrelated to political popularity.⁵⁰ The limitations upon First Amendment expression under § 441b are due to the potential such entities possess to manipulate the political process due to their external sources of wealth.⁵¹ The regulations presented in § 441b are arguably neither related nor applicable to political committees regulated under § 441a.

The Tenth Circuit also relied on the decision of the Supreme Court in *Federal Election Commission v. Democratic Senatorial Campaign Committee*⁵² (*DSCC*), as support for its finding that the Colorado Republicans made an impermissible expenditure in con-

46. *MCFL*, 479 U.S. at 241.

47. *Id.*

48. *Id.*

49. *Id.* at 265.

50. *Id.* at 257 ("Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace.")

51. *Id.* at 258-59.

52. 454 U.S. 27 (1981).

junction with a primary election. The Tenth Circuit noted that according to the ruling in *DSCC*, parties are prevented from making independent expenditures.⁵³ The court cited 11 C.F.R. § 110.7(b)(4),⁵⁴ the regulation addressed in *DSCC*, to hold that the Colorado Republican Federal Campaign Committee had violated § 441a(d). However, the Supreme Court's interpretation of this regulation in *DSCC* applied only to general election expenditures. The Tenth Circuit used the general election analysis present in *DSCC* to arrive at its decision on the pre-primary activities by the Colorado Republicans.⁵⁵ The court found that the expenditure by the Colorado Republicans was made prior to the primary and that it posed the potential for greater corruption due to the likely control of the party by incumbents.⁵⁶ The reliance on *DSCC* is problematic, as the Tenth Circuit appeared to ignore the specific language of the regulation.

Although not discussed in *CRFCC*, the Supreme Court did address the First Amendment interests of PACs under § 441a in *California Medical Association v. Federal Election Commission*⁵⁷ (*CMA*). The California Medical Association (*CMA*) challenged the statutory limitations on contributions it could make to its PAC and that could be made by its PAC, *CALPAC*. In its decision, the Court held that the limitations on contributions to PACs and contributions by PACs did not violate the speech rights of the *CMA* because § 441a did not limit "the amount *CMA* or any of its members may independently expend in order to advocate political views; rather, the statute restrains only the amount that *CMA* may contribute to *CALPAC*."⁵⁸ The Court reiterated, however, that although a speech interest exists with respect to campaign contributions, "the 'speech by proxy' that *CMA* seeks to achieve through its contributions to *CALPAC* is not the sort of political advocacy

53. *CRFCC*, 59 F.3d at 1019.

54. 11 C.F.R. § 110.7(b)(4) (1994) precludes national party committees, state committees, and subordinate committees of any state committee from making "independent expenditures in connection with the general election campaign of candidates for Federal office." However, 11 C.F.R. § 110.7(b)(4) only prohibits independent party expenditures in connection with the general election of candidates for Federal office, not primary elections as was the case in the 1986 expenditure by the *CRFCC*.

55. See *CRFCC*, 59 F.3d at 1021.

56. *Id.* at 1023-25.

57. *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981).

58. *Id.* at 195.

that this Court in *Buckley* found entitled to full First Amendment protection.”⁵⁹

It is important to note, however, that *CMA* never addressed the issue of independent expenditures, as the case was limited to direct contributions to candidates through the mechanism of the PAC. Justice Blackmun noted in his concurrence that “this analysis suggests that a different result would follow if § 441a(a)(1)(C) were applied to contributions to a political committee established for the purpose of making independent expenditures. . . . [C]ontributions to a committee that makes only independent expenditures pose no such threat [of corruption].”⁶⁰

Political parties’ ability and interest in engaging in the same types of political speech as other independent political committees through independent expenditures under the First Amendment has not been directly addressed. Clearly, *Buckley*, *MCFL*, and *CMA* do not deny the right of independent political entities to engage in independent expenditures, as they pose no threat of corruption in the eyes of the Court. Political parties possess the same First Amendment rights as others engaging in political speech.⁶¹ However, courts have neither addressed nor analyzed the rights of parties and independent political committees together. This is probably due to the nature of the entities and the litigation that has come before the Supreme Court. The Court has not dealt with campaign finance as it relates to the First Amendment rights of all political entities. Challenges to the regulations have been made by either independent political committees (*NCPAC*, *MCFL*, and *CMA*) or political parties (*DSCC*, *NRSC*, *Eu*, and *CRFCC*) and the courts have addressed their rights independently. Because no direct analysis of the rights of political parties versus those of independent political committees has occurred, the courts must go beyond the disjunctive views of entities’ rights rendered in earlier decisions and deal with the real issue: whether political parties and independent political committees should be entitled to the same rights to engage in political speech in the form of independent expenditures. Courts have previously compared the problems posed by contributions with those posed by expenditures in a collective and comprehensive manner. *Buckley* distinguished expenditures from contribu-

59. *Id.* at 196.

60. *Id.* at 203 (Blackmun, J., concurring in part and in the judgment).

61. See *supra* notes 9-22 and accompanying text.

tions, finding that contributions posed a greater threat of corruption than expenditures, therefore meriting the regulation of contributions.⁶² Such analysis of political parties' rights, as opposed to independent political committees that make contributions and expenditures, has yet to occur.

B. The Influence of Congress on the Court

The Tenth Circuit exhibited a high level of deference to Congress, which arguably is dangerous in the arena of campaign finance. In rejecting the claim of the Colorado Republicans that large individual donors do not pose a threat of corruption or domination of the party, the Tenth Circuit deferred to the judgment of Congress:

The members of Congress who enacted this law were surviving veterans of the election campaign process, and all were members of organized political parties. They should be considered uniquely qualified to evaluate the risk of actual corruption or appearance of corruption from large coordinated expenditures by political parties. This case is, therefore, ideally postured for deference to the congressional will.⁶³

The court correctly noted that Congress had intimate knowledge of the campaign process and the potential for corruption. However, deference to Congress in this area is unwise. Because Congress regulates itself by establishing laws governing campaign finance, courts should not defer to it on this issue, even if it has special knowledge and experience. Congress has not addressed the problems that have emerged in campaign finance since the *Buckley* decision.⁶⁴ Current campaign finance law has become a means of

62. *Buckley*, 424 U.S. at 28 (noting that contribution limits prevented corruption "while leaving persons free to engage in independent political expression").

63. *CRFCC*, 59 F.3d at 1024.

64. Since the decision in *Buckley*, Congress has failed to produce any real reform. See generally HERBERT E. ALEXANDER & MONICA BAUER, *FINANCING THE 1988 ELECTION* 110-40 (1991) (discussing the evolution of campaign finance law since the FECA was passed in 1971). Partisan conflict has been a great impediment to addressing the deficiencies that have arisen since *Buckley*. Additionally, Alexander & Bauer argue that

[c]ampaign finance is a politician's issue, along with redistricting, it is the life blood of most members of Congress. Though concerned about increasing amounts of time spent raising funds, members have come to view election reform attempts as partisan maneuvers designed to exploit their party's strengths and their rivals' weakness. . . . For rather than make the public interest the

ensuring reelection for incumbents. Members of Congress adeptly manipulate the "loopholeridden patchwork"⁶⁵ to guarantee their preservation.⁶⁶ Congress, acting in its own best interest, created the FEC as an inherently weak entity. When an entity promulgates the rules to which it is subject, close scrutiny should be required to ensure that effective regulation occurs.

C. *Deference to the Federal Election Commission*

Because of the weak nature of the FEC and the importance of the subject matter it oversees, deference to the FEC should only be given when the Commission can show an adequate justification for its interpretation of a regulation. The *CRFCC* court claimed it followed the admonition of the Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council*,⁶⁷ which held that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."⁶⁸ Deference to an agency is inappropriate when the agency has adopted an interpretation of a regulation that is inconsistent with prior interpretations of the regulation or is logically inapplicable to the issue under consideration. This is especially true when there are constitutional issues and concerns that must be addressed.

The Tenth Circuit cited *Federal Election Commission v. Democratic Senatorial Campaign Committee*⁶⁹ (*DSCC*), where the Supreme Court noted that "the Commission is precisely the type of agency to which deference should presumptively be afforded,"⁷⁰ to support its deference to the Commission on the interpretation of § 441a(d)(3). In *DSCC*, the Democratic Senatorial Campaign Committee challenged the legality of state and local Republican Party committees assigning their rights to make coordinated contributions to candidates of the National Republican Senatorial Committee (NRSC).⁷¹ The Democrats claimed that the arrangement with the

guiding light behind reform legislation . . . legislative strategists chose instead to immunize their proposals from adoption by potential allies across the aisle.

Id. at 135-36.

65. *See supra* note 8 and accompanying text.

66. *See infra* note 134 and accompanying text.

67. 467 U.S. 837 (1984).

68. *CRFCC*, 59 F.3d at 1021.

69. 454 U.S. 27 (1981).

70. *Id.* at 37.

71. *Id.* at 30.

NRSC violated the statute, as the NRSC was only empowered to make contributions to candidates and not act as the agent of state and local party committees.⁷² The Court noted that the FEC had maintained a clear and consistent position on the issue of assignment,⁷³ and the Commission had unanimously dismissed the Democrats' complaint that the NRSC had violated § 441a(d).⁷⁴ The *DSCC* Court's statement about deference arose because the Commission unanimously found that no violation occurred. *DSCC*, therefore, is a case of deference to "prosecutorial discretion."

CRFCC presents a distinctly different factual scenario. The Tenth Circuit cited two Advisory Opinions issued by the FEC as evidence that the Commission had adopted a position that required deference.⁷⁵ However, neither of these Advisory Opinions dealt with a situation in which a party expended money prior to the nomination of candidates by the other party.⁷⁶ Moreover, the court noted that the FEC appeared to have modified its position previously⁷⁷ without addressing the reasonableness of the new interpretation.⁷⁸ Deference may not be proper when an agency has not clearly established a position prior to litigating an issue.⁷⁹

72. *Id.* at 29-30.

73. *Id.* The Court noted that the FEC had consistently adhered to the same position in the case since 1976. *Id.* at 38. Moreover, the FEC had been presented with at least three challenges to its interpretation but arrived at the same conclusion each time. *Id.*

74. *Id.* at 31.

75. *CRFCC*, 59 F.3d at 1021-22.

76. Advisory Opinion (AO) 1984-15 was provided to the Republican Party by the FEC after the party requested a determination about the propriety of spending for television ads attacking the potential opponent that would be nominated by the Democrats to oppose President Reagan. See *Reporting Expenditures for Anti-Democratic Television Ads* (AO 1984-15), 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5766 (May 31, 1984). In AO 1985-14, the Democratic Congressional Campaign Committee sought a determination about publicity it proposed focusing on several members of Congress not all of whom had opponents. See *Attribution of Congressional Campaign Committee Expenditures* (AO 1985-14), 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5819 (May 30, 1985).

77. *CRFCC*, 59 F.3d at 1022 n.7. The court noted that *Corporate Support for Party Convention* (AO 1978-46), 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5348 (Sept. 5, 1978), adopted a restrictive interpretation of § 441a that only applied the regulations to party expenditures expressly advocating the election or defeat of a candidate. *Id.* The position relied on by the circuit court was set forth in AO 1984-15. *Reporting Expenditures for Anti-Democratic Television Ads* (AO 1984-15), 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5766 (May 31, 1984). That opinion construed § 441a(d) to regulate expenditures that specifically identify a candidate and convey an election-oriented message. *Id.*

78. *CRFCC*, 59 F.3d at 1022 n.7.

79. The issue of deference to an ambiguous interpretation of a regulation was addressed in *Federal Election Comm'n v. National Republican Senatorial Comm.*, 966 F.2d

While *CRFCC* deferred to the authority of the FEC, the Tenth Circuit was not required to reach the conclusion it did in this case. The specific constitutional issue raised by the appellees, the First Amendment rights of political parties to make truly independent expenditures, has never been addressed by the courts. Furthermore, the courts have never directly addressed the rights of parties and independent political committees together. This has resulted in each entity being subject to different standards and regulations with respect to their fundamental First Amendment rights. Additionally, campaign finance is too important an area for the courts to leave to the sole discretion of Congress. Congress has failed to enact meaningful reform of campaign finance in the wake of the changes that have occurred in the system since *Buckley*. Finally, deference to the FEC has become problematic in situations when the FEC fails to clearly articulate its regulatory interpretations in a consistent manner. The court ought to defer to the Commission only after carefully scrutinizing the FEC's prior actions.

In light of the Congress's and the President's failure to act and their interest in perpetuating the status quo, the federal courts must not only scrutinize their actions, but also actively seek to remedy the inequities that have emerged in the current system. This requires addressing the regulatory inconsistencies that have emerged since the Supreme Court ruled in *Buckley*. The inequities and disparities in the current system of campaign finance are likely to persist unless the courts harmonize the law as applied to similarly situated political entities.

1471 (D.C. Cir. 1992) (*NRSC*). In *NRSC*, the court refused to defer to the FEC's interpretation of a regulation due to its failure to provide any "administrative construction" of the regulation in question. *Id.* at 1475-76. The court stated,

But what, in this case, is the Commission's construction? Do we look to the Commission's litigating position, in which it supports the district court's reading of "direction or control"? Do we rely on the presumably identical reading of the regulation by the three Commissioners who voted in favor of finding probable cause? Or do we defer to the contrary interpretation of the three Commissioners who voted against pursuing the complaint?

Id. at 1476.

IV. TOWARDS A POST-BUCKLEY APPROACH TO THE REGULATION OF POLITICAL PARTIES

The decision in *CRFCC* manifests the need for courts to adopt a more aggressive attitude in the regulation of campaigns and elections. The courts must address practices that emerge as a result of prior legislation and judicial decision. They must then seek to rectify and harmonize any inequities that emerge over time with respect to the rights and abilities of political actors. These concerns manifest themselves in *CRFCC*. The court limited its analysis to the prevention of corruption as justification of the limitation placed upon political parties to make independent expenditures. The traditional interpretation of corruption is not applicable to political parties and must be abandoned. Additionally, the court did not address the dearth of analysis as to the fundamental similarity between First Amendment rights of independent political committees and political parties. The First Amendment rights of each should encompass independent expenditures. Although parties and independent political committees are different and should be subject to somewhat different regulations, independent committees are not entitled to greater speech and associational rights than political parties.

A. *Political Parties Are Not Logically Subject to Corruption Analysis*

The policy concern of preventing corruption is central to the analysis of the Tenth Circuit in its refusal to recognize that limitations on the ability of political parties to make independent expenditures constitute a violation of the First Amendment speech and associational interests of political parties.⁸⁰ In *Buckley*, the Supreme Court held that limitations on campaign contributions did not violate the First Amendment as they served to prevent "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."⁸¹ The Court's analysis focused upon the belief that political contributors may exact "political quid pro quo's"⁸² from candidates. Thus,

80. See *CRFCC*, 59 F.3d at 1023-24.

81. *Buckley*, 424 U.S. at 25.

82. *Id.* at 26.

prevention of "corruption" is the "single narrow exception to the rule that limits on political activity [are] contrary to the First Amendment."⁸³

This view of corruption has been inadequately analyzed in decisions following *Buckley*.⁸⁴ First, the *Buckley* Court's corruption analysis emerged at a time when independent political committees played an insignificant role in campaigns.⁸⁵ This is important because today independent expenditures⁸⁶ on behalf of a candidate may play a more significant role in a candidate's election than the financial assistance of direct contributors.⁸⁷ The Court in *Buckley* believed that independent expenditures provided little assistance to candidates and therefore held little potential for corruption, whereas contributions were inherently corrupting.⁸⁸ This view has been questioned by both academics⁸⁹ and members of the Court.⁹⁰

83. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-97 (1981); see also *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 225 (1989) (noting such burdens must serve "a compelling governmental interest").

84. See Kenneth J. Levit, *Campaign Finance Reform and the Return of Buckley v. Valeo*, 103 YALE L.J. 469, 473 (1993) ("[T]he Court established a dichotomy that has since governed campaign-finance regulation [T]he Court understood the corruption risk solely in terms of the threat of quid pro quo corruption—dollars given in return for political favors. Large contributions heightened this risk while unrestrained expenditures did not.").

85. *Buckley*, 424 U.S. at 47 (noting that independent committees "may well provide little assistance to the candidate's campaign"); see also Wilbur C. Leatherberry, *Rethinking Regulation of Independent Expenditures by PACs*, 35 CASE W. RES. L. REV. 13, 35-38 (1984) (discussing the history of corruption analysis and its current meaninglessness as applied to independent expenditures).

86. In 2 U.S.C. § 431(17) (1994), the statute defines an independent expenditure as one "made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate."

87. See *infra* notes 152-57 and accompanying text.

88. See Andrew P. Buschbaum, *Campaign Finance Re-Reform: The Regulation of Independent Political Committees*, 71 CAL. L. REV. 673, 683 (1983) (noting that the Court mistakenly differentiated between the corrupting influence of expenditures and contributions based upon its belief that independent expenditures were ineffective and that such expenditures were truly independent).

89. See, e.g., Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1063 (1985) (stating that the view adopted by the Supreme Court "may no longer support a different level of scrutiny for contribution[s] than for expenditure[s]"); Jeffrey M. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273, 1355 n.304 (1983) (The contribution-expenditure distinction fails to recognize that independent expenditures may be corrupting: "The larger and more exceptional the expenditure, the more likely it is that the candidate will notice and respond to it, even without any direct coordination or prearrangement."); An-

The court followed that analysis in *CRFCC*, holding that “[t]he opportunity for abuse is greater when the contributions (or in the instant case, coordinated expenditures) derive from sources inherently aligned with the candidate, rather than with independent expenditures.”⁹¹ The problem posed by this distinction is best illustrated in the case of *Federal Election Commission v. National Conservative Political Action Committee*⁹² (*NCPAC*). In *NCPAC*, the Court struck down a limitation on independent expenditures furthering the campaign of a presidential candidate accepting public financing.⁹³ The Supreme Court found that no financial “quid pro quo” exists when an independent expenditure is made in support of a candidate.⁹⁴ In its decision, the Court noted,

The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.⁹⁵

By reaching this conclusion, the *NCPAC* Court has rendered the corruption analysis largely meaningless because independent

drew Stark, *Strange Bedfellows: Two Paradoxes in Constitutional Discourse over Corporate and Individual Political Activity*, 14 *CARDOZO L. REV.* 1343, 1347 n.11 (1993) (rejecting the *Buckley* distinction and noting that “few constitutional jurists and scholars” continue to support such a distinction); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 *COLUM. L. REV.* 1390, 1395 (1994) (“[I]t is not clear that this distinction is relevant, since expenditures on behalf of a candidate can create some of the dangers of contributions.”).

90. Justice Marshall has stated, “I disagree that the limitations on contributions and expenditures have significantly different impacts on First Amendment freedoms. . . . Thus, I do not see how one interest can be deemed more compelling than the other. . . . I am now unpersuaded by the distinction established in *Buckley*.” *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U.S. 480, 520-21 (Marshall, J., dissenting). Furthermore, he noted in a footnote that originally three of the eight Justices that had heard *Buckley*, Burger, C.J., White, J. and Blackmun, J., held the same view. *Id.* at 520 n.*.

91. 59 F.3d at 1024.

92. 470 U.S. 480 (1985).

93. *Id.* at 482. In 26 U.S.C. § 9012(f) (1994), the statute makes it a criminal offense for an independent political committee to expend more than \$1,000 to further the campaign of a Presidential candidate who elects public financing of the candidate’s general election campaign.

94. *NCPAC*, 470 U.S. at 497 (“The hallmark of corruption is the financial *quid pro quo*: dollars for political favors. But here the conduct proscribed is not contributions to the candidate, but independent expenditures in support of the candidate.”).

95. *Id.* at 498.

expenditures have the same potential for corruption as contributions.⁹⁶ In light of this view of the corrupting influence of independent expenditures, the distinction between independent expenditures, which are not contributions, and coordinated expenditures, which are classified as contributions, is now unclear.⁹⁷ This problem is magnified when courts adhere to the "quid pro quo" view of corruption while appearing to find that independent expenditures do not produce the potential for such arrangement.⁹⁸ As a result of the decisions in *Buckley* and *NCPAC*, independent political committees may provide large contributions to candidates in the form of independent expenditures. The Supreme Court has held that the potential for corruption posed by such expenditures is insufficient to justify the intrusion upon the speech rights of such committees.⁹⁹ However, the campaign expenditures of political parties remain limited due to the questionable belief that parties can corrupt their own candidates.¹⁰⁰

This dichotomy is problematic. Independent political committees generally have a much narrower focus and narrower base of support than do political parties. Today, independent political committees generally take the form of Political Action Committees (PACs). Although the direct contributions of such organizations are limited,¹⁰¹ their ability to undertake other indirect campaign activ-

96. The facts in *NCPAC* illustrate the superficial distinction between coordinated and independent expenditures. *NCPAC* received support from Ronald Reagan in its fundraising as early as 1975. *NCPAC's* director, John Dolan, had a brother who worked for Reagan in the 1980 election. Moreover, *NCPAC's* offices were housed in the same building as several important Reagan campaign officials. Buschbaum, *supra* note 88, at 675 n.15.

97. The Tenth Circuit noted,

The *Buckley* opinion distinguished between independent expenditures . . . and coordinated expenditures. The *Buckley* opinion unequivocally stated that controlled or coordinated expenditures are treated as "contributions rather than expenditures" . . . Although *Buckley* found the ceiling on independent expenditures failed to serve substantial enough government interests to be constitutional, it reached the opposite conclusion as to limitations on expenditures by national or state political parties.

CRFCC, 59 F.3d at 1020 (quoting *Buckley*, 424 U.S. at 46-47 n.53, 55-59 n.67).

98. See, e.g., *id.* at 1024.

99. *NCPAC*, 470 U.S. at 501.

100. See *infra* notes 104-14 and accompanying text.

101. Under 2 U.S.C. § 441a(2) (1994),

No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$5,000;

ities are not.¹⁰² Along with this, the prohibition on independent expenditures by political parties establishes a system that provides little regulation of political committees; political parties are subject to direct voter control where as independent political committees are only subject to control by the populace indirectly.¹⁰³

The "quid pro quo" view of corruption is not logically applicable to political parties. It is difficult to envision how an individual who has been selected by a political party can be corrupted by the contributions of the party.¹⁰⁴ The candidate has been selected because the candidate's views and opinions correspond to those held by other members of the party.¹⁰⁵ It is unclear why it is an "essential feature of democracy" for a candidate to modify a position as a result of a PAC's independent expenditure,¹⁰⁶ but it is corrupt for a candidate to receive the benefit of a similar expenditure by the party whose banner the candidate carries.¹⁰⁷

In *Buckley*, the Supreme Court refused to find that preventing corruption would adequately justify limitations on independent expenditures;¹⁰⁸ however, it never applied that analysis directly to

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed \$15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed \$5,000.

102. See WILLIAM CROTTY, *AMERICAN PARTIES IN DECLINE* 133 (2d ed. 1984) (noting that PACs aggressively engage in activities other than contributions to candidates, such as supplying support personnel for candidates they favor or recruiting candidates to oppose candidates favored by the party).

103. See *infra* notes 142-45 and accompanying text.

104. See Kirk J. Nagra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 *FORDHAM L. REV.* 53, 105 (1987) (noting that the ability of parties to select candidates differentiates them from other political actors).

105. *Id.*

106. See *supra* note 95 and accompanying text.

107. See Nagra, *supra* note 104, at 105-06 (noting that parties are inherently incapable of "quid pro quo" exchanges).

108. 424 U.S. at 45. The Court noted,

It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign. Yet no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office.

Id.

political parties. It is this view of preventing corruption that the Tenth Circuit used to justify rejecting the counterclaim of the Colorado Republicans. The court focused on the finding that the First Amendment rights of the Colorado Republicans had not been infringed,¹⁰⁹ stating, "We cannot say the dangers of domination that underlay the Supreme Court's acceptance of the constitutionality of contribution limits are not present in political party expenditures."¹¹⁰ The court feared domination of pre-primary expenditures by incumbents.¹¹¹ However, the court explicitly deferred to the expertise of the same incumbents in Congress who wrote the statute.¹¹² In this case, neither party had nominated a candidate and no incumbent sought reelection, bringing the applicability of corruption analysis into question. By adhering to the analysis of corruption as developed in another context, the Tenth Circuit failed to seize the opportunity to grant political parties the same speech rights possessed by every American individual and independent political committee. The court found "corruption" or the "appearance of corruption" to exist where there was actually little possibility of its occurrence.

The view of corruption espoused in *Buckley* emerged out of an environment in which independent expenditures had not yet become important or effective.¹¹³ Moreover, direct contributions had been proven to exhibit the kind of corruption the Court feared and identified.¹¹⁴ This situation has changed since the decision in *Buckley*.

109. 59 F.3d at 1024.

110. *Id.*

111. *See id.*

112. *Id.*

113. Buschbaum, *supra* note 88, at 683; *see also* Leatherberry, *supra* note 85, at 21 (noting, however, that "[a]fter Buckley, all PACs had an incentive to make independent expenditures rather than contributions.>").

114. The Court of Appeals for the D.C. Circuit addressed the history of campaign finance abuses giving rise to concerns of corruption or the perception of corruption in its decision in *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975). The court relied on the abuses that occurred in the 1972 campaign as support for the need for campaign finance reform. *See id.* at 839-40. The court specifically noted the \$2 million contribution by the dairy producers to support Nixon's reelection and the appearance that the contributions resulted in Nixon modifying policies to favor the industry. *Id.* at 839 n.36. Moreover, the court noted that for the purpose of providing a basis for regulating campaign contributions, the perception or appearance of corruption was sufficient to justify regulation even if actual corruption could not be shown. *Id.* With respect to contributions to members of Congress, the court identified contributions by H. Ross Perot as an example of "lavish contributions by groups or individuals with special interests to legislators from both parties." *Id.* at 839 n.37.

Independent political organizations have become more astute and effective in providing indirect contributions to candidates. It is not apparent, however, that the Supreme Court would necessarily hold that the fear of corruption could justify restraints on the speech and associational rights of political parties, as the contribution limits imposed on parties were never analyzed in such a context.¹¹⁵ The position adopted by the Tenth Circuit—that 2 U.S.C. § 441a(d)(3) prevents parties from corrupting candidates, and therefore constitutes a permissible imposition upon political speech—is a questionable basis for limitation of the First Amendment as the courts have not analyzed the ability of political parties to corrupt their own candidates.

B. Political Parties Are Entitled to the Same Rights as Exercised by Independent Political Committees

The Tenth Circuit rejected the First Amendment claim of the Colorado Republicans, holding that limitations on coordinated contributions made by political parties constituted “a permissible burden on speech and association.”¹¹⁶ The court noted that the FEC believed that *Buckley* and its progeny stood for the premise that distinctions between independent expenditures and contributions were constitutionally relevant.¹¹⁷ As previously mentioned, the court also found that the potential for corruption is greater when the source is “inherently aligned with the candidate.”¹¹⁸ While this may be true, application of this view to political parties is questionable. The court noted that “[t]he same reasoning the Supreme Court used to uphold the constitutionality of other contribution limitations applies when analyzing the constitutionality of limits on coordinated expenditures by political committees.”¹¹⁹ However, it then qualified its statement in a footnote that recognized that *Buckley* never reached the First Amendment implications of the regulation to political parties.¹²⁰

The court supported its decision by providing various justifications for limiting coordinated expenditures. Section 441a(d)(3) not only prevented corruption, but it also equalized “the relative ability

115. See *Buckley*, 424 U.S. at 59 n.67.

116. *CRFCC*, 59 F.3d at 1023.

117. *Id.* at 1023-24.

118. *Id.* at 1024.

119. *Id.* (footnote omitted).

120. *Id.* at 1024 n.11.

of all citizens to affect the outcome of elections.”¹²¹ Moreover, these limitations offered a means to limit campaign costs and enhance access to the political process.¹²² However, in *Buckley*, after noting the existence of such benefits to elections, the Court stated that “[i]t is unnecessary to look beyond the Act’s primary purpose—to limit the actuality and appearance of corruption” to justify limits on campaign contributions.¹²³ These justifications for upholding the limitation found in § 441a(d)(3) were not accepted in *Buckley*, and were not applied to political parties.¹²⁴

The *CRFCC* court recognized that political parties and their activities do differ from the independent expenditures and activities of independent political committees. However, contrary to the court’s claim that parties present a greater threat of corruption than entities making independent expenditures,¹²⁵ political parties are the only political actors that can promote the goals Congress sought to promote when it originally adopted the FECA.¹²⁶ Furthermore, it is not clear that the parties can corrupt candidates they have selected by making coordinated expenditures on their behalf.¹²⁷ As previously discussed, the corruption analysis has only been applied to situations in which *individuals* or *independent political committees* engaged in expenditures and contributions.¹²⁸ Prior to *CRFCC*, there had never been an explicit discussion or ruling on the issue as it relates to political parties.

Parties are central to American politics. Although their power and roles have declined, they are essential elements to overcoming the disassociation Americans have with the political system. The decline of the party and the rise of the independent political committee have coincided with the adoption of the FECA and *Buckley*. Allowing parties to fully exercise their First Amendment rights may facilitate a general improvement in both the perceived and the actual quality of American politics and elections.

121. *Id.* at 1024 (citing *Buckley*, 434 U.S. at 26).

122. *Id.*

123. *Buckley*, 424 U.S. at 26.

124. *See id.* at 24-29 (discussing contribution limitations imposed on individuals).

125. *CRFCC*, 59 F.3d at 1024.

126. *See Nahra, supra* note 104, at 87 (noting that parties create an emotional link between the populace and elected officials which may enhance and individual’s sense of personal involvement and increase institutional legitimacy).

127. *See Clarissa Long, Note, Shouting Down the Voice of the People: Political Parties, Powerful PACs, and Concerns About Corruption*, 46 STAN. L. REV. 1161, 1188-89 (1994).

128. *See supra* notes 42-62 and accompanying text.

Political parties can bring diverse political views of Americans together. The parties are able to limit the destructive impact of factionalism by providing a structure to bring divergent social and ideological groups together.¹²⁹ Independent political committees represent narrow views and agendas. They possess significant but disproportionate power due to their ability to raise money and focus the support of their followers upon limited issues.¹³⁰ Parties provide an effective counter to the divisive and destructive influence of independent political committees.¹³¹ If political parties were able to increase their financial support for their own candidates, they could decrease the reliance on and diminish the power of independent political groups.¹³² Elections would be enhanced if parties could guarantee that competent candidates would have the resources to effectively run campaigns.¹³³ Currently, many congressional races are under-contested because challengers often do not have the financial resources to challenge incumbents¹³⁴ or the independently wealthy.¹³⁵ If the parties provided candidates with

129. See Long, *supra* note 127, at 1176 n.123; see also Lloyd N. Cutler, *Now Is the Time for All Good Men . . .*, 30 WM. & MARY L. REV. 387, 389 (1989) (arguing that national political parties are broadly based and cut across the narrow interests represented by the factions that James Madison feared).

130. See Long, *supra* note 127, at 1174.

131. *Id.* at 1173.

132. See Nahra, *supra* note 104, at 86.

133. *Id.* at 107.

134. Incumbency provides the greatest security for members of Congress seeking reelection. In 1988, only six incumbent Representatives of 408 seeking reelection lost, and five incumbent Senators lost. Richard A. Ryan, *Anger at Politicians Won't Result in Loss of Jobs for Congress*, GANNETT NEWS SERVICE, Oct. 11, 1990, available in LEXIS, News Library, Arcnws File. In the 1990 congressional elections, this was evidenced by the fact that even though Americans expressed great dissatisfaction with Congress, 96% of incumbent House members and 96.9% of Senators were reelected. Elaine S. Povich, *In Congress, Money Talks—and Re-elects*, CHI. TRIB., Nov. 20, 1990, at News 1, News 10. Many elections are non-competitive due to underfunded challengers or incumbents who raise enough money to preempt the campaigns of legitimate challengers. In 1990, 95% of House incumbents seeking re-election were either unopposed or had financially non-competitive opponents. Only 23 of 405 incumbent members faced challengers with more than 50% of the incumbent's financial resources. *Id.*

135. This trend has coincided with the rise of wealthy candidates who are willing to spend millions of their own money in an attempt to get elected. Michael Huffington of California has set records for expenditures of personal wealth in elections for the House and Senate. In 1992, Huffington spent \$5.2 million of his own money to get elected to the House of Representatives. Glenn F. Bunting, *Newcomers Quickly Join the PAC Pursuit*, L.A. TIMES, Sept. 10, 1993, at A3. Huffington then set the record for personal expenditures for a Senate election when he spent \$27.8 million of his own money in his failed attempt to defeat Diane Feinstein in the 1994 California senatorial election. Craig Winneker & Amy Keller, *Eight Well-Heeled Freshmen Make Our Annual List of*

sufficient financial support to effectively contest elections, there may be an improvement in both party competition and the public view of American politics.¹³⁶ The parties may make their candidates more attentive to the candidates actual constituents and the issues concerning them by reducing the reliance of such candidates on PACs and independent expenditures by independent political committees. Candidates who have been weaned off of this money may become more responsive to the public.¹³⁷

Allowing parties to exercise the same speech and associational rights as individuals and independent political committees may infuse greater accountability and responsibility into our political system. As currently formulated, the limitation on campaign contributions by political parties prevents political parties from campaigning against their own candidates.¹³⁸ It is presumptuous to assume that political parties always endorse each of their candidates identically,¹³⁹ or even at all.¹⁴⁰ It is impossible to justify

Congress's Wealthiest Members, ROLL CALL 50, Jan. 23, 1995, available in LEXIS, News Library, Curnws File. The fifty wealthiest members of the House and Senate have, individually, net worths of at least \$2 million. *Id.*

136. See Long, *supra* note 127, at 1176 nn.120-28 (discussing the need for and the benefits from enhanced party competition).

137. See *id.* at 1179-80.

138. As currently written, 2 U.S.C. § 441a(d) (1994) and 11 C.F.R. § 110.7 (1994) limit expenditures by parties. Once a committee assigns its rights to make expenditures under these statutes and regulations, and once the limits are met, the party is foreclosed from further contributions or expenditures in that election. See 2 U.S.C. § 441a(d)(2) to (d)(3); 11 C.F.R. § 110.7(a)(2), (b)(2). Thus, if a party campaigns against its nominee, it would be limited to the amount in the statute or the amount it had not expended.

139. See Long, *supra* note 127, at 1174 (noting that "[a] political party does not display identical support for all its candidates").

140. Since 1980, the Republican party or committees within the party have broken from supporting Republican candidates for Congress on at least two significant occasions. In 1982, some California Republican leaders and local committees launched the write-in campaign of Ron Packard after they discovered that the party's nominee, Johnnie Crean, had engaged in questionable practices in the primary. *The House: Pipeline and Out of Line; Scout's Honor*, TIME, Oct. 25, 1982, at 37, 37. Furthermore, the local Republican's conduct was directly contrary to that of the national party, which provided a contribution of \$50,000 and the endorsement of President Reagan. *Id.* Packard went on to win the election. Barry M. Horstman, *Four Incumbents Heavily Favored in Congressional Races*, L.A. TIMES, May 22, 1986, at B1.

The 1990 Louisiana election for the Senate resulted in the Republican party repudiating its nominee, former Klansman, David Duke and endorsing the Democrat incumbent Bennett Johnston. Louisiana has a unique open primary system in which all candidates compete against each other regardless of party affiliation. If no candidate receives a majority of the votes, the top two vote-getters face each other in the general election. Hugh Aynesworth, *Duke's Spector Forces GOP Pick Out of Race*, WASH. TIMES, Oct. 5, 1990, at A1, A11. When mainstream Republicans fared poorly in the polls, Republicans feared

limitations on party expenditures that prevent the party from spending money to defeat a candidate nominated for office by the party who is inimical to the interests and beliefs of the party. Parties must have the ability to support or oppose candidates.¹⁴¹ Without such power, it is difficult for them to maintain credibility. If party members disagree with the actions of party leadership, they must have the opportunity and ability to express themselves as independent members of the party without having their speech and association rights usurped by the party's collective ability to make expenditures in conjunction with general elections.

The voters may express their approval or disapproval with political parties through competition between the parties. This is not the case with independent political committees. If voters disapprove of a party's message, contributors,¹⁴² or direction, they may vote against a party.¹⁴³ No such check exists on independent political committees. Although voters may turn against candidates who are the "beneficiaries" of independent expenditures,¹⁴⁴ no mechanism exists for directly rejecting the message of the expendi-

that Duke would finish second to Johnston and that anti-incumbent sentiment would prevent Johnston from obtaining a majority. *Id.* Thus, the national party denounced Duke, eight Republican members of the Senate endorsed Johnston, and the Republican candidate endorsed by President Bush withdrew after he lost the backing of the national party, which feared that he would be unable to defeat Duke and finish second to Johnston in the primary election. *Id.*

141. See *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989). In discussing California's prohibition on primary election endorsements by political parties, the *Eu* Court stated, "Barring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association. It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments." *Id.*

142. See Long, *supra* note 127, at 1188.

143. See *id.* An excellent example of this check on parties is the 1993 Canadian election. In that election, Canadian voters sent a message to the ruling Progressive Conservative party by universally rejecting it. The party, which had 155 seats in the House of Commons and were lead by Prime Minister Kim Campbell, lost all of its seats but two. Arnold Beichman, *Turning a Corner in Canada*, WASH. TIMES, June 12, 1994, at B4.

144. An example of such voter backlash occurred in the 1982 Maryland Senate campaign. NCPAC unsuccessfully spent over \$650,000 to defeat Senator Paul Sarbanes. Bart Barnes, *Co-founder of NCPAC John (Terry) Dolan Dies*, WASH. POST, Dec. 31, 1986, at B6. As a result of the spending, Sarbanes was able to energize his nationwide fundraising. Many residents of Maryland were offended by the PACs activities and Sarbanes capitalized on their animosity towards outside influence on the campaign. Michel McQueen, *Group's Anti-Mikulski TV Ad Draws Criticism; Chavez Disassociates Himself from Effort*, WASH. POST, Aug. 30, 1986, at B5 (discussing the Sarbanes situation and the activities of the Anti-Terrorism American Committee making independent expenditures against then Representative Barbara Mikulski who was seeking the Democratic nomination to the Senate from Maryland).

tures made by the independent committees. Parties infuse the system with a measure of accountability. However, accountability is eclipsed in a system that favors those who succeed in obtaining support from independent sources.¹⁴⁵

If parties were able to increase their expenditures to support their candidates, the factionalism that exists in American politics today may decline. Parties provide a strong opponent to the influence of independent political committees.¹⁴⁶ Parties offer structures that can facilitate consensus and overcome the divisiveness that seems to have increased in American politics.¹⁴⁷ Any interpretation of the law that differentiates First Amendment rights of political parties from those of independent political committees creates a perverse system of political expression and accountability. The strength of political parties and political committees is partially measured by their ability to mobilize their supporters. Mobilization today consists of raising money to either be contributed¹⁴⁸ to the candidate by a party or expended¹⁴⁹ on behalf of the candidate by an independent political committee. In *NCPAC*, the Court stated,

We also reject the notion that the PACs' form of organization or method of solicitation diminishes their entitlement to First Amendment protection. The First Amendment freedom of association is squarely implicated in these cases. *NCPAC* and *FCM* are mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to "amplif[y] the voice of their adherents."¹⁵⁰

Campaign finance law exists in a dynamic world.¹⁵¹ Since the decision in *Buckley*, party cohesion has declined considerably,¹⁵² PACs have risen in importance,¹⁵³ and individual contributors

145. See *supra* notes 134-35 and accompanying text.

146. See Long, *supra* note 127, at 1173.

147. See *id.* at 1177.

148. See *supra* note 31 and accompanying text.

149. See *e.g.*, *supra* note 30 and accompanying text.

150. *NCPAC*, 470 U.S. at 494 (quoting *Buckley*, 424 U.S. at 22).

151. See *supra* note 108.

152. See *SORAU*, *supra* note 39, at 241 (noting that even though parties have the ability to raise significant amounts of money, they appear to be unable to energize public opinion and rally popular support as they once were able to); Long, *supra* note 127, at 1163 (noting that "political parties have lost much of their control over their candidates' actions"); Nahra, *supra* note 104, at 88 n.225 (noting that the change in support of American parties is a "dealignment" rather than a realignment).

153. See Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18

have become less important in political fundraising.¹⁵⁴ Decisions after *Buckley* have expanded the power and role of independent political committees. Most independent expenditures have become anything but independent.¹⁵⁵ *NCPAC* extended the impact of *Buckley* by rejecting limitations on independent expenditures on behalf of presidential candidates.¹⁵⁶ Thus, virtually no limit exists upon the power and ability of entities other than political parties to expend unlimited amounts of money in federal elections. Furthermore, the lack of restraint upon such expenditures provides PACs with the opportunity not only to contribute to a candidate, but also spend large amounts on the candidate's behalf.¹⁵⁷ The question the courts should address is whether this fundamental shift in political power is beneficial to our system.

If the expenditures of PACs are "entitled to full First Amendment protection,"¹⁵⁸ then political parties—entities arguably offering greater benefits to the political process than the independent political committees—must be given the same protection. The benefits of greater expenditures by political parties clearly outweigh the potential for parties corrupting their own. When the reality of independent expenditures versus coordinated expenditures is viewed as more than the superficial expenditure versus contribution distinction that currently exists, it becomes obvious that although parties differ from independent committees, their First Amendment interests are entitled to the same protection.

HOFSTRA L. REV. 213, 219 n.33 (1989) (arguing that the reforms and decisions of the 1970s "ushered in a greatly enlarged PAC role").

154. See LARRY J. SABATO, *PAYING FOR ELECTIONS* 61 (1989) (noting that between 1978 and 1984 individual contributions of less than \$100 to candidates for Congress declined from 38% of total contributions to 20%). Additionally, individuals have been replaced as the source of a majority of campaign contributions. Between 1978 and 1984 campaign contributions by individuals to congressional candidates declined from 61% to only 49%. *Id.* at 83 n.2.

155. See Buschbaum, *supra* note 88, at 675 n.15 (discussing the close relationship between entities making independent expenditures on behalf of a candidate with the staff, consultants, and supporters of the candidate).

156. See *supra* notes 92-97 and accompanying text.

157. See Long, *supra* note 127, at 1180 (arguing that limitations on PAC contributions have lead many to pursue independent expenditures as a means of exerting corrupt influences).

158. *NCPAC*, 470 U.S. at 496.

VI. CONCLUSION

The decision of the court in *CRFCC* demonstrates that issues exist that justify a change in the approach courts have taken in addressing campaign finance. First, courts must become more active and less deferential to Congress, the FEC, and prior judicial decisions in light of the results produced by *Buckley* and its progeny. Next, inconsistencies exist in the application of quid pro quo corruption analysis to political parties. Finally, even though parties differ from independent political committees, they must have the same First Amendment speech and association rights. It is clear that there is a need for a definitive decision about the First Amendment rights of political parties. There is no longer any justification for the disparate treatment of independent expenditures and coordinated expenditures. Political parties must be allowed to exercise the same First Amendment rights as any other actor or entity in the political arena.

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