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# REDISCOVERING THE INDIVIDUAL IN FEDERAL ELECTION LAW

## I. Introduction

The contribution limitation provisions of the Federal Election Campaign Act of 1971 (FECA)<sup>1</sup> have practical consequences signifi-

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1. Pub. L. No. 92-225, 86 Stat. 3 (1972) (as amended by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475; and Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339) (codified as amended at 2 U.S.C. §§ 431-455 (1976 & Supp. V 1981)); 2 U.S.C. § 441a(a)(3) (1976) (annual limit for individuals); *id.* § 441a(a)(8) (limitations apply to earmarked contributions); *id.* § 441a(f) (prohibition of exceeding limitations); *id.* § 441(a)(2) (limitations on contributions by multi-candidate political committees); *id.* § 441a(a)(1) (limitations on contributions by persons); *id.* § 441g (limitations on contributions of currency); *id.* § 441a(a)(6) (single limit for all Presidential elections excluding general election); *id.* § 441a(a)(5) (single limit for committees established, maintained or controlled by the same entity).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court distinguished between campaign contributions and expenditures, *id.* at 23, upholding restrictions on contributions, while invalidating the restrictions on "independent expenditures." *Id.* at 58-59. Significantly, FECA defines contributions to include expenditures made in support of a candidate at his request or with his cooperation, but to exclude "independent expenditures" from its strictures. *Compare* 2 U.S.C. §§ 431(9)(A), 441b(b)(2); 11 C.F.R. §§ 100.8, 114.2-.7 with 2 U.S.C. § 431(17) (Supp. V 1981); 11 C.F.R. § 100.16 (1982).

"Contribution or expenditure" is defined as including "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money or any services or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any election . . ." 2 U.S.C. § 441(b)(2) (1976). Contribution is defined separately from expenditure. *Id.* § 431(8)(A) (1976 & Supp. V 1981). A contribution does not include, *inter alia*, volunteer work by an individual without remuneration to a candidate or political committee, *id.* § 431(8)(B)(i); 11 C.F.R. § 100.7(b)(3) (1982), the use of private property or community facilities for "candidate-related or political party related activities," and the cost of invitations, food and beverages voluntarily provided by an individual for the event, 2 U.S.C. § 431(8)(B)(ii) (1976 & Supp. V 1981); 11 C.F.R. § 100.7(b)(4)-(6) (1982), sale by a vendor of food or beverage at cost to be used in a candidate's campaign or, by or on behalf of, a political committee of a political party, 2 U.S.C. § 431(8)(B)(iii) (1976 & Supp. V 1981); 11 C.F.R. § 100.7(b)(7) (1982), payment made by an individual for travel expenses of a candidate or on behalf of a political committee for which he is not reimbursed, 2 U.S.C. § 431(8)(B)(iv) (1976 & Supp. V 1981); 11 C.F.R. § 100.7(b)(8) (1982), any payment or obligation by a corporation or labor organization that would not constitute an expenditure under § 441b(b), 2 U.S.C. § 431(8)(B)(vi) (1976 & Supp. V 1981); 11 C.F.R. § 100.7(b)(10) (1982), any money or anything of value given to a national or state committee of a political party earmarked to purchase or construct an office facility which will not be used for federal electioneering purposes, 2 U.S.C. § 431(8)(B)(viii) (1976 & Supp. V 1981); 11 C.F.R. § 100.7(b)(12) (1982), legal or accounting services rendered with certain restrictions, 2 U.S.C. § 431(8)(B)(ix) (1976 & Supp. V 1981); 11 C.F.R. § 100.7(b)(13) (1982), a state or local

cantly alien to the principle of "one person, one vote" originally envisioned by our founding fathers.<sup>2</sup> These provisions, combined with

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committee's payment of cost of campaign materials used in connection with volunteer activities provided that the restrictions specified are met, 2 U.S.C. § 431(8)(B)(x) (1976 & Supp. V 1981); 11 C.F.R. § 100.7(b)(15) (1982), costs of voter registration and get-out-the-vote activities conducted by a state or local committee on behalf of presidential and vice-presidential nominees provided the specified restrictions are met, 2 U.S.C. § 431(8)(B)(xii) (1976 & Supp. V 1981); 11 C.F.R. § 100.7(b)(17) (1982), ballot access payments made or received, 2 U.S.C. § 431(8)(B)(xiii) (1976 & Supp. V 1981); 11 C.F.R. § 100.7(b)(18) (1982), and any honorarium, 2 U.S.C. § 431(8)(B)(xiv) (1976 & Supp. V 1981); 11 C.F.R. § 100.7(b)(19) (1982).

An expenditure is defined in 2 U.S.C. § 431(9)(A) (1976 & Supp. V 1981); 11 C.F.R. § 100.8(a) (1982), and does not include, *inter alia*, any news story, commentary, or editorial that is not published under the control of a candidate, committee or party, 2 U.S.C. § 431(9)(B)(i) (1976 & Supp. V 1981); 11 C.F.R. § 100.8(b)(2) (1982), nonpartisan activity designed to encourage individuals to vote or to register to vote, 2 U.S.C. § 431(9)(B)(ii) (1976 & Supp. V 1981); 11 C.F.R. § 100.8(b)(3) (1982), communications between a membership organization and its members, or a corporation and its shareholders or executive and administrative personnel, 2 U.S.C. § 431(9)(B)(iii) (1976 & Supp. V 1981); 11 C.F.R. § 100.8(b)(4) (1982), any payment or obligation by a corporation or labor organization not considered an expenditure under § 441b(b), 2 U.S.C. § 431(9)(B)(v) (1976 & Supp. V 1981); 11 C.F.R. § 100.8(b)(11) (1982), an authorized committee or candidate's costs incurred in connection with the solicitation of contributions, 2 U.S.C. § 431(9)(B)(vi) (1976 & Supp. V 1981); 11 C.F.R. § 100.8(b)(21) (1982), the payment of compensation for legal or accounting services with restriction, 2 U.S.C. § 431(9)(B)(vii) (1976 & Supp. V 1981); 11 C.F.R. § 100.8(b)(14), (15) (1982), and costs of voter registration and get-out-the-vote activities incurred by a state or local committee on behalf of presidential and vice-presidential nominees, 2 U.S.C. § 431(9)(B)(ix) (1976 & Supp. V 1981); 11 C.F.R. § 100.8(b)(18) (1982).

Section 441b(b)(2) further emphasizes that "contribution or expenditure" does not include (1) communications on any subject by a corporation or labor organization to the members of its authorized class; (2) corporate and labor organization sponsored nonpartisan registration and get-out-the-vote campaigns aimed at the authorized class; and (3) "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock." 2 U.S.C. § 441b(b)(2)(A)-(C) (1976).

2. Wright, *Money and The Pollution of Politics: Is The First Amendment An Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 609 (1982); see *Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259 (1977) (upholding provision that county charter must be approved by a referendum election); *White v. Weiser*, 412 U.S. 783 (1973) (invalidating reapportionment plan); *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970) (invalidating the apportionment of elections for school district trustees); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (invalidating congressional districting plan based on lack of good faith in obtaining mathematical precision); *Wells v. Rockefeller*, 394 U.S. 542 (1969); *Avery v. Midland County*, 390 U.S. 474 (1968) (requiring popularly elected county commissioners exercising general governmental powers be districted according to population); *Reynolds v. Sims*, 377 U.S. 533 (1964) (invalidating the apportionment of the Alabama state legislature by creating the one person, one vote principle) (companion cases: *Lucas v. Forty-fourth Gen. Assembly*, 377 U.S. 713 (1964) (Colorado); *WMCA, Inc.*

v. Lomenzo, 377 U.S. 633 (1964) (New York); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964) (Maryland); Davis v. Mann, 377 U.S. 678 (1964) (Virginia); Roman v. Sincok, 377 U.S. 695 (1964) (Delaware)); Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) (congressional districts must be apportioned equally based on art. I, § 2 of the U.S. Constitution, which "means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's."); Gray v. Sanders, 372 U.S. 368, 379 (1963) (invalidating the county unit system of nominating the governor and other officials in Georgia stating "all who participate in the election are to have an equal vote— . . . whatever their occupation, whatever their income, and wherever their home . . ."). These cases may best be understood in the language of *Gray*, 372 U.S. at 381: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can only mean one thing— one person, one vote."

"Political equality is the cornerstone of American democracy," Wright, *supra*, at 625. Our government was founded and continues to exist because of the firm conviction of Americans first proclaimed by Thomas Jefferson that "[w]e hold these truths to be self-evident: that all men are created equal." The Declaration of Independence, U.S., 1776.

Thus, political equality and freedom for the individual must be the overriding concern of the legislature and courts with regard to federal election laws. Barriers to complete political equality and freedom of the voter have been gradually abolished, such as with regard to voting taxes, U.S. CONST. amend. XXIV; sex discrimination, *id.* amend. XV; age discrimination, *id.* amend. XXVI; Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966) (Virginia poll tax for state elections invalidated under the theory that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."); literacy tests, Voting Rights Act Amendments of 1970, 42 U.S.C. § 1973 (1976); *see* Oregon v. Mitchell, 400 U.S. 112, 131-34 (1970); residency requirements, Dunn v. Blumstein, 405 U.S. 330 (1972); Carrington v. Rash, 380 U.S. 89 (1965); party affiliations, Kasper v. Pontikes, 414 U.S. 51 (1973); racial restriction, U.S. CONST. amend. XV; "white primary cases" Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927); and physical access to polling places for inmates of correctional facilities, O'Brien v. Skinner, 414 U.S. 524 (1974). Barriers diluting the right to be a candidate have also been relaxed, such as wealth restrictions, Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972), property ownership requirements, Turner v. Fouche, 396 U.S. 346 (1970), racial classifications, Anderson v. Martin, 375 U.S. 399 (1964), party affiliation, McCarthy v. Briscoe, 429 U.S. 1317 (1976), and demonstrated support requirements, Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Moore v. Ogilvie, 394 U.S. 814 (1969); Williams v. Rhodes, 393 U.S. 23 (1968). However, in recent years the injection of massive amounts of PAC wealth has created a new threat to the citizen, and thus to the integrity of the political process. *See* Wertheimer, *The PAC Phenomenon in American Politics*, 22 ARIZ. L. REV. 603, 625 (1980).

While court decisions concerning FECA and its related predecessors have not expressed the protection of the rights and powers of the individual as their purpose, *see* note 56 *infra*, this must obviously be the overriding concern. FECA's predecessors include: Act of 1907, Pub. L. No. 36, 34 Stat. 864 (commonly known as the Tillman Act, making money contributions by corporations and national banks to candidates in a federal election illegal); Act of July 25, 1910, Pub. L. No. 274, 36 Stat. 822 (making disclosure of finances by federal candidates following an election mandatory); Act of Aug. 19, 1911, 37 Stat. 25 (making preelection disclosure of finances by

the need for immense funds to wage a political campaign,<sup>3</sup> force candidates to overlook the individual citizen in the political process.

This unfortunate effect is not caused by the provisions themselves; they were enacted to create incentives for candidates<sup>4</sup> to seek input and support from a greater number of individuals.<sup>5</sup> For instance, Congress limited the amount of money that could be contributed by any one individual.<sup>6</sup> In addition, the Act prohibits direct contributions by corporations and labor organizations.<sup>7</sup> In so doing, Congress hoped that candidates would seek support from more individuals

candidates for federal office mandatory); Federal Corrupt Practices Act, ch. 368, tit. III, 43 Stat. 1070 (1925) (codified at 2 U.S.C. § 441b (1976)) (immediate predecessor of FECA which extended the meaning of the term "corporate contribution" as indicating only money to include "anything of value," and more importantly, made the acceptance as well as the giving of a corporate contribution a crime); Second Hatch Act, Pub. L. No. 753, 54 Stat. 767 (1940) (imposed the first restrictions on union contributions and prohibited federal employees from participating actively in political management or campaigns); Smith-Connally Act of 1943, ch. 144, § 9, 57 Stat. 167 (also known as the War Labor Disputes Act; enacted for the duration of World War II to prohibit union contributions to federal campaigns completely); Taft-Hartley Act, 61 Stat. 136 (1947) (also known as the Labor Management Relations Act; expanded prohibitions on corporate and union political activity to include "expenditures" in addition to "contributions"); *see* FEC v. National Right to Work Comm., 103 S. Ct. 552, 560 (1982); *United States v. UAW*, 352 U.S. 567, 570-84 (1957).

3. *See* H. ALEXANDER & J. MOLLOY, *MODEL STATE STATUTE: POLITICS, ELECTIONS AND PUBLIC OFFICE* 15 (1974); Adamany, *PAC's and the Democratic Financing of Politics* 22 ARIZ. L. REV. 569, 570-82 (1980); Kenski, *Running With and From the PAC*, 22 ARIZ. L. REV. 627, 628-29 (1980).

4. FECA defines a "candidate" as "an individual who seeks nomination for election, or election, to a Federal office . . ." 2 U.S.C. § 431(2), (18) (Supp. V 1981) (definition of the term "clearly identified" with regard to a candidate). A group organized to draft a particular person for candidacy to federal office is not a political committee within the meaning of the Act, as no identifiable "candidate" is being promoted. *FEC v. Machinists Non-Partisan Political League*, 655 F. 2d 380, 392-96 (D.C. Cir.) (a political committee organized to draft candidates, and not related to any identified candidate, is not subject to FECA disclosure provisions), *cert. denied*, 454 U.S. 897 (1981). *But see* *FEC v. Florida for Kennedy Comm.*, 492 F. Supp. 587, 595-96 (S.D. Fla. 1980) (rejecting draft committee's argument that the group is not subject to FEC jurisdiction since it would not be considered a political committee under FECA).

5. The Supreme Court has stated:

The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

*Buckey v. Valeo*, 424 U.S. 1, 21-22 (1976).

6. 2 U.S.C. § 441a(a)(3) (1976).

7. *Id.* § 441b(a).

rather than from large corporate coffers,<sup>8</sup> thereby decreasing the potential influence any one individual or corporation could have.<sup>9</sup> Yet in practice, candidates often ignore the individual contributor in favor of organizations with large fundraising capabilities.<sup>10</sup>

The imbalance of campaign contributors is exacerbated by a provision in FECA which effectively offers candidates the alternate source of financial support they desperately need. The Act permits a corporation or labor organization to create a separate segregated fund for political purposes.<sup>11</sup> This fund is administered by a political action

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8. *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *FEC v. Weinstein*, 462 F. Supp. 243, 247 (S.D.N.Y. 1978); *United States v. Chestnut*, 394 F. Supp. 581, 590 (S.D.N.Y. 1975), *aff'd*, 533 F.2d 40 (2d Cir. 1976).

9. See *Buckley v. Valeo*, 424 U.S. 1, 25-26, 38 (1976); Comment, *The Constitutionality of Restrictions on Individual Contributions to Candidates in Federal Elections*, 122 U. Pa. L. Rev. 1609, 1609-14 (1974).

10. Wright, *supra* note 2, at 615. Judge Wright states:

[Political action committees] are taking on growing importance in the strategies of candidates and their fundraisers. They are rapidly becoming the dominant force among categories of contributors. The PAC component of House candidates' campaign funds has risen steadily from 17% in 1974 to 26.4% in 1980. And PAC's have far outdistanced the federal campaign funding contributions of all national, state, and local political parties combined.

*Id.*; Wertheimer, *supra* note 2, at 580 (small individual contributions were in 1976 "only about thirty percent of the \$300 million spent by those candidates and committees. [I]n congressional races, contributions of \$100 or less averaged from thirty-four percent of receipts in the campaigns of challengers, to forty-five percent in the campaigns of Republican incumbents").

11. 2 U.S.C. § 441b(b)(2)(C) (1976) (establishment, administration and solicitations of contributions to a separate segregated fund); *id.* § 441c(b) (a government contractor may establish a separate segregated fund).

A separate segregated fund is a political committee under FECA, *id.* § 431(4)(B) (Supp. V 1981), and may, without subjecting itself to the prohibitions on contributions and expenditures by corporations under § 441b, incorporate itself for liability purposes. The treasurer of the PAC will, however, remain personally liable for the performance of all duties. 11 C.F.R. § 114.12(a) (1982).

The term "separate" as used in FECA is synonymous with "segregated" and the fund is not to be considered the sponsoring entity itself. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 422, 426 (1972). Also, a corporation or labor organization may not attempt to circumvent FECA's restrictions by establishing and maintaining numerous separate segregated funds. 2 U.S.C. § 441a(a)(5) (1976) (commonly referred to as the antiproliferation section); see *Walther v. FEC*, 468 F. Supp. 1235 (D.D.C. 1979) (holding that two or more political action committees (PACs) established, maintained and controlled by a single person should be considered a single PAC under FECA, and thus the AFL-CIO PAC and PAC of its member unions are to be treated as one); Note, *Affiliation of Political Action Committees Under The Antiproliferation Amendments To The FECA of 1971*, 29 CATH. U.L. REV. 713 (1980).

committee (PAC) which is formed, controlled and financially supported by the corporation or union.<sup>12</sup> Thus, the corporation and union are able to do indirectly that which they could not do directly, further obviating candidate dependence on individual support.

Part II of this Note discusses the Act's specific restrictions on individual contributions and the relevant legislative intent. It will be shown that instead of encouraging political candidates to look to a greater number of individual contributors, the restrictions have increased the importance of corporate PACs from which candidates solicit and receive financial support. This part concludes by suggesting that the campaign contribution limitations should be lifted to allow greater candidate solicitation of individuals.

Part III examines the operation of the PAC system and its effect on the diminished importance of the individual in the political process. Assuming that PACs are a political force here to stay, part III proposes to eradicate their undesirable by-products by lifting the restrictions on the types of entities that may create a PAC and on the class of people the PAC is authorized to solicit for contributions. This proposal forces PACs to compete with each other for individual contributions, in part by increasing the flow of information to the public, with the individual in the political system as the ultimate beneficiary.

## II. Limitations on Individuals

### A. The Existing Scheme

Section 441a of FECA, on its face, restricts individual political participation.<sup>13</sup> It prohibits a "person"<sup>14</sup> from contributing to any

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12. *Walther v. FEC*, 468 F. Supp. 1235, 1237-38 (D.D.C. 1979). See notes 61-62 *infra* and accompanying text.

13. 2 U.S.C. § 441a (1976). Contributions to political candidates, committees and parties are restricted, although contributions by individuals to a referendum vote or election are not. *Citizens Against Rent Control v. City of Berkeley*, 450 U.S. 908 (1981); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980). For a good discussion of campaign spending and ballot measure campaigns, see Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 U.C.L.A. L. Rev. 505 (1982).

14. A "person" is defined as including "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government . . ." 2 U.S.C. § 431(11) (Supp. V 1981); 11 C.F.R. § 100.10 (1982).

candidate in a federal election<sup>15</sup> in excess of \$1000.<sup>16</sup> The ceilings on total contributions by an individual to a national political party and to any other political committee within any single year are \$20,000<sup>17</sup> and \$5000<sup>18</sup> respectively. Also, in the aggregate, no individual can contribute more than \$25,000 directly to political candidates, their authorized parties, any political committees or the national political committee in any calendar year.<sup>19</sup>

The purpose of these restrictions on individual contributions is threefold: to alleviate the possibility of actual or apparent corruption caused by large contributions made by certain individuals;<sup>20</sup> to force candidates to attain support from a broader base of individuals within the community;<sup>21</sup> and, to force individuals to participate actively in the electoral process by making direct contributions and joining political groups.<sup>22</sup> These purposes are frustrated, however, by the practical effects of the restrictions.

One consequence of FECA is that the restrictions apply to individual contributions but are inapplicable to the amount of money an individual candidate may expend on his own behalf.<sup>23</sup> Hence, individual candidates of great personal or family wealth may expend unlimited amounts on their own campaign support without soliciting numerous small individual contributions. By contrast, a less affluent candidate operates at a primary disadvantage in that he is forced to spend time, money and effort simply trying to rally financial back-

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15. "Election" is defined in 11 C.F.R. §§ 100.2(a), 100.8(b)(4)(v), 104.6(a)(1)-(2) (1982). National banks, federally-chartered corporations and their respective political action committees are subject to the Act's provisions for all elections. 2 U.S.C. § 441b(a) (1976); 11 C.F.R. §§ 102.1(c), 114.2 (1982). A state-chartered bank or corporation need only comply with FECA in connection with federal elections. 2 U.S.C. § 441b(a) (1976). States concede that the federal election law supersedes state law in federal matters, *see, e.g.*, 1977 Op. N.Y. State Bd. of Elect. (Apr. 18). If a person or a political committee administering a separate segregated fund contributes to federal, state and local elections, the expenses must be prorated in order to ensure compliance with FECA, *see, e.g.*, 1975 Op. N.Y. State Bd. of Elect. (Aug. 27).

16. 2 U.S.C. § 441a(a)(1)(A) (1976).

17. *Id.* § 441a(a)(1)(B).

18. *Id.* § 441a(a)(1)(C).

19. *Id.* § 441a(a)(3).

20. *Buckley v. Valeo*, 424 U.S. 1, 25-28 (1976).

21. *See* note 5 *supra* and accompanying text.

22. *Buckley v. Valeo*, 424 U.S. 1, 22 (1976).

23. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court invalidated restrictions on expenditures by candidates of their personal or family wealth in support of their own election. *Id.* at 54. The Court found the governmental interest in preventing actual or apparent corruption was insufficient to sustain expenditure limits that were violative of first amendment rights. *Id.* at 53. *See also* note 25 *infra* and accompanying text.



ing.<sup>24</sup> Hence, limits on individual contributions discriminate between individual political candidates.<sup>25</sup>

A second consequence of FECA also serves to frustrate its purposes. On the face of the statute, no ceiling exists on the amount of money a PAC meeting the qualifications of a multicandidate political committee<sup>26</sup> may contribute in the aggregate to political candidates, their parties, political committees or a national political party. A PAC, therefore, is expressly granted a greater voice in the political arena through its unlimited contributions than is an individual.<sup>27</sup>

Furthermore, candidates are not encouraged as a result of these provisions to solicit contributions from a broader base of individuals within the community. PACs may contribute \$5000 per candidate in any election,<sup>28</sup> whereas an individual may only contribute \$1000 to any candidate in an election.<sup>29</sup> Therefore, candidates who are able to rally enough support from PACs have no need to expend much time and effort soliciting considerably smaller contributions from many more individuals.<sup>30</sup> Also, as one commentator has suggested, a candidate may have the leverage of influence in Congress as an added

24. See generally Adamany, *supra* note 3, at 581-82; Rhodes, *In response to Obey-Railsback*, 22 ARIZ. L. REV. 670, 671 (1980).

25. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held that "[t]he ancillary interest in equalizing the relative financial resources of candidates competing for elective office" was insufficient to justify expenditure restrictions violative of first amendment rights. *Id.* at 54. This Note is not, however, arguing that expenditure limitations be revived. Rather, it argues that restrictions on individual contributions should be lifted in order to provide the equalizing element between individual and PAC contributions. See text accompanying notes 37-55 *infra*.

26. The qualifications are set forth in the definition of multicandidate political committee:

[T]he term 'multicandidate political committee' means a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

2 U.S.C. § 441a(a)(4) (1976).

The FEC has recommended to Congress that this definition be changed in light of the fact that no minimum contribution is specified. Because of this, a situation can easily arise in which a committee contributes \$1 to four candidates and is thereby eligible to give \$5000 to the fifth candidate. FEDERAL ELECTION COMMISSION ANNUAL REPORT 1979, at 38.

27. An individual's contributions in the aggregate in any calendar year may not exceed \$25,000. See note 6 *supra* and accompanying text.

28. 2 U.S.C. § 441a(a)(2)(A) (1976).

29. *Id.* § 441a(a)(1)(A).

30. See Mayton, *Politics, Money, Coercion, and the Problem With Corporate PACs*, 29 EMORY L.J. 375, 386 (1980).

incentive to gain PAC funds<sup>31</sup> which he would rarely have the opportunity to assert over an individual. Hence, it is more likely that a candidate will rely mostly on PAC contributions and omit extensive efforts to seek individual support.

FECA provisions regarding individual limitations also fail to decrease the potential for actual or apparent corruption.<sup>32</sup> The funds obtained by a candidate or committee are still from a single source, whether derived from an individual or a PAC. Although a PAC is limited to some extent, it may still give five times the amount to a candidate that an individual can contribute.<sup>33</sup> PACs may also expend unlimited amounts of money independently in support of a candidate.<sup>34</sup> Clearly the money and not the contributor is the potentially corrupting influence.

Realistically, FECA individual contribution limitations are not the incentive for political activism that the Supreme Court considered them to be in the leading case of *Buckley v. Valeo*.<sup>35</sup> Perhaps the reason that individuals have not become more politically active is that they perceive the enormous strength and influence of corporate and union PACs that have emerged in recent years.<sup>36</sup> The restrictions placed on individual contributions therefore serve to diminish the overall political involvement by the citizen.

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31. *Id.* at 381-82; see also Adamany, *supra* note 3, at 572.

32. See note 20 *supra* and accompanying text. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held that the intent of Congress to limit the mere appearance of corruption was sufficient to justify the regulation of individual contributions. The Court argued that despite limitations, individuals could still "assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *Id.* at 28. This was in light of the fact that individuals could contribute to separate segregated funds. *Id.* at 28 & n.31. The Court, however, failed to recognize that the appearance of corruption could just as readily be associated with large corporate or union PAC contributions as with large individual contributions.

33. See Wright, *supra* note 2, at 621; notes 29-30 *supra* and accompanying text.

34. The Supreme Court invalidated restrictions on independent expenditures made on behalf of candidates in a federal election. *Buckley v. Valeo*, 424 U.S. 1, 51 (1976). For a definition of "independent expenditures," see 2 U.S.C. § 431(17) (Supp. V 1981); 11 C.F.R. §§ 100.16, 109.1(a), 100.8(a)(3) (1982); see also *Common Cause v. Schmitt*, 455 U.S. 129 (1982) (limits on independent expenditures made for the benefit of a presidential candidate are prohibited by the first amendment).

35. See note 5 *supra* and accompanying text; Budde, *The Practical Role of Corporate PAC's in the Political Process*, 22 ARIZ. L. REV. 555, 555-58 (1980).

36. See Mayton, *supra* note 30, at 386.

## B. Proposals for Restoring Political Power to the Individual

Although FECA allows individuals to make independent expenditures without limit<sup>37</sup> and to volunteer personally to aid any political candidate or committee,<sup>38</sup> the majority of Americans participate in the political system solely through their individual money contributions to candidates and committees and of course, through their votes.<sup>39</sup> Abolishing individual contribution restrictions is one way to restore political power to the people.

One immediate effect of such an action can best be viewed in the context of campaign financing for national party affiliated candidates and independent candidates. In *Anderson v. Federal Election Commission*,<sup>40</sup> the appellant, an independent candidate for the presidency in 1980, argued that sections of FECA were invalid because they favor national political party candidates.<sup>41</sup> Under section 441a(a)(1)(B), committees established and maintained by a national political party may receive contributions not exceeding \$20,000 from any single individual.<sup>42</sup> A companion section, 441a(d)(1), allows a national political party to expend these funds according to a statutory formula.<sup>43</sup> Thus, the appellant claimed that in the November 1980 general election the national committees could funnel up to \$4.7 million to the party's presidential candidate. A candidate not affiliated with a national party, however, is limited to the \$1000 contributions from individual contributors.<sup>44</sup> The appellant unsuccessfully requested a preliminary injunction to permit him to accept up to \$20,000 from each individual.<sup>45</sup> Although the First Circuit affirmed the denial of the injunction

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37. See note 34 *supra*.

38. 2 U.S.C. § 431(8)(B)(i) (Supp.V 1981) (services volunteered by individual); *id.* § 431(8)(B)(ii) (food, beverages and invitations volunteered as well as the use of residential premises, church or community room for candidate party related activities); *id.* § 431(8)(B)(iv) (volunteering to pay travel expense of candidate for which person is not reimbursed); *id.* § 431(8)(B)(x), (xi), (9)(B)(viii) (campaign materials used in connection with volunteer activities).

39. See Lowenstein, *supra* note 13, at 590-602 (arguing, *inter alia*, that enormous contributions by organizations create a strong disincentive to political participation by individuals).

40. 634 F. 2d 3 (1st Cir. 1980).

41. *Id.* at 3-4.

42. 2 U.S.C. § 441a(a)(1)(B) (1976); 634 F.2d at 4.

43. 2 U.S.C. § 441a(d)(1) (1976); 634 F.2d at 4 & n.3. This formula allows the national committee of a political party to expend an amount equal to two cents multiplied by the voting age population of the United States in connection with the general election campaign of its Presidential candidate.

44. 2 U.S.C. § 441(a)(1)(A) (1976); 634 F.2d at 4 & n.4.

45. 634 F.2d at 5.

because "the record [was] devoid of a factual basis" upon which the constitutional claims could be assessed,<sup>46</sup> as a practical matter the court was wary of granting the appellant's request two weeks before the presidential election.<sup>47</sup> The fundraising disparity illustrated in *Anderson* is a prime example of the inequities imposed by arbitrary monetary limitations on individual contributions.

An alternative to outright abolition of the \$1000 restriction would be to allow individuals, unincorporated associations and partnerships to contribute whatever amount they wish, but anything donated above this \$1000 limitation would be taxable to the candidate receiving the money.<sup>48</sup> This tax could support nonpartisan activities and political communications by the government, thus broadening the knowledge and interest of the general public in the political process.<sup>49</sup> Another possible recipient of the tax could be a public fund for federal congressional and senatorial candidates in their elections. Through this tax, public funding which is now available for presidential elections could be made available for all elections,<sup>50</sup> thus equalizing the chances of all candidates to succeed.<sup>51</sup> Moreover, because individual contributors from the general public would be funding elections, individual influence on the political system would be more widely felt.

Neither the elimination of restrictions on individual contributions nor the tax on donations exceeding the \$1000 limitations interfere with FECA's purpose to alleviate corruption or the appearance of corruption from politics.<sup>52</sup> Existing disclosure requirements<sup>53</sup> would

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46. *Id.*

47. *Id.*

48. See H. ALEXANDER & J. MOLLOY, *supra* note 3, at 7, 80 (§ 503(a)(b)).

49. Congress could then exercise its discretion as to whether these funds would be used within that election itself or could be placed in a large fund to be used in all elections.

50. Presently, public funding is available for presidential primary and general election campaigns, and party nominating conventions. 26 U.S.C. §§ 9001-9072; see Comment, *Buckley v. Valeo: The Supreme Court and Federal Campaign Reform*, 76 COLUM. L. REV. 852, 882-90 (1976); see, e.g., *Anderson v. FEC*, 634 F.2d 3 (1st Cir. 1980). Thus, PACs have directed their efforts and financial support to other elections. See Sorauf, *Political Parties And Political Action Committees: Two Life Cycles*, 22 ARIZ. L. REV. 445, 452 (1980).

51. See notes 23-25 *supra* and accompanying text.

52. See note 20 *supra* and accompanying text.

53. 2 U.S.C. § 432(f)(1) (Supp. V 1981) (statements and reports by authorized committees); *id.* § 432(f)(2) (statements and reports by a House or Senate candidate's principal campaign committee); *id.* § 432(g)(1) (filing, statements and reports with the Clerk of the House); *id.* §§ 432(g)(4), 434(a)(4) (statements and reports by nonauthorized committees); *id.* § 432(g)(4) (filing, statements and reports with the

force politicians to account to their opposing candidates, the government and the public for any favors, especially in the case of large donations.<sup>54</sup> Also, individual contributions would pose no greater threat of corruption than do large contributions from corporate or union PACs. Indeed, in situations involving a vote on economic policy, contributions from PACs supporting the voting representatives may have more of a corruptive influence than in the case of an individual whose contributions are less likely to influence a vote.<sup>55</sup>

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FEC); *id.* § 432(g)(2) (filing, statements and reports with the Secretary of the Senate); *id.* §§ 432(g)(1),(2), 434(a)(2) (filing designations, statements and reports of a House or Senate candidate); *id.* §§ 432(g)(4), 434(a)(3) (filing designation, statements and reports by a presidential candidate); *id.* § 433(a) (organization's statement); *id.* § 433(d)(1) (statement of termination); *id.* § 434(c)(2) (statement of independent expenditures); *id.* § 434(a)(5) (postmark as of the date of filing); *id.* § 434(a)(6) (notice of contribution of \$1000 or more that is received shortly before an election must be given); *id.* § 434(a)(9) (filing date of special election reports); *id.* § 437 (convention financing reports); *id.* §§ 437(g)(b), 438(a)(7) (failure to file); *id.* § 439 (a)(1) (filing, statements and reports with state officials); *id.* § 434 (b) (contents of reports); *id.* § 431(13) (definition of identification); *id.* § 438(a)(2) (FEC published bookkeeping and reporting manual); *id.* § 434(a)(7) (cumulative reporting); *id.* § 434(b)(8) (debts); *id.* § 434(c)(3) (index of independent expenditures); *id.* §§ 434(b)(6)(B)(iii), (c)(1)-(2) (reporting procedures in connection with independent expenditures); *id.* § 438(a)(4) (restrictions on the use of information taken from reports); *id.* §§ 432(g)(5), 438(a)(4), 439(b)(3) (availability of reports to the public); *id.* § 438(a)(6)(B), (C) (index to reports and statements made by multicandidate political committees); *id.* § 438(a)(4) (substitution of pseudonyms for the names of contributors); *id.* § 434(a)(8),(9) (waivers of quarterly and special election reports); *id.* § 438(a)(6)(A) (FEC requirement of index of designations, reports and statements).

54. H. ALEXANDER & J. MOLLOY, *supra* note 3, at 7.

55. Kenski, *supra* note 3, at 639, 643; Nicholson, *The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures*, 65 CORNELL L. REV. 945, 991-95 (1980); Railsback, *Congressional Responses to Obey-Railsback*, 22 ARIZ. L. REV. 667, 668 (1980); *see* Wertheimer, *supra* note 2, at 611.

56. Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 ARIZ. L. REV. 373, 403 (1980) (quoting 117 CONG. REC. 43,380 (1971) (remarks of Sen. Hansen)). Political equality for all individuals is always the focus of concern. *See* note 2 *supra*. Therefore, FECA's main objective must be to safeguard the public's individual rights from corporations and labor organizations. *See* *United States v. UAW*, 352 U.S. 567 (1957). In that case, the Supreme Court strongly stated "[t]he evil at which Congress has struck in [the federal election laws] is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party." *Id.* at 589. The Court further noted "[a]s the historical background of this statute indicates, its 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." *Id.* at 575.

More explicit purposes concerning the campaign spending laws have been repeatedly articulated by courts and legislators. President Theodore Roosevelt, in his annual message to Congress in 1904 and again in 1905, first expressed his fear of

### III. PAC Impact

#### A. The PAC System

The drafters of FECA sought to prevent those entities that have the capability to amass a huge store of wealth from using their general funds "for active electioneering directed at the general public on behalf of a candidate in a Federal election. . . ." <sup>56</sup> Accordingly,

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corporate wealth as a threat, not to the political candidate, but to the individual voter. See Bolton, *supra*, at 375. The President delineated the two purposes of the election laws:

All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts.

*UAW*, 352 U.S. at 572 (1957) (quoting 40 CONG. REC. 96).

Protection of minority shareholders and members from decisions by corporate and union officials to use general funds to support candidates and/or causes to which the individual shareholder or member is opposed, is a purpose that has been seized upon by many courts. The cases largely focused on whether or not the contributions by members or shareholders comprising these general funds were given voluntarily for the purposes for which they are used. See *United States v. Boyle*, 482 F.2d 755, 761-62 (D.C. Cir.) (Congress intended to protect individual union members against both overtly coerced and unknown contributions: each is equally involuntary), *cert. denied*, 414 U.S. 1076 (1973); *Pipefitters Local No. 562 v. United States*, 407 U.S. 385, 413-14 (1972); *United States v. UAW*, 352 U.S. 567, 592 (1957) ("[W]as the broadcast paid for out of the general dues of the union membership or may the funds be fairly said to have been obtained on a voluntary basis?"); *United States v. Chestnut*, 394 F. Supp. 581 (S.D.N.Y. 1975), *aff'd*, 533 F.2d 40, 50-51 (2d Cir. 1976); *Barber v. Gibbons*, 367 F. Supp. 1102, 1103-04 (E.D. Mo. 1973); *United States v. Anchorage Cent. Labor Council*, 193 F. Supp. 504, 508 (D. Alaska 1961) ("[T]he purposes of the statute . . . are clearly expressed in these . . . decisions, and in the debates before Congress . . . . [S]econd, to protect the union member from having union officials endorse candidates or attempt to influence voters which may be contrary to the wishes of the individual member").

Other cases also evidence the protection of the dissenting union member. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 233-36 (1977) (government employees objecting to union expenditure of compulsory service fees for ideological political purposes were entitled to relief); *Brotherhood of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 122 (1963) (denying the unions the power to use members' dues over their objection for political purposes, and suggesting various remedies for the dissenting employee); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 768-69 (1961) (holding that unions were prohibited from using membership dues paid under a shop agreement for political purposes over the objection of an employee). One commentator has expressed doubt as to the continuing existence of this purpose in light of *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792-95 (1978), and *Cort v. Ash*, 422 U.S. 66, 80-82 (1975). See Bolton, *supra*, at 413. *But see* *FEC v. National Right to Work Comm.*, 103 S. Ct. 552, 559 (1982) (stating in dicta that the purpose of FECA as protecting the dissenting shareholder or member would be sufficient in itself to justify the regulation).

FECA prohibits corporations and unions from contributing directly to candidates in a federal election.<sup>57</sup> Corporations and labor organizations, however, are permitted to amass a separate segregated fund for political purposes.<sup>58</sup> This fund is administered by a political action committee.<sup>59</sup>

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Campaign financing laws were also enacted to protect against actual corrupt practices or the appearance of corrupt practices of legislators who may become indebted to corporations and unions that have made large contributions to the officials' support and benefit. *Id.*; *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 788 n.26 (1978); *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976); *United States v. UAW*, 352 U.S. 567, 579 (1957); *Schwartz v. Romnes*, 495 F.2d 844, 849-51 (2d Cir. 1974); *FEC v. Weinstein*, 462 F. Supp. 243, 246-48 (S.D.N.Y. 1978); *United States v. First Nat'l Bank*, 329 F. Supp. 1251, 1254 (S.D. Ohio 1971).

57. 2 U.S.C. §441b(a) (1976). A comprehensive set of provisions regulating corporate and union political activity is included in the Act: *id.* §441b(a) (contributions and expenditures by corporations, labor organizations and national banks); *id.* §441b(b)(2) (definition of contributions and expenditures); *id.* §§ 431(8)(B)(vi), (9)(B)(iii), (v) (Supp. V. 1981), 441b(b)(2)(A)-(C)(1976) (contribution/expenditure exemptions); *id.* § 441a(a)(5) (limitations for affiliated separate segregated fund); *id.* § 441b(b)(7) (definition of executive/administrative personnel); *id.* §§ 441b(b)(1), 441c(c) (definition of a labor organization); *id.* § 441b(b)(3)-(6) (1976 & Supp. V. 1981) (solicitation of contributions to a separate segregated fund); *id.* § 441b(b)(4)(A)(ii),(5) (1976) (solicitation of contributions to a separate segregated fund by a trade association); *id.* § 441b(b)(4)(A)(i) (solicitation of contributions to a separate segregated fund by corporation); *id.* §441b(b)(6) (corporate solicitation methods available to labor organization); *id.* §441b(b)(4)(B) (1976 & Supp. V. 1981) (cross solicitation by corporations and labor organizations); *id.* §441b(b)(4)(C) (1976) (solicitation of contributions to a separate segregated fund by membership organizations, cooperatives and corporations without capital stock from their members).

58. See note 11 *supra* and accompanying text; Budde, *supra* note 35, at 563-67 (analysis of the allowance for state PACs). Corporations and labor organizations also possess the constitutional and statutory right to communicate with those affiliated with them. U.S. CONST. amend. I; 2 U.S.C. § 441b(b)(2)(A) (1976); 11 C.F.R. §§ 114.3-.4 (1982); see *United States v. Congress of Indus. Org.*, 335 U.S. 106, 121 (1948), in which the Supreme Court stated:

If § 313 were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.

Corporations may also engage in other partisan and nonpartisan activities. 2 U.S.C. §441b(b)(2)(A) (1976); 11 C.F.R. §§ 114.3-.4 (1982). Partisan activities include, but are not limited to: communications by a corporation or labor organization to its authorized class, *id.* § 114.3(a); the distribution of printed material to the authorized class provided it is produced at the expense of the corporation, labor organization, or PAC of either, and is not the republication of material prepared by the candidate or his committee, *id.* § 114.3(c)(1)(i), (ii); candidate or party representative appearances at meetings, conventions or other regularly scheduled functions of the corporation or labor organization provided that the meeting is held primarily for other purposes, *id.* §114.3(c)(2); the candidate or party representative

While general corporate or union treasury money may not be used for direct contributions,<sup>60</sup> it may be used for the establishment, maintenance and solicitation of contributions to these separate segregated funds.<sup>61</sup> No restriction is placed on the amount of money a corporation or labor organization may contribute for these support purposes.<sup>62</sup> In light of the fact that the amount of contributions solicited largely depends upon the financing of the fund by the sponsoring entity,

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appearing is permitted to solicit contributions from the authorized class at scheduled functions, *id.*; telephone banks to urge the authorized class to register and/or vote for a particular candidate or candidates, *id.* § 114.3(c)(3); registration and get-out-the-vote drives, offering transportation and services to the authorized class to assist them in registering and voting, as well as urging individuals to register with a particular party and vote for a particular candidate or candidates, *id.* § 114.3(c)(4).

FECA also permits corporations and labor organizations to engage in nonpartisan activity. *Id.* § 114.4. Nonpartisan communications on any subject, registration, and get-out-the-vote drives are freely permitted if made by the corporation or labor organization and directed at members of the authorized class, *id.* § 114.4(a)(1), (2). The regulations are more restrictive, however, with regard to nonpartisan activities aimed at employees in addition to the authorized class. Such activities include: appearances by candidate and party representatives on corporate premises, *id.* § 114.4(b)(1), with restrictions set forth in (i), (ii), (iii), (iv), (v), and on union premises, *id.* § 114.4(b)(2), with restrictions set forth in *id.* §§ 114.4(b)(1)(i)-(iii), 114.4(b)(2)(i)-(ii); registration and voting information communicated by posters, newsletters and other means, *id.* § 114.4(c)(1), with restrictions set forth in (i), (ii). This allows a corporation or labor organization to distribute or reprint any instructional materials produced by the official election administrators, *id.* § 114.4(c)(2), and voter guides and brochures describing candidates and their positions, *id.* § 114.4(c)(3), with restrictions set forth in (i), (ii); registration and get-out-the-vote drives, offering assistance in transportation, *id.* § 114.4(d), with restrictions set forth in (i), (ii); the donation of funds to civic and other nonprofit organizations for registration and get-out-the-vote drives, *id.* § 114.4(d)(2); and the utilization of corporate and union employees and facilities by the civic or nonprofit corporation to conduct these activities, *id.* § 114.4(d)(3). See Sproul, *Corporations and Unions in Federal Politics: A Practical Approach to Federal Election Law Compliance*, 22 ARIZ. L. REV. 465, 475-77 (1980). However, not only does FECA fail to encourage corporations and unions to sponsor nonpartisan political activities, it actually deters them. Section 441b(b)(2)(C) has been construed as restricting corporate and union unilateral participation unless the nonpartisan activity is "co-sponsored with and conducted by an organization which does not support or endorse candidates or political parties." FEDERAL ELECTION COMMISSION ANNUAL REPORT 1979, at 39.

59. See note 12 *supra* and accompanying text.

60. 2 U.S.C. § 441b (a) (1976).

61. *Id.* § 441b(b)(2)(C); see Nicholson, *supra* note 55, at 952.

62. See 2 U.S.C. § 441b(b)(2)(C) (1976). Also, if the PAC expends its own funds for its establishment, maintenance, and solicitation of contributions to it, the corporation or labor organization may reimburse the PAC for the expenditures made by it for these purposes. FEDERAL ELECTION COMMISSION ANNUAL REPORT 1976, Advisory Op. No. 1976-111; FEDERAL ELECTION COMMISSION ANNUAL REPORT 1979, Advisory Op. No. 1979-33.



FECA hardly restricts overall corporate and union contributions at all.

Moreover, PAC contributors for political purposes in the aggregate are unrestricted. The ultimate control of the fund is vested in a small group of managers or officers of the corporation or union with no contributor input into decisions as to expenditure of funds.<sup>63</sup> The Act provides that the intended use of the funds must be stated in solicitations to employees; however, the recipients of the funds do not have to be identified.<sup>64</sup> FECA also affirmatively proscribes coercive tactics by PACs in soliciting contributions.<sup>65</sup>

Under the statute, only corporations and labor organizations, as opposed to entities such as unincorporated associations, partnerships and investment groups, are permitted to create PACs.<sup>66</sup> Solicitation of

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63. The Supreme Court, in *Pipefitters Local No. 562 v. United States*, 407 U.S. 385 (1972), supported this control by corporate or union management, stating "[n]o-where . . . has Congress required that the political organization (PAC) be formally or functionally independent of union control or that union officials be barred from soliciting contributions or even precluded from determining how the monies raised will be spent." *Id.* at 415; *see also* 41 Fed. Reg. 35, 968 (1976), where the FEC specifically allows a sponsoring entity to exercise control over the fund.

One advocate of the PAC system has recognized that PACs concentrate their efforts on increasing contributions and expending their funds, rather than on fostering member participation and knowledge. PACs do not enable their members to be "an essential component of effective campaigns." Elliott, *Political Action Committees-Precincts of the 80's*, 22 ARIZ. L. REV. 539, 552-54 (1980).

64. 2 U.S.C. § 441b(b)(3)(B) (1976) (no specification that the information concerning the intended use of the funds contain the names of recipients); *see also id.* § 441b(b)(3)(C) (employees must be informed of their right of refusal at the time of their solicitation). According to the regulations, members as well as employees must be informed of the purposes of the fund and their right of refusal at the time of their solicitation. No statutory basis exists for this inclusion of members in the regulations. 11 C.F.R. § 114.5(a)(3) (1982).

65. Section 441b prohibits PACs from coercing persons to contribute to them by using:

money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction. . . .

2 U.S.C. § 441b(b)(3)(A) (1976). An employee must be informed of his right to refuse without fear of reprisal. *Id.* § 441b(b)(3)(C). The regulations also prohibit PACs from obtaining contributions through "reverse checkoffs," meaning that an amount is deducted by an employer from an employee's paycheck unless the employee requests a refund. 11 C.F.R. § 114.5(a) (1982); *see* *FEC v. National Educ. Ass'n*, 457 F. Supp. 1102, 1106 (D.D.C. 1978) (holding that a reverse checkoff system requiring a member to act to prevent contribution violated FECA).

66. 2 U.S.C. § 441b(b)(2)(C) (1976) (allowing corporations, labor organizations, membership organizations, cooperatives and corporations without capital stock to establish separate segregated funds). For clarification of the distinction between a

funds by the PAC is limited to people who belong to the "authorized class";<sup>67</sup> this class can include members,<sup>68</sup> shareholders,<sup>69</sup> executive and administrative personnel,<sup>70</sup> the families of each of these individ-

nonprofit organization and a cooperative, *see* Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 508 (1981).

67. For purposes of this Note, those persons whom a corporation or labor organization may legally solicit for contributions to its PAC are referred to as members of the authorized class. A corporation's authorized class includes its stockholders and their families, and executive and administrative personnel and their families. 2 U.S.C. § 441b(b)(2)(A) (1976); 11 C.F.R. § 114.5(g)(1) (1982). Twice a year a corporation may in writing solicit its employees. 2 U.S.C. § 441b(b)(4)(B) (1976 & Supp. V 1981); 11 C.F.R. § 114.6 (1982). A labor organization may solicit contributions to its PAC from its members and their families. 2 U.S.C. § 441b(b)(2)(A) (1976); 11 C.F.R. § 114.5(g)(2) (1982). Twice a year it may solicit, in writing, contributions from shareholders, executive and administrative personnel, and nonunion employees. 2 U.S.C. § 441b(b)(4)(B) (1976 & Supp. V. 1981); 11 C.F.R. § 114.6 (1982). This allowance for twice a year solicitation of corporate and union employees resulted from the Sun Oil Advisory Opinion, FEC Ad. Op. 1975-23, 40 Fed. Reg. 56,584 (1975), in which the FEC stated that it would allow corporations and labor organizations to solicit contributions to their PACs from employees. In response to this opinion, Congress in its 1976 Amendments to FECA, Pub. L. No. 94-283, 90 Stat. 475 (1976), limited solicitation of employees to twice a year, although solicitation of executive and administrative personnel and their families is still permitted without restriction. A membership organization, cooperative or corporation without capital stock is limited to solicitation of its members. 2 U.S.C. § 441b(b)(4)(C) (1976). Solicitation of families is not permitted as no provision enabling such action is contained in the statute. *See id.*

68. 2 U.S.C. § 441b(b)(2)(A) (1976) (members of a labor organization); *id.* § 441b(b)(4)(c) (members of a membership organization, cooperative or corporation without capital stock). The regulations state:

"Members" means all persons who are currently satisfying the requirements for membership in a membership organization, trade association, cooperative, or corporation without capital stock and in the case of a labor organization, persons who are currently satisfying the requirements for membership in a local, national, or international labor organization. Members of a local union are considered to be members of any national or international union of which the local union is a part and of any federation with which the local, national, or international union is affiliated. A person is not considered a member under this definition if the only requirement for membership is a contribution to a separate segregated fund.

11 C.F.R. §§ 100.8(b)(4)(iv), 114.1(e) (1982). *See* *FEC v. National Right to Work Comm.*, 103 S. Ct. 552 (1982); notes 99-102 *infra* and accompanying text.

69. 2 U.S.C. § 441b(b)(2)(B) (1976); *id.* § 441b(b)(4)(B) (1976 & Supp. V 1981) (twice a year solicitation by labor organization of shareholders of its member-organization). No definition of a shareholder is given within FECA, except that the Conference Report states that "the normal concepts of corporate law shall be controlling." H.R. REP. No. 1057, 94th Cong., 2d Sess. 64 (1976). But this vague statement of intention without a clear definition has raised significant problems. *See* Sproul, *supra* note 58. *But see* 11 C.F.R. § 114.1(h) which sets three requirements in order for a person to be considered a stockholder: (1) a "vested beneficial interest in stock"; (2) the power to direct how the stock shall be voted, if it is voting stock and (3) the right to receive dividends. *Id.*

70. 2 U.S.C. § 441b(b)(2)(A) (1976); *id.* § 441b(b)(4)(B) (1976 & Supp. V 1981) (twice a year solicitation of executive and administrative personnel of member corpo-

uals,<sup>71</sup> and occasionally lower-level employees.<sup>72</sup> These creation and solicitation restrictions have significantly decreased the individual's role in the political process.

### B. Problems with the PAC System and Infringement of Individual Rights

The injection of PAC funds and influence in the political process<sup>73</sup> creates unforeseen barriers to individual political equality and diminishes the individual's importance. The most obvious cause of this inequality between individual and PAC contributors is that no ceiling exists on the amount of money a PAC meeting the qualifications of a political committee<sup>74</sup> may contribute in the aggregate to political candidates, their parties, political committees or a national political party. This gives unlimited power to management or top officials of a corporation or union who retain control over PAC spending.<sup>75</sup> Hence, the statute distinguishes for the purposes of contribution limitations between a single individual and a small group of individuals with the cloak of management. Also, since restrictions on individuals contributions exceed those of a PAC, a candidate is more likely to concentrate his efforts on attaining support from PACs, thus ignoring the individual.<sup>76</sup>

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rations by a labor organization. Section 441b(b)(7) defines "executive and administrative personnel" as "individuals employed by a corporation who are paid on a salary, rather than an hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities." *Id.* § 441b(b)(7) (1976); 11 C.F.R. § 100.8(b)(4)(iii) (1982); *see also* H.R. REP. NO. 1057, 94th Cong., 2d Sess. 62 (1976). The Conference Report accompanying the 1976 Amendments stated:

The term 'executive or administrative personnel' is intended to include the individuals who run the corporation's business, such as officers, other executives, and plant, division, and section managers, as well as individuals following the recognized professions, such as lawyers and engineers, who have not chosen to separate themselves from management by choosing a bargaining representative; but is not intended to include professionals who are members of a labor organization, or foremen who have direct supervision over hourly employees, or other lower level supervisors such as 'straw-bosses.'

*Id.*; 11 C.F.R. § 114.1(c) (1982) (definition of "executive or administrative personnel").

71. 2 U.S.C. § 441b(b)(2)(A) (1976).

72. *Id.* § 441b(b)(4)(B) (1976 & Supp V 1981).

73. *See* notes 77-80 *infra* and accompanying text.

74. *See* note 26 *supra* and accompanying text.

75. *See* note 63 *supra* and accompanying text.

76. *See* note 30 *supra* and accompanying text.

Moreover, PACs wield great power within the political process.<sup>77</sup> They have the potential to influence Congressional voting; non-voting political decisions concerning principles and policies of our electorate; a candidate's chance for success in an election; and, most importantly, what information the public and the individual as a member of the public has regarding the political process.<sup>78</sup> PACs are drawn into the political arena as a result of their interest in such areas as taxation, economic policy and governmental regulations.<sup>79</sup> Their demonstrated success in achieving their objectives through the recipients of their contributions causes the individual citizen to question the integrity of the political process, and thus take a more apathetic attitude toward it.<sup>80</sup>

Appearances of corruption are further aggravated by the strong tendency of PACs to direct their funds largely toward the reelection of incumbents, who in the view of the corporation or union, may have more power and be of greater assistance in the political realm than may a newcomer. Consequently, PAC contributions are not made as a result of any particular ideological slant.<sup>81</sup> Given this predisposition toward incumbents as a result of self-interest, as well as the PAC's sparse dissemination of information concerning the recipients of the fund to the individual contributor,<sup>82</sup> FECA provisions and court decisions attempting to enforce the knowing and voluntary character of contributions to PACs<sup>83</sup> appear illusory. Hence, free choice of the

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77. Alexander, *The Obey-Railsback Bill: Its Genesis and Early History*, 22 ARIZ. L. REV. 653, 657 (1980); Wertheimer, *supra* note 2, at 611-16; Wright, *supra* note 2, at 616.

78. Kenski, *supra* note 3, at 643-44; Railsback, *supra* note 55, at 668.

79. Wright, *supra* note 2, at 616.

80. Railsback, *supra* note 55, at 668; Wright, *supra* note 2, at 625.

81. Adamany, *supra* note 3, at 590-91 ("PAC contributing strategies do not, therefore, hold promise of revitalizing competition and thus accountability in electorally non-competitive districts where political opposition already suffers severe financial deprivation"). *Id.* at 591; Mayton, *supra* note 30, at 381 ("Corporate PACs tend to be nonidealistic. The author of a 1932 work called *Money in Elections* noted that there was a 'complete divorce of such (corporate) contributions from any question of policy' and that the corporation simply backed those likely to gain office—usually the incumbents"); Sorauf, *supra* note 50, at 452-53 ("By pursuing a legislative strategy, of course, PAC's ruled out a strategy of supporting candidates on the basis of party or issue positions . . . . PAC's contributed to candidates, especially incumbent candidates, of both parties"); Wertheimer, *supra* note 2, at 609-11 ("PAC contributions can be viewed as investments by special interests in Congressional decisionmaking. This can be seen clearly in the fact that PAC's strongly favor incumbents over their challengers, regardless of party"). *Id.* at 609.

82. See notes 64-65 *supra* and accompanying text.

83. See *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 414 (1972) (holding that solicitation of contributions to a separate segregated fund

individual to contribute to PACs is insignificant as it is stripped of any real input and ideas.

Furthermore, judicial safeguards of individual rights under the present statutory scheme allowing for these powerful and influential PACs are also inadequate. In *Cort v. Ash*,<sup>84</sup> the Supreme Court held that an individual has no private civil cause of action for violations of FECA.<sup>85</sup> An individual is limited to filing a complaint with the Federal Election Commission<sup>86</sup> (FEC) which will then pursue it to the

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“[m]ust be conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other reprisal within the union’s institutional power.”); *United States v. Boyle*, 482 F.2d 755, 760-64 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973).

84. 422 U.S. 66 (1975). For an analysis of this case, see Smith, *Business, Buck\$ & Bull: The Corporation, The First Amendment & The Corrupt Practices Law*, 4 DEL. J. CORP. LAW 39, 97-98 (1978); cf. Note, *Curbing Corporate Campaign Contributions: Implying a Civil Action From the Federal Corrupt Practices Act*, 18 U.S.C. § 610, 63 GEO. L.J. 1159 (1975).

85. 422 U.S. at 77-85. See also *Belluso v. Turner Communications Corp.*, 633 F.2d 393, 395-96 (5th Cir. 1980) (discussing the four considerations as to whether a private right of action is implicit in a statute not explicitly providing for one as identified by the Supreme Court in *Cort*).

86. 2 U.S.C. § 437g(a)(1) (Supp. V 1981). In the 1974 Amendments to the Federal Election Campaign Act of 1971, Congress established the Federal Election Commission (FEC) to enforce the federal election laws. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 208, 88 Stat. 1279 (current version at 2 U.S.C. § 437c (Supp. V 1981)). Previously, the election laws had rarely been enforced by the Department of Justice assisted by various “supervisory officers” empowered with this responsibility. Federal Election Campaign Act of 1971, Pub. L. No. 92-225 §§ 301, 309, 86 Stat. 12, 18 (repealed 1974). See Note, *supra* note 84, at 1159-60. As a reaction to the Nixon campaign practices, the Weed Scott Report, and the Watergate scandals, the FEC was created in 1974 to alleviate this lack of enforcement. See Mayton, *supra* note 30, at 375-82; Smith, *supra* note 84, at 41-43; Wright, *supra* note 2, at 610. The sole interruption in the FEC’s existence occurred with the ruling of *Buckley v. Valeo*, 424 U.S. 1 (1976), that as initially constituted, the Commission was unconstitutional and therefore precluded from asserting any enforcement or rulemaking authority. *Id.* at 137-41. Past acts of the Commission were accorded *de facto* validity, *id.* at 142, and the statute was subsequently amended to comply with constitutional standards. The President now appoints six voting members whom the Senate must then confirm. 2 U.S.C. § 437c(a)(1) (Supp. V 1981).

The FEC has primary and exclusive jurisdiction in all civil enforcement matters, *id.* §§ 437c(b)(1), 437d(e), while the Attorney General of the United States prosecutes all criminal violations. *Id.* § 437g(c). See, e.g., *United States v. Tonry*, 433 F. Supp. 620, 623 (E.D. La. 1977); *United States v. Jackson*, 433 F. Supp. 239, 241 (W.D.N.Y. 1977), *aff’d*, 586 F.2d 832 (2d. Cir.), *cert. denied*, 440 U.S. 913 (1978). If the violation has been knowing and willful, the Commission will refer the case to the Attorney General. 2 U.S.C. § 437c (Supp. V 1981). See Note, *supra* note 84, at 1163-64; Baran, *The Federal Election Commission: A Guide for Corporate Counsel*, 22 ARIZ. L. REV. 519, 530-31 (1980).

extent the agency deems appropriate.<sup>87</sup> FECA's expedited review provision, section 437h of Title 2 of the United States Code,<sup>88</sup> is also an inadequate protection of individual constitutional rights. Section 437h provides that the FEC, the National Committee of any political party or an individual eligible to vote in a Presidential election may institute an action in the district court in order to challenge "the constitutionality of any provision of this Act."<sup>89</sup> However, in light of procedural shortfalls of section 437h,<sup>90</sup> constitutional justiciability requirements<sup>91</sup>

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In addition to enforcement proceedings, 2 U.S.C. § 437g (Supp. V 1981), the most important power that the FEC exercises is its issuance of advisory opinions, *id.* § 437d(a)(7), concerning specific application of FECA to a set of facts, *id.* § 437f(a)(1),(b), at the request of any person, *id.* § 437f(a). A person relying on an advisory opinion and acting upon it in good faith is immune from any sanction that could be levied as a result of the Act, *id.* § 437f(c); 11 C.F.R. § 112.5(b)(1982).

87. A written, signed, sworn, notarized complaint may be filed with the FEC by any person, 2 U.S.C. § 437g(a)(1) (Supp. V 1981); 11 C.F.R. § 111.4 (1982), under penalty of perjury, *id.* The FEC will then investigate the complaint, 2 U.S.C. §§ 437d(a)(9), 437g(a)(2), 438(b). If the Commission finds reason to believe that a violation of FECA has or will occur, *id.* § 437g(a)(2),(a)(4)(A)(i), it will then make an attempt at conciliation with the violator, *id.* § 437g(a)(4)(A); 11 C.F.R. § 111.18. Four members of the Commission must vote affirmatively on the "reason to believe finding" in order to pursue the alleged violation. 2 U.S.C. § 437g(a)(2)(Supp. V 1981); 11 C.F.R. §§ 111.9, 111.10 (1982). Successful conciliatory efforts are binding and no further redress on the identical violations may be taken. 2 U.S.C. § 437g(a)(4)(A)(i)(Supp. V 1981); 11 C.F.R. § 111.9 (1982). *See also* FEC v. Illinois Medical Political Action Comm., 503 F. Supp. 45 (N.D. Ill. 1980) (successful conciliation agreement also results in dissolution of protective order imposed on the FEC prohibiting it from disclosing documents received by the violator during the investigation).

At no point during the investigation is the individual complainant informed of the status of the case, nor does he take an active role unless the FEC dismisses it without taking action or fails to act on it within 120 days of filing. 2 U.S.C. § 437g(a)(8)(A)(Supp. V 1981). If the FEC acted incorrectly, the court will require it to take the specified action within thirty days. *Id.* § 437g(a)(8)(C). Upon refusal of the FEC to take this action, the individual may institute a private civil action for the violation involved in the original complaint. *Id.* For a more detailed analysis of the machinations of the FEC, see generally Baran, *supra* note 86; Note, *The Federal Election Commission, The First Amendment, and Due Process*, 89 YALE L.J. 1199 (1980).

88. 2 U.S.C. § 437h (Supp. V 1981).

89. *Id.* § 437h(a). It further provides that the single-judge district court shall immediately certify all constitutional questions to the court of appeals sitting en banc. *Id.* Direct appeal to the Supreme Court is available upon a final decision of the court of appeals. *Id.* § 437h(b)(1976). Furthermore, the court of appeals and the Supreme Court must "advance on the docket and . . . expedite to the greatest possible extent the disposition of any matter certified. . . ." *Id.* § 437h(c).

90. Ambiguities exist between judicial review provisions of FECA and the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9042 (1976). The latter Act requires that all constitutional questions arising under it be heard by a three-judge district court. *Id.* §§ 9010(c), 9011(2). This conflicts with § 437h's requirement that

and self-imposed prudential rules,<sup>92</sup> the ability of voters to have their claims adjudicated is questionable under this provision.

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all constitutional questions be certified immediately by a district court judge to the court of appeals sitting en banc. 2 U.S.C. § 437h(a) (Supp. V 1981); see, e.g., *Buckley v. Valeo*, 424 U.S. 1, 8-11 (1976). The Supreme Court in that case noted the jurisdictional ambiguities but refused to pass on them because the lower courts had already simultaneously heard the case in both a court of appeals sitting en banc and a three-judge district court. *Id.* at 9 n.6; see also *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y.), *questions answered*, 616 F.2d 1, 1-2 (2d Cir. 1980) (following the procedure of *Buckley* but varying it somewhat by prescribing that a single judge district court and a three-judge district court would make their findings before, rather than after, a remand by the court of appeals).

A second procedural shortfall is the requirement in § 437h that the court of appeals sit en banc. 2 U.S.C. § 437h(a) (Supp. V 1981). Doubt as to the meaning and constitutionality of this requirement has caused courts to hear cases instead under FED. R. APP. P. 35. See *FEC v. Lance*, 635 F.2d 1132, 1137 (5th Cir. 1981); *California Medical Ass'n v. FEC*, 641 F.2d 619, 623 (9th Cir.), *aff'd*, 453 U.S. 182 (1981).

Conflicts between the FEC's enforcement power under 2 U.S.C. §§ 437g, 437h (Supp. V 1981), have plagued the Commission and the courts. FECA provides that § 437g actions instituted by the FEC be advanced on the docket and heard ahead of all other actions, except those brought under § 437h. *Id.* § 437g(10). The Act fails to provide any means to consolidate the enforcement proceedings under § 437g and the special expedited review offered by § 437h. This failure is particularly burdensome in light of the fact that § 437h may be applied by way of a counterclaim. See *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 49 (2d Cir. 1980). Therefore, when the FEC institutes an action pursuant to § 437g in the district court, the respondent may counterclaim under § 437h and have the action advanced on the docket ahead of the § 437g proceeding and immediately certified to the court of appeals en banc. In effect, trials containing identical issues and facts can proceed simultaneously in two separate courts. *California Medical Ass'n v. FEC*, 453 U.S. 182, 205-06 (Stewart, J., dissenting, joined by Burger, C.J., Powell & Rehnquist, JJ.). The Supreme Court in *California Medical* split in a 4-1-4 vote over the issue of jurisdiction under § 437h. The dissent detailed the inefficiency and waste suffered by the courts and the FEC under the judicial review provisions of FECA. *Id.*

The FEC has repeatedly recommended to Congress that the discrepancies between the various judicial review provisions be alleviated. FEDERAL ELECTION COMMISSION ANNUAL REPORT 1980, at 7; FEDERAL ELECTION COMMISSION, ANNUAL REPORT 1979, at 41; FEDERAL ELECTION COMMISSION, ANNUAL REPORT 1978, at 45.

91. See *Buckley v. Valeo*, 424 U.S. 1, 11-12 (1976) (noting the requirement that a justiciable case or controversy must exist in all actions, including those brought under 2 U.S.C. § 437h). The requirement of § 437h that the constitutional questions be certified immediately to the court of appeals creates a greater possibility that there will be an insufficient factual basis upon which to determine if a case or controversy exists. See *Martin Tractor Co. v. FEC*, 627 F.2d 375, 378-80, 383 (D.C. Cir. 1980); *National Chamber Alliance for Politics v. FEC*, 627 F.2d 375, 378-80, 91 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980) (consolidation and dismissal of both cases for want of a justiciable case or controversy despite the constitutional claim alleged); *United States v. UAW*, 352 U.S. 567, 591-93 (1957) (emphasizing the importance of a detailed factual record); *Mott v. FEC*, 494 F. Supp. 131, 133-35 (D.D.C. 1980) (district courts need not automatically certify all constitutional claims under § 437h, especially in the absence of a fully developed factual record or FEC advisory opin-

FECA allows only corporations and labor organizations to create PACs.<sup>93</sup> However, corporations and unions obviously do not possess

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ion); *Gifford v. Congress*, 452 F. Supp. 802, 806-10 (E.D. Cal. 1978) (holding that frivolous constitutional claims should not be certified under § 437h to the court of appeals sitting en banc). Furthermore, FECA already provides that the FEC may render advisory opinions. 2 U.S.C. § 437d(a)(7) (Supp. V 1981); *see also* *Martin Tractor Co. v. FEC*, 627 F.2d 375, 384-86, 388-90 (D.C. Cir. 1980)

With regard to the justiciability of the claim, the parties must have a personal stake in the outcome to attain standing to maintain the suit. *Baker v. Carr*, 369 U.S. 186, 204 (1962). The standing of any individual to bring a suit under § 437h is questionable. *See, e.g.*, *Martin Tractor Co. v. FEC*, 627 F.2d 375, 378 & n.6 (D.C. Cir. 1980). In the consolidated cases of *Martin Tractor* and *National Alliance*, the district court held that § 437h was inapplicable to individuals who were not asserting their rights as voters, 460 F. Supp. 1017, 1019 (D.D.C. 1980), but rather, as in the particular cases, employees of a corporation. The District of Columbia Circuit refused to intimate a view as to the lower court's holding, but did note its discrepancy with the decision in *Bread Political Action Comm. v. FEC*, 591 F.2d 29, 33-34 (7th Cir. 1979) (holding that the express designation of the three types of plaintiffs eligible to seek judicial review under § 437h does not act to exclude all others from asserting standing to bring constitutional challenges under the provision). 627 F.2d at 378.

92. A live case or controversy may be dismissed for prudential reasons, even when a complaint is governed by 2 U.S.C. § 437h (Supp. V 1981), *Clark v. Valeo*, 559 F.2d 642, 650 n.11, 657 (D.C. Cir.) (en banc) (Leventhal, J., concurring) (arguing dismissal of the case entirely on prudential grounds), *aff'd mem. sub nom. Clark v. Kimmit*, 431 U.S. 950 (1977); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 52 (1980) (holding that despite the fact that § 437h is limited to questions of constitutionality, "[i]f a court can decide a case on non-constitutional grounds, it should not stray into the field of constitutional analysis").

Standing may also be denied as a prudential matter. In *Bread Political Action Committee v. FEC*, 591 F.2d 29 (7th Cir. 1979), the Seventh Circuit noted that:

[W]ithout their enumeration in § 437h(a), serious questions could be raised about the standing of each of the specified plaintiffs. The standing of the Commission to challenge the constitutional validity of the statute it was created to enforce may have been doubted on the basis of conflicting case law. . . .

Congressional doubts about the standing of political parties and voters may have been based on the fact that challenges to much of the Act by such plaintiffs might be viewed as asserting either "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens" or the rights of third parties. Such a view might lead to a finding of no standing under prudential rules.

*Id.* at 33 n.6.

93. 2 U.S.C. § 441b(b)(2)(C) (1976).

The 1976 amendments to § 441b, Pub. L. No. 94-283, 90 Stat. 475, 492 (1976), expressly permit membership organizations, cooperatives and corporations without capital stock to establish separate, segregated funds for political purposes. 2 U.S.C. § 441b(b)(2)(C) (1976). Previously, it was unsettled as to whether the term "corporation" was limited to the traditional for-profit corporate entity. *See Sproul, supra* note 58, at 487.

Some states have also made their election laws applicable to nonprofit corporations. *See, e.g.*, 1974 Op. N.Y. State Bd. of Elect. No. 5; N.Y. ELEC. LAW § 14-116



significant similar characteristics justifying their identical status. Likewise, for-profit and nonprofit corporations, both of which may create a PAC, are vastly different. These fundamental distinctions have surprisingly escaped legislative and judicial recognition.

For example, on the individual level, courts have failed to distinguish between shareholders of a for-profit corporation and members of a nonprofit corporation, and indeed have equated the two groups.<sup>94</sup> These groups of people should be treated differently, however, for several reasons.<sup>95</sup> One reason is that members of a nonprofit corporation have a greater expectation of privacy.<sup>96</sup> In a for-profit corporation, the shareholders are listed on a public record. Members of a nonprofit corporation, however, need not be exposed to the public view.

Second, the nature of the two organizations soliciting the contributions is entirely different.<sup>97</sup> In *Federal Election Commission v. National Right to Work Committee* (NRWC),<sup>98</sup> a nonprofit corporation

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(McKinney 1978) ("The term 'corporation' in section 480 of the former Election Law of 1949 includes within its meaning not-for-profit corporations. . .").

94. *FEC v. National Right to Work Comm.*, 103 S. Ct. 552, 557-58 (1982). The Supreme Court in that case noted the floor statement of Senator Allen concerning solicitation of members of a nonprofit corporation:

Mr. President, all this amendment does is to cure an omission in the bill. It would allow corporations that do not have stock but have a membership organization, such as a cooperative or other corporation without capital stock and, hence, without stockholders, to set up separate segregated political funds as to which it can solicit contributions from its membership; since it does not have any stockholders to solicit, it should be allowed to solicit its members. That is all that amendment provides. It does cover an omission in the bill that I believe all agree should be filled.

*Id.* at 557. The Court construed this statement as suggesting an analogy between members of a nonstock corporation and stockholders and union members. *Id.*

95. See generally Hansmann, *supra* note 66, at 568.

96. See *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (denying a state the right to compel disclosure of NAACP's rank-and-file members); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *Savola v. Webster*, 644 F.2d 743, 747 (8th Cir. 1981).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court implied that if a case should arise concerning FECA's disclosure requirements and a situation such as in *NAACP*, in which the threat to first amendment rights is so serious and the interest furthered by disclosure so insubstantial, the requirements will not be applied. *Id.* at 71-74. Such was the situation in *Brown v. Socialist Workers '74 Campaign Comm.*, 103 S. Ct. 416 (1982) (holding that the Socialist Workers Party should not be compelled to disclose the names of its contributors and recipients of its expenditures because the disclosure would serve to subject them to threats, harassment, or reprisals from government officials or private parties). Importantly, no distinction is made between members and contributors. *Buckley v. Valeo*, 424 U.S. 1, 66 (1976).

97. See notes 103-05 *infra* and accompanying text.

98. 103 S. Ct. 552 (1982).

solicited 267,000 persons for contributions to its PAC.<sup>99</sup> The Supreme Court found that the NRWC violated restrictive FECA provisions because it had solicited individuals outside of its authorized class which was limited to members.<sup>100</sup> Although a correct decision in light of Virginia nonprofit corporation law and the prohibitive nature of FECA,<sup>101</sup> the result appears inequitable. The NRWC had merely asked contributors to support their organization's cause. No coercion was exerted on the alleged members who were well aware of what they were contributing to when they made their pledges.<sup>102</sup> Unlike a for-profit corporation which is organized strictly to channel any financial gain back to those who have a share in it, a nonprofit corporation is organized primarily for public interest and benefit.<sup>103</sup> An identifiable ideology and purpose are often apparent which put a contributor-member on notice of the political sympathies and affiliations of the organization.<sup>104</sup>

Members of nonprofit corporations voluntarily join because they agree with the purpose of the corporation in furthering a societal interest and benefit; they expect no monetary return from their involvement.<sup>105</sup> This knowledge and awareness on the part of the members, as opposed to the often obscure shareholder understanding of political sympathies of the for-profit corporation,<sup>106</sup> would appear to

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99. *Id.* at 556.

100. *Id.* at 558, 561.

101. *Id.* at 558-61.

102. *Id.* at 556-57.

103. In *National Right to Work Committee*, NRWC was organized expressly for non-pecuniary purposes to inform Americans of the power of labor organizations in their daily lives. 103 S. Ct. at 555.

Nonprofit corporations are typically created for "charitable, social, political, trade, professional, recreational, educational, cultural, civic, governmental, religious and scientific purposes." Note, *New York's Not-For-Profit Corporation Law*, 47 N.Y.U. L. REV. 761, 768 (1972). For a good discussion of the unique role of the nonprofit corporation as compared with for-profit corporations, see Hansmann, *supra* note 66, at 504-06.

A nonprofit corporation may be organized to make a profit, although the distribution of the profits to members is prohibited. See note 105 *infra* and accompanying text.

104. *E.g.*, National Right to Work Comm., Socialist Workers Party, and the American Red Cross.

105. *E.g.*, N.Y. NOT-FOR-PROFIT CORP. LAW § 201 (McKinney Supp. 1982-1983); see Hansmann, *supra* note 66, at 501, 600-15.

106. Since political sympathies are not a prime factor in the contribution of PAC funds by a for-profit corporation or a union, see notes 81-83 *supra* and accompanying text, patterns of giving evincing PAC philosophy are therefore nonexistent, and do not increase shareholder understanding.

create an important distinction between the two groups. Accordingly, members of nonprofit corporations should not be equated with shareholders of for-profit corporations; the former group should be unlimited as contributors are volunteers with full knowledge of the solicitor's aims and ideals.

More importantly, FECA's arbitrary distinction between for-profit and nonprofit corporations and unions, and all other entities, dilutes individual choice and denies the potential for even greater input into the stream of politics.<sup>107</sup> The structural similarities and potential of these other groups, such as partnerships, unincorporated associations and investment firms, to amass large amounts of wealth render their separation from corporations and labor organizations inexplicable.<sup>108</sup> Because they are considered "persons" under the Act, all entities other than corporations and unions are subject to the same restrictions as a single individual.<sup>109</sup> Consequently, these groups are effectively pre-

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107. See 2 U.S.C. § 441b(a) (1976) (expressly identifying corporations and labor organizations). See generally Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U. CHI. L. REV. 148, 163-65 (1974).

108. Comment, *supra* note 107.

109. *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981). In this case, a not-for-profit unincorporated association of doctors, the California Medical Association (CMA), formed a political action committee entitled CALPAC. *Id.* at 185. However, because the term "person" under FECA includes unincorporated associations, § 441a(a)(1)(C) restricts CMA's total contribution to CALPAC to \$5000. *Id.* at 185 & n.2. CMA argued that this restriction was unconstitutional in light of the great leeway that corporations and unions enjoy to support their separate segregated funds. Yet unincorporated associations are not permitted to make similar "support" payments. *Id.* at 200-01. The Court rejected this equal protection argument, stating that no discrimination exists because corporations and labor organizations are subject to many more restrictions than are individuals or unincorporated associations. Such restrictions include a total ban on direct contributions and the limiting of solicitation of contributions to the authorized class. *Id.* at 201.

The Court failed to consider that an unincorporated association such as CMA, consisting of 25,000 doctors is more analogous to a corporation or union which are also collectivities of persons, than it is to a single individual. *Id.* at 201. The discrepancy is rooted in the Court's belief that the restrictions on corporations and labor organizations are necessarily more burdensome than those imposed on individuals and other groups. *Id.* at 200. This conception is superficial, however, in light of the fact that a PAC is subject to the control of management only, is supported by the corporation or union, and is unlimited in the aggregate amount of contributions that it may make in a calendar year. See notes 38-62 & 74-75 *supra* and accompanying text. An unincorporated association is limited to \$5000 aggregate donation to any one multicandidate political committee. 2 U.S.C. § 441a(a)(1)(C) (1976). This effectively restrains this unincorporated association's PAC from soliciting outside its class of members and limits the amount each member could contribute to a pittance. (Here, \$5000 contribution divided by 25,000 members would make twenty cents the maximum contribution per member). See note 14 *supra* and accompanying text.

cluded from participating in the political process and the people affiliated with them are unfairly denied the right to join together under the guidance of the sponsoring organization to support mutual interests and ideals. Hence, the present statutory biases work a grave injustice to our citizens and erode the base of our democratic system.

### C. Recommendations: Altering the PAC System

PACs have grown at a remarkable rate since 1974, and the degree of their influence is unprecedented.<sup>110</sup> As a result, pleas to increase restrictions on PAC contributions<sup>111</sup> seem unlikely to be heard.<sup>112</sup> A better proposal would be to allow all organizations, not only corporations and labor organizations, to create PACs. Moreover, restrictions limiting solicitation of contributions to the PAC to persons within the authorized class should be eliminated entirely.<sup>113</sup>

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110. Kenski, *supra* note 3, at 628. For detailed statistics and discussion of the explosive growth of PACs, see Adamany, *supra* note 3, at 588-89; Alexander, *supra* note 77, at 654-58; Epstein, *The PAC Phenomenon: An Overview*, 22 ARIZ. L. REV. 355, 355-58, 362-64 (1980); Wertheimer, *supra* note 2, at 605-07; Wright, *supra* note 2, at 614-15.

111. Adamany, *supra* note 3, at 597-602 (calling for, *inter alia*, reduced limits on individual and aggregate PAC contributions); Mayton, *supra* note 30, at 386 (calling for the elimination of salaried employees from corporate solicitation); Wright, *supra* note 2, at 643-44 (calling for ceilings on aggregate PAC contributions).

112. This appears particularly true in light of the recent defeat of the Obey-Railsback bill, which was adopted by the House of Representatives, S. 832, 96th Cong., 1st Sess., 125 CONG. REC. H9261-9305 (1979) (text at H9289-90), but was defeated in the Senate.

The Obey-Railsback bill imposed a ceiling on total contributions of all PACs to a single candidate as well as ceiling amounts that a single PAC could contribute to a single candidate in primary run-off and general elections. See Adamany, *supra* note 3, at 598-99.

113. This Note argues for virtually no restrictions or very limited restrictions on individual campaign spending. In addition, it advocates the promotion of more effective and beneficial "collection cups," see note 127 *infra*, by allowing for the creation of more PACs that may focus their attention on a broader range of persons; again, this means the lifting of restrictions. This Note does not, however, dispute the fact that Congress has the right to regulate elections. See *FEC v. National Right to Work Comm.*, 103 S. Ct. 552, 559 (1982); *Buckley v. Valeo*, 424 U.S. 1, 13 (1976); *Wesberry v. Sanders*, 376 U.S. 1, 29-30 (1964) (Harlan, J., dissenting); *United States v. Classic*, 313 U.S. 299 (1941) (congressional authority to regulate primaries); *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (sovereign power of Congress to regulate presidential elections); *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (Congress has the "authority to provide a complete code for congressional elections"); *Ex parte Yarbrough*, 110 U.S. 651, 657-61 (1884) (the power of Congress to regulate elections need not be expressly granted in the Constitution); *Ex parte Siebold*, 100 U.S. 371, 383 (1879) (Congress' power over election laws is paramount to state regulations); *United States v. Boyle*, 482 F.2d 755, 763 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973); *United States v. United States Brewers' Ass'n*, 239 F. 163, 167 (W.D. Pa. 1916).

These changes will have significant benefits for the citizen in the political process. Whereas Congress tried and failed to broaden the base of individual supporters through the provisions restricting the total amount of an individual's contribution,<sup>114</sup> these proposals would go a long way toward realizing this goal.

Allowing all types of organizations to create political action committees would force all PACs and their sponsoring organizations to compete actively for the support of every individual contributor. In this competitive environment, each PAC would be forced to disclose fully the reasons underlying its decision to contribute to certain causes, candidates and committees.<sup>115</sup> Just as the candidate or the party must convince the voting public of the legitimacy and strength of his or its views, so PACs would have to convince contributors to support their undertakings. The quality of information concerning political activities, persons and groups supported by a PAC would be improved, and PAC tendencies to contribute automatically to incumbents would be weakened, if not eliminated.<sup>116</sup> The increased existence and variety of PACs would afford the individual a greater choice, thereby making his ultimate contribution more meaningful and voluntary.<sup>117</sup> Moreover, arbitrary distinctions between organizations imbedded in the present statutory scheme would be removed.<sup>118</sup>

The abolition of restrictions confining solicitation of contributions to members within the authorized class would also serve to enhance competition among PACs, and to promote involvement in the political system by a greater number of individuals. Increased solicitation by PACs would result in a greater access to information concerning political matters by a broader base of individuals within the community.<sup>119</sup> Since all people would then be entitled to question PACs and their viewpoints, more responsibility would be placed on controlling officials to account for PAC actions;<sup>120</sup> with this increased disclosure, the appearance of corruption surrounding PAC activities would be removed.<sup>121</sup> The present mystique concerning PAC activities, which

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114. See note 30 *supra* and accompanying text.

115. See note 82 *supra* and accompanying text.

116. See note 81 *supra* and accompanying text.

117. See notes 82-83 *supra* and accompanying text.

118. See notes 107-09 *supra* and accompanying text.

119. See, e.g., H. ALEXANDER & J. MALLOY, *supra* note 3, at 11-12.

120. See note 75 *supra* and accompanying text.

121. See *supra* note 80 and accompanying text; Wertheimer, *supra* note 2, at 623-25.

not only persons outside but inside the authorized class may sense,<sup>122</sup>

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122. For an illustration of how officials are unwilling to pierce the veil concerning PAC activities even when the request is made by those who are within the authorized class of contributors note the following:

'WHEREAS Standard Oil Company of California ("the Corporation") has established a political action committee (PAC) to facilitate political contributions from employees as permitted by law;

WHEREAS the Corporation bears PAC operation costs and its name and goodwill are associated with its PAC activities;

WHEREAS some stockholders may regard some PAC activities as not in the Corporation's best interest and should be informed of the Corporation's political activities;

THEREFORE BE IT RESOLVED THAT the stockholders respectfully request the Board of Directors to adopt the following policy:

The Corporation shall disclose in its Annual Report information about any PAC as follows:

- name(s) of Corporation and subsidiary (as described in 11 CFR par. 100.5(g)(2)(i)(A)) PAC(s);
- PAC officers and persons who select PAC fund recipients, their corporate jobs and how the persons were selected;
- criteria for recipient selection and amount donated;
- aggregate amounts donated by the Corporation and its subsidiaries for the current year;
- procedures instituted for compliance with the law including ensuring voluntary contributions by the individuals solicited;
- total PAC costs for the immediately preceding fiscal year;

A statement in the Annual Report shall inform stockholders that they may request from the Corporation copies of PAC reports filed with the Federal Election Commission, texts of PAC solicitation presentations, brief explanations why each donation was in the Corporation's best interest, and any information listed above relating to PAC(s) of subsidiaries.

My supporting statement is that the Corporation's stockholders are also voters and citizens who need the information to make intelligent judgments whether an excessive amount of corporate funds is spent on PAC costs, the extent to which the Corporation should be involved in financing elections, and whether adequate steps have been taken to ensure against potential coercion in solicitation, which would be illegal. The Corporation must guard against distraction of management and employees from performing their work through politicization.'

*Recommendation of the Board against the proposal.*

The Standard Oil Company of California/Chevron Political Action Committee has been established pursuant to Federal laws authorizing PAC's. Neither the Company nor any of its subsidiaries make contributions to the Socal/Chevron PAC. As permitted by law the Company pays for the printing, mailing and administration expenses of the Socal/Chevron PAC. Contributions to the Socal/Chevron PAC are entirely voluntary. Contributions up to \$200 per year are confidential unless the contributor specifies the candidate for political office to whom his contributions is to be directed, in which case the contributor must be identified in a report filed with the Federal Election Commission. The only persons solicited for contributions by the PAC are employee stockholders and annuitant stockholders.

would be dissipated. Furthermore, the judicial review provisions allowing all individuals to lodge complaints with the FEC<sup>123</sup> and bring a constitutional challenge as a voter<sup>124</sup> would be more appropriate if all individuals qualify as contributors to all PACs. The difficulties encountered by the courts in attempting to interpret FECA's vague definitions regarding those within the authorized class<sup>125</sup> also would be ameliorated.

Most importantly, allowing for the creation of PACs by all organizations and the elimination of restrictions on solicitation of only authorized persons would undoubtedly increase the amount of money flowing from PACs into the political process.<sup>126</sup> This increased availability of money and consciousness would equalize the chances of all candidates, whether they be poor or wealthy, newcomer or incumbent.<sup>127</sup>

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Non-directed contributions to the PAC are distributed to candidates for political office as determined by the Committee of six employees who administer the PAC. The Committee files periodic reports with the Federal Election Commission as required by law.

The cost to the Company to compile and disseminate the information required by the proposal would far exceed the PAC expenses paid by the Company and, in the opinion of your Directors, would serve no useful purpose.

Your Directors recommend that stockholders vote AGAINST the proposal.

*Excerpted from STANDARD OIL CO. OF CALIFORNIA, NOTICE OF ANNUAL MEETING OF STOCKHOLDERS, MAY 3, 1983, AND PROXY STATEMENT.*

123. 2 U.S.C. § 437g(a)(8)(C) (Supp. V 1981).

124. *Id.* § 437h(a).

125. See *FEC v. National Right to Work Comm.*, 103 S. Ct. 552 (1982) (determining the scope of "members" within the authorized class). Some difficulty also exists in determining who are to be considered stockholders under the Act. For example, no court has decided whether participants in employee stock ownership plans (ESOP's) are stockholders for FECA purposes. Vandegrift, *The Corporate Political Action Committee*, 55 N.Y.U. L. REV. 422, 450-52 (1980).

126. This Note proceeds on the assumption that more, not less, money is needed to provide access to candidates, parties and issues, and to ensure an informed electorate.

The essence of the problem is summed up in the thought that American politics has failed to provide the motivation to find or develop effective collection cups for sufficient numbers of conscientious citizens who perhaps might learn to donate money to politics if properly approached. The importance of small contributions in a democracy warrants the time, effort, energy and investment to round them up in large numbers.

H. ALEXANDER & J. MOLLOY, *supra* note 3, at 16. Presently, PACs have increased the amount of money available for politics. Adamany, *supra* note 3, at 589. The allowance for more PACs, however, will provide even more "collection cups" and thus, more money.

127. See note 2 *supra* and accompanying text. Benjamin Franklin once wrote, "the *all* of one man is as dear to him as the *all* of another . . . the poor man has an *equal* right but the *more* need to have representatives in the legislature than the rich one." Goldberg, *Equality and Governmental Action*, 39 N.Y.U. L. REV. 205, 206

#### IV. Conclusion

The importance of the electoral process has traditionally been viewed by Congress as creating the need for heavy regulation to insure its strength and vitality. However, when practical application of FECA campaign contribution restrictions results in subordinating the rights of the individual to the rights of numerous special interest collectivities, clearly the Congress should reconsider its methods.

PAC power and influence has emerged recently as a significant factor in the American political system at the expense of individuals, candidates and political parties. Undeniably, PACs do serve a justifiable purpose as a source of funds sorely needed to allow candidates to reach the greatest number of prospective voters. Also, at least theoretically, PACs are created to solicit small contributions from individual citizens, thus promoting individual participation and access to the political system. Yet, these positive characteristics of PACs, although recognized, remain largely untapped. Congress should realize the potential which PACs offer as instruments for attaining a more well-informed electorate and a political system responsive to the needs and ideas of the individual citizen. The current arbitrary restrictions on the creation of PACs and the solicitation of individuals should be abandoned in order to foster the proliferation of PACs and channel PAC energies and funds toward a greater number of people. Additionally, individuals and groups other than corporations or labor organizations must be given at least an equal status to that of PACs to alleviate the tension between the competing interests. Finally, restrictions on individual rights to contribute should be abolished or at a minimum curtailed absent a more compelling government interest in denying these rights.

*Susan H. Marren*

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(1964). James Madison expressed the similar view of political equality for all individuals in *THE FEDERALIST* NO. 57:

Who are to be the electors of the Federal Representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of people of the United States . . . .

Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.

*Id.* (quoted in Wright, *supra* note 2, at 626).



