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INDEPENDENT SPENDING, POLITICAL ACTION COMMITTEES, AND THE NEED FOR FURTHER CAMPAIGN FINANCE REFORM

The role of political action committee (PAC) contributions within the electoral process has been criticized by commentators[1] and legislators[2] alike. Yet, a potentially larger danger goes relatively unnoticed. The tremendous growth in total PAC contributions over the past two decades[3] has occurred within the confines of federal ceilings on contribution amounts.[4] In contrast, a less familiar PAC campaign technique, the independent expenditure, is not subject to federal ceilings. PAC "independent expenditures" are those made on a candidate's behalf, but without the beneficiary's consultation or approval.[5] In the 1984 presidential election, over $16 million in independent expenditures aided President Reagan's re-election campaign.[6] Because it buys additional media advertising, an independent spending campaign conducted by a sophisticated PAC is just as beneficial to a candidate as a comparable direct contribution. As Supreme Court Justice White stated, "Independent PAC expenditures function as contributions."[7]

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1. *See* E. DREW, POLITICS AND MONEY 4, 38-52, 84-93 (1982); A. ETZIONI, CAPITAL CORRUPTION 182-208 (1984); Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?* 82 COLUM. L. REV. 609, 614-20 (1982). *But see* Budde, *The Practical Role of Corporate PACs in the Political Process,* 22 ARIZ. L. REV. 555 (1980) (PACs are an outgrowth of corporate involvement in politics); Elliot, *Political Action Committees—Precincts of the '80s,* 22 ARIZ. L. REV. 539 (1980) (PACs are a healthy addition to political process).

2. *See* Chiles, *PACs: Congress on the Auction Block,* 11 J. LEGIS. 193 (1984). Congressional concern for the role of PAC money in the political process reached a high in 1983, when 17 bills introduced that year focussed wholly or in part on restricting PACs. J. CANTOR, POLITICAL ACTION COMMITTEES: THEIR EVOLUTION, GROWTH AND IMPLICATIONS FOR THE POLITICAL SYSTEM (Cong. Res. Service Rep. No. 84-78 197 (1984)). Senator Robert Dole of Kansas commented, "When these political action committees give money, they expect something in return other than good government." Taylor, *Efforts to Revise Campaign Laws Aim at PACs,* Washington Post, Feb. 28, 1983, at A1, col. 1. *See also infra* text accompanying note 15.

3. *See infra* text accompanying note 144.

4. *See* 2 U.S.C. § 441a (1982 and Supp. IV 1986).

5. "The term 'independent expenditure' means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation of consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17) (1982 and Supp. IV 1986). *See also* 11 C.F.R. § 109 (1987) (further definition of statutory term).

6. *See* FEC INDEX OF INDEPENDENT EXPENDITURES, 1983-84.

7. FEC v. National Conservative Political Action Comm., 470 U.S. 480, 510 (1985) (White, J., dissenting).

A majority of the Supreme Court, however, disagrees with this view. In *Buckley v. Valeo*,[8] the seminal decision on federal campaign finance legislation, the Court compared restrictions imposed on the amounts of direct contributions with those imposed on independent expenditures. The Court found both a practical and a constitutional distinction between the two campaign techniques.[9] Thus, the Court upheld limits on amounts directly contributed to campaigns while striking similar ceilings on independent spending which benefit candidate campaigns.[10] More recently, the Court forcefully announced the special protection given to independent PAC spending in *FEC v. National Conservative Political Action Committee*.[11] There, a ceiling on independent expenditures in publicly-funded presidential campaigns was held unconstitutional.[12] Two related consequences of these Supreme Court decisions have been the dissection of a comprehensive campaign finance legislative scheme and the phenomenon of increased independent PAC spending.

I. INTRODUCTION

This Comment will explore the political ramifications of the distinction first articulated in *Buckley v. Valeo*, a distinction which has directly and indirectly enlarged the role PACs play in campaigns through independent expenditures. The inquiry will begin with a brief review of the present regulatory scheme for PACs and independent spending. An examination of *Buckley v. Valeo* and subsequent decisions concerning the Federal Election Campaign Act (FECA)[13] will further detail the unique constitutional protection given to unlimited independent PAC spending. After a brief look at the power of PAC money, this Comment will discuss four reasons why restrictions on independent spending are necessary and constitutional. Finally, this Comment will examine an array of suggested reforms. Because each reform option suffers from some inherent shortcoming, a new statutory ceiling on independent PAC spending is proposed. The arguments which are made here, and a ceiling on expenditures much higher than those previously held unconstitutional, support a limit on this campaign technique.

In 1976 the Supreme Court first frustrated Congress's attempt to curb the huge expenditures of money made by and on behalf of political campaigns. Later decisions have maintained the position, first assumed by the Court in *Buckley*, that independent spending on a candidate's behalf does not pose the inherent danger posed by large contributions to a candidate's campaign.[14]

8. 424 U.S. 1 (1976).
9. *Id.* at 19-23. *See infra* text accompanying notes 77-83.
10. 424 U.S. at 23-51. *See also infra* text accompanying notes 70-93.
11. 470 U.S. 480 (1985).
12. *Id.* at 496-501. *See also infra* text accompanying notes 115-29.
13. Current version codified at 2 U.S.C. §§ 431-56 (1982 & Supp. IV 1986).
14. *See infra* text accompanying notes 98-129.

Regardless of the initial wisdom of this view, four aspects of the current electoral process create the need for a re-evaluation. First, the view that independent PAC spending poses no corruptive potential is outdated. Second, because independent spending can aid a candidate just as direct contributions do, independent expenditures constitute a loophole in contribution restrictions. Third, PAC spending engenders an appearance of corruption which taints the political process as much as actual corruption. Finally, the evidentiary and political burdens on the Federal Election Commission (FEC) make difficult the investigation of improper coordination between candidates and PACs who spend on their behalf. Senator Dan Evans' statement that independent expenditures are "probably the highest sleaze factor in campaigns today"[15] may have been an example of congressional rhetoric. Behind that rhetoric, however, is the reality that independent spending creates the potential for corruption and it is now time for Congress to impose stronger restrictions on independent spending.

II. Background

A. *The Present Regulatory Scheme of PACs and Independent Spending*

1. *Categories*

The number of PACs and the amount of their independent spending[16] has grown substantially while subject to a federal regulatory scheme. Although independent expenditures may also be made by individuals, the cost and effort necessary for effective independent campaigns makes them uniquely PAC phenomena.[17]

Regulation begins with categorization. The catch-all phrase "political action committee" refers to three types of statutorily-defined groups. Virtually all PACs are "political committees," as defined by the FECA.[18] One type

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15. Novak & Cobb, *The Kindness of Strangers*, Common Cause, Sept./Oct. 1987, at 32.

16. *See infra* text accompanying notes 143-58.

17. In 1984, nine of the top ten independent spenders were PACs. *See* FEC Press Release, October 4, 1985, at 2.

18. 2 U.S.C. § 431(4) (1982).

> The term "political committee" means—(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or
>
> (B) any separate segregated fund established under the provisions of § 441b(b) of this title; or
>
> (C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

Id.

of PAC is any club, association or group which receives political contributions or makes political expenditures exceeding $1,000 a year.[19] Most political committees are also "multi-candidate committees," which means they are at least six months old, have more than 50 contributors and have given money to at least five federal candidates.[20] The multi-candidate committee designation allows the PAC to contribute larger sums of money than individuals or other political committees.[21] A third category of PACs is distinguished by its affiliation with a sponsoring organization. A "separate segregated fund" PAC allows corporations and unions—two organizations prohibited from making direct contributions or expenditures—to participate politically as PACs.[22] Although much attention is focused on the unaffiliated PACs,[23] separate segregated fund PACs account for nearly 80 percent of all PACs.[24] The three types of PACs however, are not mutually exclusive categories; most PACs fall into all three. The FEC presently divides PACs into six categories for statistical purposes.[25]

2. *Registration and reporting requirements*

Notwithstanding the special restrictions on segregated funds, all PACs are similarly regulated. PACs must first register with the FEC.[26] In addition, all PACs are required to provide basic information on the identity of the committee; its affiliated organization or candidate, if any; the name and address of the treasurer; and the banks used by the committee.[27] PAC officials may or may not decide to incorporate. While by-laws which establish goals, guidelines and organizational structure are recommended by some authorities,

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19. *Id.* § 431(4)(a).

20. 11 C.F.R. § 100.5(e)(3) (1987).

21. *Compare* 2 U.S.C. § 441a(1) (1982) (contribution limit of $1,000 per election) *with id.* § 441a(2) ($5,000 per election).

22. 2 U.S.C. § 441b (1982). Corporations have been prohibited from making contributions in federal elections since 1907. *See* Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907). The ban was later extended to unions. *See* War Labor Disputes Act, Pub. L. No. 78-89, § 9, 57 Stat. 163, 167-68 (1943). For a brief discussion of the history and purpose of § 441b, see J. CANTOR, *supra* note 2, at 3-5, 36-38; Note, *Integrating the Right of Association with the* Bellotti *Right to Hear*—Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 72 CORNELL L. REV. 159, 168-70 (1986).

23. *E.g.*, Latus, *Assessing Ideological PACs: From Outrage to Understanding* in MONEY AND POLITICS IN THE UNITED STATES 142 (M. Malbin ed. 1984).

24. J. CANTOR, *supra* note 2, at 3.

25. The FEC categorizes PACs based on the characteristics of the committees' sponsors. In 1987-88, there were 1937 corporate, 394 labor, 820 trade/member/health, 61 cooperative, 166 corporations without stock, and 1200 "nonconnected" PACs. FEC Press Release, September 8, 1988. *See generally* Eismeier & Pollock, *Political Action Committees: Varieties of Organization and Strategy* in MONEY AND POLITICS IN THE UNITED STATES 122 (M. Malbin ed. 1984) (discussion of similarities and differences among PAC types).

26. 2 U.S.C. § 433(a) (1982).

27. 11 C.F.R. § 102.2 (1987).

they are not required by law.[28] If a PAC is organized primarily to receive and spend political monies, it qualifies for limited tax-exempt status.[29] PACs must also file reports on their financial activities at regular intervals. Total receipts; receipts from individuals, party committees and other political committees; loans; dividends and interest earned must all be reported separately.[30] PACs contributing more than $200 a year must be identified by name and give the date and amount of their contribution.[31] Total expenditures must be reported by category and those receiving funds must be identified by name and address.[32] Finally, PACs must disclose the amount of cash on hand as well as their outstanding debts and obligations.[33]

3. Contribution restrictions and expenditure regulations

Political committees, like individuals, are limited to contributing $1,000 to any candidate for each election.[34] Thus, the ceiling is $2,000 for a candidate who wins the primary and campaigns in the general election. A multicandidate committee, however, may contribute up to $5,000 per candidate per election.[35] Thus, a nationally-based PAC with more than 50 contributors is permitted to contribute $8,000 more than an individual to a particular candidate. The contribution limits for corporate and labor PACs depend on whether or not they are designed as multi-candidate committees. The Presidential Election Campaign Fund Act (Fund Act)[36] imposes additional contribution restrictions. Public funding of presidential candidates is conditioned upon the candidate's refusal of private contributions during the general campaign.[37] Thus, PACs may not contribute to the general campaign of a presidential nominee who receives public funding.

The low ceilings on direct contributions from PACs (or complete prohibitions in some presidential races) starkly contrast the absence of similar limits on independent PAC expenditures. The lack of limits on independent PAC expenditures can not be attributed to lack of effort on Congress's part.

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28. *See* CORPORATE POLITICAL ACTION COMMITTEE GUIDELINES, I-9 (Chamber of Commerce of the United States of America, 1982).

29. I.R.C. § 527 (1987).

30. 2 U.S.C. § 434(b)(2) (1982 and Supp. IV 1986).

31. *Id.* § 434(b)(3).

32. *Id.* § 434(b)(4) (operating expenses, transfers to other committees, loans, and independent expenditures are a few categories); *id.* § 434(b)(5).

33. *Id.* §§ 434(b)(1), 434(b)(8).

34. *Id.* § 441a(a)(1)(A).

35. *Id.* § 441a(a)(2)(A).

36. I.R.C. §§ 9001-13 (1987). The fund is maintained through a voluntary check-off on federal tax forms. *Id.* § 9006(a). It distributes to each major party presidential candidate who agrees to comply with spending and contribution limits an amount equal to $20,000,000 in 1972 dollars, adjusted for inflation. *Id.* § 9004(a)(1). In 1980, the two party nominees received $29.4 million in public subsidies. Alexander, *The Regulation and Funding of Presidential Elections,* 1 J. L. & POL. 43, 54 (1983).

37. I.R.C. § 9003(b)(2) (1987).

The 1971 FECA provided that all expenditures on a candidate's behalf, even if made by a third party, were treated as expenditures by the candidate.[38] This presumption could be rebutted only by showing that no candidate directly or indirectly authorized the activity.[39] Such candidate certification was subsequently held to be an unconstitutional prior restraint in violation of the first amendment.[40] In response, Congress amended the FECA in 1974 and limited expenditures made independent of a candidate's campaign to $1,000.[41] The Supreme Court struck down this provision as violative of first amendment rights of political expression and association.[42] In a later decision, the Court invalidated the $1,000 ceiling on independent spending on behalf of a publicly-funded presidential candidate.[43] The Court there noted that "PACs' expenditures are entitled to full First Amendment protection."[44]

Subsequent congressional regulation of independent expenditures has been limited to requiring full disclosure of such campaign activities. Any independent expenditure exceeding $200 necessitates reporting the name and address of the payee, along with the date, amount and purpose of the expenditure.[45] The spending PAC must also indicate whether the independent expenditure is in support of or in opposition to a candidate, as well as the name and office sought by such candidate.[46] Finally, the PAC or individual must certify that the expenditure was not made in cooperation or consultation with the candidate.[47] Any independent expenditure aggregating $1000 or more and made within the final 20 days of the election must be reported within 24 hours.[48]

4. Segregated fund PACs

Regulation which is unique to segregated fund PACs is generally designed to monitor the influence of the sponsoring organization. Use of any money contributed under threat or without knowledge of its political purpose is expressly prohibited.[49] Segregated fund PACs are further limited in their ability to solicit contributions. For corporate and labor PACs, the FECA

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38. Because the legislative history of the 1971 FECA supported such an interpretation, regulations to that effect were promulgated. J. CANTOR, THE EVOLUTION OF AND ISSUES SURROUNDING INDEPENDENT EXPENDITURES IN ELECTION CAMPAIGNS (Cong. Res. Service Rep. No. 82-87) 7-8 (1982).

39. *Id.* at 8.

40. ACLU v. Jennings, 366 F. Supp. 1041 (D.C.Cir. 1973), *vacated sub nom.* ACLU v. Staats, 422 U.S. 1030 (1975).

41. 18 U.S.C. § 608 (Supp. IV 1975).

42. Buckley v. Valeo, 424 U.S. 1, 51 (1976).

43. FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985).

44. *Id.* at 496.

45. 2 U.S.C. § 434(b)(3) (1982).

46. *Id.* § 434(c).

47. *Id.* § 434(b)(6)(B)(iii).

48. *Id.* § 434(c)(2)(C).

49. *Id.* § 441b(b)(3).

limits the number of solicitations of those not connected to the sponsoring organization to two times a year.[50] The solicitation practices of nonconnected PACs (those without a sponsoring organization) are not similarly regulated.

A corporation or union may not contribute directly to its segregated fund, but may pay all start-up, administrative, and solicitation costs of the separate PAC.[51] Moreover, the segregated fund may be completely controlled by the sponsoring corporation or union, whose officers may decide how the PAC's money is spent.[52] Segregated fund PACs are subject to the federal law restricting individual contributions to all PACs to $5,000 in any calendar year.[53]

5. *The role of the Federal Election Commission*

The FEC is responsible for policing the independence of independent spending. A large part of this task involves the issuance of advisory opinions[54] which may, among other things, explain what constitutes the "cooperation" or "consultation" which destroys the "independent" nature of PAC spending.[55] The FEC is also responsible for investigating improper coordination between candidates and the PACs who spend on their behalf.[56] However, because many believe that instances of collusion between candidates and PACs far outnumber those that the FEC has officially discovered, the FEC has been criticized for its weak enforcement record.[57]

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50. *Id.* § 441b(b)(4). Generally, corporations and their PACs may solicit only shareholders, executives, and their families. Labor PACs may solicit only their members and their families. *Id.* § 441b(b)(4)(A)(ii). Solicitation restrictions on a nonprofit corporation were upheld in FEC v. National Right to Work Comm., 459 U.S. 197 (1982).

51. 2 U.S.C. § 441b(b)(2)(C) (1982).

52. *National Right to Work Comm.*, 459 U.S. 197, 200 n.4 (1982).

53. 2 U.S.C. § 441a(a)(1)(C) (1982).

54. 2 U.S.C. § 437(f) (1982 & Supp. IV 1986) details the Commission's power to issue advisory opinions. *See also* 11 C.F.R. § 112 (1987) (procedures for requesting and issuing advisory opinions); Baran, *The Federal Election Commission: A Guide for Corporate Counsel*, 22 ARIZ. L. REV. 519, 536-37 (1980) (administrative procedure for issuing advisory opinions).

55. 11 C.F.R. § 109.1(b)(4) (1987) provides general guidelines as to what is "cooperation" or "consultation." An expenditure resulting from cooperation with the candidate is considered an in-kind contribution to the candidate and an expenditure by the candidate. *Id.* § 109.1(c). Thus, PACs wanting to avoid contribution and expenditure restrictions want their spending classified as "independent."

56. 2 U.S.C. § 437g(a)(2) (1982 & Supp. IV 1986). *See also* 11 C.F.R. § 111 (1987) (compliance procedure). Two other areas of investigation are whether the expenditure is (1) express advocacy of the election or defeat of (2) a clearly identified candidate. Comment, *The Federal Election Campaign Act and Presidential Election Fund Act: Problems in Defining and Regulating Independent Expenditures*, 1981 ARIZ. ST. L.J. 977, 989 [hereinafter Comment, *Regulating Independent Expenditures*]. *See infra* text accompanying notes 219-28.

57. *See, e.g.*, Novak & Cobb, *supra* note 15, at 35; O'Connor, *Who's Afraid of the F.E.C.?*, 18 WASH. MONTHLY 22 (March 1986); Comment, *Campaign Finance Re-Reform: The Regulation of Independent Political Committees*, 71 CALIF. L. REV. 673, 688-91 (1983) [hereinafter Comment, *Campaign Finance Re-Reform*]. *See infra* text accompanying notes 229-35.

B. *The Supreme Court's Role in Campaign Finance Regulation*

The era of modern federal campaign finance regulation[58] began with the Federal Election Campaign Act (FECA) of 1971.[59] Congress's first attempt to fully exercise its constitutional power to regulate federal elections[60] limited the total amount federal candidates could spend on media advertising, restricted the amount federal candidates could contribute to their own campaigns, and required more complete disclosure of contributions and expenditures.[61] The FECA has been credited with revealing the abuses of the Watergate scandal.[62] In turn, the Watergate scandal spurred the creation of further campaign finance reform.

The FECA Amendments of 1974[63] have been described as "the most comprehensive reform legislation passed by Congress."[64] Briefly stated, the 1974 amendments limited the amount of contributions to candidates for federal office,[65] limited the amount of independent expenditures per candidate,[66] specified detailed reporting and record-keeping requirements for candidates and political committees,[67] and established the Federal Election Commission.[68] Within days of the amendments' effective date, the constitutionality of the FECA was challenged.[69]

1. Buckley v. Valeo

In *Buckley v. Valeo*[70] the Supreme Court upheld some provisions of the 1974 amendments to the FECA while striking down others. The decision has

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58. Until 1971, most federal law relating to campaign finance was codified in the Federal Corrupt Practices Act, ch. 368, 43 Stat. 1070 (1925).

59. Pub. L. No. 92-225, 86 Stat. 3 (1972).

60. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1.

61. At about the same time, the Revenue Act of 1971 provided for a voluntary system of publicly-financed presidential candidacies. Pub. L. No. 92-178, § 801, 85 Stat. 497, 562 (1971). The current public-funding legislation is codified at I.R.C. §§ 9001-13 (1987).

62. *See, e.g.*, Nicholson, *The Supreme Court's Meandering Path in Campaign Finance Regulation and What it Portends for Future Reform*, 3 J.L. & POL. 509, 511 (1987).

63. Pub. L. No. 93-443, 88 Stat. 1263 (1974).

64. Buckley v. Valeo, 519 F.2d 821, 831 (D.C.Cir. 1975).

65. 2 U.S.C. § 441a (1982).

66. 18 U.S.C. § 608(e)(1) (1970 ed. Supp. IV) (repealed 1976).

67. 2 U.S.C. §§ 431-34 (1982 & Supp. III 1985).

68. *Id.* §§ 437(c), (d), (f) & (g). The 1974 legislation also provided for public matching funds for presidential candidates during the prenomination campaign and limits on overall campaign expenditures during that period. I.R.C. §§ 9031-42 (1982).

69. Among the ideologically diverse plaintiffs who were challenging the legislation were Senator James Buckley, former Senator Eugene McCarthy, the Mississippi Republican Party and the New York Civil Liberty Union. Buckley v. Valeo, 424 U.S. 1, 7-8 (1976). The per curiam decision, appendix, and separate opinions filled 294 pages of the United States Reports.

70. 424 U.S. 1 (1976).

had as much impact on campaign finance reform in this country as the 1974 legislation itself. The Court examined the governmental interests served by the FECA and the first amendment rights implicated by the legislation, and then balanced the two. The immediate result of the decision was judicial dissection of the legislative scheme, which prompted the 1976 amendments to the FECA.[71] The most consequential long-term effect of *Buckley* is the Court's constitutional distinction between contribution restrictions and limits on expenditures.

The Court first established a framework of first amendment analysis in which it examined the FECA's limits on campaign funding and spending. Two constitutional guarantees were implicated by the campaign finance reform legislation. The Court reasoned that since the public debate of issues and candidates is essential to democracy, the right to political expression was a paramount consideration in the evaluation of the legislation.[72] Recognizing the need and efficacy of group association in political advocacy, the Court also noted that the first amendment protects political association.[73] The *Buckley* majority explicitly rejected the argument that the contribution and expenditure provisions regulated conduct, rather than speech. The Court noted that contribution and expenditure limitations "impose direct quantity restrictions on political communication and association."[74] By recognizing the dependence of both candidates and the electorate on the media and its expensive modes of communication,[75] the Court accepted the maxim "money talks."[76]

According to the Court's reasoning, however, money talks in different ways. The Court found constitutional and practical distinctions between direct contributions and independent expenditures which supported its decision to uphold limits on the former while striking down similar limits on the latter. One such distinction was the different roles the two campaign finance techniques play. The *Buckley* majority characterized an individual's contribution to a candidate as a symbol of support. A ceiling on contribution size, therefore, is not a restraint of political expression since the symbolic

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71. Pub. L. No. 94-283, 90 Stat. 475 (1976).

72. 424 U.S. at 14-23. *See also* Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[a] major purpose of that Amendment was to protect the free discussion of governmental affairs").

73. 424 U.S. at 15-16. *See also* Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973) (first amendment "freedom to associate" encompasses right to associate with a political party); Emerson, *Freedom of Association and Freedom of Expression,* 74 YALE L.J. 1, 22 (1964) ("Associational expression is simply an extension of individual right of expression, and for the same reasons and to the same extent, should be free of governmental abridgement."). The *Buckley* court, however, recognized that the right to associate is not absolute. 424 U.S. at 25.

74. 424 U.S. at 18.

75. *Id.* at 19.

76. *Id.* at 262 (White, J., dissenting); FEC v. National Conservative Political Action Comm., 470 U.S. at 509 (White, J., dissenting). *See generally* Wright, *supra* note 1 (Supreme Court decisions used first amendment as justification for nondemocratic effects of concentrated wealth in election campaigns). *See also infra* note 78.

expression of support remains unaffected.[77] The message "I support you" is communicated even if the contribution is limited to $1000.

However, the Court viewed the amount of independent expenditures as directly related to the quality and quantity of political speech. In contrast to the symbolic nature of a contribution is the vital practicality of an expenditure. "Virtually every means of communicating ideas in today's mass society requires the *expenditure* of money."[78] Thus, statutory limits on independent spending constitute "substantial rather than merely theoretical restraints on the quantity and diversity of political speech."[79]

The Court also found the FECA's $1,000 limit more burdensome on the first amendment freedom of association in the context of the independent expenditure than in the context of direct contributions.[80] Contribution ceilings restrict one means of associating with a candidate, but allow the contributor to join a political committee and to provide personal assistance to the committee's efforts on behalf of the candidate.[81] Independent spending limits,

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77. 424 U.S. at 21. "A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his 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.* The Court also noted that contributions become political expression only through a candidate or political association. *Id. But see id.* at 244 (Burger, C.J., separate opinion) ("We do little but engage in word games unless we recognize that people—candidates and contributors—spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utters the words."). *See also* Polsby, Buckley v. Valeo: *The Special Nature of Political Speech,* 1976 SUP. CT. REV. 1, 22-23 (contributors have secondary speech interest in speaking through a candidate).

78. 424 U.S. at 19 (emphasis added). *Buckley* can be viewed as protecting the right of the wealthy to influence the political process. The Court explicitly rejected the governmental interest in equalizing the relative ability of individuals and groups to affect election outcomes as a justification for limits on independent spending. "[T]he 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." *Id.* at 48-49. Some commentators have forcefully criticized this aspect of the *Buckley* decision. *See* Nicholson, Buckley v. Valeo: *The Constitutionality of the Federal Election Campaign Act Amendments of 1974,* WIS. L. REV. 323, 327-40 (1977); Shockey, *Money in Politics: Judicial Roadblocks to Campaign Finance Reform,* 10 HASTINGS CONST L.Q. 679, 693-99 (1983); Tushnet, *An Essay on Rights,* 62 TEX. L. REV. 1363, 1387 (1984). *See also* Forrestor, *The New Constitutional Right to Buy Elections,* 69 A.B.A. J. 1078, 1080 (1983) ("[T]his sweeping pronouncement [in *Buckley*] is about as sound as a declaration that the First Amendment protects the use of bullhorns by those able to afford them to drown out other speakers in political debate."). *But see* FEC v. National Conservative Political Action Comm., 470 U.S. 480, 493 (1985) (analogizing $1,000 limit on independent spending in presidential races to "allowing a speaker in a public hall to express his views while denying him the use of an amplifying system").

79. 424 U.S. at 19. *But see The Supreme Court, 1975 Term,* 90 HARV. L. REV. 171, 179 (1976) ("In fact, the pooling of funds contributed by supporters and delegation of promotional decisions to the candidate will produce more cost-effective and articulate advocacy than could be achieved by individual expenditures.").

80. 424 U.S. at 22.

81. *Id.* Such reasoning has prompted some commentators to call *Buckley* a compromise

however, restrict the ability of PACs to reflect and amplify the voice of their contributors.[82] Thus, before examining the specific provisions of the FECA, the Court established as a general principle that expenditure limits infringe upon first amendment freedoms more than contribution limits.[83]

Because the Court considered the spending limits more constitutionally problematic than contribution limits, it apparently applied different levels of scrutiny to the two types of legislation.[84] In the context of contributions regulation, the Court held that specific amount restrictions were valid. The Court explicitly rejected the contention that narrowly drawn disclosure requirements and bribery laws, although constituting a less restrictive means of regulation than contribution limits, were the constitutionally mandated alternative.[85] Instead, the *Buckley* Court was quick to defer to Congress's determination that such limits were necessary to prevent actual and apparent corruption resulting from large contributions.[86] The Court applied more exacting scrutiny, however, to the limitations on independent expenditures.[87] Despite the congressional view that unlimited independent spending threatens the integrity of contribution limits,[88] the Court found that no such danger

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decision. *E.g.*, Fleischman & McCorkle, *Level-Up Rather Than Level-Down: Towards a New Theory of Campaign Finance Reform,* 1 J.L. & POL. 211, 222-23 (1984). *See also* Nicholson, *supra* note 62, at 545 (Burger Court's divergent approaches to campaign finance legislation may be explained by desire to construct policy compromises).

82. 424 U.S. at 22. The first amendment rights of PACs were further explored in FEC v. National Conservative Political Action Comm., 470 U.S. 480, 493-95 (1985).

83. 424 U.S. at 23.

84. The Court did not expressly announce a lower standard of judicial scrutiny for contribution limits, but later lower court and Supreme Court decisions recognized differing levels of scrutiny. *E.g.*, FEC v. Massachusetts Citizens for Life, Inc., 107 S. Ct. 616, 629 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."). *Accord* Common Cause v. Schmitt, 512 F. Supp. 489, 496 (1980) ("A 'contribution' case . . . is entitled less-exacting judicial scrutiny . . . ."), *aff'd by an equally divided Court,* 455 U.S. 129 (1982).

85. 424 U.S. at 27.

86. *Id.* at 26-28. A unanimous Court later continued to apply minimal scrutiny and pay great deference to congressional attempts to regulate contributions in FEC v. National Right to Work Comm., 459 U.S. 197 (1982). At issue there was the power of statutorily segregated funds to solicit contributions. National Right to Work Committee (NRWC) was a nonprofit corporation organized to oppose the role of labor unions in the United States. *Id.* at 200. After the ideological corporation solicited contributions from 267,000 individuals, the FEC found probable cause that NRWC violated the federal law limiting solicitation by segregated fund PACs to "members." *Id.* at 201. Citing the 75-year history of the federal ban on corporate contributions, the Court declined to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.* at 210. Such judicial deference, however, was inappropriate when reviewing restrictions on independent spending. *See* FEC v. Massachusetts Citizens for Life, Inc., 107 S. Ct. 616, 629 (1986) ("[T]he desirability of a broad prophylactic rule cannot justify treating alike business corporations and appellee [an ideological corporation] in the regulation of independent spending.").

87. 424 U.S. at 44-45. *See infra* text accompanying notes 162-66.

88. *See* S. REP. No. 689, 93rd Cong., 2d Sess. 18 (1974). "[C]ontrols [on independent expenditures] are imperative if Congress is to enact meaningful limits on direct contributions.

existed.[89]

The Court's view that independent spending, unlike contributions, posed no danger of corruption was the final rationale offered for striking down the $1,000 limit on independent expenditures. The per curiam decision adopted the conclusion of Congress and the Court of Appeals that "large contributions are given to secure a political *quid pro quo* from current and potential office holders."[90] The interest in limiting actual and apparent corruption was thus sufficient to uphold the FECA's contribution limits.[91] That same interest, however, was found inadequate to justify the ceiling on independent expenditures.[92] Because expenditures were not coordinated or approved by the candidate, the Court found diminished potential for corruption. Indeed, the Court reasoned, such independent spending may prove counterproductive to a candidate's campaign.[93] Under the *Buckley* analysis, a $10,000 contribution to a candidate poses the danger of corruption while a $10,000 expenditure made independent of the candidate, but on his behalf, is potentially counterproductive and most likely innocuous.

Justice White, in his concurring and dissenting opinion, questioned the distinctions drawn by the majority. He would have deferred to the congressional determination that independent spending limits were necessary to prevent evasion of the contribution limits.[94] Justice White believed that concern for actual corruption and the appearance of corruption justified spending restrictions just as it justified contribution restrictions.[95] Chief Justice Burger and Justice Blackmun agreed that there were no constitutional differences between contribution limits and expenditure limits. "For me contributions and expenditures are two sides of the same first amendment

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Otherwise, wealthy individuals limited to a [$1,000] direct contribution could also purchase one hundred thousand dollars' worth of advertisements for a favored candidate. Such a loophole would render direct contribution limits virtually meaningless." *Id.*

89. 424 U.S. at 47.

90. *Id.* at 26-27. The Court later defined the exchange that is feared as "dollars for political favors." FEC v. National Conservative Political Action Comm., 470 U.S. at 497.

91. 424 U.S. at 26-27. The government also offered two "ancillary" interests served by contribution limits. *Id.* at 25-26. The interest in equalizing political voices was expressly rejected. *Id.* at 48-49. *See supra* note 78. The interest in curbing the skyrocketing costs of political campaigns, according to the *Buckley* majority, was not served by the contribution limits. 424 U.S. at 26 n.27.

92. *Id.* at 45.

93. *Id.* at 47. *But see* Cox, *Constitutional Issues in the Regulation of the Financing of Election Campaigns,* 31 CLEV. ST. L. REV. 395, 411 (1982) ("The assumption made by the Court . . . seems utterly implausible as applied to expenditures by political committees, organizations whose primary purpose is to promote the election of a candidate or candidates . . . ."). *See infra* text accompanying notes 167-75.

94. 424 U.S. at 259-62 (White, J., separate opinion). "It would make little sense to me, and apparently made none to Congress, to limit the amounts an individual may give to a candidate or spend with his approval but fail to limit the amounts that could be spent on his behalf." *Id.* at 261.

95. *Id.*

coin."[96] Unlike Justice White, however, Justices Burger and Blackmun would have struck down both types of regulations as violative of the First Amendment.[97]

2. *Post-*Buckley *Supreme Court decisions*

The distinctions drawn in *Buckley* between contribution restrictions and limits on independent expenditures have been sharpened in subsequent Supreme Court rulings on the constitutionality of campaign finance reform.[98] These later decisions, which have uniformly upheld contribution limits in the context of candidate election campaigns and struck down spending limits, have focused on two analytical themes first developed in *Buckley*. First, the governmental interest in preventing actual or apparent corruption justifies the regulation of contributions but not that of expenditures. Second, the right of individuals and PACs to spend political money deserves greater constitutional protection than the right to contribute directly to candidates. These guideposts help to understand what one commentator has characterized as the Court's "meandering path" in campaign finance regulation.[99]

The sufficiency of the anti-corruption goal and the lesser scrutiny applied to contribution restrictions has allowed the post-*Buckley* Court to sustain federal limits on contributions.[100] In *FEC v. National Right to Work Committee,*[101] a unanimous Court deferred to congressional concern for corruption and upheld the federal restriction on the ability of segregated fund PACs to solicit contributions.[102] In *California Medical Association v. FEC*[103] the Court upheld the FECA's $5,000 annual limit on contributions to multicandidate PACs. A 5-4 majority of the Court agreed with Congress that limiting contributions to multi-candidate PACs was necessary to prevent evasion of the contribution limits upheld in *Buckley.*[104] The plurality decision in *California Medical Association* noted the constitutional distinction between independent spending and direct contributions. Unlike independent expen-

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96. *Id.* at 241 (Burger, C.J., separate opinion).

97. *Id.* at 241-46 (Burger, C.J., separate opinion); *id.* at 290 (Blackmun, J., separate opinion).

98. *See supra* text accompanying notes 100-29.

99. Nicholson, *supra* note 62, at 510.

100. Even in Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981), where the Court struck down a city ordinance's $250 limit on contributions to PACs opposing or supporting ballot measures, the analysis first adopted in *Buckley* was affirmed. Because a referendum campaign imposing rent control lacked the danger of candidate corruption, the contribution limit was held to be unnecessarily and unconstitutionally burdensome on the organization's right of association. *Id.* at 297-99.

101. 459 U.S. 197 (1982).

102. *See supra* note 86.

103. 453 U.S. 182 (1981).

104. *Id.* at 198. Justice Blackmun agreed with the plurality's view that the $5,000 ceiling was necessary to prevent evasion of the contribution limits, but wrote separately to apply a closer scrutiny to the contribution limits. *Id.* at 202-03 (Blackmun, J., separate opinion).

ditures, which are a direct expression of the spender's views, "the transformation of contributions into political debate *involves speech by someone other than the contributor.*"[105] Thus, contributions by the California Medical Association (CMA) to CALPAC, the PAC created and sponsored by the CMA, represent "speech by proxy,"[106] which is not entitled to full first amendment protection.[107]

The Court's inclination to strike down restrictions on independent expenditures has extended to situations where the spender assumes the corporate form.[108] In *FEC v. Massachusetts Citizens for Life, Inc.*,[109] the Court's most recent decision concerning campaign finance legislation, the ban on corporate independent expenditures was held unconstitutional when applied to nonstock, ideological corporations.[110] Central to the Court's decision was the constitutional distinction between campaign contributions and independent spending. "We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."[111] Thus; *National Right to Work Committee*, where federal restrictions were upheld, was distinguished as a case involving contributions, not expenditures.[112] The interest in preventing corruption and the appearance of corruption was again cited as a legitimate state interest.[113] Nonetheless, the *Massachusetts Citizens for Life* majority considered the FEC's concern for the unfair deployment of wealth unwarranted in the context of an ideological corporation.[114]

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105. *Id.* at 197. (quoting Buckley v. Valeo, 424 U.S. 1, 21 (1976)) (emphasis in original).

106. *Id.* at 196.

107. *Id.* The "proxy speech" approach, used to support statutory restrictions on contributions, was later held not to apply in the context of expenditure limitations. FEC v. National Conservative Political Action Comm., 470 U.S. 450, 494-95 (1985).

108. *Cf.* FEC v. National Right to Work Comm., 459 U.S. 197 (1982) (danger of corruption posed by a non-profit, ideological corporation sufficient to sustain contribution solicitation restrictions).

109. 107 S. Ct. 616 (1986).

110. *Id.* at 630-31. At the center of the controversy was a newsletter published by MCFL, which urged readers to vote pro-life. *Id.* at 620. Because the newsletter represented "express advocacy" of several pro-life candidates, *id.* at 623, MCFL was held in violation of 2 U.S.C. § 441b, which requires all such corporate expenditures to be made through a segregated fund PAC. *See supra* text accompanying notes 49-53.

111. 107 S. Ct. at 627. *See also id.* at 630 ("[T]he government enjoys greater latitude in limiting contributions than in regulating independent expenditures."). *But see id.* at 634 (Rehnquist, C.J., dissenting) ("The distinction between contributions and independent expenditures is not a line separating black from white.").

112. *Id.* at 629.

113. *Id.* at 627.

114. *Id.* at 628. "Groups such as MCFL . . . do not pose that danger of corruption." Because the nonstock corporation "was formed to disseminate political ideas, not to amass capital," its resources reflect the popularity of its views, not its economic success. *Id.* The Court noted three characteristics of MCFL which were essential to the Court's decision. First, MCFL was formed expressly to promote political ideas. Second, it had no shareholders. Third, it was not connected with a business corporation. *Id.* at 631. Corporations which do not possess

The Court reiterated the broad range of constitutional protection afforded to independent spending and named PACs as beneficiaries of that protection in *FEC v. National Conservative Political Action Committee*[115] (*NCPAC*). There, the National Conservative Political Action Committee (NCPAC) and the Fund for a Conservative Majority (FCM) challenged the constitutionality of the federal $1,000 ceiling on independent expenditures on behalf of a presidential candidate receiving public financing.[116] Both PACs solicited and spent large sums of money in support of President Reagan's 1980 campaign and his re-election effort in 1984.[117] Having concluded that the PACs' independent expenditures exceeded $1,000 and were prohibited by federal law, the Court declared the ceiling on such spending unconstitutional.[118]

The analysis used in *Buckley* once again proved crucial. The Court, however, went further in *NCPAC*, asserting that "the expenditures at issue in this case produce speech at the core of the First Amendment."[119] The funneling of contributions through PACs did not diminish the first amendment interests. The decision in *California Medical Association*, which upheld contribution limits to multi-candidate political committees, was distinguished on two grounds. First, *California Medical Association* involved contribution limits instead of the spending ceiling challenged in *NCPAC*. Second, the "proxy speech" rationale for according less deference to restrictions on contributions to noncandidate committees was rejected in the context of independent spending. The "proxy speech" rationale did not apply, the Court reasoned, because contributors approved of the PACs' messages.[120]

Another rationale for striking down the independent spending ceiling in *NCPAC* was the need to protect rights of association. Justice Rehnquist, writing for the *NCPAC* majority, characterized groups such as NCPAC and

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these characteristics must establish a segregated fund PAC to make independent expenditures. *See* 2 U.S.C. § 441b (1982).

115. 470 U.S. 480 (1985).

116. The Presidential Election Campaign Fund Act, I.R.C. §§ 9001-13 (1987), provides for public funding of presidential candidates who agree to certain restrictions on expenditures and contributions. *Id.* at §§ 9003-04. The Act also provides for criminal penalties for any political committee, other than the candidate's official committee, which incurs an expenditure to further the candidate's campaign in an aggregate amount exceeding $1,000. *Id.* § 9012(f).

117. The total in independent expenditures for Ronald Reagan's 1984 campaign was $9,839,033 for NCPAC and $1,638,621 for FCM. *See* FEC INDEX OF INDEPENDENT EXPENDITURES, 1983-1984, at 12, 28.

118. 470 U.S. at 496-501. The Court had previously considered the constitutionality of § 9012(f) in Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980), *aff'd by an equally divided Court,* 455 U.S. 129 (1982) (O'Connor, J., not participating). Because an equally-divided affirmance is not entitled to precedential weight, Trans World Airlines v. Hardison, 432 U.S. 63, 73 n.8 (1977), the Court in *NCPAC* was not bound by the *Schmitt* decision, which held § 9012(f) unconstitutional. One commentator has suggested that the significance of *Schmitt* is that three justices were temporarily persuaded that PAC independent spending was potentially corruptive. Nicholson, *supra* note 62, at 517.

119. 470 U.S. at 493.

120. *Id.* at 494-95.

FCM as "mechanisms by which large numbers of individuals of modest means can join together" to amplify their political voice.[121] The Court, typically hostile to the theory that the first amendment exists to equalize the wealthy and impoverished in political debate, viewed PACs as a necessary counterbalance to the wealthy who may buy expensive media ads on their own.[122] The Court distinguished *National Right to Work Committee*[123] as a decision involving the constitutional rights of corporations, and declared that "PAC's expenditures are entitled to full First Amendment protection."[124]

The Court reaffirmed the *Buckley* holding that only the prevention of actual or perceived corruption justifies restrictions on campaign financing. As in *Buckley*, the anti-corruption interest in *NCPAC* was held irrelevant because independent expenditures posed no danger of a political *quid pro quo*.[125] The majority apparently did not view the close contacts between the PACs and the candidate as significant.[126] The Court also suggested a narrowing of its definition of corruption. A candidate's or incumbent's change in his or her own position on issues in response to PAC spending, the Court noted, "can hardly be called corruption."[127] The FEC had attempted to

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121. *Id.* at 495. *But see* Adamany, *PAC's and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569, 596 (1980) ("The real or effective financial constituency in these circumstances is the PAC and its leadership, not the small givers to PAC campaign warchests. The candidate knows the programs and objectives of the PAC, and it is to the PAC officers that preferred access is given."); Cox, *supra* note 93, at 411 (undue influence flows to PAC managers, not PAC contributors).

122. 470 U.S. at 495. The Court previously rejected the governmental interest in equalizing the economic ability of individuals to communicate politically as a justification for campaign finance legislation. Buckley v. Valeo, 424 U.S. at 48-49. *See also supra* note 78.

123. 459 U.S. 197 (1982).

124. 470 U.S. at 495-96. A fuller discussion of PACs' first amendment rights is found in Common Cause v. Schmitt, 512 F. Supp. 489, 499-500 (D.D.C. 1980).

125. 470 U.S. at 497. The exchange of official favors is hypothetically possible, the Court noted, but unlikely without cooperation and prearrangement. *Id.* at 498.

126. For example, the founder of NCPAC was Reagan's Midwest coordinator for the authorized presidential election campaign in 1980. Joint Stipulation of Facts Nos. 75-77, 470 U.S. 480 (1985) (No. 83-1032). The NCPAC chairman's brother was on President Reagan's campaign staff and also served in the Reagan administration. *Id.* No. 79. The PACs used the same advertising agents and pollsters as the official campaign. *Id.* Nos. 86-87, 131. NCPAC has also obtained briefing sessions with the President and his aides for its largest contributors. *Id.* Nos. 50-54, 61-62, 122. In his *NCPAC* dissent, Justice White noted the "significant contacts" between PACs and candidates. 470 U.S. at 511 (White, J., dissenting).

127. 470 U.S. at 498. The Court described corruption as "dollars for political favors." *Id.* at 497. Excluded from this narrow definition is the concern for the excessive political influence generated by large sums of money.

> The concern behind campaign finance legislation is not about corruption; it is about the danger that major contributors to successful candidates will receive in return some excessive measure of influence in the making of public policy. That influence may be in the form of "access"—open doors and sympathetic ears—or it may be in some extra weight of information or consideration on the scales of decision in policymaking. Indeed it may merely arise from the election of officials already

demonstrate to the district court a familiar type of corruption by offering evidence that PAC officials had received high-level appointments in the Reagan Administration. Newspaper articles and polls purportedly showing public perception of corruption were also proffered.[128] Nonetheless, the Supreme Court upheld the district court's finding that such evidence was "evanescent."[129]

Justice White's dissent vigorously challenged the majority on almost all the substantive issues raised in *NCPAC*. He reiterated his belief that the *Buckley* distinction between contributions and expenditures was invalid. Justice White argued that even if the distinction was valid, "'independent' PAC expenditures function as contributions."[130] Justice White, himself a former PAC official,[131] noted that PAC spending not formally "coordinated" is still noticed and appreciated by the candidate, and must be closely regulated.[132] Justice White would have also upheld the ceiling limits because

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sympathetic to the campaign contributor's values or ideology.

Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMMENTARY 97, 104 (1986) [hereinafter Sorauf, *Political Thicket*].

In *NCPAC*, the National Congressional Club in an amicus brief argued that appellants tried to convince the Court to accept the rejected equalization rationale through an expanded definition of undue influence. Brief for National Congressional Club as Amicus Curiae at 18-20, *NCPAC*, 470 U.S. 480 (1985) (No. 83-1032). For a discussion of the differing types of political influence, and which types are to be avoided, see Nicholson, *supra* note 62, at 536-41.

Prior to the imposition of federal ceilings on contribution amounts, large contributions were considered by some to be a form of multiple voting and multiple representation. *See* Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815 (1974). *See also* D. ADAMANY, FINANCING POLITICS 236 (1969) (multiple voting); H. ALEXANDER, MONEY IN POLITICS 146-49 (1971) (multiple representation). Large independent spending campaigns by PACs may pose similar dangers.

128. Democratic Party v. National Conservative Political Action Comm., 578 F. Supp. 797, 824-27 (E.D.Pa. 1983).

129. 470 U.S. at 499 (quoting 578 F. Supp. at 830). The district court gave several reasons for rejecting the evidence offered. The Court held the poll results inadmissible because defendants were not given sufficient time to study the results and, alternatively, because the Harris and Roper surveys did not precisely inquire into the public's perception that PACs corrupt through independent spending. 578 F. Supp. at 825-26. Although one poll showed that 65 percent of respondents thought that independent expenditures "should be stopped," the district court found the answer incomplete. *Id.* at 827. *See infra* note 215. Finally, the lower court noted the hearsay problem of poll results. 470 U.S. at 827 n.42. For a critical review of the district court's and the Supreme Court's standard of such survey results, see Sorauf, *Political Thicket, supra* note 127, at 113-15.

130. 470 U.S. at 510 (White, J., dissenting).

131. Justice White had some political experience as head of National Citizens for Kennedy in the 1960 presidential election. He was also coordinator of John F. Kennedy's preconvention campaign in Colorado. Wright, *supra* note 1, at 612.

132. 470 U.S. at 510-11 (White, J., dissenting). In *Buckley*, Justice White would have deferred to Congressional judgment since many Congressmen were "seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years." 424 U.S. at 261 (White, J., separate opinion).

PACs operate independently of their contributors and therefore, speak by proxy.[133]

Finally, Justice White expressed concern for the practical effect of large PAC expenditures on the political process. He feared that "the candidate may be forced to please the spenders rather than the voters . . . ."[134] This concern for the corruptive potential of independent spending persuaded Justice Marshall to reverse the view he maintained in *Buckley*. In *NCPAC* he separately dissented, noting the danger of corruption and the illogical distinction between contributions and independent expenditures.[135]

The increasing role PACs and independent spending play in elections can be traced to the FECA and its review by the Supreme Court.[136] The power of the individual to directly influence campaigns was restricted by the FECA limits on annual contributions, which were upheld in *Buckley v. Valeo.*[137] In striking down comparable spending limits, the *Buckley* majority noted that use of the media—"the most effective mode of communication"—is very expensive.[138] Thus, pooling funds to use the media is an efficient exercise of constitutionally protected spending. In *NCPAC*,[139] where limits on independent spending were struck down, the Court recognized PACs as mechanisms for "individuals of modest means [to] join together in organizations which serve to 'amplif[y] the voice of their adherents.'"[140] More recently, in *Massachusetts Citizens For Life*,[141] where the federal ban on independent spending by ideological corporations was struck down, the Court again noted the utility of PACs: "Individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction."[142]

C. The Growth of PACs and Independent Spending

1. Numerical growth of PACs and independent PAC spending

While the Supreme Court has extolled their virtues, PACs have grown exponentially in numbers and wealth. In 1974, for example, the FEC counted

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133. 470 U.S. at 510 (White, J., dissenting). *See also* Note, *The Constitutionality of Regulating Independent Expenditure Committees in Publicly Funded Campaigns*, 18 HARV. J. ON LEGIS. 679, 689-91 (1981) [hereinafter Note, *Constitutionality of Regulating Independent Committees*] (advocating lesser judicial scrutiny to restrictions on speech not funded by speaker).

134. 470 U.S. at 157 (White, J., dissenting).

135. *Id.* at 518-21 (Marshall, J., dissenting).

136. Adamany, *Political Parties in the 1980's* in MONEY AND POLITICS IN THE UNITED STATES 101 (M. Malbin ed. 1984). The author also attributes PACs' success in soliciting and advocacy to modern technology. *Id.*

137. 424 U.S. at 29.

138. *Id.* at 19-20.

139. 470 U.S. 480 (1985).

140. *Id.* at 494 (quoting *Buckley*, 424 U.S. at 22). The *Buckley* court also suggested that contributors frustrated by the $1,000 ceiling could become personally involved with a PAC's efforts on behalf of a candidate. 424 U.S. at 22.

141. 107 S. Ct. 616 (1986).

142. *Id.* at 629.

608 PACs. In 1987, that figure stood at 4,211.[143] Similarly, the size of PAC contributions to congressional candidates has risen. In 1974, $12.5 million in PAC money went to House and Senate races; for the 1985-86 election cycle, the FEC reported that over $139 million in PAC contributions were received by congressional candidates.[144] Perhaps the most revealing statistic is the growing role of PACs within such races. In the decade between 1972 and 1982, PAC contributions rose from 14 percent to 31 percent of all monies received by House candidates.[145] Thus, the general increase in the cost of campaigning does not fully explain the growth in PAC funding. Simply stated, the money of special interest groups plays an increasingly larger role in campaign finance.[146]

Although a large percentage of PAC money is contributed directly to campaigns, independent expenditures on a candidate's behalf have become increasingly popular. In 1978, the first year in which the FEC began to account separately for independent expenditures by PACs, only $300,000 was spent independently in congressional campaigns.[147] Four years later, that figure rose to $5.3 million.[148] For the 1985-86 election cycle, over $9.5 million in PAC money was spent independently to advocate a candidate.[149] The real power of independent spending, however, lies in presidential election years. During the 1979-80 election cycle, over $16 million was spent in independent campaigns; of that amount, $13.7 million was devoted to the presidential candidates.[150] Total independent spending for the 1984 election was $23.4 million with Senate campaigns receiving a larger share of independent money.[151]

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143. F. SORAUF, MONEY IN AMERICAN ELECTIONS 78 (1988) [hereinafter F. SORAUF, MONEY]. For the 1987-88 reporting period, 4,578 PACs had registered with the FEC. FEC Press Release, September 8, 1988.

144. F. SORAUF, MONEY, *supra* note 143, at 79.

145. F. SORAUF, WHAT PRICE PACS? 39 (1984) [hereinafter F. SORAUF, WHAT PRICE?]. PAC contributions to senatorial candidates during the same period went from 12 percent of all contributions received to 19 percent of all receipts. *Id.* In the 1980 campaign, those elected to the House of Representatives received over 29 percent of their campaign funds from PACs. *Id.* For a brief discussion of the growth of PACs at the statewide level, see *id.* at 39; L. SABATO, PAC POWER 117-21 (1984). *See also* Budde, *supra* note 1, at 563-67 (PAC's operation at state level).

146. PAC contributions comprise a large percentage of all funds received by congressional leaders. For example, PACs provided over half of the $539,464 that House Speaker Thomas "Tip" O'Neill raised in 1982. Rep. Daniel Rostenkowski, chairman of the powerful Ways and Means Committee, received more than half of his $419,438 from PACs. Adamany, *Political Action Committees and Democratic Politics,* 1983 DET. C.L. REV. 1013, 1017-18.

147. J. CANTOR, *supra* note 38, at 26.

148. F. SORAUF, WHAT PRICE?, *supra* note 145, at 53.

149. FEC Press Release, May 21, 1987, at 1.

150. 11 FEC REP. No. 10 p.5 (Oct. 1985).

151. *Id.* Some suggest that the significance of independent PAC spending is exaggerated by the expenditure statistics. For example, the fundraising costs of nonconnected PACs may be reported as independent expenditures. Leatherberry, *The Dangers of Reform: A Comment on Senator Chiles' Position on PACs,* 12 J. OF LEGIS. 43, 46-47 (1985). One commentator has estimated that only one-third of the $10.6 million that PACs spent on Ronald Reagan's behalf in 1980 went to media advertising. H. ALEXANDER, FINANCING THE 1980 ELECTION 131 (1983).

2. The users and uses of independent spending

A small number of money sources account for this increase in independent expenditures. In 1984, 80 percent of all independent spending was reported by ten PACs.[152] Seven of those organizations were ideological PACs—those uniting people of similar philosophical orientations or people sharing similar positions on specific issues. Another of the top ten independent PAC spenders, the North Carolina Campaign Fund, was organized exclusively to support the re-election bid of Senator Jesse Helms. These two types of independent PACs, as opposed to PACs sponsored by corporations, unions or trade associations, are typically the biggest independent spenders. More than half of the independent expenditures in the 1985-86 election cycle were made by nonconnected PACs.[153] Joseph Cantor, a congressional analyst of PACs, has suggested that ideological and candidate-oriented PACs use independent expenditures because they seek to change the philosophical make-up of government rather than maintain cordial relations with incumbents.[154]

One common use of independent expenditures—"negative" campaigning—is uniquely suitable for the goal of changing the philosophical make-up of government. The most familiar example of this campaign tactic is NCPAC's $1.2 million effort to oppose the reelection of six liberal Democrat senators in 1980. The organization used media campaigns to attack the records and positions of the incumbent senators in order to make them vulnerable to more conservative challengers.[155] Impressed with the results of this technique,[156] PACs used 77 percent of their 1982 independent expenditures in efforts to oppose (rather than support) a candidate.[157] Although negative campaigning has become a smaller percentage of independent spending in recent years,[158] the FEC continues to report such expenditures separately.

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152. F. SORAUF, MONEY, *supra* note 143, at 111.

153. *Id.* at 114.

154. J. CANTOR, *supra* note 38, at 31. *Cf.* Latus, *supra* note 23, at 150 (ideological PACs use independent spending to "undermine targeted opponents, while their candidate remains untainted by the mudslinging").

155. "Our goal is a conservative Senate, and this is the best way to get it," said John T. Dolan, chairman of NCPAC. Light, *PACs Are Independent Expenditure Leaders,* 1980 CONG. Q. 1637. NCPAC began its negative campaigns more than a year before the election, long before the identities of the Republican challenger became known. Jacobson, *Money in the 1980 and 1982 Congressional Elections* in MONEY AND POLITICS IN THE UNITED STATES 38 (M. Malbin ed. 1982).

156. Six senators were targeted by NCPAC: George McGovern of South Dakota; Birch Bayh of Indiana; Alan Cranston of California; John C. Culver of Iowa; Frank Church of Idaho; and Thomas Eagleton of Missouri. Only Cranston and Eagleton won re-election. For an argument that independent PAC spending did not explain the results of the 1980 Senate races, see Leatherberry, *Rethinking Regulation of Independent Expenditures by PACs,* 35 CASE W. RES. L. REV. 13, 26-27 (1984).

157. F. SORAUF, WHAT PRICE *supra* note 148, at 53-54. In 1984, the North Carolina Campaign Fund, the sixth largest independent PAC spender, used all of its $765,000 in a negative campaign. FEC Press Release, October 4, 1985, at 2.

158. Only 13 percent of independent spending in the 1986 congressional campaigns was used to oppose candidates. *See* FEC Press Release, October 4, 1985, at 1.

III. Analysis

A. The Need for Restrictions on Independent PAC Spending

Although the Court has consistently found that PAC spending independent of a candidate does not pose the same dangers as do direct contributions, it has recognized the potential harm to the political process. In *Buckley*, where the Court operated without a factual record,[159] it limited the breadth of its decision. "[I]ndependent advocacy . . . *does not presently* appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."[160] When a dollar limit on independent expenditures in presidential races was struck down, the Court again recognized the possibility "that candidates may take notice of and reward those responsible for PAC expenditures . . . ."[161] Justice White, congressmen who regularly participate in political campaigns, commentators, and PAC officials themselves have identified this potential for corruption. This diverse group's common view creates a powerful argument in favor of federal restrictions on independent spending by PACs.

There are four reasons why PAC spending should be subject to more stringent federal regulation. First, current independent PAC expenditures benefit candidates and influence elections to a far greater degree than the innocuous expenditures described in *Buckley*. Second, independent spending campaigns by well-organized PACs constitute loopholes in contribution restrictions. Third, PAC spending engenders an appearance of corruption which taints the political process as much as actual corruption. Finally, coordinated spending is often easily disguised as an independent expenditure and not detected as such because the FEC is saddled with heavy evidentiary and political burdens.

One obstacle to effective limits on PAC expenditures is the higher level of scrutiny used by the Supreme Court when analyzing statutes involving restrictions on independent spending.[162] Because independent advocacy is considered more akin to pure speech than symbolic contributions, spending limits have been struck down while similar contribution ceilings have been upheld.[163] Some proponents of limiting PAC spending have argued that channeling money through PACs is "speech by proxy" entitled to only limited amendment protection.[164] A Supreme Court plurality initially adopted

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159. *Buckley* reached the Supreme Court on expedited appeal, before the effect of the legislation on federal campaigns was available for analysis.

160. 424 U.S. at 46 (emphasis added).

161. FEC v. National Conservative Political Action Comm., 470 U.S. at 498.

162. *See supra* text accompanying notes 84-89.

163. In *Buckley*, the $1,000 ceiling on contributions was upheld while the $1,000 ceiling on independent expenditures was struck down. 424 U.S. at 23-51.

164. *See* 470 U.S. at 513-14 (White, J., dissenting); Note, *Constitutionality of Regulating Independent Committees*, *supra* note 133, at 690-94.

this argument in support of limits on contributions to PACs.[165] However, the Court recently rejected this argument in striking down statutes limiting PAC spending in presidential campaigns.[166] Although there is some merit to the "speech by proxy" argument, it will not be discussed here. The governmental interest in reducing the deleterious effect of independent spending is substantial enough to overcome heightened judicial scrutiny.

1. Corruptive potential

One rationale for limits on independent expenditures is that large PAC spending campaigns have the same potential for corruption as large contributions. The Supreme Court upheld contribution limits because it recognized that large contributions are made to ensure that the contributor will have post-election access to the candidate.[167] The Court, however, struck down the $1,000 ceiling on independent expenditures because they "provide little assistance to the candidate's campaign and indeed may prove counterproductive."[168] Without coordination between the spender and the candidate, the Court reasoned, the expenditure is less valuable to the candidate and potentially less corruptive.

Although the Court's observation may have been correct when it was made in 1976, it is no longer valid. Today's independent spenders are sophisticated PACs who can and do make effective use of their money. This sophistication eliminates the need for formal communication with the candidate because a PAC can determine independently what spending can most effectively serve the candidate. Perhaps recognizing the changes in the nature of campaigns since *Buckley*, the Court has recently pulled back from its original view of independent spending. In *NCPAC* the Court stated that corruption triggered by independent spending was "hypothetically possible."[169]

The conclusion in *Buckley* that independent spending is innocuous was not inaccurate; it is, however, an outdated view. Independent PACs today make use of technology not known to candidate committees ten years ago. When the *Buckley* court discussed the use of independent expenditures it considered a hypothetical individual who purchases a billboard advertise-

165. California Medical Assoc. v. FEC, 453 U.S. 182, 196 (1981). "[T]he 'speech by proxy' that CMA seeks to achieve through its contributions to CALPAC is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection." *Id.*

166. 470 U.S. at 495 ("Unlike *California Medical Assoc.*, the present cases involve limitations on expenditures by PACs, not on the contributions they receive . . . .").

167. *Buckley*, 424 U.S. 1, 26 (1976). *See also* Buckley v. Valeo, 519 F.2d 821, 838 (D.C.Cir. 1975) (review of congressional findings on role of contributions in the 1972 and 1974 elections).

168. 424 U.S. at 47; *NCPAC*, 470 U.S. at 498.

169. 470 U.S. at 498. One reason for the Court's pulling back may be the stronger proof of coordination between PACs and candidates. *See supra* note 126. Another reason for the Court's softening position may be that the *Buckley* court was working in a "factual vacuum." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 800, 800 n.1 (1982).

ment.[170] Today, the larger, nationally-based PACs employ electronic mass mailings to solicit contributions, hire expert pollsters to measure the political mood of the country, and prepare and disseminate television and radio spots to deliver their message. The larger PACs also train people to build local and state affiliates.[171] In short, today's independent spenders are considerably more sophisticated than the billboard buyer of the *Buckley* era.

Because PACs can conduct effective independent spending campaigns, the potential for candidate recognition of PAC efforts is substantial. Just as large contributions have a corruptive potential, so do large independent expenditures. The lack of coordination with the candidate, which allegedly reduces the power of independent spending, is alleviated by the PAC's own ability to know what their candidate needs to win. The media's extensive coverage of a candidate's campaign provides PACs with the information it needs. Newspapers and newscasts tell attentive PAC officials which themes and issues the candidate is emphasizing. Political newsletters can also warn PACs when their candidate is running out of money or reaching state spending limits.[172] An even more reliable source of information is the network of consultants, pollsters and other political operatives who deal with party, candidate and political action committees.[173] Finally, negative campaigns may be undertaken without guidance from the candidate who is the campaign's beneficiary. NCPAC did not need to be told by President Reagan's campaign staff that money spent attacking Walter Mondale would benefit Reagan.[174] Additionally, the lack of candidate control over the money does not reduce the candidate's gratitude "since the candidate will realize that his or her financial supporters are doing as much as the law allows."[175]

Perhaps the most accurate barometer of the influence independent spending wields is its increased popularity among the largest PACs since the *Buckley* decision.[176] As the Court has noted, they are efficient users of political

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170. 424 U.S. at 46.

171. Latus, *supra* note 23, at 158-59.

172. E. DREW, *supra* note 1, at 136-37. When the 1980 Reagan primary campaign needed new independent money in New Hampshire and Texas, the Fund for a Conservative Majority pumped in $60,000 and $80,000, respectively. L. SABATO, *supra* note 145, at 96-97.

173. E. DREW, *supra* note 1, at 38-39. Senator Jesse Helms, chairman of the independent North Carolina Congressional Club, which made expenditures on behalf of Ronald Reagan in 1980, said in a television interview: "Well, as you may know, we have an independent effort going on in North Carolina. Uh, the law forbids me to consult with him [Mr. Reagan], and it's been an awkward situation. I've had to, sort of, uh, talk indirectly with Paul Laxalt [Mr. Reagan's campaign chairman], and hope that he would pass along . . . uh, and I . . . I think the messages have gotten through all right. . . ." Brief for Appellants at 31, Common Cause v. Schmitt, 455 U.S. 129 (1982) (No. 80-847).

174. Some negative advertising, however, can backfire. NCPAC's negative spending in the 1982 Senate races may have helped the incumbents it was designed to hurt. Cook, *Senate Election: A Dull Affair Compared to 1980's Upheaval,* 1982 CONG. Q. 2789, 2792.

175. Nicholson, *supra* note 78, at 347.

176. *See supra* text accompanying notes 147-51.

money.[177] NCPAC, one of the most powerful PACs, spent over $10 million independent of a candidate in the 1984 presidential and congressional elections.[178] In comparison, the PAC spent only $128,000 in direct contributions.[179] NCPAC literature has noted that the organization's use of independent spending is a response to the contribution limits of the FECA.[180] Because the PAC is limited to contributing only $5,000 to a favored candidate, the prospect of unlimited independent spending increases the likelihood of the candidate's success and, thus, the PAC's influence. Moreover, the passage of time has further diminished the influence of direct contributions. The ceiling set in 1974 has not been adjusted for inflation. Thus, the growing cost of campaigns, and the periodical calls in Congress for further limits on PAC contributions[181] only serve to make independent expenditures more valuable to candidates and PACs.

Ideological PACs generate the majority of independent spending,[182] but corporate and trade PACs also recognize the utility of independent spending on their candidate's behalf. When the American Medical Association wanted to fill a vacant Colorado legislative seat with a candidate favoring a cap on malpractice awards, it used AMPAC, the group's political spending arm, and independent expenditures. Three weeks before the election AMPAC paid out more than $100,000 for a radio and direct mail campaign to support its candidate, Democrat David Skaggs.[183] Despite polls which showed him trailing his opponent up to election day, Skaggs won the race with 51.46 percent of the vote. Skaggs may disagree with the Supreme Court's characterization of independent spending as counterproductive. "When you win with 51.5% of the vote," Skaggs noted, "and the AMA spent . . . $100,000 versus my spending $500,000, you can draw your own conclusion."[184]

2. Loopholes in contribution restrictions

Because independent spending can help a candidate as much as direct contributions can, it constitutes a loophole in legislation designed to limit

177. *See Buckley*, 424 U.S. at 22; *NCPAC*, 480 U.S. at 494 (PACs aggregate and amplify political voices of thousands of small contributors).

178. *See* FEC INDEX OF INDEPENDENT EXPENDITURES, 1983-1984, at 28.

179. *See* FEC REPORTS ON FINANCIAL ACTIVITY: 1983-84, FINAL REPORT: PARTY AND NON-PARTY POLITICAL COMMITTEES.

180. "PAC's can only give $5,000 per election directly to a campaign, but in an independent expenditure campaign they can spend as much as they would like." *Everything You Always Wanted to Know About NCPAC But the Media Wouldn't Tell You*, 11 (NCPAC publication) [hereinafter *Everything About NCPAC*].

181. Recent congressional bills aimed at controlling PAC contributions focus on placing limits on the amount of PAC money a candidate may use. *See, e.g.*, H.R. 2490, 98th Cong., 1st Sess. § 507 (1983).

182. Nonconnected PACs made 93 percent of all independent expenditures in the 1980 federal election campaigns. Latus, *supra* note 23, at 149.

183. Novak & Cobbs, *supra* note 15, at 32.

184. *Id.*

the influence of contributions.[185] Therefore, closing these statutory loopholes is another reason for placing limits on independent spending. Congress enacted the $1,000 annual limit on independent expenditures, a ceiling equal to the limit on direct contributions, to protect the legislative scheme of the FECA.[186] Congress did not want to inhibit spending on issues of public policy, and therefore limited spending on campaign tactics which "expressly advocat[ed]" a candidate's election or defeat.[187] Congress inserted a similar restriction in legislation providing for voluntary financing of presidential campaigns.[188] The Supreme Court struck down the loophole-closing provision two different times, and independent expenditures now provide two loopholes in campaign finance regulation.

The first loophole created by unlimited independent spending is the evasion of individual contribution limits. The Court of Appeals in *Buckley v. Valeo* upheld the $1,000 ceiling on independent spending as a necessary and narrowly drawn loophole-closing provision.[189] The Supreme Court justified striking down the provision because it was ineffective. The $1,000 limit prevented only large expenditures and failed to reach corruptive expenditures which "skirted the restriction on express advocacy."[190] Through its narrow statutory construction, the Court implicitly recognized the independent spending loophole in the FECA's contribution restrictions.[191] Chief Justice Burger predicted that the Court's holding on independent expenditures would lead to evasion of contribution limits[192] and several commentators agree with this prediction.[193] More important, however, PACs recognize and utilize this loophole. NCPAC literature bluntly explains why the organization depends on independent spending: "PACs can only give $5,000 per election directly to a

185. *See infra* text accompanying notes 189-206.

186. "If [contribution] limitations are to be meaningful, campaign-related spending by individuals and groups independent of a candidate must be limited as well." H.R. REP. No. 1239, 93rd Cong., 2d Sess. 6 (1974).

187. 2 U.S.C. § 431(17) (1985). *See also* H.R. REP. No. 1239, 93rd Cong., 2d Sess. 7 (1974) (only spending which advocates election or defeat of "clearly defined candidate" is subject to the $1,000 restriction); Buckley v. Valeo, 519 F.2d 821, 853 (D.C.Cir. 1975) (same).

188. I.R.C. § 9012(f) (1987).

189. 519 F.2d at 852-53.

190. 424 U.S. at 45.

191. "It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefitted the candidate's campaign." 424 U.S. at 45.

192. "[T]he Court's holding will invite avoidance, if not evasion of the intent of the Act, with 'independent' committees undertaking 'unauthorized' activities in order to escape the limits on contributions." *Buckley,* 424 U.S. at 253 (Burger, C.J., separate opinion). Justice White later considered the Chief Justice's prediction a reality. "The growth of independent PAC spending has been a direct and openly acknowledged response to the contribution limits in the FECA." FEC v. National Conservative Political Action Comm., 470 U.S. at 510 (White, J., dissenting).

193. Adamany, *The Sources of Money: An Overview,* 425 ANNALS 17, 30 (1976); Cox, *supra* note 93, at 410; Nicholson, *supra* note 78, at 374.

campaign, but in an independent expenditure campaign they can spend as much as they like." [194]

A second manner in which unlimited PAC spending circumvents campaign finance legislation is its effect on publicly-financed presidential races. An integral part of the Presidential Election Campaign Fund Act (Fund Act)[195] is the overall limit on candidate expenditures.[196] The Fund Act seeks to replace private contributions with public funding by limiting campaign expenditures (of those candidates accepting public funds) to the amount of the public subsidy. An important public interest served by public funding—"to eliminate reliance on large private corporations" [197]—would not be served if candidates could use public money in addition to private funds.[198] Thus, no presidential candidate receiving a public subsidy may accept contributions during the general election.[199]

As part of this legislative scheme, the Fund Act also prohibits PAC expenditures exceeding $1,000 on behalf of a publicly-funded presidential candidate.[200] Like the FECA ceiling on independent spending, which was struck down in *Buckley,* the Fund Act provision was intended to close a loophole in the direct contribution limits.[201] Yet, Congress's attempt to limit independent spending was again struck down by the Court in *NCPAC.*[202] Because unlimited PAC spending can be as beneficial and potentially as corrupting as contributions,[203] the unregulated use of independent spending can defeat one goal of publicly-subsidized presidential campaigns.[204] The role that independent spending played in the 1980 election illustrates the impact of this legislative loophole.

In 1980 both the incumbent President Carter and the challenger Ronald Reagan received $29.4 million in public subsidies. In that same year, however, an additional $10 million was independently spent on Reagan's behalf; in

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194. *See Everything About NCPAC, supra* note 180. *See also infra* note 205 (another PAC notes loophole effect of independent expenditures).

195. 26 U.S.C. §§ 9001-13 (1987).

196. *Id.* § 9003. In a rare departure from its hostility to spending limits in general, the Court upheld the expenditure ceilings for publicly-funded presidential candidates. Republican Nat'l Comm. v. FEC, 487 F. Supp. 280 (S.D.N.Y. 1980), *aff'd without opinion,* 445 U.S. 955 (1980). For a discussion of this case, see Nicholson, *Political Campaign Expenditure Limitations and the Unconstitutional Condition Doctrine,* 10 HASTINGS CONST. L.Q. 601 (1983). The *Buckley* court first suggested the constitutionality of candidate spending ceilings in publicly-funded presidential campaigns. 424 U.S. at 57 n.65.

197. S. REP. No. 689, 93rd Cong., 2d Sess. 5-6 (1974).

198. 487 F. Supp. at 285.

199. I.R.C. § 9003(b)(2) (1987).

200. *Id.* § 9012(f).

201. S. REP. No. 689, 93rd Cong., 2d Sess. 18 (1974).

202. 470 U.S. 480 (1985).

203. *See supra* text accompanying notes 167-75.

204. Federal subsidies were designed in part to reduce the "deleterious influence of large contributions." 424 U.S. at 91. The Court upheld public financing of presidential candidates as a constitutional exercise of Congress's power to legislate for the "general welfare." *Id.*

contrast, only $42,000 was spent to bolster President Carter's campaign.[205] The figures on independent spending continued to favor the Republican candidate in 1984, when Walter Mondale was outspent by Reagan supporters, $15.8 million to $804,000.[206] Although there has been much debate concerning the practical effect of independent money on final election results, no quantifiable evidence exists. However, the power of $15 million worth of favorable media advertising should not be underestimated.

PAC spending can also be used to evade state spending limits for presidential primaries. When the 1980 Reagan campaign approached the $294,000 expenditure ceiling in New Hampshire, for example, the Fund for a Conservative Majority pumped in $60,000 to aid the candidate in that crucial state.[207] The PAC money amounted to a 20 percent spending hike for Reagan in that politically significant primary.

3. Apparent corruption

A third reason for restricting PAC expenditures is closely related to the two reasons offered above. The power of independent PAC spending to benefit candidate campaigns and evade contribution restrictions creates the appearance of corruption. The Supreme Court in *Buckley* described the appearance of corruption as being "[of] almost equal concern" as actual *quid pro quo* arrangements. [208] This unusual judicial concern for appearances is a recognition that maintaining public confidence in a representative government is essential.[209] The Court more recently noted that preventing apparent corruption is a "legitimate and *compelling* government interest."[210]

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205. FEC REPORTS ON FINANCIAL ACTIVITY, 1979-1980: FINAL REPORT, PARTY AND NON-PARTY POLITICAL COMMITTEES 117. At least one of the groups supporting Ronald Reagan in 1980 was honest about the power of independent PAC spending to evade the contribution limits. The group, Americans for Change, explained its solicitation: "Reagan for President in '80 is being sponsored by Americans for Change because federal campaign financing laws prohibit national candidates from accepting personal contributions since they receive federal funds." Exhibits to Appendix I to the Jurisdictional Statement at 4b, Common Cause v. Schmitt, 455 U.S. 129 (1982) (No. 80-874) (quoted in Cox, *supra* note 93, at 401-02).

One commentator charted the source of all funds in the 1980 presidential general election. Alexander, *supra* note 36, at 43. The $11.2 million funding advantage that Ronald Reagan held over the incumbent Jimmy Carter was roughly equal to the $10.5 million advantage that the challenger had in independent PAC spending. *Id.* at 54.

206. FEC Press Release, October 4, 1985, at 2.

207. Light, *supra* note 155, at 1639.

208. 424 U.S. at 27. *See also* FEC v. National Right to Work Comm., 59 U.S. at 210 (1982). "The government interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized. . . ." *Id.*

209. CSC v. Letter Carriers, 413 U.S. 548, 565 (1973).

210. FEC v. National Conservative Political Action Comm., 470 U.S. 480, 496-97 (1985) (emphasis added). The Court's language suggests that the "compelling" interest will justify limits on independent expenditures even under the stricter scrutiny applied to such legislation. *See supra* note 84.

Thus, the prevention of perceived corruption provides a justification for restricting independent spending.

The enforcement of a statutory scheme aimed at regulating independent spending and reducing the appearance of corruption poses difficult questions. On whose perceptions do the courts base their judgments? What type of evidence is relevant? How much evidence is sufficient? Anecdotal evidence is prevalent. Any public forum on campaign finance reflects a general concern for the influence of PAC money.[211] Many members of Congress express similar views.[212] Survey research showing the public's concern for the corruptive potential of independent spending is perhaps the best evidence supporting the argument for regulation.[213]

The strongest offer of proof for the proposition that independent PAC spending creates the appearance of corruption was raised by *NCPAC* plaintiffs in the district court.[214] The plaintiffs offered the results of two nationwide telephone surveys which revealed a public distrust of PACs and independent spending.[215] However, the trial court held the poll results inadmissible on evidentiary grounds.[216] The court held that "massive political distrust" in PACs or PAC methods was not sufficient to justify independent spending limits.[217] The court noted, however, that survey research demon-

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211. *E.g., Money in Politics: A Panel Discussion,* 10 HASTINGS CONST. L.Q. 463 (1983) (transcript from the Symposium on Campaign Finance Reform).

212. The concern expressed by Rep. Matthew F. McHugh (Dem.—N.Y.) is typical:

> The average citizen sees increasing amounts of money going to political campaigns because of a special interest and concludes, in many cases, at least, that this is corrupting the process. It may not be true, but the perception is certainly there and that is as important as the reality itself.

Sorauf, *Political Thicket, supra* note 127, at 113. *See also supra* note 2.

213. *See generally* Note, *Independent Expenditures: Can Survey Research Establish a Link to Declining Citizen Confidence in Government?,* 10 HASTINGS CONST. L.Q. 763 (1983) (noting Supreme Court's willingness to receive such empirical evidence). *But see* Sorauf, *Political Thicket, supra* note 123, at 109-15 (Court's standards make proving appearance of corruption difficult).

214. 578 F. Supp. 797, 824-27 (D.D.C. 1983).

215. One poll question asked:

> Since 1971 (sic) nearly every presidential candidate has chosen to receive Federal funds rather than raise his money from outside sources. But in recent elections some private interest groups have spent very large sums of money on television advertising to support a particular candidate. Some people say this is quite all right and very different from giving the same amount of money directly to the candidate. Others say it is a purely technical way of getting around the 1971 law and should be stopped. Do you think it is all right or should be stopped?

Question reprinted in Sorauf, *Political Thicket, supra* note 127, at 113. An abridged version of the question appears at 578 F. Supp at 827. Sixty-five percent of the poll's respondents thought independent spending "should be stopped." *Id.*

216. *See supra* note 129.

217. 578 F. Supp. at 825. The Court requires the public to have a specific opinion of independent expenditures, a phenomenon which the public does not fully comprehend. "Public opinion will be about larger issues—about 'big money' in a generalized system of campaign finance." Sorauf, *Political Thicket, supra* note 127, at 114.

strating the public's perception of independent PAC spending as corruptive could "save" a statutory limit.[218]

4. Difficulties in regulating the "independent" requirement

The focus of arguments for a ceiling on independent PAC expenditures is an increasing amount of evidence revealing the corruptive potential of spending.[219] PAC spending coordinated with a candidate is regulated as a contribution to and an expenditure by the candidate while uncoordinated spending is not.[220] The FEC has the responsibility to investigate coordination and to determine if the statutory limits have been exceeded.[221] The FEC, however, has been criticized for its weak enforcement record.[222] The difficulty in proving that PAC spending was coordinated with the candidate, combined with the FEC's lack of political prowess, provide final reasons for placing effective limits on potentially corruptive independent expenditures. An examination of FEC procedures reveal the inadequacy of current PAC spending regulation.

The FEC has exclusive jurisdiction to enforce the provisions of the FECA that create civil liability.[223] Before any person or PAC can be investigated for improper coordination with a candidate, four of the six Commissioners must find "reason to believe" a violation has occurred.[224] The FEC's decision to dismiss a complaint may be appealed to federal district court.[225] The Court has acknowledged the FEC's "sole discretionary power,"[226] however, and traditionally has afforded great deference to the agency's decisions.[227] The FEC's decision will be reversed only if its interpretation was arbitrary, capricious, or an abuse of discretion.[228] Thus, the FEC's standard of proof for a showing of improper coordination is crucial for effective regulation of independent spending.

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218. 578 F. Supp. at 825.

219. *See supra* text accompanying notes 170-84.

220. 11 C.F.R. § 109.1(c) (1987).

221. 2 U.S.C. § 437g(a)(2) (1985).

222. *See* CAMPAIGN FINANCE STUDY GROUP, INSTITUTE OF POLITICS, KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY, AN ANALYSIS OF THE IMPACT OF THE FEDERAL ELECTION CAMPAIGN ACT 1972-1978, at 114-15 (1979) [hereinafter HARVARD ANALYSIS OF FECA] (prepared for Congressional Commission on House Administration); Novak & Cobb, *supra* note 15, at 35; O'Connor, *supra* note 57; Comment, *Campaign Finance Re-Reform, supra* note 57, at 688-91. According to NCPAC director John T. Dolan, "The Federal Election Commission has defined independent expenditures to the degree that it is meaningless." MacPherson, *The New Right Brigade,* Wash. Post, Aug. 10, 1980, at F-1, col. 1.

223. 2 U.S.C. § 437c(b)(1) (1985).

224. *Id.* § 437g(a)(2).

225. *Id.* § 437g(a)(8).

226. *Buckley,* 424 U.S. at 112 n. 153.

227. FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981) ("[T]he Commission is precisely the type of agency to which deference should presumptively be afforded.") *Id.*

228. *Id.* at 31, 37.

The FEC's standard for determining what constitutes coordination between a PAC and a candidate's campaign can be criticized on two fronts. First, a subjective inquiry into the parties' state of mind makes difficult the discovery of coordinated spending disguised as independent expenditures. An expenditure is presumed to be coordinated if a candidate or an agent shares polls or plans with a spender, but only if made "with a view toward having an expenditure made."[229] A second weakness in FEC regulation of PAC spending is that the FEC requires a showing of direct coordination between PAC officials and a candidate's campaign staff. When reviewing a complaint of improper coordination between Ronald Reagan's 1980 campaign and five PACs who spent heavily on his behalf, the FEC's General Counsel suggested a heavy evidentiary burden. "Absent a showing of actual agreement to use the media for purposes of coordinating activity, it would be very difficult to sustain a finding of cooperation and coordination . . . ."[230] Evidence of interlocking memberships among the Reagan campaign committee and PAC policy-making committees, indirect communication through the media, and the use of common vendors was insufficient to trigger an FEC investigation.[231] The state-of-mind standard and the direct coordination requirement make the effective regulation of independent spending extremely difficult.

While the heavy evidentiary burden makes difficult the task of demonstrating an illegal exchange of political favors, the political position of the FEC makes its task even more formidable. Because the FEC receives its authority and its funding from congressional legislation, it is unwilling, or unable, to diligently investigate individual congressmen and their ties to PACs. One can understand the FEC's unwillingness. For example, shortly after the FEC conducted its first audit of a congressional candidate, Congress stripped the FEC of its power to conduct such random audits. The loss of the agency's most powerful enforcement weapon came after its first audit revealed improprieties in the campaign finances of James J. Delaney, chairman of the House Rules Committee.[232] The FEC apparently did its job too well.

The FEC's inability to perform its enforcement duties effectively is also understandable. The FEC's staff has been reduced 13 percent since 1980, during a time in which the number of PACs it oversees doubled.[233] The FEC's budget, averaging near $13 million a year, is one of the smallest of the federal agencies.[234] Every year, congressmen—each one a potential can-

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229. 11 C.F.R. § 109(a)(4)(i)(A) (1987).

230. Joint Exhibit 9, Common Cause v. FEC, 655 F. Supp. 619 (D.D.C. 1986) (No. 83-2199), *cited with approval in*, Common Cause v. FEC, 655 F. Supp. at 624.

231. *Common Cause*, 655 F. Supp. at 624.

232. O'Connor, *supra* note 57, at 26.

233. *Id.* Some congressional leaders may be more interested in FEC regulation of PACs than others. In 1986, for example, more than two dozen PACs registered with the FEC had been set up by congressmen. Benenson, *In the Struggle for Influence, Members' PACs Gain Ground,* 1986 CONG. Q. 1751.

234. O'Connor, *supra* note 57, at 26.

didate for re-election—decide the FEC's economic power to regulate their own future campaigns. One former chairman of the FEC has called the agency's lack of independence "the most serious impediment" to effective enforcement of federal campaign finance law.[235]

Because coordinated spending among PACs and candidates often goes undetected and unpunished, the corruption generated by such a scheme goes unchecked. The power of noncoordinated PAC spending to benefit candidate campaigns represents a similar threat to the goals of federal campaign finance legislation. Current restrictions on the amount of PAC contributions, designed to limit the influence of PAC money, are evaded through unlimited independent expenditures. Finally, apparent corruption by PAC money weakens citizen confidence in the electoral process and government officials. Because the substantial influence of PAC spending on federal campaigns is a relatively recent phenomenon, the Supreme Court decisions striking down federal limits on the campaign technique are outdated. There is growing evidence which supports the need for new legislation to control this phenomenon and its impact on the American political process.

IV. Suggested Reforms

The growth in independent PAC spending and its unlimited potential has generated a variety of reform proposals. The approaches to restricting the role of independent spending are as varied as the perceived problems of the phenomenon. In fact, each proposal attempts to mitigate a particular weakness within the current federal regulatory scheme. This narrow focus, however, is the cause of each proposal's inherent flaw. Thus, the proposed reforms for regulating independent spending fail in much the same way as past campaign finance legislation has failed. Campaign money restricted in one way will surface in another.[236] A brief review of the available reform options demonstrates this inevitable characteristic of campaign finance reform and the need for a simple, yet effective, solution to unlimited PAC spending.

Some proposals are designed to compensate the candidate who is the target of PAC negative advertising or whose opponent is receiving independent spending support. One type of proposed compensatory legislation focuses on the broadcast laws. According to the proposal, broadcasters would be

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235. Curtis, *Reflections on Voluntary Compliance Under the Federal Election Campaign Act*, 29 Case W. Res. 830, 851 (1979). Another former FEC chairman has noted the Commission's lack of independence: "You can't ignore that incumbents write the laws the Commission enforces; they have control over the Commission's budget . . . If that isn't enough, a congressional oversight committee monitors our performance and activity." H. Alexander & B. Haggerty, The Federal Election Campaign Act After A Decade Of Reform 116 (1981) (quoting former FEC chairman John McGarry) (cited in Comment, *Campaign Finance Re-Reform*, *supra* note 57, at 690 n.108).

236. *Cf.* Adamany, *supra* note 146, at 1015 ("Changes in any aspect of campaign funding have an impact on all others.").

required to give an equal amount of free broadcast time to congressional candidates facing independent spending campaigns.[237] Critics contend that such legislation would only prompt increases in the cost of broadcast advertising or discourage television and radio stations from airing independent campaign ads.[238]

Another type of compensatory legislation is related to proposed public funding of congressional candidates. Congress's most recent campaign finance bill, for example, would provide additional public funds to candidates who are attacked, or whose opponent is supported, by $10,000 or more in independent spending.[239] The prospect of additional public funding for the opposing candidate, like the prospect of free broadcast time, would supposedly discourage independent PAC spending. These proposals, however, would also penalize the candidate who is the presumed beneficiary of PAC spending—even if the PAC money is uninvited and unwelcomed. Under these regulatory schemes, independent spending would assume an even greater and more distorting role in campaign finance.

A simpler and more logical way to curb the excesses of independent spending is to regulate more strictly the coordination between PACs and the candidates they support. Closer regulation would reduce the level of independent PAC spending to that which is truly "independent." The Supreme Court implicitly recognized the importance of FEC enforcement when it presumed that coordinated spending would be treated as contributions.[240] More effective regulation of independent spending would require the use of objective criteria, rather than the present "state of mind" standard.[241] Among the objective factors used in analyzing whether a channel of communication exists between a candidate and a PAC are: an exchange of employees between candidate committees and PACs; shared polling data and mailing lists, and a substantial number of common vendors.[242] The latest congressional attempt to reform campaign finance included these factors in its revised definition of "independent expenditures." Also included was any consultation between the spender and the candidate's staff about "the candidate's plans, projects, or needs" and any spending by one "seeking or obtaining any legislative benefit or consideration."[243]

237. *E.g.*, S. 1806, 99th Cong., 1st Sess. (1985) (amending 47 U.S.C. § 315).

238. *E.g.*, Pressman, *Senate to Vote on Limiting PAC Contributions*, 1985 CONG. Q. 2445.

239. S. 2, 100th Cong., 1st Sess. § 504(a)(4) (1987). *See also* Note, FEC v. NCPAC: *Judicial Misinterpretation of* Buckley v. Valeo *and a Proposed Remedy*, 14 J. OF LEGIS. 107, 121-23 (1987) (proposing public funding of candidates whose opponents are supported by independent spending).

240. Buckley v. Valeo, 424 U.S. 1, 46 n.53 (1976).

241. Comment, *Campaign Finance Re-Reform*, *supra* note 57, at 695. Coordination is presumed when an expenditure is made "[b]ased on information about the candidate's plans . . . provided to the expending person by the candidate . . . *with a view toward having an expenditure made*." 11 C.F.R. § 109.1(b)(4)(i)(A) (1987) (emphasis added).

242. Comment, *Campaign Finance Re-Reform*, *supra* note 57, at 695-97.

243. S. 2, 100th Cong., 1st Sess., § 6 (1987).

A new standard for measuring the independence of PAC spending would ease the FEC's evidentiary burden, but not its political burden. A former FEC chairman has questioned the Commission's ability to regulate the incumbents who control the commission and its funding.[244] Because the FEC must turn to Congress for funding and authority, "Congress can and will undo anything the FEC does that the Congress does not like."[245] The structure of the Commission also gives incumbents an opportunity to exert pressure. The yearly change in the chair of the Commission prevents individual commissioners from building an independent power base.[246] Reducing the FEC's contact with Congress to only formal communications and extending the length of terms for commissioners are suggested reforms that would bring about the political independence the FEC needs.[247] However, even a more independent FEC and closer regulation of improperly coordinated PAC spending will not reduce the corruptive potential of unlimited independent spending, particularly when direct contributions remain subject to statutory ceilings.

Because many attribute the increase in independent spending to the federal ceilings on direct contribution amounts, another approach to curbing PAC spending involves increases in current contribution limits. This approach is based on the belief that unrealistically low ceilings on contributions are the reason for the increased use of independent expenditures.[248] Herbert Alexander, a longtime proponent of minimal campaign finance regulation, has suggested that the $1,000 individual contribution limit be increased to $5,000 and that the $25,000 aggregate ceiling be repealed.[249] Several campaign finance reform bills of the past decade have included such provisions.[250] The "Level-Up" approach to campaign finance reform, which advocates a minimum floor of public funding and the repeal of candidate spending ceilings, also calls for increases in—if not the repeal of—contribution limits.[251] With no overall spending ceilings and significantly increased contribution levels, the great need for independent PAC spending "would simply not exist."[252]

244. Curtis, *supra* note 235, at 853-55.

245. *Id.* at 853. *See* text accompanying notes 232-35.

246. HARVARD ANALYSIS OF FECA, *supra* note 222, at 114.

247. Curtis, *supra* note 235, at 853-55.

248. J. CANTOR, *supra* note 38, at 62; Alexander, *supra* note 205, at 49; Latus, *supra* note 23, at 150; Leatherberry, *supra* note 151, at 50.

249. Alexander, *Making Sense About Dollars in the 1980 Presidential Campaigns* in MONEY AND POLITICS IN THE UNITED STATES 32 (M. Malbin ed. 1982).

250. For a discussion of proposed legislation designed to encourage direct contributions, see J. CANTOR, *supra* note 38, at 63-65.

251. *See generally* Fleischman & McCorkle, *supra* note 81 (approach calls for increasing overall amount and diversity of speech by placing more money in hands of candidates and lifting current contribution and expenditure ceilings). *Cf.* Adamany, *supra* note 146, at 1016 ("American politics is not characterized by excessive spending, but rather by financial undernourishment.").

252. Fleischman & McCorkle, *supra* note 81, at 285.

Proposals to lift current restrictions on contributions can be criticized for two reasons. First, an increase in contribution levels can resurrect the danger of corruption inherent in large contributions.[253] Second, the ability to give more money directly may not deter the wealthier supporters of PACs from contributing as much as the law will allow and then using PACs to spend additional money independently. Consequently, raising contribution levels may promote evils which were the original focus of the FECA regulations while failing to address the current problems generated by unlimited independent spending.

The most effective way to curb independent spending would be a ceiling limit similar to those previously struck down by the Supreme Court.[254] The Court's holding that annual limits on independent expenditures is unconstitutional is based on the belief that these spending schemes pose no danger of corruption and is, therefore, subject to revision.[255] Reform-minded legislators should note Court language suggesting that judicial or legislative findings of corruptive potential would support a limit on independent spending.[256] Because the FEC officially has found few instances of collusion between candidates and PACs, the danger of corruption may be difficult to demonstrate. Nonetheless, a Congressional fact-finding committee free from the evidentiary burdens imposed on the FEC may be able to demonstrate the undue influence of past PAC spending campaigns and the potential for corruption in future PAC expenditures.

A separate but related justification for re-imposing limits on independent spending is the declining citizen confidence in government and the electoral process. The Court has consistently held that the appearance of corruption threatens American democracy as much as actual corruption.[257] Anecdotal evidence of the public's distrust in PAC spending exists but is insufficient as proof of perceived corruption.[258] Survey research that links declining citizen confidence in the political process to independent PAC spending,

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253. Nicholson, *supra* note 62, at 561.

254. FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985); Buckley v. Valeo, 424 U.S. 1 (1976).

255. *Cf.* "Neither the right to associate nor the right to participate in political activities is absolute." 424 U.S. at 25 (quoting CSC v. Letter Carriers, 413 U.S. 548, 567 (1967)).

256. 470 U.S. at 510 n.7 (1985) (White, J., dissenting) (quoting *Buckley,* 424 U.S. at 46). "The possibility was . . . left open [in *Buckley*] that unforseen developments in the financing of campaigns might make the need for restricting 'independent' expenditures more compelling. The exponential growth in PAC expenditures, accompanied by an equivalent growth in public and congressional concern, suggests that independent expenditures may well prove to be more serious threats than they appeared in 1976. The time may come when the governmental interests in restricting such expenditures will be sufficiently compelling to satisfy not only Congress but a majority of this Court as well." *Id.* (citations omitted). *See also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978) (record or legislative findings of corruptive potential would merit judicial attention).

257. 470 U.S. 480, 496-97 (1985). *See supra* text accompanying notes 208-10.

258. *See supra* notes 211-13 and accompanying text.

however, may support a new attempt by Congress to stem the growth of independent spending.

Legislative findings demonstrating that independent spending is potentially corruptive may not alone erode the Supreme Court's resistance to expenditure ceilings. In *NCPAC*, the $1,000 limit on PAC expenditures was also held unconstitutionally broad.[259] According to the Court: "It is not limited to multimillion dollar war chests; its terms apply equally to informal discussion groups that solicit neighborhood contributions."[260] In the absence of legislative history indicating such an interpretation, the Court declined to construe the statutory limits as applying only to wealthy PACs or to those whose contributors have no voice in how their contributions are spent.[261] Thus, any new attempt by Congress to restrict the amount of independent PAC spending should address the problem of over-broad legislation.[262]

In addition, Congress would have to set an expenditure ceiling which would not unduly restrict the first amendment rights of PACs. In *NCPAC*, the $1,000 limit was analogized to "allowing a speaker in a public hall to express his views while denying him the use of an amplifying system."[263] PACs' dependence on the "indispensable" electronic media and the cost of media use may require a ceiling much higher than $1,000.[264] The constitutional values threatened by annual limits on independent spending make the enactment and defense of such reform a formidable task.

The task may be made less formidable by a proposed ceiling on independent PAC spending which is sensitive to these constitutional arguments. The Court in *Buckley* noted the growing use of expensive mass media for the exercise of political expression.[265] The proposed ceiling should, therefore, be large enough to permit the purchase of newspaper ads and/or radio and television commercials.[266] The first amendment rights of PACs have been grounded in the political association rights of their members.[267] Thus, the

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259. 470 U.S. at 498.

260. *Id.*

261. *Id.* at 498-99. One proposal to reduce the role of independent PAC spending involves dollar limits on spending by political committees whose contributors do not participate directly in PAC decision-making. Comment, *Campaign Finance Re-Reform, supra* note 57, at 692-94.

262. However, the *NCPAC* court also doubted the utility of such criteria, calling them "intolerably vague." 470 U.S. at 499.

263. *Id.* at 493.

264. *See Buckley,* 424 U.S. at 19. In contrast to the Court's closer scrutiny of spending limit amounts, it has been willing to accept the contribution ceilings set by Congress. "If [Congress] is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Id.* at 30 (quoting Buckley v. Valeo, 519 F.2d 821, 842 (D.C.Cir. 1975)).

265. 424 U.S. at 19 ("[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money.").

266. One commentator has called for a ceiling "high enough to allow meaningful entry into the marketplace of ideas." Nicholson, *supra* note 62, at 562.

267. FEC v. National Conservative Political Action Comm., 470 U.S. 480, 494 (1985). *See also* Common Cause v. Schmitt, 512 F. Supp. 489, 499-500 (D.D.C. 1980) (political committees have first amendment rights commensurate with individuals' rights).

ceiling amount should continue to allow PACs the ability to "amplif[y] the voice of their adherents."[268]

A $75,000 annual ceiling on independent expenditures in support of a candidate would preserve basic rights to political expression and association while reducing the deleterious effects of enormous spending campaigns.[269] PACs would not be subject to any overall spending limits, only a ceiling on how much may be spent on a single candidate. The proposed legislation would also apply only to funds spent in "express advocacy" of a candidate. A PAC would be free to spend unlimited amounts to discuss issues, inform the electorate, and get out the vote. The $75,000 ceiling would not stifle PAC spending to such an extent that the larger PACs would have no vehicle through which they can funnel their political money. Finally, the $75,000 figure, much higher than the $5,000 limit on contributions from multicandidate PACs, may be more attractive to those hesitant to place restrictions on popular PACs.

V. Conclusion

Laws regulating political spending and giving are an unnatural mechanism. Yet, without such regulation the electoral process would become a marketplace driven by those with economic power. Congress has sought to preserve the democratic element of candidate campaigns by placing restrictions on contributions and expenditures and, for presidential campaigns, by replacing private money with public subsidy. The contribution limits upheld in *Buckley v. Valeo* dramatically reduced the corruptive potential of unlimited individual contributions. The interest in curbing such excessive influence was sufficient to sustain the burden on contributors' first amendment rights, yet did not justify similar restrictions on independent spending. The low ceilings on direct contributions and the unlimited potential for independent spending have transformed the latter into a powerful vehicle for political money. The need for nationwide fundraising and sophisticated media campaigns has made PACs more efficient independent spenders than individuals.

Just as independent PAC spending has become the new vehicle for large sums of political money, it has become the new source of undue influence. Informal coordination between PACs and the candidates they support raises skepticism over the true independence of independent spending. The large sums spent by some PACs raise much of the same concern for corruption that large contributions once did. Well-financed PACs frustrated by the contribution limits have turned to independent expenditures, thus defeating the original purpose of the contribution restrictions.

No easy solution exists to the problems generated by independent PAC spending. Legislation granting free broadcast time or additional public fund-

268. 470 U.S. at 494 (quoting *Buckley*, 424 U.S. at 22).

269. The ceiling amount may be staggered for different offices. For example, the ceiling may be lower for House of Representatives candidates and higher for presidential candidates.

ing to candidates opposing PAC-supported candidates would penalize those who do not seek or want PAC expenditures on their behalf. Improvement in the FEC's regulation of PAC spending might reduce improper coordination among PACs and candidates, but would not lessen the corruptive potential of uncoordinated spending. Increasing the level of direct contributions would fail to discourage additional spending by PACs while resurrecting the danger of corruptive contributions. A renewed attempt by Congress to pass an appropriate statutory ceiling on independent expenditures, accompanied by legislative findings which justify such limits, is the greatest hope for effective and acceptable regulation of independent PAC spending.

Those who oppose any direct restrictions on independent PAC spending argue that its present role in campaign finance is relatively small. However, the trend is toward an increasingly larger role for independent spending. The absence of ceiling limits on PAC spending and the soaring cost of electoral campaigns increase the potential influence of PAC money spent on a candidate's behalf. Rather than waiting until problems of undue influence escalate, a national discussion on the problem and the solution of independent spending should begin now. Debate on the merits of a $75,000 annual limit on independent expenditures is a good starting point for that discussion.

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