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Independent Expenditures by PACs in Federal Elections: Is Election Law Reform Needed Again

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COMMENTS

INDEPENDENT EXPENDITURES BY PACs IN FEDERAL ELECTIONS: IS ELECTION LAW REFORM NEEDED AGAIN

I. INTRODUCTION

In 1974 Congress amended the Federal Election Campaign Act[1] (FECA) to limit the amount of money individuals, political committees, and other groups could contribute to candidates in federal elections.[2] FECA also limited the amount of money that individuals, political committees, and groups could spend independently to support or oppose a federal candidate.[3] In addition, Congress enacted the Presidential Election Campaign Fund Act to prohibit presidential candidates who opt for public campaign financing from receiving campaign contributions.[4] Similar to FECA, the Fund Act limited the amount of money a political committee could spend independently in support of a presidential candidate.[5]

In separate cases in 1976[6] and 1985,[7] the Supreme Court held the limitations on independent expenditures in both the FECA and the Fund Act

1. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (current version at 2 U.S.C. §§ 431-455 (1982)). Unless otherwise indicated, all citations in this Comment are to the current versions of all statutes.
2. 2 U.S.C. § 441a (1982).
3. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 101, 88 Stat. 1263, 1265 (repealed 1976).
4. 26 U.S.C. § 9012(b) (1982).
5. *Id.* § 9012(f).
6. Buckley v. Valeo, 424 U.S. 1 (1976).
7. FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985).

were unconstitutional. As a result, individuals, groups, and political committees are limited in the amount of money they may contribute directly to a federal candidate, but they have no limitation on the amounts they may spend independently of a candidate to influence the outcome of a federal election.

This Comment examines the impact of these Supreme Court decisions on federal election campaigns. It focuses on the increasing use of independent expenditures by political action commmittees (PACs) to influence federal elections, and examines whether these expenditures threaten to introduce into federal elections the corruption which the FECA and Fund Act were intended to prevent. It explores the constitutional boundaries within which any legislative attempts to control independent expenditures must operate. Finally, it proposes changes in federal election laws which can reduce the problems independent expenditures cause in federal campaigns.

II. THE FECA AND THE FUND ACT

For much of this century,[8] Congress has attempted to prevent corruption in federal elections. The decade of the 1970s witnessed the most fruitful period of election reform legislation.[9] Congress passed the Federal Election Campaign Fund Act of 1971[10] (FECA) to promote disclosure of campaign contributions and expenditures and to limit the amount of money federal candidates could spend on media advertising.[11] In the wake of the Watergate

8. For example, the Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (1907) (current version at 2 U.S.C. § 441b (1982)) prohibited national banks and corporations from contributing money to federal candidates or political parties. The Federal Corrupt Practices Act of 1925, 43 Stat. 1070 (current version at various sections of 2 and 18 United States Code) limited the amount of money that could be contributed in some federal campaigns and imposed some record keeping and disclosure requirements on contributors. The Act, however, had many loopholes and was largely ineffective. The Hatch Act of 1939, Pub. L. No. 76-251, 53 Stat. 1147 (current version at various sections of 1, 5, and 18 United States Code), limited participation by federal workers in federal elections. The War Labor Dispute Act of 1943, 9, 57 Stat. 167-68 (1944) and the Taft-Hartley Act of 1947, 304, 61 Stat. 136 (1948), prohibited labor unions from making contributions in federal elections (current prohibition at 2 U.S.C. § 441b (1982)). For a discussion of the history of legislation to prevent corruption in federal elections, see Claude and Kirchhoff, *The Free Market of Ideas, Independent Expenditures, And Influence*, 57 N.D.L. REV. 337, 339-42 (1981); CONGRESSIONAL QUARTERLY, DOLLAR POLITICS 3-8 (3d ed. 1982).

9. Claude and Kirchhoff, *supra* note 8, at 340-42.

10. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (current version at 2 U.S.C. §§ 431-455 (1982)).

11. The Act required that anyone wishing to purchase an advertisement in newspapers, or on TV or radio, first obtain a certification from the candidate the ad was intended to benefit. The certification plan counted these independent expenditures as part of the candidate's overall spending lid on media advertising. With-

scandal,[12] Congress in 1974 rewrote much of FECA in an attempt to more effectively control the corrupting influence of money in federal elections.[13]

The revised FECA limited to $1,000 the amount of money an individual could contribute to a federal candidate in each election.[14] Groups which established themselves as multicandidate political committees within the meaning of the Act were permitted to contribute $5,000 per candidate per election.[15] Individuals were limited to contributions of $5,000 to any single

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out certification being granted by the candidiate, persons and groups were prohibited from purchasing any political advertisements intended to benefit a federal candidate. A three judge district court held this process unconstitutional. ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom.* Staats v. ACLU, 422 U.S. 1030 (1975). The case would have been settled by the Supreme Court had Congress not already repealed the certification requirement. For a discussion of the certification process and its demise, see Baran, *Attempted Regulation of Independent Group Speech*, 10 N.Y.U. REV. L. & SOC. CHANGE 87, 87-89 (1980-1981).

12. The 1971 version of FECA relied on public disclosure of contributions to deter candidates from accepting large campaign contributions. The belief was that disclosure would discourage candidates from accepting large contributions in order to avoid the appearance of corruption. In any event, with public disclosure, the voters could decide themselves whether they wanted to be represented by a candidate who appeared beholden to large contributors.

The 1972 presidential election proved that disclosure itself did little to prevent large and corrupting contributions. Indeed, the law had the unintended effect of promoting large contributions prior to the effective date of the Act as the Nixon campaign rushed to collect almost $20 million, including $1.5 million in cash contributions, which it hoped to avoid disclosing. Dubious contributions included $200,000 given in an attache case and a $100,000 secret donation from billionaire businessman Howard Hughes which a Nixon confidant kept locked in a safety deposit box. More than $700,000 came in the form of illegal contributions by corporations. The largest individual donor to the campaign was a Chicago insurance executive who contributed $73,054 to reelect Nixon after the disclosure law took effect, but who later admitted to contributing more than $2 million to the campaign before the effective date of the Act. CONGRESSIONAL QUARTERLY, *supra* note 8, at 10-11.

The scramble to raise funds prior to the effective date of the Act and the eventual Watergate revelations of the huge amounts of money that poured into the Nixon campaign prior to the effective date motivated Congress to amend FECA in 1974. S. REP. NO. 689, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5587.

13. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (current version at 2 U.S.C. §§ 431-455 (1982)).

14. FECA prohibits "persons" from making contributions in excess of $1,000 to any federal candidate in each election. 2 U.S.C. § 441a(a)(1)(A) (1982). "Person" is defined to include any individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons. *Id.* § 431(11). "Election" includes any general, special, primary, or runoff election. *Id.* § 431(1). A person may, for example, make a maximum $1,000 contribution to a candidate in a primary election and another $1,000 contribution to that candidate in the general election, since each election is counted separately under FECA for contribution purposes.

15. The term "multicandidate political committee" means a political comm-

political committee in any calendar year[16] and political committees were limited to contributing $5,000 to any other single political committee in any calendar year.[17] In addition, individuals were limited to making contributions aggregating no more than $25,000 during any calendar year.[18] There was no such aggregate limitation on contributions by political committees. To prevent evasion of the contribution limits through expenditures independent of the candidate, FECA limited independent expenditures to $1,000 per candidate.[19]

FECA continued the general prohibition on contributions to candidates by banks, corporations, and labor unions.[20] This prohibition dated back to prior Congressional efforts to limit corruption in federal campaigns.[21] Under this previous legislation, corporations and labor unions were able to contribute money to candidates indirectly. Labor unions actively raised large amounts of money from voluntary member contributions and then contributed these funds to labor supported candidates.[22] Corporations could also raise voluntary contributions from employees and contribute them to candidates, but corporations were less likely than unions to do this.[23] Instead, it was corporate executives who often made large personal contributions.[24]

FECA revolutionized the role of corporations and labor unions in campaign financing by permitting them to establish political committees, termed in the Act "separate segregated funds" (SSFs), to make political contribu-

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ittee which has been registered with the Federal Election Commission for at least six months, which has received contributions from more than fifty persons, and which has made contributions to five or more candidates for federal office. *Id.* § 441a(a)(4). Multicandidate political committees may contribute up to $5,000 to a federal candidate in each election. *Id.* § 441a(2)(A). Each election is counted separately for contribution purposes.

16. *Id.* § 441a(a)(1)(C).

17. *Id.* § 441a(a)(2)(C).

18. *Id.* § 441a(a)(3). A contribution made to a candidate in a year other than the calendar year in which the election is held is considered to have been made during the calendar year in which the election is held. *Id.*

19. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 101, 88 Stat. 1263, 1265 (repealed 1976). The relevant provision reads: "No person may make an expenditure . . . relative to a clearly indentified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000." *Id.* The definition of "person" in the Act included any individual, partnership, committee, association, corporation, or any other organization or group of persons. *Id.*

20. 2 U.S.C. § 441b (1982); *see supra* note 8.

21. For a discussion of prior legislation aimed at limiting contributions by corporations and labor unions, see Adamany, *PAC's and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569, 583 (1980). *See also supra* note 8.

22. Adamany, *supra* note 21, at 583.

23. *Id.*

24. *Id.*

tions and expenditures.[25] Thus, FECA legitimized and boosted the role of corporate and labor political committees in federal campaigns.[26]

While FECA applies to all federal elections, the Presidential Election Campaign Fund Act[27] applies special rules to presidential candidates who accept public funding for their campaigns under the Fund Act. The Fund Act prohibits such presidential candidates from accepting any campaign contributions.[28] To prevent evasion of the no contribution rule, the Fund Act prohibited independent expenditures on behalf of a presidential candidate in excess of $1,000.[29]

Because FECA permitted multicandidate political committees and separate segregated funds to contribute more money to candidates than individuals or other groups could, and because FECA did not limit the total amount of contributions these favored funds could make, FECA spawned an explosion in the formation of these political committees. The number of political action committees[30] grew from 608 in 1974 to more than 4,000 today.[31]

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25. 2 U.S.C. § 441b(b)(2)(C) (1982).

26. FECA permits a corporation, labor union, or other sponsoring organization to pay from its own treasury the cost of establishing, administering, and soliciting contributions to its separate segregated fund. *Id.* § 441b(b)(2)(C). These costs can be substantial. One author writes that in 1980 corporations alone spent $20 million of treasury money to operate their SSFs. Adamany, *Political Finance and the American Political Parties*, 10 HASTINGS CONST L.Q. 497, 561 (1983). Since the corporate or labor sponsor of the SSF pays its administrative costs, all contributions made to the SSF may be contributed to candidates or spent independently on their behalf. This provision of FECA directly encouraged corporations and labor unions to form these political committees. *Id.*

This provision gives SSFs an advantage over PACs which are not connected to any sponsoring organization since these nonconnected PACs must pay their own operating expenses, thus reducing the money they have to contribute to candidates or spend independently. Brownstein, *On Paper, Conservative PACS Were Tigers in 1984—But Look Again*, 17 NAT'L J. 1504, 1505 (1985). On the other hand, SSFs are limited by FECA to soliciting contributions only from stockholders, employees, or members of their sponsoring organizations, while the nonconnected PACs have no such restrictions. 2 U.S.C. § 441b(b)(4) (1982).

27. 26 U.S.C. §§ 9001-9013 (1982).

28. *Id.* § 9012(b). Presidential candidates do accept contributions in primary elections and these may be matched with public funds. *Id.* §§ 9031-9042.

29. *Id.* § 9012(f).

30. The term "political action committee" is not defined by federal statutes. Sabato defines a PAC as either the separate, segregated campaign fund of a sponsoring labor, corporate, or trade organization, or the campaign fund of a group formed for the purpose of giving money to candidates. L. SABATO, PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES 7 (1984).

31. Boyle, *PACs and Pluralism: The Dynamics of Interest Group Politics*, 6 CAMPAIGNS AND ELECTIONS 6 (Spring 1985). The FEC classifies political action committees into six types: corporate, labor, trade/membership/health, nonconnected,

III. ELECTION LAW AND THE FIRST AMENDMENT

Much of FECA came under constitutional attack in *Buckley v. Valeo*.[32] There the Supreme Court upheld FECA's limitations on contributions to candidates, but struck down FECA's limitations on independent expenditures as violative of the first amendment. The Court noted that FECA's limitations on contributions and expenditures operated in an area of fundamental first amendment concern.[33] FECA places burdens on both associational rights[34]

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cooperative, and corporate without stock. The first four types are by far the most numerous. Corporate PACs grew from 89 in 1974 to 1,682 by 1985. During the same decade, labor PACs grew from 201 to 394 and trade/membership/health PACs from 318 to 698. Nonconnected PACs grew from 110 in 1977 to 1,053 by 1985. During this eight year period, cooperative PACs grew from 8 to 52 and corporate without stock PACs from 20 to 103. *Id.* at 7. The corporate, labor, trade/membership/health, cooperative, and corporate without stock PACs are termed "separate segregated funds" under FECA and must comply with the restrictions for SSFs. *See supra* notes 25-26 and accompanying text.

In recent years, the fastest rate of growth has occurred among nonconnected PACs. These PACs are "nonconnected" because they do not have a sponsoring organization. Boyle, *supra*, at 7. About half of these nonconnected PACs are ideological in nature. *Id.* at 6. It is these nonconnected, ideological PACs which engage most in independent expenditures. *Id.* at 12.

The distinctions between the various types of PACs and their regulation by the FEC is explained in two guides published by the FEC: FEDERAL ELECTION COMMISSION, CAMPAIGN GUIDE FOR CORPORATIONS AND LABOR ORGANIZATIONS (1985) and FEDERAL ELECTION COMMISSION, CAMPAIGN GUIDE FOR NONCONNECTED COMMITTEES (1985).

32. 424 U.S. 1 (1976) (per curiam). Numerous plaintiffs filed suit to challenge much of FECA. Plaintiffs included a presidential candidate, a senatorial candidate, a potential contributor, and several political interest groups. *Id.* at 7-8. Plaintiffs challenged FECA's contribution and expenditure limitations; FECA's reporting and disclosure provisions; FECA's establishment of the Federal Election Commission; and the public financing scheme for the presidential primary and general election campaigns established by the Presidential Election Campaign Fund Act, and the presidential primary matching funds plan. *Id.* at 11. The Supreme Court generally upheld FECA's reporting and disclosure provisions, and upheld the public financing of presidential primary and general election campaigns. *Id.* at 60-61, 85-86. However, the Court held that the FEC as established by FECA was unconstitutional because it violated the separation of powers doctrine in that some of its members were appointed by Congress rather than the president. *Id.* at 109-43. After *Buckley*, Congress remedied this problem and the FEC was able to resume operation. The Court's treatment of FECA's contribution and expenditure limitations is discussed *infra* notes 33-52 and accompanying text.

33. The Court noted that discussion and debate of public issures and candidates for office are essential to the operation of our system of government. *Buckley*, 424 U.S. at 14.

34. Giving money to a candidate helps to affiliate a person with a candidate. The Court noted that FECA's contribution limits do impinge on a person's right to affiliate financially with a candidate, but do not limit a person's right to otherwise assist personally in a candidate's campaign. However, the Court noted the FECA's

and speech rights.[35] The Court found that FECA's limitations on independent expenditures placed substantial restrictions on the quantity and diversity of speech,[36] while the limitations on contributions only marginally restricted contributors' ability to engage in speech,[37] since the Court believed a contribution to a candidate merely expressed a general sign of support for the candidate which was not dependent on the size of the contribution.[38] While the candidate of association which receives the contribution may use it for political speech, this use involves speech by someone other than the contributor, so the contributor's speech rights are not implicated.[39]

The Court believed the more serious issue regarding FECA's contribution limits was their impact on contributors' rights of political association.[40] Because the contribution limits infringed on associational rights, they were subject to strict scrutiny.[41] The Court found that the prevention of corruption and the appearance of corruption were sufficiently compelling governmental interests to justify the limitations on contributions in FECA.[42] The Court thought that the limitations were justified to prevent the contributor from obtaining a quid pro quo from the candidate in exchange for the contribution,[43] and were justified to prevent the appearance of corruption in a campaign finance system which relies on private contributions for its source of funds.[44] Applying similar analysis to FECA's limitations on contributions by political committees, the Court found limitations were also justified.[45]

$1,000 limitation on independent expenditures relative to a candidate effectively prevents associations of persons from amplifying their views. Thus, the Court believed FECA's expenditure limits more substantially burdened protected speech and associational rights than FECA's contribution limits. *Id.* at 22-23.

35. Restrictions on the amount of money that can be spent on political communication reduces the quantity of speech available to the public. *Id.* at 19.

36. The Court noted that the $1,000 limititation on independent expenditures effectively prohibits persons from communicating through the mass media, whose advertising rates far exceed $1,000. *Id.* at 19-20 n.20.

37. *Id.* at 20.

38. *Id.* at 21.

39. *Id.*

40. *Id.* at 24.

41. *Id.* at 25.

> [A]ction which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. . . . [However] . . . a 'significant interference' with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.

Id.

42. *Id.* at 26.

43. *Id.* at 26-27.

44. *Id.* at 27.

45. In order for the higher $5,000 contribution limit to apply, a political committee must have been registered with the FEC for at least six months, have received contributions from more than fifty persons, and have contributed money to

By contrast, the Court held that FECA's limitations on independent expenditures substantially burdened the right to speech and were not justified by any compelling state interest.[46] The Court held that the governmental interest in preventing corruption was not served by the independent expenditure limit.[47] The Court noted that expenditures which were not independent of the candidate, i.e, which were coordinated with the candidate's campaign, were already subject to FECA's contribution limits since FECA treats these non-independent expenditures as contributions.[48] The Court believed that the true independent expenditure did not pose a danger of extracting an improper quid pro quo from the candidate since the expenditure itself might provide little actual help to the candidate's campaign and could even be counterproductive.[49]

A second state interest advanced in support of the independent expenditure limitation was the state's interest in equalizing the abilities of individuals and groups to influence elections.[50] The Court rejected this interest, noting that the idea that government may restrict the right of some to speak in order to enhance the rights of others is foreign to the First Amendment's purpose of fostering the widest dissemination of information.[51] Thus, the Court held unconstitutional FECA's limitations on independent expenditures.[52]

Following the reasoning of *Buckley*, the Court in *FEC v. National Conservative Political Action Committee*[53] (*National Conservative PAC*) struck

at least five federal candidates. *See supra* note 15. The Court held this provision did not impermissibly infringe on associational rights. Rather, it "enhances the opportunity of bona fide groups to participate in the election process, and the registration, contribution, and candidate conditions serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees." *Buckley*, 424 U.S. at 35-36.

46. *Buckley*, 424 U.S. at 45.

47. *Id.*

48. *Id.* at 46-47.

49. *Id.* at 47.

50. *Id.* at 48.

51. *Id.* at 48-49.

52. *Id.* at 51. The *Buckley* decision also ruled on a number of other provisions of FECA not discussed elsewhere in this Comment. For example, the Court upheld the $25,000 limit on total contributions during a calendar year by an individual. *Id.* at 38. The Court struck down FECA's limitations on how much money a candidate could contribute to his own campaign. *Id.* at 52-54. The Court held invalid FECA's ceilings on overall campaign expenditures by candidates seeking federal office. *Id.* at 54-57. (The expenditure ceilings under the Presidential Election Campaign Fund Act and the presidential primary matching fund plan are valid since the candidate agrees to abide by the expenditure ceiling—and the prohibition against soliciting any contributions in the general presidential election—as a condition for receiving public funding for his campaign. A candidate may choose to decline public funding and hence not be subject to any expenditure ceilings or contribution limits in his campaign.)

53. 470 U.S. 480 (1985). The FEC and various other parties brought suit

down the Fund Act's limitations on independent exenditures by political committees.[54] The Court stated that the expenditure limitation burdened core First Amendment rights of speech and association,[55] hence mandating strict scrutiny analysis.[56] The Court found that the $1,000 limitation on independent expenditures in the Fund Act restricted the quantity of expression in presidential campaigns.[57] The Court analogized the situation to one in which a speaker is permitted to address a public hall, but denied the use of an amplifying system.[58] The Court rejected the argument that the PAC's form of organization entitles them to less First Amendment protection than individuals.[59] The Court also rejected the argument that PAC speech is speech by proxy and thus subject to limitation.[60]

The Court noted that preventing both corruption and the appearance of corruption are the only legitimate and compelling state interests that can be used to justify restrictions on campaign finances.[61] The Court believed that independent expenditures did not raise problems of corruption since there was little danger of a political quid pro quo present.[62] The Court stated that

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against two political action committees which had announced their intention to spend large sums of money independently on the Reagan campaign to help reelect President Reagan in 1984. Section 9012(f) of the Fund Act limited independent expenditures in presidential campaigns to $1,000. 26 U.S.C. § 9012(f) (1982). The Court held that the section 9012(f) limitation on independent expenditures by political committees is unconstitutional. *Id.* at 496-500.

The Court had dealt with this identical issue in a prior case. In 1980 a three judge district court held the limitation on independent expenditures in the Fund Act was unconstitutional. The Supreme Court, without issuing an opinion, affirmed by an equally divided vote. Thus, that case had no precedental value. Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980), *aff'd by equally divided court*, 455 U.S. 129 (1982) (O'Connor, J., abstaining).

54. 470 U.S. at 496-501.

55. *Id.* at 493.

56. *Id.* at 500-01.

57. *Id.* at 493-94.

58. *Id.* at 493.

59. *Id.* at 494 (The Court noted that the PAC form is a means by which many persons may join together to express their views and that this activity is protected associational activity under the First Amendment.).

60. *Id.* at 494-95. Contributors to PACs

> obviously like the message they are hearing from these organizations and want to add their voices to that message . . . . To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.

Id. at 495.

61. *Id.* at 496-97; *see also* Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981).

62. *National Conservative PAC*, 470 U.S. at 497-98. The Court stated that independent expenditures may in fact provide little assistance to a campaign and

even if the $1,000 limitation was shown to prevent potential corruption, the statute as drafted was fatally overbroad.[63]

Two other Supreme Court cases are relevant to the issue of independent expenditures. In *First National Bank of Boston v. Bellotti*, the Court held that a state could not limit a corporation's right to make expenditures to express its views on a political issue in a non-candidate referendum election.[64] The Court stated that such a limitation was not justified by any governmental interest in preventing corruption since the election involved a public issue, not a candidate from whom a quid pro quo might be extracted.[65] In *FEC v. National Right to Work Committtee (NRWC)*, the Court upheld FECA's detailed limitations on corporations' SSFs and the people from whom these SSFs may solicit contributions.[66] Unanswered by *Bellotti* and *NRWC*, however, is whether a corporation itself can be limited in making independent expenditures on behalf of a candidate rather than making such expenditures through an SSF.[67]

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could even be counterproductive. The absence of coordination of an expenditure with the candidate lessens the risk that the expenditure could be made in order to solicit an improper commitment from the candidate it is intended to benefit. *Id.*

63. *Id.* at 498. The Court noted that the statute was overbroad in that it was not limited just to multimillion dollar independent expenditures but also brought within its sweep much smaller goups which might want to spend more than $1,000 to publicize their views about a presidential candidate. The Court refused to adopt a narrow construction of the statute that might cover only rich PACs, where the potential for corruption or the appearance of corruption might be greatest, because the legislative history of the statute did not permit such a construction. *Id.* at 498-500.

64. 435 U.S. 765 (1978). A Massachusetts statute prohibited business corporations from making expenditures or contributions for the purpose of influencing referendum proposals which did not materially affect the property, business, or assets of the corporation. *Id.* at 767-68. The Court held that the statute is invalid because it violates the corporations' First Amendment rights of expression. *Id.* at 776.

65. *Id.* at 790.

66. 459 U.S. 197 (1982). Specifically, the Court held that FECA's provisions which limit an SSF established by a corporation without capital stock to soliciting contributions only from "members" of the corporation are constitutional. The Court noted FECA's provisions on SSFs had several purposes. One purpose is to prevent corporations—which because of the special advantages of the corporate form of organization are able to amass great wealth—from using their wealth for political contributions to candidates in an attempt to gain commitments from them. *Id.* at 207. Another purpose is to protect persons who pay money into corporations or labor unions for purposes other than support of candidates from having their money used for political contributions. *Id.* at 208. The Court found these governmental interests were sufficient to uphold the regulations here at issue over a First Amendment challenge. *Id*; *see supra* note 26.

67. *National Conservative PAC*, 470 U.S. at 495-96. At a late stage in the publication of this comment, the Supreme Court decided this issue. The case involves Massachusetts Citizens for Life, Inc., a non-profit, anti-abortion group, which used its corporate funds to publish and distribute an election newsletter urging readers to

The Supreme Court's decisions in these election law cases have produced much criticism. The *Buckley* distinction between contribution limits, which are acceptable under the first amendment, and independent expenditure limits, which are not, has been greatly criticized. Critics claim that the Court's belief that independent expenditures are unlikely to result in corruption ignores political realities. Independent expenditures pose as much danger for creating implicit quid pro quos as direct contributions to candidates do.[68] In many instances, independent campaign expenditures are independent of the candidate in form only.[69] Even when the expenditures are independent, a candidate usually will recognize and appreciate the spenders' efforts.[70]

The legislative history of FECA suggests that the Court's decision in *Buckley* greatly reduces FECA's effectiveness as a means of controlling the corrupting influence of money in federal campaigns. Congress enacted the limitations on independent expenditures in order to make meaningful the contribution limits to candidates.[71] Without these limits on independent expenditures, a contributor is able to make the maximum contribution directly to the candidate and then spend unlimited amounts on the candidate's behalf independently. It was precisely this problem which prompted Congress to enact the independent expenditure limits in the first place.[72] Without them, Congress believed "such a loophole would render direct contribution limits virtually meaningless."[73]

Other critics attacked the Court's willingness to regard any interest other than the prevention of corruption or the appearance of corruption as a

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support candidates who had taken anti-abortion positions. The FEC argues that such expenditures can only be made from a separate segregate fund under FECA. The 1st Circuit Court of Appeals held FECA's provisions of SSFs could not be applied to a non-profit "ideological" corporation such as Massachusetts Citizens for Life since application would violate the corporation's First Amendment rights. FEC v. Massachusetts Citizens for Life, Inc., 769 F.2d 13, 23 (1st Cir. 1985). The Supreme Court affirmed. 107 S. Ct. 616 (1986).

68. Claude and Kirchhoff, *supra* note 8, at 364.

69. Comment, *Campaign Finance Re-Reform: The Regulation of Independent Political Committees*, 71 CALIF. L. REV. 673, 684 (1983). For example, a candidate may communicate with the group making independent expenditures on his behalf through the media or mutual personal contacts. Other groups actually recruit candidates for office, train them, and then make independent expenditures in support of their campaigns. *Id.* at 675.

70. Comment, *The Federal Election Campaign Act and Presidential Election Campaign Fund Act: Problems in Defining and Regulating Independent Expenditures*, 1981 ARIZ. ST. L.J. 977, 985 n.67. Justice White agrees with many of these critics. *National Conservative PAC*, 470 U.S. at 509-11 (White, J., dissenting); Buckley v. Valeo, 424 U.S. 1, 259-62 (1976) (per curiam) (White, J., dissenting).

71. S. REP. No. 689, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5587, 5604.

72. *Id.*

73. *Id.*

Missouri Law Review, Vol. 51, Iss. 4 [1986], Art. 3

sufficiently compelling interest to justify limits on independent expenditures.[74] One commentator analogizes the situation to the Court's one man, one vote decisions in reapportionment cases[75] where the Court has required political equality.[76] This critic suggests that the Court could apply a similar "one voter, one buck" analysis to uphold the expenditure limitations.[77]

Other criticism strikes at the heart of *Buckley* by asserting that the Court erred equating the expenditure of money with speech.[78] Critics taking this approach argue that money is, at most, a means of expression—not speech itself—and, therefore, subject to less protection than speech.[79]

IV. Independent Expenditures Today

Buckley and its progeny have given a green light for independent expenditures,[80] and such expenditures by PACs have increased rapidly in recent years. In 1976, PACs made $1.6 million in total independent expenditures in the presidential election.[81] In the 1984 presidential election, PACs made $16.2 million in independent expenditures in support of Ronald Reagan and

74. *National Conservative PAC*, 470 U.S. at 508-09 (White, J., dissenting); Forrester, *The New Constitutional Right to Buy Elections*, 69 A.B.A. J. 1078 (1983); Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Colum. L. Rev. 609 (1982).

75. Baker v. Carr, 369 U.S. 186 (1962).

76. Forrester, *supra* note 74, at 1080.

77. *Id.* Forrester is harshly critical of the Court's blanket statement that the "concept that government may restrict the speech of some . . . in order to enhance relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49. Forrester writes:

> This sweeping pronouncement is about as sound as a declaration that the First Amendment protects the use of bullhorns by those able to afford them to drown out other speakers in political debate. When justified, the law does equalize voices so all can hear the several messages without undue influence or advantage.

Forrester, *supra* note 74, at 1080. Forrester thinks equal protection of the law is best served by permitting Congress to equalize financial resources in campaigns through limits on independent expenditures. *Id.*

78. Wright, *supra* note 74, at 611-13. This is also the view of Justice White. Buckley v. Valeo, 424 U.S. 1, 262 (1976) (per curiam) (White, J., dissenting).

79. Forrester, *supra* note 74, at 1081; Wright, *supra* note 74, at 639.

80. 2 U.S.C. § 431(17) (1982).

> The term 'independent expenditure' means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is 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.

Id.; *see also* 11 C.F.R. 109 (1985).

81. Cong. Q., March 23, 1985, at 533.

$1.2 million in independent expenditures in support of Walter Mondale.[82] In the 1984 House and Senate races, PACs made more than $5 million in independent expenditures in support of various candidates,[83] a large increase from the $317,000 spent independently in the 1978 congressional races.[84]

It is the nonconnected, ideological PACs, however, which have done most of the independent spending in recent elections.[85] These PACs are particularly well suited to make independent expenditures since they have a national contribution base founded on their direct mail solicitation activities.[86] These PACs find that the $5,000 per candidate per election contribution limit is too low to achieve their objectives, so they prefer to make independent expenditures to boost their influence on an election's outcome.[87] By contrast, business and labor SSFs have generally chosen to use their money to make direct contributions to candidates rather than spend independently.[88]

Independent expenditures are most effective in close races.[89] Effective independent spending may shift from two to eight percent of the vote to a

82. Brownstein, *supra* note 26, at 1504. Three conservative ideological PACs—the Fund for a Conservative Majority, RuffPAC, and the National Conservative PAC—made more than 80% of the $16.2 million in independent expenditures spent on behalf of Ronald Reagan. *Id.* There is dispute, however, as to how much of this money was actually spent to aid in the election of Reagan and how much was spent on PAC administration and solicitation of funds. Since these PACs are nonconnected, they must pay their own administration and solicitation expenses, unlike SSFs whose sponsoring organization may pay these expenses for them. One investigator found that NCPAC spent 85% of its "independent expenditures" on direct mail fundraising, while RuffPac spent 93% of its "independent expenditures" on the same fundraising activities. *Id.* at 1505. This suggests that the real impact of these independent expenditures on the election campaign may actually have been quite small. If "independent expenditures" by nonconnected PACs are largely a disguised form of overhead, as these figures suggest, then their importance may generally have been overestimated by many critics of independent expenditures.

83. CONG. Q., Nov. 23, 1985, at 2445. Much of this money was spent in North Carolina independent expenditure campaigns in support of the reelection of Republican Senator Jesse Helms. *See* Brewer, *PACs on the Warpath: How Independent Efforts Re-elected Jesse Helms*, 6 CAMPAIGNS AND ELECTIONS 5 (Summer 1985).

84. MONEY AND POLITICS IN THE UNITED STATES: FINANCING ELECTIONS IN THE 1980s 150 (M. Malbin ed. 1984) [hereinafter MONEY AND POLITICS].

85. *Id.* at 149. In fact, in the 1982 election cycle, only 4% of all PACs made any independent expenditures at all. However, another 6% of PACs say they plan to make such expenditures in the future. L. SABATO, *supra* note 30, at 96. The National Conservative PAC draws more attention to itself for its independent expenditures than all other PACs combined. *Id.* at 99.

86. MONEY AND POLITICS, *supra* note 84, at 150. However, this solicitation activity may substantially reduce the amount of money these PACs actually spend to support a candidate. *See supra* note 82.

87. MONEY AND POLITICS, *supra* note 84, at 150.

88. *Id.* at 145.

89. *Id.* at 165.

candidate, thus providing the margin for victory in tight contests.[90]

V. CONTROLLING INDEPENDENT EXPENDITURES

Because the Supreme Court has held that independent expenditures cannot constitutionally be limited by amount, any legislative efforts to control them must be aimed at directing money, which would be spent independently, to other uses, such as direct contributions to candidates or to political parties. If legislative reform is to be undertaken at all, its objective should be to limit the special, narrow influence of PACs by enhancing the influence of individual voters and political parties in campaigns.

The chief reason that PACs make independent expenditures is to circumvent FECA's low contribution limits to candidates.[91] If independent expenditures by PACs continue to increase, there could arise a situation where effective control of campaigns is in the hands of big spending PACs rather than in candidates' hands.[92] Clearly, FECA was not intended to produce such a result.

To reduce this danger, the limitations on contributions to candidates should be increased to at least keep pace with inflation since the limits were enacted more than ten years ago. Limitations on contributions by individuals should be raised to the same level as that of PACs.[93] This would diminish the power of PACs by encouraging individuals to make contributions directly to a candidate rather than through a PAC.[94] Individuals could also be encouraged to contribute to candidates by increasing the current tax credit[95] they now receive for political contributions.[96] One proposal calls for elimination of the credit for contributions made to PACs.[97]

A more radical change in existing law would be to implement public financing for congressional campaigns in order to increase the resources of candidates.[98] Some form of public financing for campaigns would also reduce the potential for corruption inherent in the current campaign financing scheme

90. *Id.*

91. Leatherberry, *The Dangers of Reform: A Comment on Senator Chiles' Position on PACs*, 12 J. OF LEGIS. 43, 50 (1985).

92. *Id.* at 52.

93. Alexander, *The Future of Election Reform*, 10 HASTINGS CONST. L.Q. 721, 740 (1983).

94. *Id.*

95. 26 U.S.C. § 41 (Supp. 1986) (gives taxpayers a fifty percent tax credit for political contributions up to a maximum credit of $50 for individuals and $100 for persons filing joint returns).

96. MONEY AND POLITICS, *supra* note 84, at 237.

97. *Id.*

98. Wertheimer and Huwa, *Campaign Finance Reforms: Past Accomplishments, Future Challenges*, 10 N.Y.U. REV. L. & SOC. CHANGE 43, 63 (1980-1981).

which relies on private contributions to candidates since public financing would eliminate the possibility of the political quid pro quo. However, while public financing might help an underfunded candidate combat independent PAC expenditures made on behalf of his opponent, it is not a complete answer to the independent expenditure problem since independent expenditures would continue to play an influential role in congressional campaigns just as they currently do in the publicly funded presidential campaign.[99]

Finally, attempts should be made to strengthen the role of political parties in federal campaigns.[100] Parties promote broader, more general interests than PACs do and promote political consensus rather than factionalism.[101] Two ways to do this would, first, be to increase FECA's limits on the amounts individuals may contribute to party committees[102] and, second, increase FECA's limits on the amounts of money parties may spend on behalf of their own candidates for office.[103]

VI. CONCLUSION

The problems created by the Supreme Court's unleashing of independent expenditures into the political process are many. FECA's effectiveness as a means of limiting the potentially corrupting influence of money in federal campaigns has been substantially undermined.[104] As independent expenditures increase, the integrity of campaign finance laws will be further threatened; the expenditures create the appearance of candidates being beholden to spend-

99. Leatherberry, *supra* note 91, at 51. If the opportunity to contribute directly to candidates were entirely precluded as part of a public financing plan, as with the Presidential Fund Act plan, independent expenditures on behalf of congressional candidates would likely increase further since this would be the only way a supporter of a candidate could aid him financially. *Id.* A public financing plan based on matching private contributions to candidates with public funds would lessen the incentive of supporters to make independent expenditures by encouraging them to make contributions directly to the candidate's campaign. *See* Wertheimer and Huwa, *supra* note 98. However, even under such a plan, some independent expenditures would continue. Nevertheless, such a plan is still worth trying, if only because most campaigns currently have too little, rather than too much, money to spend to get their messages to the voters.

100. L. SABATO, *supra* note 30, at 176.

101. *Id.*

102. *Id.*; *see* 2 U.S.C. 441a(a)(1)(B), (2)(B) (1982) (limiting individuals to contributions of $20,000 and PACs to contributions of $15,000 to a political party in any calendar year).

103. L. SABATO, *supra* note 30, at 177. It makes little sense to permit PACs to make unlimited independent expenditures on behalf of candidates but to deny political parties this same opportunity. *Id.*; *see* 2 U.S.C. § 441(a), (h) (1982) (establishing maximum amounts that political parties may spend to support their parties' candidates for federal office).

104. *See* notes 71-73 and accompanying text.

Missouri Law Review, Vol. 51, Iss. 4 [1986], Art. 3

ers.[105] Effective control of campaigns may one day shift to big spending PACs and away from candidates themselves.[106]

Reform is clearly needed, but that is not likely to happen soon.[107] Without a great public demand for reform, Congress is unlikely to act.[108] In the early 1970's it took Watergate to focus public attention on campaign finance and cause the public to demand change. No such dramatic event is likely to galvanize public opinion in favor of reform in the near future, therefore the current problems with independent expenditures will persist.

J. GREGORY MERMELSTEIN

105. Claude and Kirchhoff, *supra* note 8, at 364.
106. *See* note 92 and accompanying text.
107. Glen, *Congress's Appetite for Controversial Campaign Finance Reforms Dimininshing*, 17 NAT'L J. 580 (1985). In December 1985, the U.S. Senate postponed until 1986 consideration of various proposals to limit the influence of PACs. CONG. Q., Dec. 7, 1985, at 2567. The legislation appears to have little chance of passage by either the Senate or the House at the time of this writing.
108. Glen, *supra* note 107, at 580.