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## Federal Election Commission v. National Conservative Political Action Committee: A Judicial Cure for Congressional Overzealousness in Presidential Campaign Finance Regulation

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*FEDERAL ELECTION COMMISSION v. NATIONAL CONSERVATIVE  
POLITICAL ACTION COMMITTEE: A JUDICIAL CURE  
FOR CONGRESSIONAL OVERZEALOUSNESS IN  
PRESIDENTIAL CAMPAIGN FINANCE  
REGULATION*

INTRODUCTION

The United States Supreme Court in *Federal Election Commission v. National Conservative Political Action Committee*<sup>1</sup> abandoned its traditional conservative mode of analysis and invoked the first amendment<sup>2</sup> to strike down statutory limits on the independent expenditures<sup>3</sup> of political action committees (PACs).<sup>4</sup> This uniquely aligned opinion<sup>5</sup> applied a liberal interpretation of the first amendment to unlock the shackles placed by Congress upon PACs' independent expenditures. The conservative faction of the Court, led by Justice Rehnquist,<sup>6</sup> stepped away from its deferential attitude toward legislative determinations in complex lawmaking, and refused to constitutionally approve a key section of Congress's election financing scheme.

Specifically, in Part I of its opinion, the majority found that a Democratic group of petitioners lacked standing to invoke expedited judicial

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1. 105 S. Ct. 1459 (1985).

2. U.S. CONST. amend. I.

3. Specifically, the Court invalidated 26 U.S.C. § 9012(f) (1982), which set forth:

Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding \$1,000.

Paragraph (2) of the section has no application to the facts in this case.

Independent expenditures are spent without the guidance of or coordination with a candidate or a campaign committee. See *infra* text accompanying notes 59-61. The party who makes an expenditure directly controls the avenue by which a political view is expressed. For example, an expenditure includes purchasing a newspaper ad independently to voice one's opinion on an issue. See *infra* Comment, note 29, at 432-36.

Contributions, on the other hand, are given directly to the campaign committee of a candidate. At the time of contribution, the campaign committee gains complete control over the donated funds. See Richards, *The Rise and Fall of the Contribution/Expenditure Distinction: Redefining the Acceptable Range of Campaign Finance Reforms*, 18 NEW ENG. L. REV. 367, 370-72 (1983) (discussing the nature of contributions).

4. PACs are formed by various corporations and groups to influence elections and lobby for special interests. PACs represent a wide range of special interests, including doctors, gun enthusiasts, auto workers, carpenters, and real estate agents. *Lawscope*, 67 A.B.A. J. 280-81 (1981).

5. Rehnquist, J., delivered the opinion of the Court, in which Burger, C.J., Blackmun, Powell, and O'Connor, JJ. joined. Brennan, J., joined only in Part II of the opinion. Stevens, J., concurred in Part II of the opinion and dissented as to Part I. White, J., filed a dissenting opinion, in Part I of which Brennan, J., and Marshall, J., joined. Marshall, J., filed a separate dissent.

6. Thomas, *Court at the Crossroads*, TIME Oct. 8, 1984, at 31.

review<sup>7</sup> to request a declaratory judgment upholding the constitutionality of section 9012(f) of the Presidential Election Campaign Fund Act (Fund Act).<sup>8</sup> In Part II, the Court reached the central issue of the case, and refused to declare the section constitutional.<sup>9</sup> In effect, the Court proclaimed the unconstitutionality of limits on PACs' independent expenditures.

This comment will elucidate the facts surrounding the Supreme Court's decision. It also will trace the extensive background behind congressional and judicial policymaking in the election area. Finally, this comment will analyze the Court's holding and illuminate the underlying message of Justice Rehnquist's opinion.

#### I. FACTS OF *FEDERAL ELECTION COMMISSION v. NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE*

The National Conservative Political Action Committee (NCPAC) and the Fund for a Conservative Majority (FCM) are corporations registered as political committees<sup>10</sup> with the Federal Election Commission (FEC).<sup>11</sup> Prior to the 1984 presidential elections, the two PACs announced their intentions to spend vast sums of money to further the reelection of President Ronald Reagan.<sup>12</sup> To counteract this conservative threat, the Democratic Party, the Democratic National Committee (DNC), and a citizen<sup>13</sup> (collectively, the Democrats) filed an amended complaint seeking a ruling which would declare section 9012(f) of the Fund Act constitutional,<sup>14</sup> and thus prohibit the PACs' spending. The FEC then intervened as a defendant to press for a dismissal of the complaint based on the Democrats' lack of standing.<sup>15</sup> One month later, in June of 1983, the FEC brought a cause of action seeking the same de-

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7. 26 U.S.C. § 9011(b)(2) (1982), sets forth that "[s]uch proceedings shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court." This statute provides for expedited review directly from the special three-judge district court panel to the United States Supreme Court.

8. Presidential Election Campaign Fund Act, Pub. L. No. 92-178, 26 U.S.C. §§ 9001-9013 (1971) (amended 1974).

9. 105 S. Ct. at 1471.

10. 26 U.S.C. § 9002(9) (1971) defines a political committee as "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office."

11. The FEC (created by the Federal Election Campaign Act (FECA), *see infra* note 36) has the duty to administer, enforce, and formulate policy with regard to the FECA and the Fund Act. 2 U.S.C. § 437c (1974) (amended 1980).

12. As an example of the magnitude of previous spending, NCPAC's election expenses in 1980 were over \$7 million. See *Lawscope*, *supra* note 4, at 280. FCM spent over \$2 million on President Reagan's bid for election in 1980. See Comment, *Independent Political Committees and the Federal Election Laws*, 129 U. PA. L. REV. 955, 962 (1981).

13. The private citizen, Edward Mezvinsky, was the Chairman of the Pennsylvania Democratic State Committee. 105 S. Ct. at 1462.

14. *Democratic Party v. National Conservative Political Action Comm.*, 578 F. Supp. 797, 803 (E.D. Pa. 1983), *rev'd in part*, 105 S. Ct. 1459 (1985).

15. *Id.*

claratory judgment requested by the Democrats.<sup>16</sup> The three-judge panel formed pursuant to the Fund Act<sup>17</sup> consolidated both of the cases and heard arguments.<sup>18</sup>

The district court granted the Democrats and the FEC standing under section 9011(b)(1)<sup>19</sup> and Article III of the Constitution.<sup>20</sup> On the merits, the court refused to declare section 9012(f) constitutional.<sup>21</sup> The panel did not, however, declare the section unconstitutional. The panel found that the limitations on political committee expenditures constituted an impermissibly overbroad violation of fundamental first amendment rights of freedom of speech and association.<sup>22</sup> Furthermore, the court refused to save the law by limiting the scope of the Fund Act.<sup>23</sup>

The Democrats and the FEC filed cross appeals to the Supreme Court in accordance with the expedited review provisions of the Fund Act.<sup>24</sup> The Supreme Court subsequently reversed the grant of standing to the Democrats, but affirmed the panel's refusal to declare section 9012(f) constitutional.<sup>25</sup>

## II. BACKGROUND

### A. *Historical Analysis of the Federal Campaign Financing Law Scheme*

Issues of campaign funding have challenged the people of the United States and their government since the founding fathers presented the Constitution to the original thirteen colonies. James Madison warned that when the citizen loses control over the government, wealth and birthright can poison a free election process.<sup>26</sup> To avert this evil, Madison suggested a system in which the people play the role of the masters with the elected officials as slaves.<sup>27</sup>

Unfortunately, Madison's fears came to reality at the turn of this century, when corporations during the industrial revolution began to exhibit undue influence over the nation's election process. The industrial giants of the time were amassing huge sums of money and using

16. *Id.*

17. 26 U.S.C. § 9011(b)(2) (1982). *See supra* note 7.

18. *Democratic Party*, 578 F. Supp. at 803.

19. 26 U.S.C. § 9011(b)(1) (1982) (states that "[t]he Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or con[s]true any provision of this chapter").

20. U.S. CONST. art. III, § 2, cl. 1, which provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

21. *Democratic Party*, 578 F. Supp. at 840.

22. *Id.*

23. *Id.*

24. 26 U.S.C. § 9011(b)(2) (1982). *See supra* note 7.

25. 105 S. Ct. at 1471.

26. Roeder, *Is Congress the Best that PAC's Can Buy?*, Rocky Mountain News, July 21, 1985, at 61, col. 1 (quoting THE FEDERALIST No. 57 (J. Madison)).

27. Correspondence from Lewis H. Larue, *Politics and the Constitution*, 86 YALE L.J. 1011 (1977).

"war chests" to make unlimited campaign contributions. In an effort to prevent the corrupt effects of large accumulations of wealth upon the federal election process, Congress enacted the Tillman Act in 1907<sup>28</sup> which barred national banks and other federally-chartered corporations from making contributions to candidates in any election.<sup>29</sup> Eighteen years later, Congress strengthened the Tillman Act by voting into law the Federal Corrupt Practices Act.<sup>30</sup> The new law created the first contribution reporting requirements<sup>31</sup> in an attempt to curb the political indebtedness of elected officials to their major campaign contributors.<sup>32</sup> Labor unions were similarly regulated by the 1943 War Labor Disputes Act.<sup>33</sup> Regulation of individuals, however, did not occur until the enactment of the Hatch Political Activities Act of 1939.<sup>34</sup>

These statutes were fairly effective in creating a basic framework for election financing. Spiraling campaign expenditures, however, became a topic of intense debate during President Nixon's term in office.<sup>35</sup> Congress toughened the regulatory system in 1971 by enacting two complex campaign financing laws: the Federal Election Campaign Act (FECA) and the Fund Act.<sup>36</sup> Congress promulgated the FECA to

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28. Pub. L. No. 59-36, ch. 420, 34 Stat. 864 (1907), stated [t]hat it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State Legislature of a United States Senator.

29. See Comment, *The Constitutionality of Limitations on Individual Political Campaign Contributions and Expenditures: The Supreme Court's Decision in Buckley v. Valeo*, 25 EMORY L.J. 400, 402 (1976) (technical analysis of the early campaign laws).

30. Ch. 368, tit. III, 43 Stat. 1070 (1925) (repealed 1972).

31. Ifshin & Warin, *Litigating the 1980 Presidential Election*, 31 AM. U.L. REV. 487 (1982). These requirements forced campaign committees to file a statement containing names and addresses of all contributors with the Clerk of the House of Representatives. The law also required the committees to report the amount of all contributions received.

32. Comment, *supra* note 29, at 403. Justice Frankfurter explained that the statute's "aim was not merely to prevent the subversion of the integrity of the electoral process. Its underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States v. UAW*, 352 U.S. 567, 575 (1957).

33. Pub. L. No. 78-89, ch. 144, § 9, 57 Stat. 163 (1943) (also known as the Smith-Connolly Act); see also Taft-Hartley Labor Management Relations Act of 1947, Pub. L. No. 80-101, ch. 120, § 304, 61 Stat. 136, 159 (which strengthened the power of the War Labor Disputes Act).

34. Pub. L. No. 76-252, ch. 410, 53 Stat. 1147 (codified at 5 U.S.C. §§ 7321-7327 (1976)) (barring federal employees from campaigning for candidates for federal office, and barring candidates from using federal employment or benefits as a reward for campaign support).

35. Spending during the 1968 presidential campaign equaled \$44.2 million. In 1972, spending for the presidential race rose dramatically to \$83 million. Cox, *Constitutional Issues in the Regulation of the Financing of Election Campaigns*, 31 CLEV. ST. L. REV. 395 (1982).

As spending continued to skyrocket throughout the 1970's, large disparities between Republican and Democratic monetary outlays became evident. For instance, in all 1980 campaigns, approximately \$400 million were raised by candidates. Republicans solicited \$108 million from individual contributors, while the Democrats could raise only a paltry \$19 million from individuals. T. WHITE, *AMERICA IN SEARCH OF ITSELF* 426 (1982).

36. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 2 U.S.C. §§ 431-454 (amended 1980); Fund Act, *supra* note 8.

broaden the public's awareness of the source of campaign contributions.<sup>37</sup> For the first time, this statute set forth ceilings on campaign spending and extensive disclosure provisions.<sup>38</sup> Concurrently, the Fund Act created a public funding mechanism for presidential elections.<sup>39</sup> These two laws, although enacted separately, blended to form an extensive set of election financing guidelines.<sup>40</sup>

Despite congressional efforts to control campaign corruption through the FECA and the Fund Act, the eruption of Watergate caused the nation to view the presidential election process in an intensely skeptical manner. In response to this public outcry,<sup>41</sup> Congress amended each of the Acts in 1974. The FECA amendments placed limits on campaign contributions<sup>42</sup> and expenditures,<sup>43</sup> required reporting of campaign committee receipts and disbursements,<sup>44</sup> and created the FEC to enforce the provisions of the Acts.<sup>45</sup> The Fund Act amendment required presidential and vice-presidential candidates to make the mutually exclusive choice between accepting either public campaign funding or financing from private sources.<sup>46</sup>

#### B. *Buckley v. Valeo*

A major setback for Congress occurred in 1976 when the Supreme Court determined that several sections of the 1974 FECA amendments could not pass constitutional scrutiny. Before the 1976 presidential campaign went into full swing, a variety of politically involved parties<sup>47</sup> brought suit against the federal government to determine the constitu-

37. Annot. 18 A.L.R. FED. 959 (1974).

38. The Act placed specific limits on expenditures made by candidates for advertising in the media. Pub. L. No. 92-225, 86 Stat. 3, 47 U.S.C. 104 (a), (b) (1972) (repealed 1974). See Berry & Goldman, *Congress and Public Policy: A Study of the Federal Election Campaign Act of 1971*, 10 HARV. J. ON LEGIS. 331 (1973) (thorough analysis of the FECA's legislative history).

The FECA's disclosure requirements mandated that political committees follow a certain form of organizational structure. 2 U.S.C. § 432 (1972) (amended 1980). The FECA also required political committees to register and file a statement of organization with the FEC. 2 U.S.C. § 433 (1972) (amended 1980). After a political committee began accepting contributions, the statute required the committee to file reports of receipts and disbursements with the FEC. 2 U.S.C. § 434 (1972) (amended 1980). See also Ifshin & Warin, *supra* note 31, at 495.

39. The Fund Act provided for public funding of presidential elections. To raise money for the election fund, Congress established a system whereby taxpayers could contribute one dollar with the filing of their tax returns. 26 U.S.C. § 6096 (a) (1971).

40. Ifshin & Warin, *supra* note 31, at 495.

41. *Id.* at 492.

42. 2 U.S.C. § 441a(a)(1)(A) (1976).

43. 18 U.S.C. § 608(e)(1) (1974) (repealed 1976) (as an expenditure limit example).

44. 2 U.S.C. § 434(a) (1971) (amended 1980).

45. 2 U.S.C. § 437(c) (1974) (amended 1980). See *supra* note 11.

46. In 1976, Congress repealed several provisions of the law which had been struck down by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). In 1979 and 1980, Congress made further incidental revisions to the FECA and Fund Act. The latest improvements attempted to streamline the Acts' procedural application by simplifying disclosure requirements. See Ifshin & Warin, *supra* note 31, at 496.

47. The plaintiffs included candidates, political parties, public interest groups, and PACs. *Buckley*, 424 U.S. at 7-8.

tionality of the 1974 FECA amendments. After accepting jurisdiction, the Court granted standing to each party.<sup>48</sup> The Justices also sanctioned the public funding<sup>49</sup> and disclosure<sup>50</sup> aspects of the law, while striking down the FEC appointment procedure.<sup>51</sup>

More importantly, however, the *per curiam* opinion upheld the *contribution* limitations of the Act<sup>52</sup> while invalidating the *expenditure* ceilings.<sup>53</sup> Generally, the Court found that fundamental rights of free speech and association were infringed upon by both categories of limitations.<sup>54</sup> The first prong of the strict scrutiny analysis applied by the Court required the government to prove "compelling" congressional interests behind the promulgation of the law.<sup>55</sup> The second prong required congressional means "closely drawn to avoid unnecessary abridgement" of the interest.<sup>56</sup>

The contribution limits passed strict scrutiny because the Justices believed that these caps only incidentally affected crucial first amendment guarantees.<sup>57</sup> The Court concluded that Congress's motive to

48. *Id.* at 12.

49. *Id.* at 92-93 (The Court agreed with Congress's goal in creating public financing "to use public money to facilitate and enlarge public discussion and participation in the election process, goals vital to self-governing people."); see *supra* note 39.

50. *Buckley*, 424 U.S. at 84; see *supra* note 38.

51. *Buckley*, 424 U.S. at 135. The Court concluded that since a majority of the members of the FEC were appointed by the President *pro tempore* of the Senate and the Speaker of the House, the selection procedure violated appointment guarantees provided to the President by the appointment clause. The appointment clause states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . ." U.S. CONST. Art. II, § 2, cl. 2.

52. *Buckley*, 424 U.S. at 29. The contribution limitations upheld by the Court included individual contribution caps of \$1,000 to a single candidate, a political committee contribution ceiling of \$5,000 to a single candidate, and a \$25,000 limit on individual contributions to all candidates within a single year. 18 U.S.C. § 608(b) (repealed 1976).

53. *Buckley*, 424 U.S. at 51. The expenditure limits overturned included independent expenditure restrictions placed on relatives of candidates, limits placed on a candidate's expense of personal funds, ceilings placed on individual expenditures targeted to affect a clearly identified candidate, and limits placed on the overall expenses of a campaign. 18 U.S.C. § 608(a), (c), and (e) (1974) (repealed 1976).

54. The Court acknowledged that expenditures are entitled to first amendment protection:

"to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957) . . . . This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269, 270 (1964).

*Buckley*, 424 U.S. at 14.

55. *Id.* at 25; see also *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (elucidating the Court's strict scrutiny first amendment test).

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

57. *Id.* at 21. The Court defined what later became known as "speech by proxy": "the transformation of contributions into political debate [which] involves speech by someone other than the contributor." *Id.*; see also Note, *The Constitutionality of Regulating Independent Expenditure Committees in Publicly Funded Presidential Campaigns*, 18 HARV. J. ON LEGIS. 679 (1981). See generally Comment, *supra* note 29, at 429 (analyzes the Court's "speech-by-proxy" statement); *Recent Decisions*, 49 GEO. WASH. L. REV. 801, 814 (1981) (criticizing and explaining the application of *Buckley's* contribution distinction in *Common Cause v. Schmitt*, 512 F. Supp. 489 (D.D.C. 1980), *aff'd* 101 S. Ct. 1344 (1981)).

eliminate the infamous *quid pro quo*<sup>58</sup> was sufficiently compelling to justify this minor infringement.

The independent expenditure ceilings, on the other hand, failed to pass the Court's strict scrutiny review. The opinion equated constitutionally-protected speech with the spending of money to directly further one's political views.<sup>59</sup> The Justices then found that basic constitutional rights were heavily infringed upon by the expenditure limitations.<sup>60</sup> The Court rejected the law as a method to further the government's single compelling interest of eliminating the evil *quid pro quo*, since expenditures were made without prearrangement, cooperation, or coordination with the candidate.<sup>61</sup> Therefore, the expenditure ceilings were invalidated.

### C. *Post-Buckley Decisions*

After *Buckley*, the Supreme Court began to show a definite trend in its holdings concerning election financing laws. The Court struck down several laws which limited independent expenditures.<sup>62</sup> In *First National Bank v. Bellotti*,<sup>63</sup> various corporations and banks opposed an amendment to the Massachusetts Constitution that would have allowed a graduated personal income tax. Yet they could not fight this amendment because of a state law which prohibited corporate spending to influence the outcome of public issues submitted to the voters.<sup>64</sup> The groups, therefore, brought an action challenging the constitutionality of the law. The Court struck down the statute,<sup>65</sup> and noted that spending to express political views "is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."<sup>66</sup>

In another public-issue case, a group of citizens vehemently opposed a ballot measure which would have placed rent controls on many

58. When a contributor gives money to a candidate in exchange for a favor in the future, a *quid pro quo* has occurred. See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 297 (1981).

59. According to the Court, the first amendment must protect political expenditures "because virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Federal Election Commission*, 105 S. Ct. at 1467 (quoting *Buckley*, 424 U.S. at 19).

60. 105 S. Ct. at 1467.

61. *Buckley*, 424 U.S. at 46-47. See generally, Comment *The Federal Election Campaign Act and Presidential Election Campaign Fund Act: Problems in Defining and Regulating Independent Expenditures*, 1981 ARIZ. ST. L.J. 977, 992 (1981) (analyzing the distinction made by *Buckley* between contributions and expenditures).

62. *Common Cause v. Schmitt*, 455 U.S. 129 (1982), *aff'g* 512 F. Supp. 489 (D.D.C. 1980); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).

63. 435 U.S. at 795.

64. The law prohibited corporations from making expenditures or contributions for the purpose of "influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." *Id.* at 768 n.2 (quoting Mass. Gen. Laws Ann. ch. 55, § 8 (West Supp. 1977)).

65. *Bellotti*, 435 U.S. at 795.

66. *Id.* at 777.



of the city's rental units.<sup>67</sup> However, these citizens felt they could not effectively lobby against the measure because a city ordinance placed a \$250 expenditure limit on any contributor who wished to influence the outcome of such elections.<sup>68</sup> Consequently, the citizens brought suit to have the law declared unconstitutional. The Court found that the law could not promote the government's compelling interest of preventing the *quid pro quo*, because public question elections involve issues and not candidates.<sup>69</sup>

A further indication of the Court's distaste for limits on independent expenditures occurred in its summary affirmation of a district court ruling that held as unconstitutional section 9012(f) of the Fund Act.<sup>70</sup> This decision foreshadowed the *Federal Election Commission* decision, but had no precedential value since the Court was evenly split on its vote.<sup>71</sup>

On the contribution side of the coin, two important election financing laws have been sanctioned by the Court. In *Federal Election Commission v. National Right to Work Committee*,<sup>72</sup> the Court upheld an FEC enforcement action against the National Right to Work Committee (NRWC), a nonprofit corporation formed to oppose compulsive unionism. The FEC sought to enjoin NRWC from soliciting contributions for its segregated campaign fund from nonmembers, in violation of 2 U.S.C. § 441b(b)(4)(A) and (C).<sup>73</sup> The Court found that the regulation was "sufficiently tailored" to promote the government's interest in protecting the integrity of the campaign process.<sup>74</sup>

Limitations on individual contributions to PACs were upheld in *California Medical Association v. Federal Election Commission*.<sup>75</sup> According to the Court, contributions to PACs at best represented "speech by proxy,"<sup>76</sup> and a strict scrutiny analysis did not apply. The majority accepted the congressional motive of preventing actual or apparent corruption by limiting contributions.<sup>77</sup> The majority also explained that without the limits imposed on contributions to PACs, contributors might evade

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67. *Citizens Against Rent Control*, 454 U.S. at 292.

68. The law prohibited any person from making, or any campaign treasurer from accepting contributions "in support of or in opposition to a measure . . . [exceeding] two hundred and fifty dollars (\$250)." *Id.* at 229 (quoting Election Reform Act of 1974, Ord. No. 4700-N.S. (approved by the voters in Berkeley, CA)).

69. *Citizens Against Rent Control*, 454 U.S. at 297-98.

70. *Common Cause v. Schmitt*, 455 U.S. 129 (1982), *aff'g* 512 F.Supp. 489 (D.D.C. 1980).

71. *See Hertz v. Woodman*, 218 U.S. 205 (1910) (affirmations by evenly split vote are of no precedential value).

72. 459 U.S. 197 (1982) (upholding 2 U.S.C. § 441b(b)(4)(A), (C) (1976)).

73. Since corporations may not contribute to federal elections, this law allowed a corporation to create a "separate segregated fund" and to use this fund for campaign purposes. Money can only be solicited for the fund from "members" of the corporation. *National Right to Work Committee*, 459 U.S. at 198 n.1.

74. *Id.* at 208.

75. 453 U.S. 182 (1981) (upholding several statutes which restricted contributions to PACs).

76. *Id.* at 196. *See supra* note 57.

77. *California Medical Association*, 453 U.S. at 197.

other campaign financing laws by giving large sums of money to PACs.<sup>78</sup> In essence, the Court placed this law within the *Buckley* contribution category and upheld the statute with little discussion.

The post-*Buckley* decisions demonstrate that the Court will strictly scrutinize laws that impinge on first amendment rights by limiting independent campaign expenditures. Conversely, the Court will take a more deferential approach to contribution limitations.

### III. FEDERAL ELECTION COMMISSION V. NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE.

In *Federal Election Commission*, the Court reaffirmed that it will not accept independent expenditure limitations which impermissibly infringe upon basic first amendment rights. Yet, before reaching a decision on the constitutionality of section 9012(f), the Court denied the Democrats' standing.<sup>79</sup> The Court allowed only the FEC the right to bring a declaratory action to test the constitutionality of the Fund Act.<sup>80</sup>

#### A. Standing

Justice Rehnquist discounted the Democratic Party's request to bring an action against another private party, because Congress did not expressly include this group in the statute's list of eligible plaintiffs.<sup>81</sup> Justice Rehnquist's rationale in denying the DNC and Mr. Mezvinsky standing, on the other hand, combined interpretations of sections 437c(b)(1),<sup>82</sup> 9010,<sup>83</sup> and 9011,<sup>84</sup> to find that under the present circumstances these plaintiffs could not bring a declaratory action to determine the constitutionality of section 9012(f).

Crucial to Justice Rehnquist's determination of the effect of these laws was his interpretation of the word "appropriate" in section 9011(b)(1).<sup>85</sup> He set forth that Congress intended "appropriate" actions to include only private suits against the FEC.<sup>86</sup> According to the Justice, a judicial grant of standing to the Democrats would seriously

78. *Id.* at 198.

79. 105 S. Ct. at 1465. Because the Court's interpretation of the statute denied the Democrats' standing, the Court refused to reach the Article III issue analyzed by the lower court.

80. 105 S. Ct. at 1464. See 26 U.S.C. § 9011(b)(1) (1982); see also *supra* note 19.

81. 105 S. Ct. at 1464.

82. U.S.C. § 437c(b)(1) (1982) (gives the FEC "exclusive primary jurisdiction with respect to the civil enforcement of such provisions").

83. 26 U.S.C. § 9010(a) (1982) (grants the FEC the power "to appear in and defend against any action filed under section 9011").

84. See 26 U.S.C. § 9011(b)(1) (1982); see also *supra* note 19.

85. 105 S. Ct. at 1464. The Court conceded that section 9011(b)(1) allows a named party to implement a suit without exhausting the administrative remedies as required by 2 U.S.C. § 437g (1982).

86. 105 S. Ct. at 1464. See S. REP. NO. 677, 94th Cong. 6, 1st Sess., reprinted in 1976 U.S. CODE CONG. & AD. NEWS 929, 934. The legislative history provided in this report states that "with the exception of actions brought by an individual aggrieved by an action by the Commission, the power of the Commission to initiate civil actions is the exclusive civil remedy for the enforcement of the provisions of the Act."

undermine the FEC's exclusive jurisdiction to enforce the Fund Act.<sup>87</sup> Furthermore, he noted that a grant of standing would allow millions of eligible voters the right to expedited judicial review by direct appeal under section 9011(b)(2).<sup>88</sup>

### B. *Constitutionality of Section 9012(f)*

In part II of the decision, the Court reached the merits of the case and began a comprehensive analysis of the constitutionality issue surrounding section 9012(f). The Court first pointed out the self-proclaimed positions of the PACs as ideological organizations which advocate conservative doctrines.<sup>89</sup> The opinion also set forth the funding mechanisms of NCPAC and FCM.<sup>90</sup> As Justice Rehnquist explained, each of the PACs spent money in a totally independent manner, free from any cooperation with the Reagan team.<sup>91</sup> With this expository section, the majority laid the groundwork for placing PAC spending within the "expenditure" category of *Buckley*.

The Court next furnished a brief overview of the Fund Act's regulatory scope, contrasting its impact with the much broader boundaries of FECA control.<sup>92</sup> The Court then reviewed section 9012(f) of the Fund Act, which imposed a criminal penalty against any political committee that incurred expenses in excess of \$1,000 to further the election of a presidential or vice presidential candidate.<sup>93</sup>

Justice Rehnquist applied the challenged law to NCPAC and FCM by placing the PACs within the congressional definition of "political committees,"<sup>94</sup> and determined<sup>95</sup> that their mode of spending fell within the definition of "qualified campaign expense."<sup>96</sup> Finally, the Court concluded that the expenditures of NCPAC and FCM were within the expressed prohibitions of section 9012(f).<sup>97</sup>

After finding that the constitutionality of section 9012(f) was di-

87. 105 S. Ct. at 1464; *see also* 121 CONG. REC. 12199 (May 3, 1976) (statement of Rep. Hayes).

88. 105 S. Ct. at 1464.

89. 105 S. Ct. at 1465. NCPAC, for instance, spent \$7 million in 1980, which contributed to the defeat of four well-known Democratic senators: Frank Church (D - Idaho), George McGovern (D - S.D.), John Culver (D - Iowa), and Birch Bayh (D - Ind.). *Lawscope*, *supra* note 4, at 281.

90. The PACs solicit money from the general public and place the funds in a pool. The Board members then decide where and how to spend the contributions. The contributors have no input into these spending decisions. 105 S. Ct. at 1465.

91. *Id.* The Court even suggests that these expenditures could produce counterproductive results with regard to President Reagan's campaign. *See Buckley*, 424 U.S. at 47.

92. The Fund Act specifically governs the public financing of presidential elections. The FECA regulates all federal elections. 105 S. Ct. at 1466.

93. *Id.* *See* 26 U.S.C. § 9012(f) (1982).

94. *See supra* note 10.

95. 105 S. Ct. at 1466.

96. According to the Court, "[t]he term 'qualified campaign expense' simply means an otherwise lawful expense by a candidate or his authorized committee 'to further his election' incurred during the period between the candidate's nomination and 30 days after election day." 105 S. Ct. at 1466 (citing 26 U.S.C. § 9002(11) (1982)).

97. 105 S. Ct. at 1466-67.

rectly at issue, the Court began a review of this provision, using *Buckley* as the applicable precedent. The Court placed the PACs' expenditure of funds "to propagare political views"<sup>98</sup> under the protection of the first amendment's right to free speech.<sup>99</sup> The majority quoted *Buckley* to illustrate the necessity of incurring large expenses when trying to further one's political views in a highly media-saturated society.<sup>100</sup> The Court's first amendment analysis also included a discussion of the PACs' associational rights. Justice Rehnquist found freedom of association rights implicated<sup>101</sup> by examining the PACs' funding mechanism — public contributions. He accepted these groups as valuable tools for expanding the often inconsequential voice of the individual.<sup>102</sup>

Justice Rehnquist then discussed several prior opinions to rebut the FEC's argument that PACs' spending should be categorized as regulatable "speech-by-proxy."<sup>103</sup> The Court distinguished its holding in *California Medical Association*, which upheld limitations on contributions to PACs, rather than expenditures by PACs, as was the case here.<sup>104</sup> Moreover, Justice Rehnquist cited the special nature and history of congressional regulation over corporate activity in the election arena as the basis for differentiating the *National Right to Work Committee* opinion.<sup>105</sup> He agreed with the FEC that NCPAC and FCM exhibit all of the characteristics of a corporation. Yet he looked beyond these two highly professional groups, and focused on the effects of section 9012(f) upon smaller groups formed to influence the outcome of an election. He cited his concurrence in *Citizens Against Rent Control*, where the Court interpreted the scope of a challenged ordinance to include both informal neighborhood groups and extremely well-organized PACs.<sup>106</sup>

The next phase of the Court's analysis included an examination of section 9012(f), using strict scrutiny review.<sup>107</sup> The majority opinion expressly distinguished the precedential value of two prior Supreme Court rulings which applied a lenient test to superficial first amendment

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98. *Id.* at 1467.

99. The Court noted that the law applies only when the expression of political views is accompanied by the expenditure of money. *Id.*

100. *Id.* See *supra* note 59.

101. *Id.* at 1467. See *NAACP v. Alabama*, 357 U.S. 449 (1958) (which placed the freedom of association among the Constitution's most cherished rights).

102. 105 S. Ct. at 1468. See *Buckley*, 424 U.S. at 22 (applying first amendment associational rights when groups are formed to "amplify] the voice of their adherents").

103. 105 S. Ct. at 1467-68. "Speech by proxy" does not receive full first amendment protection. See *California Medical Association*, 453 U.S. at 196 (where the Court placed contributions to PACs under the regulatable contribution category using a "speech by proxy" approach); see also *supra* note 57.

104. 105 S. Ct. at 1468. See *California Medical Association*, 453 U.S. at 199 (advancing contribution limitations as a valid means to preserve the integrity of the election process).

105. 105 S. Ct. at 1468. See *National Right to Work Committee*, 459 U.S. at 210; see also *Tillman Act*, *supra* note 28; *Federal Corrupt Practices Act*, *supra* note 30.

106. 105 S. Ct. at 1468-69. See *Citizens Against Rent Control*, 454 U.S. at 300 (Rehnquist, J., concurring). Justice Rehnquist argued that the invalidated Berkeley ordinance expressly affected the rights of small political groups, as well as large corporations. According to the Justice, the misguided intent of the Berkeley City Council was as unacceptably broad as the congressional intent here. 105 S. Ct. at 1468.

107. *Id.* at 1469-71. See *supra* text accompanying notes 55-56.

questions.<sup>108</sup>

The Court reiterated the importance of Congress's interest in preventing corruption or the appearance of corruption. The majority sanctioned this interest as the only identifiable compelling purpose vital enough to justify congressional regulation over political speech.<sup>109</sup> According to Justice Rehnquist, however, this purpose was not furthered by the means chosen, because PAC expenditures were not prearranged or coordinated with any candidate.<sup>110</sup> He acknowledged that independent expenditures by groups such as NCPAC and FCM could create the appearance of corruption. Nevertheless, the Justice expanded his analysis of section 9012(f)<sup>111</sup> past the "multimillion dollar war chests"<sup>112</sup> to include those smaller groups searching for a realistic and noticeable political outlet.

Justice Rehnquist also dismissed any possible justification for limiting the scope of the law.<sup>113</sup> The Court declined the opportunity to determine the size at which PACs would become regulatable.<sup>114</sup> Furthermore, the majority renounced, as "intolerably vague," the drawing of arbitrary lines between those PACs which permit contributors direct input into expenditure decisions and those PACs which fail to permit such participation.<sup>115</sup>

In conclusion, the Court expressly addressed the overbreadth issue. It agreed with the FEC that the law at issue did constitute a proper prophylactic measure focused at preventing large PACs from engaging in corrupt practices.<sup>116</sup> However, it refused to validate section 9012(f) because the statute unjustifiably encroached upon the constitutional rights

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108. 105 S. Ct. at 1469 (citing *Connick v. Myers*, 461 U.S. 138 (1983) (where the Court exhibited a deferential attitude toward a governmental employer's decision to terminate an employee) and *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) (which applied a rational relation test because the Post Office's regulations were not content-based)).

109. The Court refused to accept any other government interest as "compelling." 105 S. Ct. at 1469. For other government interests rejected by the Court, see *Citizens Against Rent Control*, 454 U.S. at 298 (rejecting the asserted purpose of the law as a prophylactic measure to make known the identity of contributors). Justice White's dissent in *Federal Election Commission* suggested Congress's goal was to make public financing workable. 105 S. Ct. at 1479 (White, J., dissenting). See also *Buckley*, 424 U.S. at 57 (rejecting the reduction of skyrocketing campaign costs as a "compelling" interest); 117 CONG. REC. 42397 (1971) (statement of Sen. Taft) (mentioning a congressional purpose to hinder individuals from using an expenditure loophole to avoid the Act's contribution limits).

110. 105 S. Ct. at 1469.

111. *Id.* at 1469-70. The Court explains that "[e]ven were we to determine that the large pooling of financial resources by NCPAC and FCM did pose a potential for corruption or the appearance of corruption, § 9012(f) is a fatally overbroad response to that evil." *Id.*

112. *Id.* at 1470.

113. *Id.* at 1470-71. See *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971) (stating that a statute's constitutional validity must be upheld whenever possible).

114. 105 S. Ct. 1471. See 117 CONG. REC. 42398 (1971) (statement of Sen. Taft spelling out the purpose behind regulating independent expenditures).

115. See 117 CONG. REC. 42398 (1971) (statement of Sen. Pastore illustrating the difficulty of drawing regulatory lines in a sensitive constitutional area).

116. 105 S. Ct. at 1471.

of smaller "committee[s], association[s], or organization[s]".<sup>117</sup> According to the majority, section 9012(f) failed to pass the Court's "rigorous" first amendment review.<sup>118</sup> The majority concluded by citing the seminal overbreadth doctrine case, *Broadrick v. Oklahoma*.<sup>119</sup>

### C. Justice Stevens's Concurring Opinion

In a separate opinion, Justice Stevens concurred with the majority in striking down section 9012(f).<sup>120</sup> He differed in theory, however, with the Court's standing determination. Justice Stevens believed that section 9011(b)(1)'s plain language<sup>121</sup> clearly conferred standing to the DNC. According to the Justice, however, *McCulloch v. Sociedad Nacional de Marineros de Honduras*<sup>122</sup> rendered any discussion of the standing issue unnecessary.

### D. Dissenting Opinions

Justice White's dissent<sup>123</sup> disagreed with the majority's rulings on both the standing and constitutional issues. Justice White read the plain terms of section 9011(b)(1) to grant the Democrats' standing.<sup>124</sup> The Justice also disagreed with the majority's linchpin interpretation of the word "appropriate."<sup>125</sup> He recognized the word as qualifying only the nature of the case and not the plaintiff's identity.<sup>126</sup> For instance, a plaintiff could not seek a Supreme Court adjudication of damages, but could bring a lawsuit to question the Fund Act's constitutionality. His dissent accused the majority of confusing the clear intent of Congress by judicially intertwining the plain meanings of three separate election law provisions.<sup>127</sup>

In summary, Justice White ascertained a clear congressional intent merely to centralize the enforcement of the Acts in one administrative agency<sup>128</sup> and interpreted section 9011(b)(1) to grant an equal opportunity for standing upon each of the named groups.<sup>129</sup> He criticized the majority's standing determination<sup>130</sup> as a boondoggle for individuals or

117. *Id.* at 1471. See 26 U.S.C. § 9012(f) (1982).

118. 105 S. Ct. at 1471. The Court borrows *Buckley's* use of the word "rigorous," 424 U.S. at 29, to illustrate the magnitude of the applicable test.

119. 105 S. Ct. at 1471 (citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)).

120. 105 S. Ct. at 1471 (Stevens, J., concurring).

121. Justice White's dissent further elucidated the background behind this interpretation. *Id.* at 1472 (White, J., dissenting).

122. 372 U.S. 10 (1963) (in which the Court rejected reaching a jurisdictional issue in one case because the merits of that case were disposed of in a companion opinion).

123. 105 S. Ct. at 1471 (White, J., dissenting).

124. *Id.* at 1472. See *supra* note 19.

125. 105 S. Ct. at 1471 (White J., dissenting). See *supra* note 19.

126. *Id.*

127. Justice White condemned the Court for finding in the statute "complex hidden meanings" which Congress could not have created. *Id.*

128. *Id.*

129. See *supra* note 19.

130. Justice White criticized the Court's decision requiring 9011(b)(1) parties (except for the FEC) to have a legitimate argument with the FEC before bringing suit. 105 S. Ct. at 1473 (White, J., dissenting).

groups who challenge a provision of the election laws.<sup>131</sup>

He then discussed his reasons for dissenting from the majority's holding that section 9012(f) was unconstitutional. Initially, he stated his disagreement with the majority opinion in *Buckley*, and criticized its "house-that-Jack-built"<sup>132</sup> analysis equating expenditures of money with actual speech.<sup>133</sup> Justice White continued to disagree with the contribution/expenditure distinction made in *Buckley*.<sup>134</sup> He asserted that uncoordinated expenditures could easily foster the appearance of corruption and, in support, outlined a number of situations demonstrating the close relationships existing between PACs and various campaign committees.<sup>135</sup>

As an alternative argument, the White dissent accepted the *Buckley* holding but classified PACs' spending as within the regulatable contribution category. According to Justice White, the financial control of PACs rests within the hands of only a few powerful PAC leaders, thus the contributing citizen never actually voices his or her political views.<sup>136</sup> Consequently, he supported the governmental interests behind section 9012(f), and concluded that these goals outweighed the statute's marginal interference with an individual's first amendment rights.

As a final alternate basis for dissenting, Justice White suggested that the *Buckley* holding was not applicable to the present case. He determined that, because *Buckley* invalidated only selected provisions of the FECA,<sup>137</sup> the Court could not cite this case as precedent for an analysis of the Fund Act. Justice White relied upon the special purpose for which Congress enacted the Fund Act<sup>138</sup> as a bona fide rationale for upholding section 9012(f). Justice White clearly advocated Congress's goal of closing any loophole which innovative individuals or groups might use as a subterfuge to avoid FECA's contribution limitations.<sup>139</sup> He also approved of Congress's intention to control the skyrocketing

131. See U.S. CODE CONG. & AD. NEWS *supra* note 86, at 935-36 for an illustration of Congress's intent to foster quick reviews of the election financing laws.

132. 105 S. Ct. at 1475 (White, J., dissenting).

133. *Id.*

134. For a politician's view of Justice White's skepticism with regard to expenditures, Senator Russell Long stated, "[w]hen you're talking in terms of large campaign contributions [in the context of independent expenditures] the distinction between a campaign contribution and a bribe is almost a hairline's difference." Cox, *supra* note 35, at 396.

135. 105 S. Ct. at 1476 (White, J., dissenting). See 113 CONG. REC. 10201 (observation by Sen. Gore that so long as unregulated expenditures are defined as being uncoordinated with the candidate, "lack of 'control' is very easy to manage").

136. See *supra* note 90.

137. See *supra* note 53 and accompanying text.

138. 117 CONG. REC. 41937, 41938 (remarks of Sen. Mansfield explaining an important congressional purpose surrounding the enactment of the Fund Act: "relieving the candidate's dependence on the gigantic economic interests within the nation [because] when someone gives us [Senators] \$1,000, \$2,000, \$3,000, or \$5,000, we spend a little more time with that guy").

139. See 117 CONG. REC. 42402 (remarks of Sen. Dominick for legislative history relating to expenditure limitations).

costs of campaigns.<sup>140</sup> According to Justice White, the legislative history demonstrated that section 9012(f) was narrowly drawn, and the majority's bifurcation of the Fund Act would destroy these valuable purposes.

Partially in agreement with Justice White, Justice Marshall filed a separate dissent.<sup>141</sup> His analysis contained a straightforward criticism of *Buckley* and rejected its artificial constitutional distinctions between contributions and expenditures.<sup>142</sup> Therefore, Justice Marshall would have held that both campaign contributions and expenditures fall within legitimate regulation by the government.

#### IV. ANALYSIS

##### A. *Standing*

The Court's denial of standing to the Democrats has unfortunate implications. It steps beyond the boundaries of proper judicial review and ventures into the realm of Congress's lawmaking power. The Court based its opinion on the fear of granting millions of people standing to challenge the Fund Act. This phobia, however, should not sanction the Court's disallowance of justiciability to parties with a sufficient "personal stake in the outcome of a controversy."<sup>143</sup>

The Court's intertwining of sections 437c(b)(1), 9010, and 9011(b)(1), represents a transparent exercise in judicial rhetoric. Simply stated, the Court's analysis should have concentrated solely upon section 9011(b)(1) which clearly granted standing to the Democrats.<sup>144</sup> While the legislative history may support the majority's interpretation of section 437c(b)(1),<sup>145</sup> which requires exhaustion of administrative remedies, Congress failed to exhibit such motivation when enacting section 9011(b)(1).<sup>146</sup> In fact, by expressly naming three groups within the Fund Act's provision, the lawmakers plainly mandated their intent to grant each party a coequal right to file a lawsuit.<sup>147</sup>

The Court usually construes standing strictly when faced with a constitutional attack upon a statute.<sup>148</sup> An exception arises, however, when Congress expressly provides for judicial review.<sup>149</sup> For example,

140. 105 S. Ct. at 1480 (White, J., dissenting).

141. *Id.* (Marshall, J., dissenting).

142. *Id.* at 1481.

143. *Buckley*, 424 U.S. at 11 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

144. 26 U.S.C. § 9011(b)(1) (1982). See *supra* note 19.

145. See U.S. CODE CONG. & AD. NEWS *supra* note 86, at 934, 936.

146. See Ifshin & Warin, *supra* note 31, at 502.

147. 105 S. Ct. at 1472 (White, J., dissenting).

148. *Bread Political Action Comm. v. Federal Election Commission*, 455 U.S. 557 (1982); Keefe, *It's Tough to Get "Standing" and "Ripeness" These Days*, 67 A.B.A. J. 228 (1981); Note, *Standing to Challenge the Constitutionality of the FECA: The Effect of a Congressional Attempt to Relax Standing Requirements*, 65 GEO. L.J. 1231, 1235 (1977).

149. *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (even though the Court held that the Sierra Club did not have standing to sue federal officials in this case because neither the club nor its members suffered any injury, it stated that, in other situations, standing can be gained by an express grant of Congress).



in *Buckley*, the Court opted for a relaxed standing test, in deference to the congressional grant.<sup>150</sup> Because Congress explicitly granted standing to individuals eligible to vote and national committees of political parties,<sup>151</sup> their standing should have been upheld by the Court.

Moreover, the Court erred in not bringing the overbreadth doctrine to its logical conclusion. The application of this doctrine normally allows a relaxation of the standing requirement.<sup>152</sup> To meet the standard, the plaintiff must only assert a legitimate claim of actual harm or, in the alternative, a threat of definite harm in the future.<sup>153</sup> Because of their historical inability to keep pace with Republican Party capitalization,<sup>154</sup> the Democrats will undoubtedly suffer a substantial threat of future harm if section 9012(f) does not remain in effect.

Finally, the Court should remain flexible and mold judicial standing requirements to protect those who have been or will be harmed by an unconstitutional law.<sup>155</sup> Unfortunately, the present ruling deprives more than just the two politically active groups involved here from litigating the constitutionality of the Fund Act in the future. An unrealistic fear of a massive litigant invasion descending upon the high Court cannot justify deprivation of an express grant of standing.

#### B. *Constitutionality of Section 9012(f)*

The Court's decision on the merits truly furthered the constitutional rights of politically active citizens. The traditionally conservative members of the Court, joined by Justice Brennan, openhandedly applied the Constitution to protect the interests of the little guy. The Court struck down every justification for section 9012(f) by using an overbreadth interpretation.

As the *Buckley* opinion noted, individuals can hardly voice their political views today without spending large sums of money.<sup>156</sup> Justice Rehnquist eloquently applied this reasoning to allow small groups of individuals the opportunity to combine efforts and money to compete with wealthy fat cats who can personally afford to bankroll a candidate's bid for election.<sup>157</sup>

Furthermore, even though large PACs engage in "speech by

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150. See *supra* note 148.

151. 26 U.S.C. § 9011(b)(1) (1982). See *supra* note 19.

152. When an overbroad statute may chill protected free speech, the Court has found that potential litigants must be allowed the opportunity to challenge the law. See *Secretary of State of Md. v. Joseph H. Munson Co.*, 104 S. Ct. 2839, 2846 (1984).

153. *Bigelow v. Virginia*, 421 U.S. 809, 816 (1975), quoting *NAACP v. Burton*, 371 U.S. 415, 433 (1963) (applying a relaxed standing requirement because the challenged law had potential for "sweeping and improper applications").

154. See *Cox*, *supra* note 35.

155. *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (a stockholders' derivative suit was allowed "to provide such remedies as are necessary to make effective the congressional purpose").

156. *But see* Comment, *supra* note 29, at 427; Wright, *Politics and the Constitution: Is Money Speech?* 85 *YALE L.J.* 1003 (1976).

157. See 105 S. Ct. at 1467; see *supra* text accompanying note 46.

proxy,"<sup>158</sup> smaller political groups, whose members control spending decisions, directly voice their beliefs. The Court correctly ruled against expenditure limits to protect the direct political expression of all groups. At the same time, the FEC properly classified NCPAC and FCM as corporations, which are historically subject to legislative control.<sup>159</sup> The Constitution, however, protects all types of associations, and the Court rightfully placed smaller organizations beyond the permissible scope of congressional regulation.

It is well established that when fundamental rights are infringed, strict scrutiny applies.<sup>160</sup> The Court has recognized only one compelling interest<sup>161</sup> and that is to guard the election process from corruption or the appearance of corruption. The Court did not accept any other interest as compelling, agreeing with the *Buckley* Court's rejection of interests such as "the mere growth in the cost of federal election campaigns . . . ."<sup>162</sup> The Court correctly refused to sanction any new governmental interests because of its commitment to protect neighborhood political groups.

At the means end of the spectrum,<sup>163</sup> Justice Rehnquist reiterated *Buckley's* rejection of utilizing expenditure limitations to control corruption.<sup>164</sup> On the other hand, a variety of commentators, including Justice White, voice legitimate concern over this decision.<sup>165</sup> Each of these critics believe that both expenditures and contributions breed corruption.<sup>166</sup> They support congressional motives to protect campaign integrity as being equally applicable to independent expenditures and contributions. Nevertheless, these individuals fail to grasp the broader benefits of the majority's opinion. Small organizations cannot possibly have a significant effect upon any evil that Congress finds necessary to control. Even if large, highly-organized PACs foster the appearance of corruption, a small faculty group forming a political committee<sup>167</sup> does not necessarily reflect such evil doing. Section 9012(f), however, regulated the activities of both. The Court properly administered a dose of overbreadth's "strong medicine"<sup>168</sup> to destroy this unjustified infringement on first amendment rights.

Finally, by refusing to limit the scope of section 9012(f), the Court sent a none too subtle message to Congress. When Congress has enacted a statute using its high degree of expertise in an area, the Court

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158. See *supra* text accompanying note 100.

159. See *supra* text accompanying notes 28-34; cf. Cox, *supra* note 35, at 409; *Recent Decisions*, *supra* note 57, at 814.

160. See *supra* text accompanying notes 54-56.

161. See *supra* note 109.

162. *Buckley*, 424 U.S. at 57; see also *supra* note 109.

163. See *National Right to Work Committee*, 459 U.S. at 208.

164. See *supra* text accompanying note 61.

165. See 105 S. Ct. at 1476 (White, J., dissenting); Cox, *supra* note 35, at 409; *Recent Decisions*, *supra* note 57, at 815; Note, *supra* note 12, at 977.

166. See *supra* note 139.

167. See *supra* note 115 (statement of Sen. Pastore).

168. *Broadrick*, 413 U.S. at 613.

will generally exercise great deference in reviewing the law.<sup>169</sup> Federal statutes regulating speech and association normally hold a presumptively valid status.<sup>170</sup> Moreover, where Congress has expressly considered the constitutionality of the law under review,<sup>171</sup> the judiciary respects the legislative decision.<sup>172</sup> However, because of Congress's blatant attempt to step beyond constitutionally permissible boundaries, the Court pointedly refused to apply these precepts in limiting section 9012(f)'s impact. The underlying message of the opinion suggested that Congress must modify the Act, using its legislative and political expertise to regulate only those groups which illegitimately corrupt the election process.

#### CONCLUSION

Every citizen holds an allegiance to a special interest: farmers believe in government subsidies, students advocate financial aid, and environmentalists wish to protect nature. The Supreme Court has protected the amplification and advocacy of many interests in *Federal Election Commission v. National Conservative Political Action Committee*. Obstacles to the direct expression of one's view, in conjunction with the voices of others of similar opinion, will no longer hinder free political speech.

Congress has the power to regulate large, highly-organized PACs,<sup>173</sup> and the Court has challenged it with the opportunity to amend section 9012(f). Congress must seize upon this opening and narrow the scope of election finance regulation. When Congress meets this challenge, a proper balance will be struck between legitimate lawmaking power and first amendment protection.

David C. Puchi

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169. *Burroughs v. United States*, 290 U.S. 534 (1934) (affirming the congressional power to regulate presidential and vice-presidential elections).

170. *Fleming v. Nestor*, 363 U.S. 603, 617 (1960).

171. *See supra* note 115.

172. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

173. *See supra* text accompanying notes 28-34.