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PACs in Kentucky: Regulating the Permanent Committees

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PACS in Kentucky: Regulating the Permanent Committees

INTRODUCTION

In the 1980s, public attention at the national and state levels has focused on the ways political candidates finance their campaigns for public office.[1] Among the proposals for reforming campaign financing systems are those that focus on the activities of political action committees, commonly referred to as PACs.[2] Like other proposed reforms to campaign finance laws, those focusing on PACs have generated vigorous debate over the need for further regulations restricting PACs' role in funding political campaigns.[3] Additionally, restrictions on political participation by any individual or group raise tough first amendment questions.[4]

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[1] *See, e.g.*, Haughee, *The Florida Election Campaign Financing Act: A Bold Approach to Public Financing of Elections*, 14 FLA. ST. U.L. REV 585, 589-90 nn.27-33 (1986). For some recent examinations of Kentucky's campaign finance laws see Dunlop, *Winning at Any Cost: How Money Poisons Kentucky's Elections*, The Courier-Journal (Louisville), Oct. 11-18, 1987 (an eight-part series on money and politics in Kentucky); *Cap Campaign Spending*, The Courier-Journal (Louisville), June 11, 1987, at A8, col. 1; *Legislature Should Outlaw Post-Election Fund-Raisers*, Lexington Herald-Leader, Dec. 22, 1986, at A16, col. 1; *Public Financing Would Curb Costs of Gubernatorial Races*, The Courier-Journal (Louisville), Apr. 17, 1979, at A6, col. 1.

[2] This Note uses the generic term "PAC" to include all political committees organized to participate in political campaigns but not created by candidates or political parties. Primarily, this Note focuses on PACs organized to support candidates for political office on a continuing basis.

[3] *See Symposium on Political Action Committees and Campaign Finance*, 22 ARIZ. L. REV. 351 (1980). *Compare* Chiles, *PACs: Congress on the Auction Block*, J. LEGIS. 193, 217 (1984) ("If money, through the vehicle of political action committees, is undermining [Congress'] role as the people's representative, action should be taken.") (1984) *with* Leatherberry, *The Dangers of Reform: A Comment on Senator Chiles' Position on PACs*, 12 J. LEGIS. 43, 53 (1985) ("Maintenance of the status quo is preferable to the problems which would likely be caused by major reform proposals.").

[4] *See infra* notes 130-248 and accompanying text.

PACs, known as "permanent committees" under Kentucky law,[5] are currently objects of concern in the Commonwealth.[6] Prior to the legislative session of 1988, proponents for reforming Kentucky's campaign finance laws urged the Legislature to amend existing laws regulating PACs to limit their participation in Kentucky's elective system.[7] Swept up by the election reform fervor of the day, the Legislature responded by making significant changes in the way PACs may function in the Commonwealth.[8]

This Note addresses some of the issues that the Kentucky Legislature must consider before imposing further restraints on the political activities of PACs. It also outlines some of the issues that Kentucky courts may face if PACs challenge the constitutionality of restrictions placed on their political activities in 1988. The first section traces the evolution of PACs as major political players at the national and state levels.[9] The second section outlines Kentucky's current regulations on PAC activities.[10] This section also examines the arguments for and against limiting PACs' participation in financing political campaigns.[11] The third section considers the first amendment questions implicated by legislative restraints on PACs.[12] Finally, the fourth section suggests proposals for confronting the problems likely to arise from enforcement of the current regulatory scheme.[13]

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[5] KY. REV STAT. ANN. § 121.015(3)(c) (Baldwin 1986) [hereinafter KRS] defines a permanent committee as:

> A group of individuals, including an association, committee or organization, other than a campaign committee or party executive committee, which is established as, or intended to be, a permanent organization having as a primary purpose political activity which may include support of or opposition to selected candidates, political parties, or issues of public importance, and which functions on a regular basis throughout the year.

[6] *See, e.g.*, Dunlop, *Unrestrained, PACs Enjoy Growing Clout*, The Courier-Journal (Louisville), Oct. 16, 1987, at A1, col. 3; *Ravages of Corruption (6)*, The Courier-Journal (Louisville), Oct. 16, 1987, at A10, col. 1; *Law Should Be Amended to Put Controls on PACs*, Ashland Independent, July 19, 1987, at 12, col. 1; *Kentucky Must Curb PACs*, The Courier-Journal (Louisville), July 21, 1987, at A6, col. 1.

[7] *Id.*, COMMON CAUSE/KENTUCKY PAC STUDY (1987).

[8] *See* S.B. 53; S.B. 268.

[9] *See infra* notes 14-62 and accompanying text.

[10] *See infra* notes 63-98 and accompanying text.

[11] *See infra* notes 99-129 and accompanying text.

[12] *See infra* notes 130-248 and accompanying text.

[13] *See infra* notes 249-78 and accompanying text.

I. PAC BEGINNINGS

A. PACs at the National Level

PACs have participated in American political campaigns for more than forty years, notwithstanding the recent attention focused on them. Labor unions created the first PACs at the end of World War II to circumvent federal legislation prohibiting them from making campaign contributions to candidates for federal office.[14] During the 1950s and 1960s, union-affiliated PACs represented the majority of those in operation, but business, professional, and ideological groups steadily increased their use of PACs in this period.[15] Although corporate PACs were rare prior to the 1970s, corporations employed various other methods to circumvent federal and state restrictions on their political activities.[16]

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[14] The War Labor Disputes Act of 1943 (Smith-Connally Act) imposed the initial restrictions on political contributions by unions. ch. 144, 57 Stat. 163, 167 (1943) (repealed Sept. 1, 1947). The Labor Management Relations Act of 1947 (Taft-Hartley Act) made the restrictions permanent. ch. 120, 61 Stat. 136, 159 (1947) (codified as amended at 18 U.S.C. § 610 (repealed by Pub. L. 94-283, Title II, § 201(a), May 11, 1976, 90 Stat. 496).

See Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 402-09 (1972) (reviewed legislative history of Acts and start of CIO's first PAC); H. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM 105, 133 (1976); A. MATASUR, CORPORATE PACS AND FEDERAL CAMPAIGN FINANCING LAWS: USE OR ABUSE OF POWER? 8-10 (1986); L. SABATO, PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES 5-6 (1984).

[15] Herbert Alexander, a well-respected commentator on campaign finances, noted in his study of the 1964 presidential campaigns that "miscellaneous committees" (all committees other than those affiliated with unions) increased in number from nineteen in 1960, to twenty-six in 1964. This is not a shocking increase, but the increase in expenditures attributed to those committees is significant. They reported $850,000 in total disbursements in 1960, compared to $1,963,000 in total disbursements for 1964. H. ALEXANDER, FINANCING THE 1964 ELECTION 63-66 (1966). Two new PACs contributing to this sharp increase—the American Medical Political Action Committee (AMPAC) and the Business-Industry Political Action Committee (BIPAC)—continue to play major roles in campaigns today. *See* L. SABATO, *supra* note 14, at 16, Table 1-4; 45-46, Table 2-3 (AMPAC is one of the "Top Ten" PAC fundraisers and contributors; BIPAC supplies basic information to many multicandidate corporate PACs).

[16] *See* H. ALEXANDER, *supra* note 14, at 128 ("[E]stablishing expense accounts ., providing company goods and services, [and] keeping officials on the payroll while they are working on a campaign."); A. MATASUR, *supra* note 14, at 24 (trustee accounts, provision of stockholder lists, payroll deduction systems); L. SABATO, *supra* note 14, at

All commentators on PACs agree that the Federal Election Campaign Act (FECA) of 1971,[17] and the amendments to it in 1974,[18] contributed most to the rapid ascension of PACs as major political players in the 1970s and 1980s.[19] FECA (1971) "reformed" campaign finance regulations by limiting campaign contributions and expenditures in federal elections,[20] but it also established the validity of using union and corporate funds to establish and operate separate segregated funds for political purposes (*i.e.*, PACs).[21] Union leaders pushed for this provision to

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6-7; Adamany, *PAC's and the Democratic Financing of Politics*, 22 ARIZ. L. REV 569, 583 (1980) (individual contributions were often systematically solicited from corporate executives).

[17] Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455 (1985)).

[18] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

[19] *See, e.g.*, A. MATASUR, *supra* note 14, at 9-11 ("The explosive growth of corporate PACs is largely a result of the Amendments made to FECA in 1974."); L. SABATO, *supra* note 14, at 8-9; Chiles, *supra* note 3, at 198-201 (1984); Epstein, *The PAC Phenomenon: An Overview*, 22 ARIZ. L. REV 355, 358-59 (1980) ("The widespread use of PAC's [*sic*] is clearly a product of the crucial legal developments during the period 1971-76. ").

[20] The Federal Election Commission (FEC) defines a contribution as "a gift, subscription, loan ., advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 11 C.F.R. 100.7(a)(1). An expenditure, in comparison, is "[a] purchase, payment, distribution, loan ., advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." *Id.* at 100.8(a)(1). Expenditures coordinated with or made at the direction of a candidate's campaign are treated as contributions. *See* Buckley v. Valeo, 424 U.S. 1, 46-47 n.53 (1976). Independent expenditures are defined as: "expenditure[s] for a communication 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." 11 C.F.R. 100.7(a)(1)(iii).

Some commentators suggest that Congress enacted FECA (1971) and its amendments to reform the campaign financing system by "minimizing the power of wealth and 'special interests,' " but that the legislation had the "unanticipated and unintended" effect of increasing the power of special interests. *See, e.g.*, Kenski, *Running With and From the PAC*, 22 ARIZ. L. REV 627, 627-28 (1980). Other commentators are more cynical in their assessment of Congress' motives. *See* Leatherberry, *supra* note 3, at 44 (many commentators "believe FECA (1974) was 'a deliberate attempt by Democrats to skew the financial balance in their favor by sanctioning PACs' "); Wertheimer, *The PAC Phenomenon in American Politics*, 22 ARIZ. L. REV 603, 605 (1980) (FECA (1974) "was proposed and successfully lobbied for by labor and business groups seeking to protect and enhance the role of PACs").

[21] The U.S. Supreme Court discussed this aspect of FECA (1971) in *Pipefitters*,

eliminate then-existing doubts about the legitimacy of their PAC operations.[22] Ironically, their efforts also opened the door for corporations to establish their own PACs without fear of legal repercussions.[23]

Although FECA (1971) was a step toward the coming PAC explosion, the trigger was the amended version of FECA enacted in 1974.[24] FECA (1974) removed the last serious obstacle to the wide-scale creation of corporate PACs by expressly permitting government contractors to establish and administer their own PACs.[25] In addition, FECA (1974) imposed contribution limits on individuals at $1,000 per candidate in each election[26] but permitted PACs to contribute $5,000 per candidate in the same period.[27] This enhanced the impact of PAC contributions compared to contributions from individuals.[28]

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407 U.S. at 431-32. *See also* Epstein, *supra* note 19, at 358 (FECA (1971) "permitted corporations and labor organizations to establish and administer political action committees.").

[22] A. MATASUR, *supra* note 14, at 9-10; L. SABATO, *supra* note 14, at 8.

[23] L. SABATO, *supra* note 14, at 8-9.

[24] A. MATASUR, *supra* note 14, at 10 ("The explosive growth of corporate PACs is largely a result of the amendments made to FECA in 1974.").

[25] A. MATASUR, *supra* note 14, at 11; L. SABATO, *supra* note 14, at 9.

[26] 2 U.S.C. at § 441a(a)(1)(A).

[27] *Id.* at § 441a(a)(2)(A). This section applies to "multicandidate committees." The FEC defines a multicandidate committee as "a political committee which (i) has been registered with the Commission, Clerk of the House or Secretary of the Senate for at least 6 months; (ii) has received contributions for Federal elections from more than 50 persons; and (iii) has made contributions to 5 or more Federal candidates." 11 C.F.R. 100.5(e)(3). The impact of this provision is that PACs which fail to meet the requirements of multicandidate committee status can only contribute a maximum of $1,000 to a candidate. This prevents fly-by-night PACs created to benefit just one or a few candidates from contributing more than individuals. This in turn deters the use of PACs to circumvent limitation on individual contributions.

[28] A. MATASUR, *supra* note 14, at 11; L. SABATO, *supra* note 14, at 9. *See* H. ALEXANDER, THE CASE FOR PACs, 12 (1983) (Public Affairs Council Monograph) (PACs filled the void left by the limits placed upon individual contributions); M. RUBINOFF, PRINCIPLE OR PRAGMATISM: INTEREST GROUPS, PACs AND CAMPAIGN CONTRIBUTIONS IN 1984 2 (1985) ("The limits on individual contributions paved the way for the PACs as a means to legally circumvent the tight provisions of the law."); L. SABATO, *supra* note 14, at 8-9 (limits on individual contributions "increase[d] candidates' reliance on PAC dollars"); Conlon, *The Declining Role of Individual Contributions in Financing Congressional Campaigns*, 3 J. L. & POL. 467, 479 (1987) ("changes in federal election laws have encouraged the growth of PACs to meet the increasing financial needs of congressional candidates").

Other political and socioeconomic factors facilitated the PAC explosion. PACs entered the political arena during a period of declining participation in the Democratic and Republican parties.[29] Americans were turning away from the dominant political parties to focus their political efforts on a few issues or a single issue.[30] PACs offer "special interest" groups[31] an ideal vehicle for gaining access to lawmakers by channeling money into political coffers.[32] Thus, the increasing political pluralism of the United States during the 1970s and 1980s made PACs valuable political tools for groups not affiliated with traditional sources of political power, such as unions or corporations.

From 1974 to June 1987, the number of PACs registered with the Federal Election Commission (FEC) jumped from 608[33] to 4,211.[34] This is a substantial increase in the number of PACs operating in the federal political system, but the true test of potential political strength is how much money PACs expend to finance political campaigns.

Since partial public financing of presidential elections has diminished the significance of PAC money in presidential campaigns,[35] most PAC money enters congressional

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[29] Alexander, *Introduction* to ALMANAC OF FEDERAL PACs at vi-vii (1986); M. RUBINOFF, *supra* note 28, at 3.

[30] Alexander, *supra* note 29 at v; M. RUBINOFF, *supra* note 28, at 2.

[31] This Note defines "special interests" broadly to include all identifiable groups which promote specific economic, social, or other objectives for the benefit of their members. It does not give this term any qualitative weight, positive or negative.

[32] *See* Sorauf, *Political Parties and Political Action Committees: Two Life Cycles*, 22 ARIZ. L. REV 445, 452 (1980) ("PAC strategy is calculated to support those candidates who would best provide the access and sympathy for the group's legislative goals."); Wertheimer, *supra* note 20, at 612 ("PAC campaign giving provides special interests with access and influence, and it affects legislative decisions."); Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 619 ("PAC money augments interest-group lobbying.").

[33] Wertheimer & Huwa, *Campaign Finance Reforms: Past Accomplishments, Future Challenges*, X N.Y.U. REV L. & SOC. CHANGE 43, 48 (1980-81).

[34] J. Graves, S. Yuill, & L. Shier, Campaign Financing in Kentucky: A 10 1/2 Year Study of PACs 2 (1987) [hereinafter J. Graves] (paper presented by Dr. Graves, a professor at Kentucky State University, at the 9th Annual Conference of the Council on Governmental Ethics Laws, Quebec, Canada, September 28-30, 1987).

[35] *See* Wertheimer & Huwa, *supra* note 33, at 46. *But see* Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985) (The Court held unconstitutional the FECA's $1,000 limitation on independent expenditures by political committees for the support of presidential candidates receiving public financing. This

races.[36] Annual reports from the FEC reveal that PACs spend many millions of dollars in congressional campaigns and that the total amount spent has steadily increased with time.[37] Critics of PACs claim that this shows the potential threat PACs pose to democratic politics,[38] while other commentators argue that it merely represents the public disclosure of money that entered congressional races under the table prior to FECA.[39] In either case, the magnitude of the sums suggest that PACs do play a vital role in financing congressional campaigns.[40]

B. PACs in Kentucky

The extent to which PACs operated in Kentucky prior to the mid-1970s is unclear, because research in this area began only recently [41] Nonetheless, two differences in Kentucky's campaign

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allows PACs to spend large amounts of money on their own to support presidential candidates receiving public financing [as the NCPAC did for President Reagan in 1984].).

[36] L. SABATO, *supra* note 14, at 9; Wertheimer & Huwa, *supra* note 33, at 48.

[37] *See* 1983 FEC ANN. REP. 11, 12.

[38] *See A Government of, By, and For the PACS—How PACs Give You the Best Congress Money Can Buy*, in PEOPLE AGAINST PACs: A COMMON CAUSE GUIDE TO WINNING THE WAR AGAINST POLITICAL ACTION COMMITTEES, 7-10 (1983) (Common Cause, "a nonprofit, nonpartisan citizens' lobbying organization that works to improve the way federal and state governments operate," *id.* at 3, issued this special publication on PACs).

[39] L. SABATO, *supra* note 14, at 166; Leatherberry, *supra* note 3, at 44.

[40] The FEC's Final Report on the financial activity of PACs in the elections of 1983-84 reveals that PACs expended over $135 million in the elections of 1983-84. 1 FEC REPORTS ON FINANCIAL ACTIVITY 1983-84: FINAL REPORT, PARTY AND NON-PARTY POLITICAL COMMITTEES 78 (1985) (this amount represents the sum of contributions to candidates and expenditures for and against candidates).

The most revealing data in the FEC's report for 1983-84 was that incumbent members of the House received 42.4% of their total campaign funds from PACs while candidates for open seats received 27% from PACs. In comparison, incumbent Senators received 23% from PACs; challengers received 16%; and open seat contenders received 9%. 1985 FEC ANN. REP. 26, chart II.

These figures suggest that political candidates who need campaign funds on a continuing basis, like incumbent U.S. Representatives or their counterparts at the state level in Kentucky, can rely heavily on PAC money to finance their campaigns. This Note considers whether this holds true in Kentucky in the next section. *See infra* notes 53-57 and accompanying text.

[41] Several studies have been issued recently. *See* COMMON CAUSE/KENTUCKY, *supra* note 7; J. Graves, *supra* note 34; Jewell & Miller, Interest Groups in Kentucky: Adapting to the Independent Legislature (1986) (prepared for presentation at the annual meeting of the Southern Political Science Association, Nov. 6-8, 1986); O'Keefe, Interest Group

finance legislation and that on the federal level suggest that PAC activity prior to the 1970s was negligible. First, unions had no incentive to establish PACs. Kentucky law did not (and still does not) limit political contributions and expenditures by labor organizations.[42] Second, Kentucky has longstanding constitutional and statutory provisions that prohibit direct or indirect contributions to political candidates by corporations.[43]

With unions and corporations disinclined to initiate PAC activities, the evolution of PACs in Kentucky began later than in the national arena. More significantly, the onrush of PACs in Kentucky did not stem from a change in regulations governing the political activities of unions and corporations. Although unions and corporations have their own PACs now, the law remains unchanged. This raises the question of what provided the impetus for the PAC movement in Kentucky during the 1970s. No definitive answers are forthcoming, but several compelling common sense conclusions arise.

One obvious factor contributing to the creation of PACs was the implementation in 1974 of limits on campaign contributions by individuals.[44] Once the legislature restricted the amount of money available from individuals, PACs arose to fill the void.[45]

Another factor contributing to the rise of PACs in Kentucky is the increasing pluralism of state politics. As noted above, the

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Contributions in Kentucky's 1983 Gubernatorial and Senatorial Elections (1986) (prepared for presentation at the 1986 Annual Meeting of the Kentucky Political Science Association, Berea, Ky., Feb. 28, 1986).

[42] Kentucky's Corrupt Practices Act only applies to corporations. *See* KRS §§ 121.025, 121.035 (Baldwin 1986). See Naegele Outdoor Advertising Co. v. Moulton, 773 F.2d 692, 697-700 (6th Cir. 1985), *cert. denied,* 475 U.S. 1121 (1986) for a good discussion of the legislative history of Kentucky's Corrupt Practices Act.

[43] KY. CONST. § 150; KRS at §§ 121.025, 121.035. *See also Naegele Outdoor Advertising*, 773 F.2d at 697 ("Direct and indirect corporate contributions to candidates have been prohibited by Kentucky since the Corrupt Practices Act of 1916." (citation omitted)).

[44] KRS at § 121.150(6). This section, effective July 15, 1986, set the limit on contributions by individuals at $4,000. From 1974 until July 1986 the limit had been $3,000. KRS § 121.150(5) (Baldwin 1984).

[45] *See* COMMON CAUSE/KENTUCKY, *supra* note 7, at Table 1 (Total partisan expenditures increased from $3,208,280 in 1973 to $4,453,262 in 1975 while total PAC expenditures increased from $189,919 to $588,010 in the same period.). Similarly, the rise of PACs on the national scene followed the imposition of limits on individual contributions in federal elections. *See supra* notes 26-28 and accompanying text.

national trend toward more pluralistic politics and the corresponding increase in the number of special interest groups demanding attention from public officials spurred the creation of the PAC system.[46] This same trend has affected Kentucky politics. Historically powerful interest groups in Kentucky representing agriculture, coal, and the horse industry must now compete with interest groups representing almost every occupation, profession, trade, business, and industry operating in the state.[47] Many of these groups use PACs to supplement their lobbying efforts with a continuing source of campaign funds.[48] The adoption of PACs to perform this function at the national level was available as a model for interest groups working to influence state and local officials in Kentucky

Together, the various forces that made PACs the ideal vehicles for the political activities of interest groups resulted in an increasing proliferation of PACs operating in Kentucky politics. Over the last decade, the number of PACs registered in Kentucky has jumped from 93 to 333, an increase of 258 per cent.[49] The

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[46] *See supra* notes 30-32 and accompanying text.

[47] *See* Jewell & Miller, *supra* note 41, at 1, 6, 15-18, 26.

[48] *Id.* at 18-19 (As the legislature has become more independent, "some [interest] groups have used their PACs to channel more funds into legislative races.").

[49] *See* J. Graves, *supra* note 34, at 2. Graves' finding of a 254% increase was adjusted for the increase in the number of PACs from June 1987 to Sept. 1987. PACs registered in Kentucky as of Sept. 1987 are identified in the listing of permanent committees registered in Kentucky compiled by the Registry of Election Finance (the Registry).

When comparing statistical information compiled by Graves, Yuill and Shier with that of Common Cause, significant differences in their totals are discovered. For example, findings on total PAC expenditures for 1977 reveal approximately a $600,000 discrepancy. All annual PAC expenditure totals reveal similar discrepancies.

One reason for such discrepancies between findings is that Common Cause's PAC Study only reported PAC expenditures for partisan races, while Graves, Yuill and Shier also reported expenditures for nonpartisan and independent elections. Another reason for the discrepancy is that Graves, Yuill and Shier include in their figures information on permanent committees referred to as "political PACs"—committees established to promote candidates of one party or of a faction within a party. Common Cause contends that these PACs should be designated as campaign committees. Telephone interview with Alaine Goldstein, Executive Director of Common Cause in Kentucky, Oct. 27, 1987.

Given the broad definition of "permanent committee" under Kentucky law, Graves, Yuill and Shier are correct in designating political committees as permanent committees if they operate "on a regular basis throughout the year. " KRS § 121.015(3)(c). This Note accepts the findings of Graves, Yuill and Shier because they correspond with the

actual number of PACs existing in a given period fluctuates as PACs focusing on a particular election or public issue fade after the election is over or after the issue loses significance.[50] Although 333 PACs are currently registered in Kentucky, that number is misleading because 145 of them are local organizations for the Kentucky Educators Public Affairs Council (KEPAC).[51] Reflecting the traditional political and socioeconomic focus of state government, 144 of the remaining 186 registered PACs operate from Louisville, Lexington, and Frankfort.[52]

According to a study by researchers from Kentucky State University, PACs spent $1,350,798 in Kentucky elections of 1977, and over $2.2 million in 1986.[53] These figures suggest that PACs play significant roles in Kentucky politics, but they provide only a rough approximation of the political influence PACs exercise. To understand whether PAC money threatens to create a government "by the PACs, for the PACs," as Common Cause asserts,[54] we must know the proportion of PAC expenditures to total election expenditures. All the research done to date indicates that PACs impact more on legislative, judicial, and local elections than on gubernatorial elections.[55] One recent study shows that PAC expenditures compose 7.3% of total election expenditures in the primary and general gubernatorial elections of 1983.[56] In comparison, PAC expenditures in the Senate elec-

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Registry's registration records. Furthermore, Jeanetta Sacre, who has worked with PACs for over 12 years, helped Dr. Graves research his study with Yuill and Shier. Based on her intimate knowledge of the day-to-day workings of PACs in Kentucky, she supports the classification of "political committees" as permanent committees. Telephone interview with Jeanetta Sacre, April 11, 1988.

[50] Interview with Jeanetta Sacre, Staff Member at the Registry of Election Finance (the Registry) who handles PAC reports and issues or questions about PACs, in Frankfort, KY (Oct. 5, 1987).

[51] KEPAC is the political arm of the Kentucky Education Association. J. Graves, *supra* note 34, at 2.

[52] These numbers come from the Registry's listing of permanent committees registered in Kentucky as of Sept. 28, 1987 *See supra* note 49.

[53] J. Graves, *supra* note 34, at 4.

[54] COMMON CAUSE/KENTUCKY, *Press Release*, Sept. 9, 1987. *See supra* note 38 for a description of Common Cause.

[55] J. Graves, *supra* note 34, at 18; Jewell & Miller, *supra* note 41, at 6, 7.

[56] Jewell & Miller, *supra* note 41, at table 1 (This percentage represents the average percentage of campaign spending provided through PACs in both primary and gubernatorial elections in 1979 and 1983.).

tions of 1983, and the House elections of 1984, compose 28.6% and 26% of total election expenditures respectively [57]

Another indicator of the political clout PACs have compared to individuals is how much PACs can contribute to political candidates. Under Kentucky law, individuals can give a maximum of $4,000 to any one candidate in any one election.[58] On the other hand, Kentucky law did not limit PAC contributions to candidates until mid-1988. Effective March 11, 1988, PACs can only contribute a maximum of $4,000 per candidate per election.[59] Even when PACs could give unlimited contributions to candidates the majority consistently contributed $1,000 or less each year.[60] As a general rule, less than 20% contributed more than $10,000 in a year.[61] Nevertheless, limiting PAC contributions should lessen the appearance that a select group of PACs can exert greater influence on Kentucky elections than can individuals.[62]

II. REGULATING PACs

After the enactment of campaign finance reform legislation in 1988, Kentucky law imposes far more substantive limits on

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[57] *Id.* at table 2 (This figure represents the total of those presented by Jewell & Miller.).

[58] *See supra* note 44.

[59] The Legislature amended KRS § 121.150 to include a $4,000 limit on PAC contributions to candidates. Sentate Bill 53 [hereinafter S.B. 53] included a provision declaring an emergency so that it became effective when signed by the Governor on March 11, 1988. *Legislative Record*, April 14, 1988, at p. 9. Later, the Legislature enacted Senate Bill 268 [hereinafter S.B. 268] making sweeping changes to Kentucky's election laws. Included in S.B. 268 were additional amendments to KRS § 121.150. S.B. 268 took effect on July 15, 1988. *Legislative Record*, April 14, 1988, at p. 9. Essentially, the combined impact of S.B. 53 and S.B. 268 is that the limits on PAC contributions are effective 4 months before the other amendments to KRS § 121.150. For convenience, this Note will refer to S.B. 268 as amending KRS § 121.150 unless specific reference to S.B. 53 is required.

[60] J. Graves, *supra* note 34, at 4.

[61] *Id.* These figures indicate that PAC contributions did not overwhelm political campaigns prior to enactment of contribution limits.

[62] A study by Graves, Yuill & Shier shows that 25 PACs have *averaged* more than $28,000 in expenditures annually. *See id.* at 9, 11 (note that nine of these PACs had only existed one year at time of study). Furthermore, this study shows that 40 to 50 PACs channelled $10,000 or more each year into political coffers. This suggests that a select group of PACs could exert substantial influence on Kentucky elections. *See id.* at 2-4.

PACs than it had previously Prior to 1988, the focus of the regulations was on procedural requirements designed to ensure complete disclosure of receipts, expenditures, contributors, and recipients of contributions. Kentucky law now imposes limits on PAC contributions to candidates just as it limits individual contributions to candidates. This section examines the regulations applicable to PACs, with particular emphasis on the 1988 finance reform legislation. This section also examines the arguments for and against limiting PAC involvement in financing state political campaigns.

A. Existing Regulations

The current regulatory scheme may be divided for analytical purposes into five parts: (1) filing requirements; (2) operational requirements; (3) reporting requirements; (4) limitations on contributions and expenditures; and (5) administration and enforcement provisions.

1. *Filing Requirements*

To register for operation in Kentucky, a PAC must file a statement of organization with the Registry of Election Finance (the Registry), giving official notice of intention and time of organization.[63] This statement lists the names, addresses, and positions of the PAC's officers and designates the candidate(s) or issue(s) that the PAC plans to support or oppose.[64] The law requires that the PAC have at least two officers, a chairperson and treasurer One person cannot serve in both capacities.[65] Obviously, creating a PAC is not a complex task.

Effective July 15, 1988, Kentucky law requires PACs to choose a name that "shall reasonably identify to the public the sponsorship and purpose of the committee.[66] The Registry must refuse registration until the PAC files in a manner that "clearly identif[ies] the specific purpose, sponsorship and source from

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[63] KRS § 121.170(1) (Baldwin 1986).

[64] *Id.* The Registry furnishes a form called the "Political Committee Statement of Organization" to those who wish to organize a PAC. Sacre interview, *supra* note 50.

[65] KRS at § 121.170(3).

[66] *Id.* at § 121.170(1) (as amended by S.B. 268).

which the committee originates."[67] Proponents of this requirement argued successfully that it will help remove the mystery surrounding PACs whose names give no hint what candidate, issue, or ideology they support or oppose.[68]

2. *Operational Requirements*

All contributions made to a PAC to support or to defeat a candidate in an election must be made through the PAC's treasurer [69] PACs must establish a primary campaign depository with a financial institution authorized to transact business in Kentucky before they accept any contributions.[70] A statement listing the names, addresses, and occupations of contributors of more than $300 and of all cash contributors must accompany deposits.[71] Effective 1988, "deputy campaign treasurers may make expenditures from secondary depositories but only from monies which first have been deposited in the primary campaign depository "[72]

3. *Reporting Requirements*

PACs must file reports with the Registry on a quarterly basis from the time of inception to the time of termination.[73] These quarterly reports, made on forms issued by the Registry, must disclose "all money, loans or other things of value received by [the PAC] from any source, since the date of the last report."[74] Additionally, the PAC must list the names, addresses, occupations, and ages (if under legal voting age) of persons or groups who give the PAC more than $300.[75] The report must identify the amount that each contributor gave and the date of contribution. Finally, all expenditures which the PAC makes or incurs, including but not limited to contributions to candidates, must

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[67] *Id.*
[68] *See* COMMON CAUSE/KENTUCKY *supra* note 7.
[69] *Id.* at § 121.150(1).
[70] *Id.* at § 121.220(1).
[71] *Id.* at § 121.220(2).
[72] *Id.* at § 121.220(1) (as amended by S.B. 268).
[73] *Id.* at § 121.180(5) (Baldwin 1986).
[74] *Id.*
[75] *Id.*

be set forth in the quarterly reports.[76] These reports are available for public inspection upon receipt at the Registry [77]

The Legislature made only slight changes in 1988 to the reporting requirements imposed on PACs. The changes require that PACs explicitly identify cash contributors and the "aggregate amount of cash contributions" received.[78]

4. *Limitations on Contributions and Expenditures*

As of March 11, 1988, Kentucky limits the amount PACs can contribute to a candidate or expend in an election to $4,000 per candidate, per election.[79] Also, as of March 1988, PACs cannot accept a contribution in excess of $4,000 from "any person in any one (1) election."[80]

PACs are limited in the type of contribution that they may accept based on the contribution's form and its source. First, PACs may not accept "any anonymous contribution in excess of one hundred dollars ($100), and all such contributions in excess of one hundred dollars ($100) shall be returned to the donor, if the donor can be determined."[81] Second, they may not

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[76] *Id.* Note: this includes "independent expenditures." An "independent expenditure" is statutorily defined as an expenditure: "[m]ade for a communication which expressly advocates the election or defeat of a clearly identified candidate and which is not made with any direct or indirect cooperation, consent, request or suggestion or consultation involving a candidate or his authorized committee or agent." KRS at § 121.150(1).

[77] *Id.* at § 121.180(7).

[78] *Id.* at § 121.180(5) (as amended by S.B. 268).

[79] *Id.* at § 121.150(6) (as amended by S.B. 268). At the same time the Legislature enacted contribution limits it also enacted provisions prohibiting the creation of subsidiary PACs and the shifting of money for the purpose of circumventing those limits. KRS § 121.150 (as amended by S.B. 268) provides:

> (7) Except for permanent committees organized as of January 1, 1988, permanent committees or contributing organizations affiliated by bylaw structure or by registration, as determined by the registry of election finance, shall be considered as one (1) committee for purposes of applying the contribution limits of subsection (6) of this section.
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> (8) No permanent committee shall contribute funds to another permanent committee for the purpose of circumventing contribution limits of subsection (6) of this section.

[80] *Id.* at § 121.150(6) (as amended by S.B. 268). Individuals may not contribute "more than four thousand dollars ($4,000) to all permanent committees and contributing organizations in any one (1) year." *Id.* at § 121.150(9) (as amended by S.B. 268).

[81] *Id.* at § 121.150(3) (as amended by S.B. 268). If the PAC cannot find a donor, the contribution escheats to the state. *Id.*

accept cash contributions over $100.[82] Finally, beginning in 1988, PACs may not "accept any contribution in excess of one hundred dollars ($100) from any person who shall not become eighteen (18) years of age on or before the day of the next general election."[83]

5. *Administration and Enforcement*

The Registry of Election Finance administers and *initiates* enforcement of campaign finance regulations in Kentucky It is an independent agency composed of seven members.[84] The Governor appoints four members, and the Lieutenant Governor, Attorney General, and Secretary of State each appoint one member.[85] The Registry must appoint a full-time executive director, legal counsel, accountant, and such other employees necessary to perform its function.[86]

Initially, the Registry was meant to be a repository for campaign reports.[87] It now takes an active role in administering campaign finance regulations by informing candidates, PACs, and other political participants of their legal responsibilities and by initiating enforcement actions against those who violate the law [88] In particular, the Registry requires timely and accurate reports.[89]

As a general rule, the Registry prefers informal enforcement of the regulations by notifying violators that they have erred and requesting correction.[90] It may, however, conduct full-scale adversary hearings when it "concludes that there is probable cause to believe that the law has been violated."[91] These hearings are subject to judicial review [92] Enforcement ranges from cease

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[82] *Id.* at § 121.150(4) (Baldwin 1986).

[83] *Id.* at § 121.150(5) (as amended by S.B. 268).

[84] *Id.* at § 121.110(1) (as amended by S.B. 268).

[85] *Id.* at § 121.110(2)(a)-(f) (as amended by S.B. 268).

[86] *Id.* at § 121.120(1) (Baldwin 1986).

[87] Interview with Raymond Wallace, Executive Director of the Registry, in Frankfort, KY (Oct. 5, 1987); Jewell & Miller, *supra* note 41 at 5.

[88] Wallace interview, *supra* note 87.

[89] *Id.*

[90] *Id.*

[91] KRS at § 121.140(2).

[92] *Id.* at § 121.140(4).

and desist orders to $100-per-day fines for each day the violation remains uncorrected.[93] Imposition of maximum fines are rare, and collection of fines from those who ignore the board's order requires that the board turn the case over to the Attorney General for prosecution.[94]

Beginning in 1988, the Attorney General will have primary responsibility for enforcing election laws, including those concerning campaign finance regulation.[95] Consequently, when "the registry concludes that there is probable cause to believe that the campaign finance law has been violated *willfully*, it *shall* refer such violation to the attorney general for prosecution."[96] The Registry may only pursue prosecution for itself if "the attorney general or appropriate local prosecutor fails to prosecute in a timely fashion."[97] The Registry must petition the circuit court and show good cause why its attorney should be appointed to prosecute the violation. Upon showing good cause, the circuit court *must* grant the Registry's petition.[98]

B. Recent Rumblings

Although threatened to be overcome by the crush, proposals to reform campaign finance laws received serious consideration from legislators in 1988.[99] Reports that candidates spent more than $19 million in statewide primary races in 1987[100] prompted vigorous criticism of money's dominance of political races and of the laws which permit its dominance.[101]

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[93] *Id.* at § 121.140(2)(a), (2)(c).

[94] Wallace interview, *supra* note 87; KRS at § 121.140(3).

[95] Senate Bill 268 created two new sections to KRS Chapter 15 outlining the Attorney General's responsibilities.

[96] KRS at § 121.140(3) (as amended by S.B. 268) (emphasis added).

[97] *Id.* at § 121.140(3) (as amended by S.B. 268). The Registry may also pursue prosecution if the Attorney General so requests. *Id.*

[98] *Id.* at § 121.140(4) (as amended by S.B. 268).

[99] Senate Bill 53 passed the Senate 36-0: the House passed it 98-0. *Legislative Record*, April 14, 1988, at p. 9.

[100] *See* Johnson, *Tally Shows Primary Was Costliest Election*, The Courier-Journal (Louisville), July 6, 1987, at A1, col. 4.

[101] *See, e.g., Huge Campaign Bills Stir Calls for Reform*, Ledger-Independent (Maysville, Ky.), July 7, 1987, at 7, col. 3; *A Gold-Plated Primary*, The State Journal (Frankfort, Ky.), July 8, 1987, at 4A, col. 1.

Critics of Kentucky's campaign finance laws received compelling evidence of the need for reform when R.G. Dunlop, a staff writer for the Louisville Courier-Journal, published a series of eight articles exposing widespread corruption in Kentucky's politics and government.[102] Perhaps reflecting the seriousness of the revelations, both gubernatorial candidates pledged support for broad-based reforms of campaign finance laws prior to the general election.[103]

Among proposed reforms currently circulating in the press are some designed to reduce the influence, real or perceived, that PACs exert on Kentucky's political system.[104] One persistent and compelling criticism of PACs is that they seek to establish access to public officials with campaign contributions.[105] Some political observers charge that PACs use their access to public officials to exercise undue influence over political processes.[106]

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[102] Dunlop, *supra* note 1.

[103] Wilkinson and Harper indicated their support for campaign finance reforms during their second debate. Wilkinson and Harper Debate, sponsored by the League of Women Voters (Oct. 19, 1987), in Richmond, Ky. (Videotape available at Division of T.V & Radio, Video Library, Eastern Kentucky University Video Library, Perkins Building #102, Richmond, Ky. 40475-0951).

[104] *See supra* notes 6-8 and accompanying text.

[105] One incident which occurred after the primary elections gives credence to warnings by groups like Common Cause that PACs expect something in return for their contributions. Thomas H. Meeker, president of Churchill Downs and chairperson of Churchill Downs PAC, urged in a letter to several members of the racing industry to help Wallace Wilkinson retire the $2.3 million loan that Wilkinson made to his campaign. In the letter, Meeker clearly stated that his objective was to "make sure that we have his [Wilkinson's] ear." Approximately $5,000 of his ear-catching tune came from Churchill Downs PAC. Johnson, *Downs President, Wary of Lottery Seeks Racing's Support for Wilkinson*, The Courier-Journal (Louisville), July 15, 1987, at B1, col. 1. Although Meeker supported another Democratic candidate in the primary, his concern about the potentially adverse consequences that a state lottery would have on the racing industry drove him to establish a channel of communication with the undisputed front-runner in the Governor's race. *Id.* at B1, col. 2 & B3, col. 3. No matter that Meeker intended to conduct his activities within legal limits, his use of political contributions to obtain access to the next governor creates a strong appearance of impropriety. That he chose a PAC to channel contributions to Wilkinson's campaign clearly establishes the legitimacy of claims that PAC contributions may be used to influence public policymakers, or that they at least create this perception.

For an editorial reaction to this report see Van Curon, *Backed Wrong Horse in Primary, He Now Wants Wilkinson's Ear*, Bath County News Outlook (Owingsville, Ky.), July 23, 1987, at 11, col. 1.

[106] *See* Van Curon, *supra* note 105; *see also* J. Abourezk, *Ex-Senator Calls PACs*

Of course, the same charge is applicable to individuals who make large contributions to candidates. Yet PACs held a decisive advantage over individuals in the bid for access due to the discrepancy between limits on contributions by PACs and those by individuals. Although individuals can only contribute a maximum of $4,000 to a candidate, PACs could contribute unlimited amounts. Thus, a candidate could fund his or her entire campaign with PAC contributions.[107] By displacing the importance of campaign contributions from individuals, PACs have the potential to gain not only access, but substantial political influence. As previously noted, this process is not apparent in gubernatorial campaigns, but it appears well advanced in legislative campaigns.[108] The recent enactment of limits on PAC contributions, like those limiting individuals, ensures that PACs cannot dominate access to public officials merely by exploiting the legal limits on individual contributions.

A compelling hypothesis for why PACs concentrate their efforts on legislative campaigns is that they are responding to the increased independence exercised by the legislative branch in Kentucky's political system.[109] No longer content to allow the

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'One of the Most Corrupt' Financing Schemes Ever, The Courier-Journal (Louisville), Feb. 23, 1986, at D3, col. 1 (Abourezk was formerly senator from South Dakota).

For interesting evidence of PACs' desire to influence lawmakers see *PACs Switched Sides, Study Says*, The Courier-Journal (Louisville), Mar. 20, 1987, at A6, col. 2 (Common Cause found numerous instances in which PACs switched sides after initial candidates lost).

[107] *See supra* notes 58-59 and accompanying text.

[108] *See supra* notes 55-57 and accompanying text.

[109] Jewell & Miller, *supra* note 41, at 3-5, 11.

An interesting development concerning PACs and the legislature has arisen and may provide the impetus necessary for the passage of some type of reform legislation. In Governor Wilkinson's first press conference, he indicated that he might use a PAC formed by his campaign chairperson, Danny Briscoe, to support Democrats running against Democratic incumbents in the legislature who opposed his programs. Rugeley, *Wilkinson Vows to Use Influence*, Lexington Herald-Leader, Nov. 6, 1987, at A1, col. 5. Quite naturally, Wilkinson's remarks drew a hostile response from legislative leaders who considered it a "veiled threat" to the independent legislature. Rugeley & Brammer, *Wilkinson 'Threat' Spurs Bill to Limit Campaign Contributions by PACs*, Lexington Herald-Leader, Dec. 2, 1987, at A1, col. 2. As a result, Senate President Pro Tem John "Eck" Rose proposed legislation to limit PAC contributions to candidates to $4,000 per election. *Id.* at A1, col. 4 and A7, col. 1. One hopes that the legislature will realize, as did the media, that contribution limits alone will not reduce the influence the Governor's PAC could wield. *He Got Their Attention, All Right*, Lexington Herald-Leader, Dec.

governor to control all phases of government, the legislature now occupies a more independent and equal position vis-a-vis the executive branch.[110] As a consequence, interest groups are likely to reinforce their lobbying efforts with PAC contributions to legislators. Since the governor no longer controls the legislative process and since he or she cannot run for reelection,[111] spreading contributions among a block of legislators is a more effective long-term political investment than placing all the money on a candidate for governor.[112] The underlying implication of this hypothesis, that PACs contribute proportionately more money to legislative campaigns than to gubernatorial campaigns as a response to the legislature's enhanced position in the decision-making process, lends further legitimacy to the arguments that PACs expect a return on their political investments.[113]

The final reason critics of PACs support stricter limits on their activities is the concern that individuals will use PACs to circumvent the $4,000 limit on individual contributions.[114] Once again, the 1987 primary elections offer examples of how this might happen.[115] As of March 1988, an individual may contribute

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3, 1987, at A14, col. 1. Without comprehensive reform measures which also address the problems posed by "independent expenditures," a contribution limit will have little or no effect on PAC activities. *Id.*

Realizing the disturbance created in the legislature, Wilkinson retracted his remark about using the PAC against recalcitrant legislators. Rugeley, *Wilkinson Says He Won't Use PAC to Fight Opponents in Legislature*, Lexington Herald-Leader, Dec. 4, 1987, at A1, col. 5. Wilkinson stated that the PAC would be used to promote particular issues like the proposed lottery. *Id.* at A16, col. 1. Wilkinson's sudden reversal did not ease Rose's concerns "because the PAC's registration form said it would be used to support candidates." *Id.* at A16, col. 2. Rose suggested that Wilkinson amend the form. *Id.*

[110] *See* Rugeley & Brammer, *supra* note 109.

[111] KY. CONST. § 71.

[112] *See* Jewell & Miller, *supra* note 41, at 3-5 and 11 (legislature has grown in power since 1979).

[113] *See supra* note 105 and accompanying text.

[114] *See supra* notes 6, 7.

[115] In one case, four members of Citizens Committed to Better Government, all of whom were employees or officers of a car dealership, gave the PAC $21,000 on May 21. One individual gave $8,000 and another gave $6,000. The same day the PAC received the money it sent the money to the Wilkinson campaign. Johnson, *PAC That Aided Wilkinson Asked to Refund Donations*, The Courier-Journal (Louisville), Sept. 17, 1987, at A1, col. 4.

After discovering the apparent subterfuge, the Registry set a precedent by requesting that the Wilkinson campaign return the money to the original contributors. Rugeley,

no more than $4,000 to any one PAC in any one election.[116] This will lessen the impact of attempts to circumvent individual limits with PAC contributions.

So far, few commentators have stepped forward to defend the PAC system as it now functions in the Commonwealth. Surprisingly, when the legislature addressed a reform package in the 1988 legislative session, no organizers, members, or other supporters of PACs publicly opposed comprehensive changes in the status quo. Should they do so in the future, they can draw upon various arguments in support of PACs formulated by commentators on federal elections. Of particular interest to Kentuckians is that Senator Ford publicly supports PACs and their role in the democratic process.[117]

Ironically, one argument for PACs also underlies the fears expressed by their critics: PACs provide candidates with the funds necessary to run a viable political campaign.[118] The need for substantial amounts of money is especially critical at a time when campaign costs are rising each year.[119] Restricting funds available to candidates in a campaign financing system that relies totally upon voluntary contributions from the private sector forces candidates to spend more time pursuing campaign funds than discussing the issues. This in turn benefits wealthy candidates who can spend their personal fortunes (or loan their campaigns large sums of money without fear of bankruptcy should they lose)[120] to fund a media blitz characteristic of many victo-

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Questions concerning the constitutionality of this provision are beyond the scope of this Note.

Wilkinson PAC Told to Return $6,000 in Gifts, Lexington Herald-Leader, Sept. 17, 1987, at B1, col. 6. The Registry had no authority to enforce its request, but Wilkinson's campaign did return the amount in excess of that which the individuals involved could give under the law. Johnson, *supra*, at A8, col. 1.

[116] KRS § 121.150(6) (as amended by S.B. 268).

[117] Ford, *View from the Senate*, in THE PAC HANDBOOK 13-17 (1980).

[118] H. ALEXANDER, *supra* note 28, at 30.

[119] *See* Goldstein, *Political Finance in Kentucky*, in KENTUCKY GOVERNMENT AND POLITICS 170, 178-84 (J. Goldstein ed. 1984); Jones, *Financing State Elections*, in MONEY AND POLITICS IN THE UNITED STATES 173-80 (M. Malbin ed. 1984).

[120] In 1988, the Legislature imposed limits on the amount of money candidates may loan to their campaign committees. Candidates running for Governor may not loan their campaigns more than $50,000 in any one election; candidates for other statewide offices may not loan themselves more than $25,000; and candidates in all other races may not loan themselves more than $10,000. KRS § 121.150(13) (as amended by S.B. 268).

rious campaigns in the last decade.[121]

Another argument in support of PACs is that they increase opportunities for individuals to participate in the political process.[122] If some tangible evidence exists to support this claim, it is a difficult factor to ignore. Given the historically low turnouts by Kentucky's electorate, promoting more public participation in politics is a worthy objective.[123] But to agree that the objective is laudatory does not foreclose investigating whether PACs have increased the number of Kentuckians actively participating in politics. At least one study indicates that PAC contributors are less committed to political involvement and vote less than individuals who make direct contributions to candidates.[124] Even assuming PACs do increase public interest in politics, the legislature seems to have fashioned regulations that will not dilute this positive aspect of the PAC system.[125]

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[121] *See* Johnson, *Free-Spending Campaign Has TV Stations Smiling*, The Courier-Journal (Louisville), Apr. 24, 1987, at A1, col. 5 ("Wilkinson and Beshear will spend more than $1 million on TV, Brown more than $1.5 million according to their campaigns.").

[122] Adamany, *Political Action Committees and Democratic Politics*, 1983 DET. C.L. REV 1013, 1013-14, 1018-20; H. ALEXANDER, *supra* note 28, at 29; Budde, *The Practical Role of Corporate PACs in the Political Process*, 22 ARIZ. L. REV 555, 555-58 (1980); Ford, *supra* note 117, at 13-14; Comment, *Campaign Finance Re-Reform: The Regulation of Independent Political Committees*, 71 CALIF. L. REV 673, 674 (1983).

[123] *See* Blanchard, *Political Parties and Elections*, in KENTUCKY GOVERNMENT AND POLITICS 141, 163 (J. Goldstein ed. 1984).

[124] *See* Jones & Miller, *Financing Campaigns: Macro Level Innovation and Micro Level Response*, 38 W POL. Q. 187 (1985). This study suggests that among four groups of organizational contributors (to PACs, parties, candidates, or some combination):

> PAC contributors were least likely to have engaged in traditional campaign activities. Compared to candidate contributors, only a third to half as many PAC contributors reported wearing a campaign button, working for the party, or attending a rally or fund raiser. Also, a smaller percentage of PAC contributors than those using any other mode of contributing reported voting, especially in the general election.

Id. at 204.

[125] Limiting PAC contributions to candidates, for example, does not inhibit *participation* in political activities by PAC contributors. In Buckley v. Valeo, 424 U.S. 1, 21 (1976), the U.S. Supreme Court stated:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his [or her] political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Id.

Although commentators have presented other arguments supporting PAC activities,[126] the one which most restricts the scope of proposed regulatory schemes is that PACs are protected by the first amendment's guarantees of free speech and free association. The United States Supreme Court held in *Buckley v Valeo*[127] that the campaign finance regulations embodied in FECA (1974) implicate fundamental freedoms of speech and association.[128] Therefore, recent reforms to Kentucky's regulatory scheme must remain within the constitutional parameters set by *Buckley* and its progeny [129] This Note considers that line of cases, federal and state, in the next section.

III. CONSTITUTIONAL LIMITATIONS ON REGULATING PACS

A. Buckley v Valeo

In *Buckley v Valeo*,[130] the United States Supreme Court considered the constitutionality of "[t]he intricate statutory scheme adopted by Congress to regulate federal election campaigns"[131] embodied in the Federal Election Campaign Act of 1971, as amended in 1974.[132] This landmark decision has evoked much scholarly commentary on its implications for federal and state efforts to regulate campaign financing.[133] For the

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[126] *See generally* H. ALEXANDER, *supra* note 28, at 29-30 (claims PACs serve as "safeguard against undue influence by the government or by the media"); Budde, *supra* note 122, at 557 ("PACs assist candidates in effectively managing their campaigns and budgets.").

[127] 424 U.S. 1 (1976).

[128] *Id.* at 14-15.

[129] *See infra* notes 130-248 and accompanying text. For instance, *Buckley* prevents the imposition of limits on how much a candidate may spend of his or her own money in political campaigns. *Buckley*, 424 U.S. at 51-54.

[130] 424 U.S. 1 (1976).

[131] *Id.* at 12.

[132] *See supra* notes 17-18 and accompanying text.

[133] *See, e.g.*, BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045 (1985) (agrees with Supreme Court's first amendment analysis); Clagett & Bolton, *Buckley v. Valeo, Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VAND. L. REV 1327 (1976) (written by co-counsel for plaintiffs in *Buckley*); Wright, *supra* note 32 (Judge Wright wrote the Court of Appeals' decision reversed in *Buckley*).

purposes of this Note, three provisions of FECA (1974) challenged in *Buckley* are particularly significant in determining what regulations of PAC activities are constitutionally permissible: (1) limitations on contributions; (2) limitations on expenditures; and (3) reporting requirements.

The crux of the Supreme Court's decision in *Buckley* was its conclusion that campaign contributions and expenditures are forms of political speech and political association.[134] As such, limits upon them "operate in an area of the most fundamental First Amendment activities."[135] Although freedom of speech and freedom of association are not absolute, restraints on them are "subject to the closest scrutiny "[136] Significant restraints on them are constitutional only if "the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."[137]

Supporters of FECA (1974) maintained that its regulatory scheme served three governmental interests. They argued that "the primary interest served by the Act is the prevention 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."[138] Additionally, they argued that the State has legitimate "ancillary" interests in leveling the relative ability of rich and poor to influence political campaigns and in slowing the rapid increase of campaign costs "to open the political system more widely to candidates without access to sources of large amounts of money "[139] After considering these arguments the Supreme Court concluded that the *only* governmental interest "sufficiently important" to justify the provisions of FECA (1974) was the interest in preventing corruption or the appearance of corruption.[140] The Court then

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[134] *Buckley*, 424 U.S. at 14-15.

[135] *Id.* at 14.

[136] *Id.* at 25.

[137] *Id.* (citing Cousins v. Wigoda, 419 U.S. 477, 488 (1975); NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

[138] *Id.*

[139] *Id.* at 26.

[140] *See* BeVier, *supra* note 133, at 1081 n.169; Comment, *supra* note 122, at 682; *cf. Buckley*, 424 U.S. at 26-29 (The Supreme Court did not expressly state this, but the holding in *Buckley* and the cases following it have recognized the prevention of corruption as the only legitimate state interest for regulating political expenditures.).

considered whether the challenged provisions of FECA (1974) were narrowly drawn to fulfill the State's legitimate objective.

1. *Contribution Limits*

FECA (1974) limited contributions from individuals to $1,000 per candidate, per election, and from PACs to $5,000 per candidate, per election.[141] The Court's holding that contribution limits are constitutional rests upon a bifurcated analysis of first amendment guarantees. First, the Court found that although contributions to candidates are "symbolic expression[s] of support" which "may *result* in *political expression* [speech] if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor."[142] Since "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his [or her] contribution,"[143] limits on contributions are "only a marginal restriction upon the contributor's ability to engage in free communication."[144] Thus, the Court concluded that contribution limits "do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties."[145]

The second prong of the Court's analysis considered whether contribution limits unconstitutionally infringe upon the contributor's *freedom of association*. The Court held that "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate."[146] Nonetheless, the Court held that the contribution limits were focused narrowly upon the interest in preventing corruption and the appearance of corruption.[147] Three factors contributed to the Court's holding: (1) individuals

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[141] 2 U.S.C. § 441 (Supp. V 1975), *as amended by* Act of May 11, 1976, Pub. L. No. 94-283, 90 Stat. 486 (redesignated 2 U.S.C. § 441a).

[142] *Buckley*, 424 U.S. at 21 (emphasis added).

[143] *Id.*

[144] *Id.* at 20-21.

[145] *Id.* at 29.

[146] *Id.* at 22.

[147] *Id.* at 25-28.

were still free to volunteer their services to political campaigns; (2) individuals were still free to express their political beliefs independently; and (3) individuals were still free to create or join voluntary associations, such as PACs, to support political campaigns.[148] Since the contribution limits were drawn narrowly to satisfy the State's legitimate interest in preventing corruption or the appearance of corruption, the Court upheld the constitutionality of those provisions.

In addition to this constitutional analysis of contribution limits, the Court addressed a separate challenge to the regulations on PAC contributions. FECA (1974) allowed PACs to give $5,000 to a candidate only if it had been registered with the FEC for at least six months, "received contributions from more than 50 persons, and contributed to five or more candidates for federal office."[149] Opponents of FECA (1974) argued "that these qualifications unconstitutionally discriminate against *ad hoc* organizations in favor of established interest groups and impermissibly burden free association."[150] The Court rejected this claim, stating that the provision "enhances the opportunity of bona fide groups to participate in the election process," and "serve[s] the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees."[151] Thus, Kentucky's limits on PAC contributions and qualifications on a PAC's right to contribute serve the legitimate purpose of preventing individuals from using PACs to evade limits on individual contributions, and are therefore clearly constitutional.

2. *Expenditure Limits*

In contrast to contribution limits, the Court held that "expenditure limitations impose far greater restraints on the freedom

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[148] *Id.* at 28. The Court noted that existing law "permits corporations and labor unions to establish segregated funds to solicit voluntary contributions to be utilized for political purposes." *Id.* at 28 n.31.

[149] *Id.* at 35. This provision is currently codified at 2 U.S.C. § 441a(a)(2)(A). *See supra* note 27.

[150] *Buckley*, 424 U.S. at 35.

[151] *Id.* at 35-36.

of speech and association."[152] To avoid finding the provision limiting expenditures unconstitutionally vague, the Court narrowed its scope to cover only "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."[153] Even so, the Court held the limits unconstitutional, because they are not an effective means to reduce corruption or the appearance of corruption.[154] In a strange twist, the Court concluded that since the provision only limited "expenditures that *in express terms* advocate the election or defeat of a clearly identified candidate," a reading of the statute imposed by the Court, individuals and groups could easily circumvent the limitation by eschewing express terms of advocacy [155] Furthermore, the Court indicated its doubt that independent expenditures pose the same "dangers of real or apparent corruption comparable to those identified with large campaign contributions."[156] The Court concluded that limits on independent expenditures do not serve the government's interest, but place substantial restraints upon the exercise of free speech and association.[157]

3. *Reporting Requirements*

The Supreme Court upheld the constitutionality of the reporting requirements imposed by FECA (1974). The Court held that the disclosure provisions serve the State's substantial interests in informing the electorate and preventing corruption.[158] Requiring disclosure of contributions and independent expenditures is clearly constitutional after *Buckley* [159] Consequently, Kentucky's campaign finance laws rely heavily upon the enforcement of public disclosure of contributions and expenditures to

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[152] *Id.* at 44.

[153] *Id.* at 44. This language narrows the scope of the provision to independent expenditures. For the current definition of independent expenditures see *supra* note 20.

[154] *Id.* at 45.

[155] *Id.* (emphasis added).

[156] *Id.* at 46.

[157] *Id.* at 47-48 ("While the independent expenditure ceiling thus fails to serve any substantial governmental interest ., it heavily burdens core First Amendment expression.").

[158] *Id.* at 66-67.

[159] *See id.* at 84.

combat corruption of the political process and the appearance of such a problem.[160]

B. Post-Buckley

Since *Buckley*, the Court has issued several decisions dealing specifically with regulations affecting PACs. While subsequent decisions have given more definition to the constitutional parameters established in *Buckley*, they have retained the same fundamental principles and theoretical constructs. The most significant principle established in *Buckley* is that the only compelling state interest in regulating campaign finances is to prevent corruption or the appearance of corruption.[161] Once limited in this fashion, the State's constitutional authority to regulate campaign financing can only extend as far as the Court's definition of corruption allows. For example, an element of the Court's definition is that a candidate for public office benefits from the contribution or expenditure regulated by the State. The Court's recurrent references to the dangers of *quid pro quo* relationships encapsulates its definitional focus on a situation in which a contributor expects something from a candidate in return for campaign funds.[162] Thus, the Court concluded in *First Nat'l Bank of Boston v Bellotti*[163] that: "[r]eferenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue."[164]

In *Bellotti*, the Court struck down a Massachusetts criminal statute that *prohibited* banks and business corporations from making contributions or expenditures to influence the outcome of referendum proposals.[165] Despite the Court's conclusion that

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[160] Wallace interview, *supra* note 87.

[161] *See supra* notes 146-48.

[162] 424 U.S. at 26-27, 45, 47 ("To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 26-27).

[163] 435 U.S. 765 (1978), *reh'g denied*, 438 U.S. 907 (1978).

[164] *Id.* at 790 (citations omitted).

[165] *Id.* at 776. For discussions of *Bellotti* and its implications see Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 ARIZ. L. REV 373 (1980); Fox, *Corporate Political Speech: The Effect of First National Bank of*

corporate involvement in issue elections does not pose a threat of corruption to the political process, it stated that: "[i]f appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration."[166] How much evidence or the type of evidence sufficient to merit the Court's consideration remains an open question.[167]

In *Citizens Against Rent Control v Berkeley*[168] the Court invalidated a city ordinance which limited to $250 contributions to committees formed to participate in issue elections. The Court did not address the question left open in *Bellotti* (regarding the validity of limits as opposed to prohibitions on such activities) because the ordinance applied to contributions by persons, not just corporations.[169] Reduced to its simplest terms, the basis for the Court's holding in *Citizens Against Rent Control* was its conclusion that: "*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*."[170] In passing, the Court noted that "the record in this case does not support the California Supreme Court's conclusion that section 602 is needed to preserve voters' confidence in the ballot measure process."[171] Therefore, whether a state can justify limitations on

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Boston v. Bellotti Upon Statutory Limitations on Corporate Referendum Spending, 67 KY. L.J. 75 (1978-79) (Fox represented the appellant corporations in *Bellotti*); Kiley, *PACing the Burger Court: The Corporate Right to Speak and the Public Right to Hear After First National Bank v. Bellotti*, 22 ARIZ. L. REV 427 (1980) (Kiley represented Massachusetts in *Bellotti*).

[166] *Bellotti*, 435 U.S. at 789.

[167] Fox maintains that it is "extremely unlikely that a particular record or legislative recitation of spending history would be sufficiently egregious to warrant the imposition of any limitation on corporate spending." Fox, *supra* note 165, at 94.

[168] 454 U.S. 290 (1981).

[169] *Id.* at 299 n.6.

[170] *Id.* at 296-97 (emphasis in original).

[171] *Id.* at 299. Justice Marshall's concurrence and Justice Blackmun's concurrence indicate that the record provides inadequate evidence of a threat of corruption. *Id.* at 303-03. Justice White's dissent, on the other hand, cites several situations involving corporate involvement in issue elections which suggest corruption. *Id.* at 307-09 nn.3-5.

PAC contributions and expenditures in issue elections depends on development of an adequate judicial record or legislative findings of fact showing that PACs pose a threat to corrupt or to destroy public confidence in the ballot measure process. Until the Court reveals what findings are adequate to alter its analysis, regulations of PAC contributions or expenditures in issue elections are of dubious constitutionality [172]

One noteworthy aspect of *Citizens Against Rent Control* is the Court's decision to invalidate limits on *contributions*. This is significant because the Court's definition of corruption focuses on contributions to a candidate. In *Buckley*, The Court stated that: "[t]o the extent that large *contributions* are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined."[173] A literal reading of this passage is consistent with the Court's decision in *Citizens Against Rent Control* in that no threat of corruption exists unless a candidate is receiving a contribution. Yet, the Court has not extended this reasoning to the logical conclusion that contributions to PACs pose no threat of corruption because they do not go to candidates.

That the Court has allowed limits on contributions in situations not involving candidates indicates that the State has a legitimate interest in something other than just preventing the creation of *quid pro quo* arrangements. A majority of the Court identified this interest in *California Medical Ass'n v Fed. Election Comm'n*.[174] Although *California Medical Ass'n* issued in a plurality opinion, the plurality and Justice Blackmun, in his

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[172] Kentucky law does not limit contributions or expenditures by political issues committees. KRS §§ 121.015(3)(b), 121.150(6) (as amended by S.B. 268). These committees are prohibited, however, from accepting anonymous contributions, cash contributions, and contributions from persons under 18 that exceed $100. KRS § 121.150(3)-(6) (as amended by S.B. 268). Given the limited intrusiveness of the limits on the form of the contribution and the obvious desire to prevent corrupt practices, the first two restrictions seem constitutional. The constitutionality of limiting contributions by persons under 18 is less clear, however. Although government has traditionally limited the right to vote on the basis of age, these limits are expressly stated in the state and federal constitutions. *See* U.S. CONST. amend. XXVI, § 1; KY. CONST. § 145. The author suggests that limits on a person's political contributions based upon that person's age must also be authorized by an express constitutional provision.

[173] *Buckley*, 424 U.S. at 26-27 (emphasis added).

[174] 453 U.S. 182 (1981).

concurrence, held that the State has an interest in limiting contributions to PACs to ensure that PAC contributors do not circumvent limitations on their personal contributions to candidates.[175] Drawing an analogy with the $25,000 limit on aggregate annual contributions upheld in *Buckley*, the Court concluded that the State has a legitimate interest in preserving "the integrity of the contribution restrictions"[176] imposed to prevent the creation of *quid pro quo* relationships. Thus, at least in the context of contribution limits, the Court recognizes two levels of corruption in which the State has a legitimate interest: (1) *quid pro quo* relationships; and (2) evasion of individual contribution limits. Given the legitimate interest in protecting the integrity of contribution limits, Kentucky's $4,000 limit on contributions to PACs[177] and the $4,000 aggregate limit on individual contributions to all PACs in a year[178] is clearly constitutional.

The Court also considered the regulation of contributions to PACs in *Fed. Election Comm'n v Nat'l Right to Work Comm.*[179] This time, however, the challenged regulation limited the manner in which certain PACs can solicit contributions and the class of contributors from whom they can solicit contributions.[180] The provision targeted PACs affiliated with corporations and unions, restricting the class of their contributors to "members." National Right to Work Committee (National Right to Work), a nonprofit corporation without capital stock, was formed to lobby against "compulsory unionism."[181] Despite the federal regulation

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[175] *Id.* at 198-99 (plurality opinion); *id.* at 203 (Blackmun, J., concurring).

[176] *Id.* at 199. *See also id.* at 203 (Blackmun, J., concurring).

[177] KRS § 121.150(6) (as amended by S.B. 268).

[178] KRS § 121.150(9) (as amended by S.B. 268).

[179] 459 U.S. 197 (1982).

[180] Segregated funds (PACs) established by corporations to participate in political elections may only solicit contributions from "stockholders and their families and [the corporation's] executive or administrative personnel and their families." 2 U.S.C. § 441b(b)(4)(A)(i) (*cited in Nat'l Right to Work*, 459 U.S. at 202). PACs established by unions may solicit contributions only from "[the union's] members and their families." 2 U.S.C. § 441b(b)(4)(A)(ii). The provision continues by stating: "[t]his paragraph shall not prevent a corporation without capital stock, or a separate segregated fund established by a corporation without capital stock, from soliciting contributions to such a fund from members." 2 U.S.C. § 441b(b)(4)(C) (*cited in Nat'l Right to Work*, 459 U.S. at 202).

[181] *Nat'l Right to Work*, 459 U.S. at 199-200.

limiting its solicitation efforts to members, National Right to Work's articles of incorporation expressly stated that it "shall not have members" and its bylaws made no reference to members.[182] These and other factors convinced the Court that National Right to Work had violated the challenged regulation. The Court concluded that membership requires "some relatively enduring and independently significant financial or organizational attachment" to the corporation.[183] Merely responding to "random mass mailings" soliciting funds is insufficient to establish membership.[184]

Having concluded that National Right to Work violated the regulation, the Court considered whether the limitation was constitutional. Obviously, restricting the permissible class of contributors to a PAC infringes its associational rights under the first amendment.[185] The Court of Appeals believed that this raised "insurmountable constitutional difficulties."[186] The concern was twofold: first, unrestricted solicitation of contributions by corporate PACs does not threaten to create *quid pro quo* relationships with candidates; and second, unrestricted solicitation does not threaten corporate coercion of contributions from members holding minority political views.[187] The latter interest distinguishes campaign finance regulations aimed at corporations and unions from those aimed at individuals and noncorporate associations.

In refusing to address the Court of Appeals' valid concerns, the Supreme Court further delineated the constitutional parameters for permissible campaign finance regulations established in *Buckley* and its progeny· political activities initiated by corporations, unions, and similar socioeconomic institutions are subject to more intrusive restrictions than those initiated by other political participants.[188] Underlying the Court's willingness to approve prophylactic restrictions is its acceptance of the long-

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[182] *Id.* at 199.
[183] *Id.* at 204.
[184] *Id.*
[185] *Id.* at 206-07
[186] *Id.* at 206.
[187] *Id.*
[188] *Id.* at 210-11.

established congressional determination that corporations and unions pose a substantial threat to political processes.[189] Thus, when regulations focus on corporations and unions, the Court held that it would not "second-guess a legislative determination as to the need for prophylactic measures when corruption is the evil feared."[190]

The Supreme Court's holding in *Nat'l Right to Work* allows the state considerable leeway in regulating PACs affiliated with corporations and unions, but the holding in *Bellotti* indicates that the State's discretion is not absolute. In *Bellotti*, the Court refused to permit restrictions on corporate speech on the grounds that corporations are entitled to less first amendment protection than individuals.[191] Instead, the Court focused its first amendment analysis on the content of corporate speech which the State sought to regulate and on preserving free access to the marketplace of ideas.[192] To justify restrictions on speech, including corporate speech, the State must satisfy, "the exacting scrutiny necessitated by state-imposed restriction on freedom of speech."[193] *Nat'l Right to Work* reveals that the Court gives deference to the State's determination that it has a compelling interest in regulating corporate and union political activities, but *Bellotti* clearly indicates that the State cannot justify its regulations on the basis of the speaker's identity alone.[194]

The Court's most recent decisions on regulating PACs, *Fed. Election Comm'n v Nat'l Conservative Political Action Comm. (NCPAC)*[195] and *Fed. Election Comm'n v Massachusetts Citizens For Life, Inc.*,[196] reveal its unwillingness to permit limitations on independent expenditures. In *NCPAC*, the Court struck

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[189] *Id.* at 208-09.

[190] *Id.* at 210.

[191] *Bellotti*, 435 U.S. at 777

[192] Discussion of governmental affairs "is at the heart of the First Amendment's protection," therefore, the State may not restrict the public's right to information on matters of public concern solely upon the speaker's identity, "whether corporation, association, union, or individual." *Id.* at 776-77.

[193] *Id.* at 786.

[194] *Id.* at 777 (The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.). *Id.*

[195] 470 U.S. 480 (1985).

[196] 107 S. Ct. 616 (1986).

down a $1,000 limit on independent expenditures by PACs in publicly funded elections (*i.e.*, presidential elections).[197] The Court reaffirmed its position in *Buckley* that independent expenditures "produced speech at the core of the First Amendment" and that they do not pose a threat of corrupting political processes.[198] Although NCPAC was formally incorporated, the Court refused to follow *Nat'l Right to Work* to allow prophylactic measures against the threat of undue corporate influence. The basis for its decision was that *NCPAC* is not a "corporations" case, because the challenged provision "applies not just to corporations but to any 'committee, association, or organization (whether or not incorporated)' that accepts contributions or makes expenditures in connection with electoral campaigns."[199] The Court left open the question "whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office."[200]

In *Massachusetts Citizens for Life*, the FEC filed a complaint charging that Massachusetts Citizens for Life (Massachusetts Citizens) violated the FECA's prohibition on using direct corporate expenditures in connection with elections to public office.[201] Massachusetts Citizens is a nonprofit, nonstock corporation formed to advocate right to life principles.[202] It published a newsletter which identified candidates for state and federal offices who support its cause.[203] The Court concluded that this was an expenditure prohibited by the FECA, because it satisfied the express advocacy test set forth in *Buckley* [204]

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[197] The provision invalidated in *NCPAC* was part of the Presidential Election Campaign Fund Act, which provides partial public financing for presidential candidates of major political parties who qualify for it. *NCPAC*, 470 U.S. at 482; 26 U.S.C. §§ 9001-9013 (1982).

[198] *NCPAC*, 470 U.S. at 493, 497-98. The Court would have reached the same result even if evidence of corruption was found, because it found the challenged provision fatally overbroad. *Id.* at 498. The Court upheld the District Court's refusal to admit compelling evidence that the expenditures were not independent. *Id.* at 499.

[199] *Id.* at 496.

[200] *Id.* The Court left this question open in *Bellotti* also. *See Bellotti*, 435 U.S. at 788 n.26.

[201] *Massachusetts Citizens for Life*, 107 S. Ct. at 621; *see also* 2 U.S.C. § 441b (1982).

[202] *Massachusetts Citizens for Life*, 107 S. Ct. at 619.

[203] *Id.* at 620.

[204] *Id.* at 623.

Consequently, the Court held that Massachusetts Citizens did violate the statute.[205]

Massachusetts Citizens could have established a PAC through which to make campaign expenditures, as do similar corporations.[206] Nonetheless, the Court held that imposing the organizational requirements necessary to establish a PAC significantly burdens Massachusetts Citizens' first amendment freedoms.[207] Since this is a "corporations case"[208] the holding of *Nat'l Right to Work* suggests that the Court should defer to Congress' determination that the threat of corruption was sufficient to justify restraints on free speech and association.[209] Yet the Court considered one distinguishing factor significant in its refusal to follow *Nat'l Right to Work*. Consistent with the teachings of *Buckley* and the cases following it, the Court emphasized that Congress was attempting to limit independent expenditures, not contributions.[210] The Court indicated that this factor weighed against giving the deference to Congress shown in *Nat'l Right to Work*. As the Court stated:

> We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.
>
> In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient in *National Right to Work Committee* to support a limitation on the ability of a committee to raise money for direct contributions to candidates. The limitation on solicitation in this case, however, means that non-member corporations can hardly raise any funds at all to engage in political speech warranting the highest constitutional protection. Regulation that would produce such a result demands far more precision than § 441b provides. Therefore, the

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[205] *Id.* at 624.

[206] *Id.* at 624-25.

[207] *Id.* at 625-26; *id.* at 630-31 (O'Connor, J., concurring).

[208] Chief Justice Rehnquist used this term in *NCPAC* to distinguish it from *Nat'l Right to Work*, 470 U.S. at 496.

[209] This is the basis for Chief Justice Rehnquist's dissent. *Massachusetts Citizens for Life*, 107 S. Ct. at 632 (Rehnquist, C.J., dissenting).

[210] *Id.* at 629.

> desirability of a broad prophylactic rule cannot justify treating alike business corporations and appellee in the regulation of independent spending.[211]

After deciding that issue, the Court had to determine whether Massachusetts Citizens posed the same threat of corruption traditionally ascribed to corporations.

After examining "the concerns underlying the regulation of corporate political activity," the Court concluded that Massachusetts Citizens does not merely present "less of a threat of the danger that has prompted regulation. [I]t does not pose such a threat at all."[212] The Court identified three features of Massachusetts Citizens which negate any threat of corruption considered inherent in corporate organizations.[213] "*First*, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities."[214] Therefore, any assets received by Massachusetts Citizens are derived from its political support in the community, not from "the economically motivated decisions of investors and customers."[215] "*Second*, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings."[216] This feature of Massachusetts Citizens ensures that its political activities will not infringe on "minority" shareholders. People join this type of organization because of its political message, not to realize a personal economic benefit. Should members become dissatisfied with Massachusetts Citizens' message or activities, they can simply quit contributing to it.[217] "*Third*, [Massachusetts Citizens] was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities."[218] This feature distinguishes Massachusetts Citizens from National Right to Work, which aggressively pursued contributions from business organizations.[219] Massachusetts Citizens' policy of disassociation

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[211] *Id.*
[212] *Id.* at 630.
[213] *Id.* at 631.
[214] *Id.* (emphasis in original).
[215] *Id.* at 628.
[216] *Id.* at 631 (emphasis in original).
[217] *Id.* at 629.
[218] *Id.* at 631 (emphasis in original).
[219] *Nat'l Right to Work*, 459 U.S. at 200.

with corporations and unions ensured that they could not use organizations like Massachusetts Citizens "as conduits for the type of direct spending that creates a threat to the political market place."[220]

Although the Court noted that the decision in *Massachusetts Citizens for Life* might affect only a small class of political organizations,[221] its significance extends beyond its immediate impact on organizations like Massachusetts Citizens. By refusing to follow *Nat'l Right to Work*, the Court has established that Congress and the states cannot impose restrictions on voluntary political associations merely because they don corporate form. Therefore, requiring a corporation, or other organization formed to operate in the marketplace of ideas, to make political contributions and expenditures (particularly expenditures) through PACs is constitutional only if the corporation poses the same threat posed by corporations organized to operate in the economic marketplace.

C. *Kentucky Cases*

Several cases, state and federal, have involved challenges to Kentucky's campaign finance laws. In *Lee v Commonwealth*,[222] the Kentucky Court of Appeals considered a challenge to section 121.045 of the Kentucky Revised Statutes. This section, among other things, prohibited contributions to candidates running for Property Valuation Administrator (PVA) from property owners in the county where the candidate was running.[223] Although the court quoted *Buckley* extensively and found that the provision served no compelling state interest, it based its decision that the provision is unconstitutional on Section 59 of the Constitution of Kentucky [224] The court's failure to base its decision on the free speech provisions of the state or federal constitutions is

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[220] *Massachusetts Citizens for Life*, 107 S. Ct. at 631.

[221] *Id.*

[222] 565 S.W.2d 634 (Ky. App. 1978).

[223] KRS § 121.045 (Baldwin 1986).

[224] *Lee*, 565 S.W.2d at 637-38. Section 59, subsection 29, of the Kentucky Constitution prohibits the enactment of a special law where a general law could be made applicable. KY. CONST. § 59(29).

inexplicable, but the case is noteworthy nonetheless. In its discussion of the Corrupt Practices Act and its similarity to FECA, the court suggested that Kentucky had an interest in equalizing "the relative ability of all voters to affect the outcome of elections."[225] The court erroneously cited *Buckley* as support for this assertion. In fact, the Supreme Court rejected this interest in clear, unequivocal language.[226] This error did not affect the outcome of the case, but it deserves acknowledgment to prevent misinterpretation of the principles established in *Buckley*

In *Ky Registry of Election Finance v Louisville Bar Ass'n*,[227] the Kentucky Court of Appeals affirmed a lower court's decision that the Louisville Bar Association, a nonprofit corporation, could use its funds to purchase an advertisement containing its judicial qualification poll. The trial court held that publishing the poll did not violate the corrupt practices provision in the Kentucky Constitution or statutes as long as it met certain conditions set by the court.[228] The appeals court refused to find this holding clearly erroneous, but proceeded to the constitutional question anyway [229] Therefore, its constitutional analysis seems to be pure dicta. The analysis anticipates the holding of *Massachusetts Citizens for Life*. The Court of Appeals concluded that even though the Louisville Bar Association was a corporation and could have established a PAC to make its expenditure for the advertisement, prohibiting the expenditure violated first

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[225] *Lee*, 565 S.W.2d at 637.

[226] The Court's rejection of this interest finds its most succinct expression in the following passage:

> But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "

Buckley, 424 U.S. at 48-49 (citations omitted). This passage has generated considerable controversy. *Compare* Wright, *supra* note 32 at 612, 631-42 ("[T]he truth-producing capacity of the marketplace of ideas is not enhanced if some are allowed to monopolize the marketplace by wielding excessive financial resources." *Id.* at 636) *with* BeVier, *supra* note 133 at 1045, 1090 (agreeing with the Supreme Court's refusal in *Buckley* to relax first amendment protections to achieve political equality).

[227] 579 S.W.2d 622 (Ky. App. 1979).

[228] *Id.* at 624-25.

[229] *Id.* at 625.

amendment guarantees of the federal and state constitutions.[230] With reasoning similar to that found in *Massachusetts Citizens for Life*, the Court of Appeals held that the Louisville Bar Association was not the type of organization which poses an unwarranted threat of corrupting the political process.[231] Since *Lee* preceded *Massachusetts Citizens for Life* and *Nat'l Right to Work*, future cases in Kentucky must consider the constitutional guidelines established in those decisions when determining whether restrictions upon corporations like the Bar Association are exempt from the constitutional and statutory corrupt practices provisions.

The two most recent cases involving challenges to Kentucky's campaign finance laws were issued by the Sixth Circuit Court of Appeals. In *Ky Educators Pub. Affairs Council v Ky Registry of Election Finance*,[232] the Sixth Circuit affirmed summary judgment in favor of Kentucky Educators' Public Affairs Council (KEPAC). KEPAC is the PAC for the Kentucky Education Association (KEA).[233] Under Kentucky law KEA members can request that their employers deduct KEA dues from their pay [234] In conjunction with this system, KEPAC employs a "reverse check-off" procedure whereby it collects contributions from KEA members.[235] To decline to contribute to KEPAC, KEA members must affirmatively indicate their decision when com-

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[230] *Id.* at 627-28.

[231] The Court of Appeals stated:

> The purpose of both the constitutional and statutory provisions appear [sic] to be for the prevention of the exertion of unwarranted and perhaps unwholesome influence over political affairs by corporations formed for profit. These corporations often have at their disposal large sums of money capable of being used to further corporate fortunes through promoting the aspirations of selected candidates. The activities of the Louisville Bar Association in this case clearly do not fall within the conduct sought to be avoided by our laws. There has been no corruption of candidates or vote buying by corporate contributions, and we cannot see any need for protection of the individual members of the Bar Association in this situation.

Id. at 627.

[232] 677 F.2d 1125 (6th Cir. 1982).

[233] KEA is a non-profit corporation formed as an employee organization for teachers and other members of the educational community. *Id.* at 1127.

[234] *Id.*, KRS § 161.158(2) (Baldwin 1986).

[235] 677 F.2d at 1127.

pleting the forms necessary to have KEA dues deducted.[236] KEA members "can stop the deductions and can obtain a refund for past contributions" should they desire.[237] The court noted that implementation of the reverse check-off system in 1975 resulted in a substantial increase in the number of contributors to KEPAC and in the amount of money it collected.[238]

The basis for the Sixth Circuit's decision that KEPAC's reverse check-off system is permissible is that it "meets the 'Knowing Free-Service Donation' test set forth in [*Pipefitters Local Union No. 562 v United States*]."[239] Noting the "safeguards that protect the dissenting member,"[240] the court concluded that "the KEPAC procedure amply protects the rights of dissenters and meets tests of *Pipefitters*."[241] Although the court held that KEPAC could use the reverse check-off system under Kentucky law, it also concluded that "KEPAC has no constitutional right to a check-off or payroll deduction system for political fund raising."[242] Therefore, the Kentucky legislature can, if it believes appropriate, modify or eliminate the procedure altogether.

The final case considered in this section involves the Registry's role in enforcing campaign finance laws. In *Naegele Outdoor Advertising Co. v Moulton*,[243] the Sixth Circuit held that Kentucky's campaign finance laws do not vest exclusive control over investigation of campaign finance violations with the Registry "to the exclusion of the Kentucky State Police or the Commonwealth attorneys. "[244] Furthermore, the court con-

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[236] Failure to indicate a desire not to contribute to KEPAC results in automatic deduction of these contributions. *Id.* at 1127-28.

[237] *Id.*

[238] *Id.*

[239] *Id.* at 1132 (citing Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972)).

[240] *Id.*

[241] *Id.* at 1133.

[242] *Id.* at 1134 (citing City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 426 U.S. 283 (1976)).

[243] 773 F.2d 692 (6th Cir. 1985), *cert. denied*, 475 U.S. 1121 (1986). This case includes a good discussion of the history of campaign finance legislation in Kentucky. *Id.* at 697-99.

[244] *Id.* at 700. The court stated that "[t]he statutory scheme shows only a desire to supplement the traditional authority by increasing the powers and responsibility of the Registry, not to replace the authority of others." *Id.*

cluded that even assuming the statute vests exclusive control of investigations in Registry, the court did "not believe the Kentucky legislature created an identifiable and protected liberty interest of such proportions as to entitle it to protection as a matter of federal constitutional law "[245] This ruling gives the Registry leeway in deciding the extent of its involvement in investigation and enforcing campaign finance laws pursuant to its statutory authority [246]

The holding in *Moulton* must be considered in light of the enactment of Kentucky's election reform legislation in 1988. The legislature created two new sections to Chapter 15 of the Kentucky Revised Statutes. This legislation defines and expands the Attorney General's authority to investigate and enforce violations of election laws.[247] As a result, the Registry's role in enforcing campaign finance laws is now better defined. Once an investigation reaches the stage that probable cause exists, the Registry's role effectively ceases. The Registry only pursues an investigation beyond the probable cause determination if the Attorney General has failed to prosecute the case properly [248]

IV PROPOSALS FOR REFORM

Having examined how PACs operate in the Commonwealth, the campaign finance laws applicable to them, and the constitutional limits on permissible regulations, this Note suggests several proposals for modifying the present campaign finance regulatory scheme. These proposals address the problems likely to arise from attempts to circumvent the new restraints on PAC activities, yet remain within the constitutional framework established by *Buckley* and its progeny Obviously, the following proposals are not the only ways to regulate PAC activities, but they serve as a starting point for future legislative action.

A. Limits on PAC Contributions to Candidates

Placing limits on contributions by PACs to political candidates was an obvious suggestion for reform that the Legislature

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[245] *Id.*

[246] *See supra* notes 90-94 and accompanying text.

[247] S.B. 268 §§ 1 & 2, pp. 1-3.

[248] S.B. 268 § 2(2), pp. 1-2.

accepted with overwhelming approval.[249] Contribution limits are clearly constitutional, and they go to the heart of the *quid pro quo* relationship considered a threat to the integrity of political processes.[250] Given the logical assumption that PAC contributions have at least as much potential for corruption as contributions by individuals, arguments against imposing limits on PAC contributions are difficult to sustain. Common Cause, a supporter of imposing limits on PAC contributions, offers results from a recent exit poll to bolster its claim that Kentuckians favored limits on PAC contributions.[251] The poll revealed that approximately 64% of the respondents supported placing limits on PACs.[252] This kind of evidence and the basic equities implicated suggest that of all the newly enacted reforms to current campaign finance laws, limiting PAC contributions to candidates was the most sensible approach for the Legislature to take.

Once legislative limits on PAC contributions take effect, PACs may search for ways to circumvent the law The problem is how to close the loopholes while ensuring fair, effective enforcement of contribution limits. Two significant loopholes exist in the 1988 regulatory scheme. First, PACs organized prior to January 1, 1988, may surreptitiously create subsidiary PACs to evade contribution limits.[253] Second, those desiring to form new PACs may evade contribution limits by forming a campaign committee rather than a permament committee.[254]

1. *Subsidiary PACs*

The original bill proposing limits on PAC contributions contained an amendment designed to prohibit PACs from creating subsidiary PACs to carry out the purposes of the parent. This

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[249] Senate Bill 53, which limited PAC contributions to $4,000 per candidate per election, passed the Senate 36-0 and passed the House 98-0. *Legislative Record*, Apr. 14, 1988 at p. 9.

[250] *See supra* notes 141-51 and accompanying text.

[251] COMMON CAUSE/KENTUCKY, *supra* note 7 at 4.

[252] *Id.* WHAS-TV, in Louisville, conducted the poll during the May 1987 primary in Jefferson County. Of the respondents, 63.9% favored limits on PAC contributions; 16.1% opposed such limits.

[253] KRS § 121.150(7) (as amended by S.B. 268).

[254] Campaign committees and permanent committees are included within the term "committee" under Kentucky law. KRS § 121.015(3)(a), (c).

amendment was withdrawn before the House voted on the measure.[255] Nonetheless, when the Legislature finally passed the Omnibus Election Reform Act in 1988, a provision prohibiting creation of subsidiary PACs survived.[256] Despite the apparent good intentions of the drafters, the provision enacted may prove less effective than expected.

The subsidiary PACs prohibition is flawed in that the criteria for establishing a relationship are too easy to avoid. PACs "affiliated by bylaw structure or by registration, as determined by the registry of election finance, shall be considered as one (1) committee for purposes of applying the contribution limits of subsection (6) of this section."[257] By focusing on mere paper affiliations between PACs, the law allows compliance with its technical requirements while ignoring its intent. Rather than focusing on what PACs say they are, affiliations should be determined by the day-to-day operations of the PACs involved. Do they share contributors, employ the same political consultants, or have similar ties to the same candidate?[258] Obviously, this type of inquiry is more difficult than a paper test, but it is necessary to ensure effective enforcement of the prohibition against the creation of subsidiary PACs.

Another aspect of the subsidiary PAC provision is the impact of its grandfather clause on PACs registered as of January 1, 1988.[259] The provision allows PACs and their affiliates existing at that date to continue contributing to candidates as separate organizations.[260] As a result, one of Kentucky's largest and most visible contributors to state and local campaigns will still be able to contribute more than $4,000 to candidates. KEPAC, without creating a single new subsidiary, may *potentially* contribute $146,000 to a single candidate in an election. It can do this by simply changing its operating procedures so that the state committee and local PACs each contribute *only* $1,000 to the same candidate.[261]

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[255] *See Legislative Record*, S.B. 53, Apr. 14, 1988, at p. 9.

[256] KRS § 121.150(7) (as amended by S.B. 268).

[257] *Id.*

[258] *See infra* notes 269-72 and accompanying text.

[259] *Id.*

[260] *See supra* notes 51-52 and accompanying text.

[261] *Id.* With 146 PACs (the state organization plus 145 local organizations) contrib-

2. *Campaign Committees*

Kentucky law defines a campaign committee as "one (1) or more persons who receive contributions and make expenditures to support or oppose one (1) or more specific candidates for nomination or election to any state, county, city or district office."[262] The only distinguishing structural feature between a campaign committee and a permanent committee established to support selected candidates is that a permanent committee is "established as, or intended to be, a permanent organization which functions on a regular basis throughout the year."[263]

Campaign committees are available as vehicles for evading contribution limits on PACs simply because the newly enacted limit on PAC contributions does not apply to campaign committees.[264] Although campaign committees and permanent committees may be used in the same ways, campaign committees may give unlimited contributions to candidates. Essentially, campaign committees may be established as short-lived PACs.

Campaign committees may be treated differently than PACs solely on the assumption that they are agents for a particular candidate or candidates and therefore subject to the same regulations as candidates. Perhaps the Legislature made this assumption when it excluded campaign contributions from quantitative limits. If this is the case, the Legislature seems to have operated under a misconception. No where in Kentucky's campaign finance regulations is there a requirement that campaign committees be affiliated with a candidate or acting for a candidate. The only provision governing unauthorized or disavowed campaign committees merely prohibits them from using

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uting $1,000 apiece, a candidate may still receive $146,000 from KEPAC. The author does not intend to imply that KEPAC created its subsidiary PACs to circumvent contribution limits. KEPAC created its affiliates in 1977-78, well before attention was focused on Kentucky PAC activities. *See* J. Graves, *supra* note 34, at 2.

[262] KRS § 121.015(3)(a) (Baldwin 1986).

[263] *Id.* at § 121.015(3)(c).

[264] *Id.* at § 121.150(6) (as amended by S.B. 268). Campaign committees are also not subject to subsidiary PAC regulations, nor to the provision limiting aggregate individual contributions to PACs to $4,000 per year. *Id.* at § 121.150(7), (9) (as amended by S.B. 268).

the candidate's name and directs them to the provisions prescribing their reporting and filing requirements.[265] Obviously, campaign committees that operate like permanent committees (PACs), particularly those affiliated with a specific interest group, should be subject to the same contribution limits and other restraints applicable to PACs.

B. Limits on Independent Expenditures

Quantitative limits on independent expenditures are constitutionally impermissible unless the legislature can establish that they pose a threat of corruption or the appearance of corruption to the political system.[266] In Kentucky, the problems which many commentators attribute to independent expenditures have been nonexistent. However, since Kentucky now limits PAC contributions as well as individual contributions, PACs have an incentive to make independent expenditures. They can no longer get more "bang" for their "bucks" with direct contributions. The legislature should realize that imposing limits on PAC contributions will bring about an increase in the amounts spent on independent expenditures. This has already happened at the national level.[267]

Although limits on independent expenditures are unconstitutional, other ways exist to control them. One recurring criticism of independent expenditures is that they are not truly independent.[268] When PACs coordinate their "independent" expenditures with the candidate or the campaign staff, they are actually making a contribution in kind to the candidate.[269] To

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[265] *Id.* at § 121.210(4) (Baldwin 1986).

[266] *See supra* notes 152-57 and accompanying text.

[267] *See* L. SABATO, *supra* note 14, at 174-75; Jacobson, *Money in the 1980 and 1982 Congressional Elections* in MONEY AND POLITICS IN THE UNITED STATES: FINANCING ELECTIONS IN THE 1980s, at 51-55 (M. Malbin ed. 1984); Comment, *supra* note 122, at 674.

[268] *See, e.g.*, Comment, *supra* note 122, at 675-76. The author notes that: "[a]lthough the expenditures may legally be classified as independent, candidates often establish extensive communications with the independent committee through the media and personal contacts. Some independent committees recruit candidates and persuade them to enter the race." *Id.* at 675. As an example of this problem, the author cited extensive connections between NCPAC and the Reagan campaign in 1980. *Id.* at 675 n.15.

[269] Comment, *supra* note 122, at 687.

ensure that independent expenditures are not coordinated with the candidate's campaign, the legislature should identify a series of factors which will raise a rebuttable presumption that an expenditure is actually a contribution in kind. For instance, when PAC officers also hold positions in the candidate's campaign, a presumption of coordination is reasonable.[270] Another factor tending to show coordination of efforts is the sharing of numerous common vendors.[271] If a PAC chooses to employ the same advertising agency or political consultant, coordination appears probable.[272]

Another criticism of independent expenditures is that PACs cannot be held accountable for their actions. This criticism arose in 1980, after NCPAC funded high profile negative campaigns targeting certain members of Congress NCPAC considered too liberal.[273] As NCPAC's controversial founder, Terry Dolan, admitted, NCPAC can "lie through its teeth" about a targeted candidate, leaving that candidate's opponent free to disclaim any involvement in NCPAC's smear campaign.[274] To ensure that the public at least knows who or what organizations are responsible for slinging political mud, the legislature should require political advertisements funded by PAC expenditures to expressly, and audibly if on radio or television, state the name of the PAC that purchased the advertisement and the name of the candidate for whose *benefit* it purchased the advertisement. This way, candidates who benefit from the negative tactics employed must

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[270] For a discussion of the criteria which the FEC should use to determine if nominally independent expenditures are actually contributions in kind, see *id.* at 694-97.

[271] *Id.* at 697.

[272] *Id.* at 696.

[273] *See* Jacobson, *supra* note 267, at 51-55. NCPAC spent approximately $1.2 million for media campaigns attacking a select group of liberal Democratic incumbents in Congress. *Id.* at 54.

[274] Dolan stated in an interview:

> Groups like ours are potentially dangerous to the political process. We could be a menace, yes. Independent expenditure groups, for example, could amass this great amount of money and defeat the point of accountability in politics. A group like ours could lie through its teeth and the candidate it helps stays clean.

See Comment, *supra* note 122, at 676-77 n.21 (quoting MacPherson, *The New Right Brigade*, Wash. Post, Aug. 10, 1980, at F-1, col. 1).

either embrace or denounce them. This is arguably a harsh rule, because candidates cannot always control the actions of their supporters. Even accepting this, candidates should not be allowed to accept the benefits of negative campaigns while accepting no responsibility for their content.

C. *Reporting Requirements*

Kentucky has comprehensive disclosure requirements now, but one change suggested by Common Cause would prove beneficial. The legislature needs to increase the staff and enforcement authority of the Registry The current staff is competent and hard-working, but it cannot perform its basic administrative functions and thoroughly check for attempts to circumvent the law [275]

D. *Enforcement*

Currently, primary responsibility for enforcing campaign finance laws rests within the attorney general's office. This may prove troublesome should a future attorney general show more interest in personal, political concerns than in faithfully executing election laws. For this reason, a strong, independent Registry is arguably the best vehicle for enforcing laws inextricably intertwined with political careers and ambitions.

E. *Public Financing*

Although adoption of partial or full public financing for gubernatorial or legislative races does not target PACs in particular, supporters of public financing argue that it would go to the root of the fundamental problems with our current system of campaign financing.[276] In a system that operates on private

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[275] *See* COMMON CAUSE/KENTUCKY, *supra* note 7, at 4.

[276] *Id. See generally* Adamany, *supra* note 122, at 1022-23, 1027 (supporting public financing of congressional elections but also discussing drawbacks); Fleishman and McConkle, *Level-Up Rather than Level-Down: Toward a New Theory of Campaign Finance Reform*, 1 J. L. & POL. 211, 275 (1984) (incorporating partial public financing in sophisticated theoretical construct of campaign financing); Girard, *Campaign Finance Reform in California*, 10 HASTINGS CONST. L.Q. 567, 585 (1983) ("Direct funding of campaign expenditures from the public treasury is a superior alternative to the present

voluntary campaign contributions, the creation of political debts is inevitable. In such a system wealthy candidates will always have a decided advantage over nonwealthy candidates. Public financing would eliminate or reduce the creation of political debts, depending on whether full or partial funding is available, and it would ensure that nonwealthy candidates can afford the financial burdens imposed by effective political campaigns.

Several states have adopted public financing mechanisms for particular elections and have proven that public financing can work at the state level.[277] Yet the prospect that Kentucky's legislature will adopt such a system appears dim. The Commonwealth already faces serious financial problems, and Kentuckians clearly expressed their opposition to tax increases in the upset victory of Wallace Wilkinson in the 1987 primary Since raising the funds necessary to sustain a public financing system would pose another financial dilemma for the legislature, its adoption in the near future appears unlikely This is unfortunate because the long-term benefits of such a system might outweigh its costs.[278]

CONCLUSION

PACs have not realized their full potential for influencing elections in the Commonwealth, but the preliminary studies reveal that they are having an increasing impact on political campaigns. In particular, PACs supply a large proportion of the funds contributed to legislative campaigns. Even assuming that

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methods of financing campaigns."); Rich, *Campaign Finance Legislation: Equality and Freedom*, 20 COLUM. J. L. & SOC. PROBS. 409, 433-35 (1986) (stating that public financing has advantages, *but* noting that the decision of who gets money is an insurmountable problem).

[277] New Jersey is the best example of a state that has adopted a successful public financing system. *See* Edelman, *A Reform Worth Reforming: Campaign Finance in New Jersey*, 74 NAT'L CIVIC REV. 417 (1985) (noting that system has been successful but needs more work).

[278] The Executive Director of Common Cause in Kentucky, Alane Goldstein, argues persuasively that Kentuckians cannot afford *not* to adopt a public financing system for political campaigns. She maintains that adoption of public financing would save the Commonwealth money in the long-term by eliminating the waste inherent in the creation of political campaign debts to particular individuals and interest groups. Telephone interview with Alane Goldstein, Executive Director of Common Cause in Kentucky (Oct. 27, 1987).

candidates for legislative seats do not compromise their integrity to obtain PAC contributions, the appearance of corruption persists.[279] Although PAC contributions compose a small percentage of total contributions to gubernatorial candidates, PAC contributions have in several instances far exceeded the $4,000 limit on individual contributions.[280] With the recent enactment of legislation limiting PAC contributions to $4,000 the Legislature took a significant step toward lessening the appearance of corruption created by large PAC contributions.

Although Kentucky has witnessed a recent upsurge of interest in campaign finance reform, much work remains undone. The 1988 legislation regulating PACs is a hopeful first step, but too many gaping loopholes exist. To make contribution limits on PACs mean anything, the Legislature must be ready to address potential abusers of the system by subsidiary PACs and campaign committees. The Legislature should also consider enacting regulations to prevent PACs from circumventing contribution limits by disguising contributions as independent expenditures. Finally, to ensure vigorous enforcement of the regulatory system, the Legislature should increase the enforcement authority and resources of the Registry

Above all else, the Legislature must recognize the impact that *Buckley v Valeo*[281] and its progeny have on any type of campaign finance reform.[282] This Note argues that compelling reasons exist for regulating PAC activities but enacting contribution limits or more reporting requirements will not reduce the advantage wealthy candidates have over nonwealthy candidates. Imposing restraints on PACs will not, in all likelihood, reduce the much criticized cost of political campaigns. The only way to address these problems without violating the first amendment is to adopt partial or full public financing of political campaigns. Whether Kentuckians will recognize the long-term benefits of

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[279] *See supra* note 273 and accompanying text.

[280] For example, KEPAC contributed $35,000 to Republican John Harper in the 1987 general election for governor. *See Teacher Group Marks $35,000 for Harper Use*, Lexington Herald-Leader, Sept. 28, 1987, at B2, col. 1.

[281] 424 U.S. 1 (1976).

[282] *See supra* notes 130-221 and accompanying text.

such a change remains to be seen: until that time, the Legislature must confront the problems presented by PACs.

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