Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities

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INTRODUCTION

The campaign finance system presents many complex legal issues that make it an unusually difficult area for constitutional and policy analysis. Because of Congress' high degree of self-interest in regulating federal campaigns, the area may be one where Congress can be trusted least. Regulation of federal campaigns, however, is also an area where Congress, as a group of successful, practical politicians, skilled in the operations of the political marketplace, is arguably the most expert. Concurrently, the election process constitutes an area where the judiciary, by constitutional design, may be the most removed from practical political reality. Because of the importance of the campaign system to many essential constitutional freedoms, any inhibition of political debate must face intense constitutional scrutiny. Nevertheless, our political system, as a democracy, must respond to trends in the political marketplace that diverge from the notions of equality and equal access inherent in our majoritarian representational ideal.

Within this complex framework, Congress and the courts have struggled in recent years with how best to deal with the issue of money in politics. To date, this process of governmental thrust and judicial parry has not proved especially successful because congressional efforts to limit the influence of money in politics often have fallen victim to the Supreme Court's powers of judicial review and the creativity of the participants in the political marketplace. As a result, few of Congress' goals have been achieved. The problem, however, is not a new one: throughout this century, campaign financing regulations largely have failed to achieve desired policy goals and, for the most part, have been easily avoided and widely ignored by both the courts and federal candidates.

The most notable recent attempt to regulate American campaign financing, the Federal Election Campaign Act Amendments of 1974...
("FECA" or "the 1974 Act"), represented a comprehensive regulatory scheme designed to remedy the flaws in the campaign process highlighted by Watergate. Unlike previous statutes, which were drafted so poorly that they failed to place significant restraints on political spending, FECA was eviscerated by the Supreme Court in *Buckley v. Valeo*, demonstrating that good intentions and a receptive public mood do not always justify a significant imposition on first amendment freedoms.

The *Buckley* Court's response to FECA indicates some of the problems confronting policy planners in this area. Congress' primary goal in passing FECA was to minimize, as much as possible, the corrupting influence of money in politics. This concern took the form of mandatory disclosure of campaign financial activity, restrictions designed to reduce campaign spending, and stringent limits on what candidates could spend and receive to equalize the spending among candidates.

The Court in *Buckley* focused on different concerns. Despite the strong public sentiment favoring a massive overhaul of the nation's campaign financing process, the Court, perhaps without fully considering the impact of its decision on the integrated scheme designed by Congress, rejected many of the limitations built into FECA by Congress but allowed the overall structure to stand. In the process, the Court focused on the first amendment freedoms relevant to political campaigns, demonstrating little deference to congressional judgment. For example, it largely ignored congressional concerns regarding massive disparities in campaign spending.

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5. See infra text accompanying notes 89-99.
7. See Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 Sup. Ct. Rev. 1, 42 (1976) ("[T]here is an irreducible core of individual liberty of free expression which cannot be made to yield to the emergencies that sometimes overtake the democratic process.").
13. See Buckley v. Valeo, 424 U.S. 1, 58-59 (1976) (per curiam). Aside from a brief discussion relating to the public financing provisions, the Court did not address the issue of whether its action in striking down several sections of the FECA meant that the whole statute should be declared unconstitutional. See 424 U.S. at 254-55 (Burger, C.J., dissenting in part and concurring in part).
15. See id. at 17 (Court rejected parts of statute where "interests served . . . include
As a result of the Court’s actions in *Buckley* and subsequent cases, the area of campaign financing, despite the existence of an extensive regulatory scheme, represents a region where few, if any, of the goals Congress sought to achieve in the 1974 Act have been met. The expense of running a campaign continues to rise dramatically, public perceptions of the political process continue to decline, and candidates continue to rely on contributions from special interest groups.

As *Buckley* illustrates, the Supreme Court has played an important role in limiting Congress’ flexibility to redesign the campaign finance system, often using the first amendment as a shield to deflect congressional action that infringes upon protected political activity. In a series of cases that wins no prize for either logic or foresight, the Court has analyzed various parts of FECA on an ad hoc basis and struck down several portions of the statute on constitutional grounds without thoroughly considering the impact of its actions on the financing structure set up by Congress. In these cases, the Court struggled with a number of political issues—most notably, whether it should allow political reality to enter its discussion of constitutional theory. Nevertheless, the Court has failed to achieve a consistent jurisprudence on campaign financing regulation. Some campaign spending limitations still apply to individuals and political organizations, while other limiting sections of FECA have been struck down by the Supreme Court as unconstitutional. Although the Court may have reached the correct result in many of the campaign finance cases, it may have done so for entirely the wrong reasons.

In light of the confused Supreme Court jurisprudence, Congress has open to it a limited number of approaches to effectuate the policy goals underlying FECA. One of the purposes Congress had in enacting FECA—that of lowering the amount of money spent on political campaigns—clearly has been rejected by the Supreme Court as an illegitimate

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17. See infra note 150.
19. See infra note 150 and accompanying text.
21. See infra text accompanying notes 205-10.
23. See infra text accompanying note 126.
24. See infra text accompanying note 128.
25. See BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 Calif. L. Rev. 1045, 1045 (1985) ("Those who would continue to try to reform the system by legislation confront not merely an unsympathetic political climate but also a frustrating legal reality: the power of legislatures to purify campaign finance practices is severely limited by the Supreme Court’s interpretation of the Constitution.").
goal of campaign finance regulation. Another goal—that of equalizing spending among federal candidates—was rejected by the Court in the form embodied in FECA. Nevertheless, this second goal remains an important and legitimate policy aspiration that can still be achieved if future legislation reflects an appreciation of the Supreme Court's first amendment concerns. At present, Congress, with the Court's apparent blessing, continues to debate measures to limit the corrupting influence of money in federal campaigns. This reform effort, however, has not yet borne fruit.

The goals of minimizing the threat of corruption, developing an open political system under which candidates possess roughly equal resources, and disclosing campaign activity to the voting public clearly represent legitimate and desirable steps toward perfecting the operation of the campaign machinery, but only if these policy goals can be reached within the constitutional framework developed by the Supreme Court. Our policymakers should focus on how to use the tools of the campaign system to build a regulatory scheme that best reflects political reality and an adequate respect for first amendment principles, yet still demonstrates concern with the impact of unequal campaign resources on the operation of our democracy.

27. See id. at 107-08.
28. See id. at 107-08.
29. In the past few years, numerous proposals to limit the role of political action committees ("PACs") in the campaign finance system have received legislative attention, but none have been enacted into law. In the last session of Congress, the Senate debated two such proposals, demonstrating the degree of congressional concern with the role of PACs in the political process. Unfortunately, the debate also demonstrated the partisan posturing that threatens to thwart conscientious efforts at campaign finance reform.

The Senate passed an amendment to an unrelated bill, sponsored by Senators David Boren and Barry Goldwater, 132 Cong. Rec. S11,291 (daily ed. Aug. 12, 1986), that would have limited the amounts that congressional candidates could receive from PACs. See id. at S11,311. Because this bill was seen widely as being aimed at Republican candidates who as a group had shown a tendency to attract large sums in PAC contributions, Senator Boschwitz sponsored another amendment which would have banned PAC contributions to the national party committees. See id. at S11,318. The Boschwitz amendment would have greater impact on Democrats because the Democratic Party receives more of its national party fund from PACs than do the Republicans. See id. This amendment also passed, id. at S11,350, but the bill itself went no further. Since then, Senator Boren has reintroduced his bill in the 100th Congress, and Senate Majority Leader Robert Byrd has indicated that campaign finance reform is a priority item on his legislative agenda. See Gettenger, Reagan's Sway Over Congress Slipping Away, 44 Cong. Q. 3109, 3113 (1986). Most recently, the Senate refused action on S.2, a bill designed to limit campaign spending and the role of political action committees. This bill would have set voluntary spending limits in Senate contests for those candidates who choose to accept public funds and would restrict the aggregate amounts candidates could accept from PACs. See 45 Cong. Q. 1332 (1987). Numerous attempts were made to stop a Republican filibuster on this bill, see 45 Cong. Q. 2194 (1987), and finally further consideration of the bill was put aside. See 45 Cong. Q. 2252 (1987).
Historically, congressional attempts to regulate campaigns have failed miserably.\textsuperscript{30} For several reasons, including congressional inability to put aside its own political self-interest, the regulations simply have not accomplished their purposes. In fact, with the broad range of statutory prohibitions masking the almost complete lack of actual control over the campaign process, Congress, to some extent, has created the false appearance of regulation.

This history provides some indication of the proper approach Congress should take in drafting campaign finance regulations today. Clearly, in light of the concerns regarding corruption in politics, some regulation of the political campaign process is desirable and allowable. Given the first amendment's general antagonism towards regulation of the political marketplace and the concern with Congress regulating its own means of being elected,\textsuperscript{31} the best campaign finance regulation approach is to limit constraints to broad-sweeping requirements that serve the general interest of informing voters, allowing full public debate on political issues, and minimizing the risks of corruption. An ideal system would give legitimate candidates a means of presenting their case to the voters, while remaining relatively free from further congressional regulation.

The political parties offer the means through which these goals can be achieved. Striking down the limitations on the ability of political parties to support their candidates financially, as mandated by the Supreme Court's jurisprudence, will reaffirm constitutional principles while assisting the campaign finance structure in meeting the goals of Congress in regulating this area. The parties offer a way of ensuring equality in campaign spending while minimizing the extent of regulation.

This Article contends that under the Supreme Court's campaign finance jurisprudence, the restrictions on party spending in federal campaigns violate the first amendment by limiting the political expression of the political parties. In addition, it argues that the structure of the campaign finance system and the policies embodied in FECA can be served best by congressional action abolishing or diminishing these restrictions. Such legislative action would expand the ability of political parties to spend in support of their federal candidates and minimize congressional interference with the political marketplace of ideas.

Part I of this Article traces the development of the federal campaign finance law from early congressional regulations to the present system. Part II addresses the Supreme Court's role in the development of the current campaign scheme, focusing on how the Court's activities since passage of the 1974 Act have affected the operations of the political system. The Court has interpreted several fundamental policy and constitutional issues inconsistently, yielding jurisprudence full of contradictions.

\textsuperscript{30} See infra text accompanying notes 44-76.

\textsuperscript{31} See BeVier, \textit{Hands Off the Political Process}, 10 Harv. J.L. & Pub. Pol'y 11, 11 (1987) ("The First Amendment seems to tell legislators who are thinking about yet other worlds to conquer to keep their hands off the political process.").
and confusion. Despite the inconsistencies, a general view of the Court's policies on campaign finance does emerge. Part III assesses the party role in federal campaigns, briefly from a historical perspective, and then through the party role in recent years. It is the historical and practical role of the parties that allows the parties to sponsor candidates without the threat of corruption posed by other political groups active in elections. Building on the jurisprudence discussion of Part II, Part IV addresses the constitutional and policy arguments for lifting the limitations on political party spending on behalf of candidates. This Part assesses the constitutional arguments in light of Supreme Court jurisprudence and discusses the role that the parties can play in fulfilling the goals of Congress in creating a comprehensive campaign finance system.

I. HISTORY OF THE CAMPAIGN FINANCE SYSTEM

A. Case Study in Congressional Confusion

Despite the importance of political speech to the operation of our constitutional democracy and the protection provided such speech by the first amendment, Congress has been involved in the regulation of political campaigns since the turn of this century. The rationale for this

32. See Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (per curiam) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential..."); see also First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978) (political speech "indispensable to decisionmaking in a democracy").

33. Fairly general agreement exists that a primary purpose of the first amendment is to protect political speech. As the Court in Thornhill v. Alabama, 310 U.S. 88 (1940), stated:

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Id. at 101-02 (footnote omitted).

Similarly, the Court, in Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971), stated: "it can hardly be doubted that the [first amendment] guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." This speech is important because "speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). See also Elrod v. Burns, 427 U.S. 347, 356 (1976) ("political belief and association constitute the core of those activities protected by the First Amendment"); Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."); see generally BeVier, The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle, 30 Stan. L. Rev. 299 (1978).

34. See infra notes 44-84 and accompanying text; see also Smiley v. Holm, 285 U.S. 355, 366 (1932) (Congress constitutionally empowered "to enact the numerous requirements as to procedure and safeguards relating to elections which experience shows are necessary in order to enforce the fundamental right involved"); Ex parte Yarbrough, 110 U.S. 651, 658 (1884) (republican government "must have the power to protect the elections on which its existence depends from violence and corruption"). See generally Fleishman, Freedom of Speech and Equality of Political Opportunity: The Constitutional-
regulation is clear: because of the importance of campaigns and political dialogue, Congress may take certain steps to insure that elections meet some predetermined standard that best facilitates the operation of democracy.\textsuperscript{35}

Given the "crucial role [of political speech and association] in enabling self-government to work,"\textsuperscript{36} an inherent tension exists between allowing the political process to proceed without interference from Congress and allowing Congress to act to improve the workings of the political process. The area of campaign finance is unique because, in the campaign context, "both the first amendment and the law with which it is in potential conflict are designed to accomplish the same broad purpose, namely to advance the interests of democratic self-government."\textsuperscript{37} Congressional action to "advance" the first amendment in this area poses considerable risk as the "ins have a way of wanting to make sure the outs stay out."\textsuperscript{38} Given these concerns, a minimum of regulation is preferable, as "[t]he greatest campaign reform law ever enacted was the First Amendment . . . ."\textsuperscript{39}

Historically, Congress intended to develop stringent regulation of campaigns. Until the early 1970s, however, the political process continued to run freely, as congressional efforts to regulate the operations of the federal campaign system did not prove effective.\textsuperscript{40} Congress had implemented a wide range of statutes regulating campaign finance, but these statutes were designed and enforced in such a way that, in effect, the process was largely free from regulation, with the statutes serving primarily as an unused safety valve.\textsuperscript{41} The ineffectiveness of these laws led
to doubts about Congress' capacity to regulate campaigns effectively and to concerns about the sincerity of incumbent politicians in regulating their political livelihood.

From Congress' first efforts to regulate the financing of federal campaigns, a pattern emerged that would repeat itself in all subsequent efforts to reform the financing of the nation's campaigns. Congress' first step in the construction of a federal campaign finance system was the Tillman Act of 1907, prohibiting corporate contributions to federal campaigns. The Tillman Act was a part of Theodore Roosevelt's progressive program to minimize the influence of large corporate contributors in campaigns—a concern that has persisted to this day. This Act

42. See BeVier, supra note 25, at 1078 ("The historical ineptitude of legislatures attempting electoral reform suggests that deference to legislative 'expertise' is unwarranted.").

43. According to Professor BeVier's article on the first amendment and campaign finance reform, even if the first amendment theoretically permits or even requires Congress to regulate free political expression in the name of competing goals such as equality, there is little evidence to suggest that Congress can be trusted to "do it better," and therefore that the Court should defer to Congress' judgment. To the contrary, there is reason to believe that Congress is systematically untrustworthy and a proven incompetent at genuinely reforming the political process. BeVier, supra note 25, at 1080.

44. Ch. 420, 34 Stat. 864 (1907).

45. See id. The Act, still on the books, has faced strong challenge in recent years. See Federal Election Comm'n v. Massachusetts Citizens for Life, 107 S. Ct. 616, 626-27 (1986); see also infra notes 170-73. While not formally addressing the constitutionality of this statute, the Court has hinted at the outcome of such a challenge. See First Nat'l Bank v. Belotti, 435 U.S. 765, 821 (1978) (White, J., dissenting) ("If the corporate identity of the speaker makes no difference, all the Court has done is to reserve the formal interment of the Corrupt Practices Act and similar state statutes for another day."). In United States v. Congress of Indus. Orgs., 335 U.S. 106 (1948), the Court avoided deciding the constitutionality of the restrictions on corporate and union giving by deciding that the indictment at issue did not charge acts within the scope of the Corrupt Practices Act. The Court's opinion was a narrow one, explicitly limited to the facts of that case. See id. at 123-24. Four members of the Court, Justices Rutledge, Black, Douglas, and Murphy, argued that the section, as applied, was unconstitutional. See id. at 129-30 (Rutledge, J., concurring). The constitutional question has survived until today. See Bolton, supra note 39, at 373 ("Few constitutional issues have been so extensively debated without a resolution by the Supreme Court as the validity of federal restrictions on corporate and union political activity.").

46. Corporate spending in federal campaigns "raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." Federal Election Comm'n v. Massachusetts Citizens for Life, 107 S. Ct. 616, 628 (1986). According to the Court, the Tillman Act ban on contributions is "meant to ensure that competition among actors in the political arena is truly competition among ideas." Id. While "the special characteristics of the corporate structure require particularly careful regulation," Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 209-10 (1982), the Court rejected the application of this statute to Massachusetts Citizens for Life, a nonstock, nonprofit corporation founded to protect Pro-Life principles, because "[t]he resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace." Massachusetts Citizens for Life, 107 S. Ct. at 628.

For a historical discussion of the passage of the Tillman Act, see generally E. Sikes,
did not meet its goal, however, as it "hardly dented corporate influence on federal elections."\(^{47}\) This cycle, of lofty goals of minimizing the influence of money in campaigns combined with statutes ineffective in implementing these goals, repeats itself throughout the history of campaign finance regulation.\(^{48}\)

The next development in campaign finance regulation was the passage of the first law requiring disclosure of spending and contributions in federal elections. Following the presidential election in 1904, the National Publicity Law Association was founded to urge passage of an election disclosure law,\(^{49}\) which Congress eventually passed in 1910.\(^{50}\) Again, though the goals behind these provisions were admirable,\(^{51}\) the legisla-


51. A number of scholars have argued that an effective disclosure law represents the best method of regulating campaigns, both in terms of the effectiveness of campaign laws and the benefit to the public. See, e.g., J. Pollock, *Party Campaign Funds* 262-63 (1926); Bicks & Friedman, supra note 47, at 999-1000. For the most part, campaign disclosure laws have avoided successful constitutional challenges. In *Buckley v. Valeo*, 424 U.S. 1 (1976), for example, the Supreme Court rejected most of the allegations in this area. See id. at 84 & n.113.

The primary concern with disclosure laws is that they might prevent the candidates of minor parties from raising funds. See id. at 71 (minor parties argued that disclosure requirements would have a chilling effect on the number of contributions made because supporters would be fearful of public exposure); see also Redish, supra note 37, at 924-25 (arguing that "disclosure requirements present a serious conflict with the... first amendment right of anonymity"). In *Burroughs v. United States*, 290 U.S. 534, 548 (1934), the Court, in dictum, seemed to reject the challenges to disclosure laws. Since *Burroughs*, however, the Court has expanded the associational rights guaranteed by the first amendment in the context of challenges to other types of disclosure laws. See *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960) (holding an Arkansas statute compelling a teacher to file an affidavit listing every organization he belonged or contributed to within the past five years unconstitutional because it impaired the teacher's right of free association); *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (holding the Alabama court could not compel the NAACP to reveal names and addresses of Alabama members and agents because members' right to pursue their lawful private interests is protected by the fourteenth amend-
tion lacked significant effect.\(^5\)

In 1925 Congress passed the Federal Corrupt Practices Act of 1925 ("FCPA"),\(^53\) which was intended to serve as a comprehensive regulation of the financing of federal campaigns.\(^54\) This Act, with some additions,\(^55\) remained the primary campaign finance law until its repeal in 1971.\(^56\)

The Federal Corrupt Practices Act was so "riddled with loopholes,"\(^57\) however, that the exceptions "pull[ed] the teeth" of the limitations.\(^58\) The problems with the FCPA were numerous. It set "impossibly low limits on campaign expenditures . . . , then allowed them to be ignored through the fiction that candidates were officially ignorant of, and thus not legally responsible for, most of the money spent in their campaigns."\(^59\) In addition, the Hatch Act,\(^60\) part of the comprehensive federal campaign finance scheme, simultaneously allowed a series of gifts to

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52. See infra text accompanying notes 57-71.


54. For the most part, the FCPA reenacted and codified existing campaign law. A major addition consisted of broadening the prohibition on corporate contributions from "money" to "anything of value." See Fleishman, supra note 34, at 403.

55. The primary changes involved the extension of the ban on corporate contributions to labor unions, see Hatch Political Activities Act, ch. 410, 53 Stat. 1147 (1939) (codified at scattered sections of 5 & 18 U.S.C.) and the 1940 amendments to the Hatch Act, ch. 640, 54 Stat. 767 (1940), which primarily prohibit active political participation in federal campaigns by federal employees. In United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), the Court upheld the Hatch Act provisions, stating that "plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited." Id. at 567.

The Hatch Act also limits the amount of contributions to a single committee, see Hatch Act, ch. 640, § 6, 54 Stat. 767, 772 (1940) (current version at 2 U.S.C. § 441a(a) (1976)), and limited the amount that could be spent by either an interstate political committee or one that is a branch of a national committee. See Act of June 25, 1948, ch. 645, 62 Stat. 723 (1948), repealed by Campaign Communications Act, Pub. L. No. 92-225, § 204, 86 Stat. 3, 10 (1972). These provisions fell victim to the same loopholes that confronted the prior attempts to limit spending and contributions. See infra notes 57-71.


58. Bicks & Friedman, supra note 47, at 988. See also G. Thayer, supra note 57, at 62-63 ("In keeping with the temper of the times, the [Corrupt Practices Act] was more show than substance. . . . ").

59. See G. Jacobson, Money in Congressional Elections 164-65 (1980); see also Redish, supra note 37, at 905 ("Though these laws appear to place stringent limitations upon campaign finance, congressional committees and commentators are in general agreement that the laws have been wholly ineffective in accomplishing their stated purpose.").
different committees organized for the benefit of the same candidate, and placed no limits on the number of committees or contributions. The FCPA did not apply to political committees supporting federal candidates in only one state. In addition, because of the Supreme Court's ruling in Newberry v. United States, the disclosure provisions of the FCPA did not apply to primary elections or state nominating conventions.

As a result, the FCPA "was neither enforced nor enforceable." The loophole permitting creation of multiple committees and other flaws of the reporting system rendered the remaining disclosure provisions "practically useless." Enforcement of the statute was "farcical," as, despite flagrant violations, no prosecutions were ever brought under the FCPA.

The overall result of the FCPA's regulatory system was that its "limitations [did] not limit and [its] prohibitions [did] not prohibit." Despite the fact that the FCPA "was an almost total failure at achieving its stated purpose," the system continued basically unchanged until the Federal Election Campaign Act was enacted in 1971.

63. 256 U.S. 232 (1921).
64. In Newberry, because the Court could not conclude "that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections," id. at 258, it overturned the convictions for exceeding the spending limits imposed on primary elections. See id. Because Newberry "was widely construed to have invalidated all federal corrupt practices legislation relating to nominations," United States v. Congress of Indus. Orgs., 335 U.S. 106, 114 (1948), the 1925 Corrupt Practices Act did not apply to primary elections or party nominating conventions. Newberry was overruled, sub silentio, in United States v. Classic, 313 U.S. 299, 317-20 (1941).
65. G. Jacobson, supra note 59, at 164.
66. See L. Overacker, supra note 49, at 35-36; Note, supra note 61, at 1264-66. When candidates created multiple committees to avoid the contribution and spending limits, the resulting proliferation of committee names affiliated with a single candidate made it virtually impossible for the disclosure provisions to operate effectively. See Adamany & Agree, supra note 2, at 86-88 (discussing the inadequate operation of reporting requirements and the lack of monitoring).
68. See Bicks & Friedman, supra note 47, at 991.
69. See H. Penniman and R. Winter, Campaign Finances: Two Views of the Political and Constitutional Implications 6 (1971). Senate campaigns in 1970 spent as much as eighty times the amount specified in the FCPA. See id. at 8. Similarly, all presidential candidates after 1940 exceeded their limits. See id. at 23. Accordingly, setting limits in this area proved "quite futile." J. Pollock, supra note 51, at 142.
71. BeVier, supra note 25, at 1079.
During the late 1960s and early 1970s, commentators and politicians devoted extensive attention to the problem of money in politics, focusing on the ineffectiveness of existing law. Much of the discussion centered on the massive loopholes in the FCPA. The parties to the debate expressed widespread distrust of the existing law and an almost universal recognition that "the existing law amount[ed] to little more than no law at all." Congress was involved in much of this debate, although no significant changes occurred during the 1960s.

Finally, after extensive debate, Congress passed the Federal Election Campaign Act of 1971 (the "1971 Act"), which replaced the Federal Corrupt Practices Act as the governing body of federal law regulating the campaign process. The 1971 Act imposed a number of significant restrictions on federal campaign spending, including requirements for low-cost political advertising, ceilings on media expenditures by candidates, limitations on a candidate's personal expenditures, a strengthening of the prohibitions on corporate and labor union contributions, a repeal of existing contribution and expenditure limits, and mandatory disclosure of campaign contributions.

73. See H. Alexander, supra note 40, at 201-29; Fleishman, supra note 34, at 389-91.
74. See Lobel, Federal Control of Campaign Contributions, 51 Minn. L. Rev. 1, 22-33 (1967).
75. Robinson, Revision of Federal Law on Campaign Finances, 30 Geo. Wash. L. Rev. 328, 328 (1961). "Perhaps no major national law with so many loopholes and so little enforcement has survived as long as have the election finance statutes. Evasion in spirit, if not in letter, has long been the rule. Apparent violators have seldom been bothered with legal proceedings." Id. at 337.
76. See Robinson, supra note 75, at 347-57 (discussing congressional proposals during this period).
80. Id. § 104, 86 Stat. at 5.
83. Id. § 207, § 405, 86 Stat. at 11, 20.
84. Id. § 302-04, 86 Stat. at 12-15; see H. Alexander, supra note 40, at 305-12; Fleishman, supra note 34, at 393-97; Note, Campaign Finance Reform: Pollution Control for the Smoke-Filled Rooms?, 23 Case W. Res. L. Rev. 631, 662-66 (1972). Professor Fleishman discusses the Presidential Campaign Fund Act, tit. VIII of the Revenue Act of 1971, 85 Stat. 562-74, which provides for the tax check-off system for the Presidential Election Campaign Fund. See Fleishman, supra note 34, at 397-99. The tax check-off is the portion of the federal income tax return that gives the individual taxpayer the option to donate one dollar, or two dollars for a joint return, to presidential campaigns. See id. at 397. This law did not become fully effective until the public financing provisions of the
The constitutionality of these provisions was questioned extensively subsequent to their passage. The 1971 Act, however, was not challenged in court, primarily because the subsequent financing abuses of Watergate demonstrated the need for further campaign finance reform. One commentator posited that despite its brief existence, the 1971 Act may have contributed to President Nixon's resignation as the campaign reports filed pursuant to the 1971 Act's disclosure requirements led to many of the Watergate revelations.

The repercussions of Watergate, not the least of which was the public demand for congressional action to remedy the obvious flaws in the campaign system, prompted Congress to reform the financing structure of federal campaigns. By contrast with the ineffectual Corrupt Practices Act and the stop-gap 1971 Federal Election Campaign Act, the 1974 FECA amendments represented "the most ambitious and thoroughgoing reforms of the election process ever enacted by Congress." Because of the public concern with the fairness and honesty of the campaign process after Watergate, Congress enacted FECA as an "attempt to give practical vent to the shame and guilt aroused by the whole sorry spectacle."

Although the public clearly demanded some kind of reform in light of Watergate, the exact nature of the reform remained vague and became the subject of much debate. One option was a comprehensive reorganization and regulation of the campaign process to restore public confidence and promote fairness and honesty in the campaigns. Another ap-

1974 amendments became effective, as the Act did not provide for any means of distributing the funds collected by the tax check-off.


88. Id. at 851.


90. Polsby, supra note 7, at 2.

91. Fleishman, supra note 35, at 852.

92. The D.C. Circuit may have best expressed this view: "[W]e have arrived at the comprehensiveness of the present Acts through the failure of piecemeal regulation to preserve the integrity of federal elections." Buckley v. Valeo, 519 F.2d 821, 907 app.
proach, building on earlier scholarship, was to develop an effective public disclosure system for campaign contributions and expenditures. This approach would permit the proper operation of the democratic process by respecting the first amendment rights of campaign contributors and allowing contribution data to become a source of information to the voting public. The latter approach, however, allows the first amendment to work most effectively by publicizing the sources of campaign donations while minimizing the necessary regulation of the political process.

As a result of the tremors Watergate sent throughout the country, the final form of the 1974 amendments tilted toward a more extensive regulation of the campaign structures. Accordingly, "the 1974 amendments [made] running for federal office a regulated industry, with all the familiar trappings—reports to file, forms to fill out, regulations to observe, and a regulatory commission to live with." The 1974 Act, as passed, targeted four primary goals: disclosure of campaign financial activity, prevention of corruption stemming from the influence of large contributors, reduction of campaign spending so as to bring about an equality of spending among candidates for federal office, and invigoration of the election process. When passed originally by the Senate, FECA also had included public financing for Senate and House races. Although the Senate viewed these provisions as an essential ingredient of the proposal, they were eliminated in conference.

After passage, many commentators criticized FECA for its protection...
of incumbents. To many, Congress appeared to be responding to the pressure presented by the Watergate disclosures with legislation that looked good to the public but that actually increased protection for incumbents. Criticism focused on the spending limits imposed on House and Senate campaigns, which might prevent lesser-known challengers from publicizing their campaigns, and on the contribution limits, which might prevent these same challengers from raising a base of funds to run their campaigns.

II. THE SUPREME COURT AND THE PRESENT DAY CAMPAIGN FINANCE SYSTEM

A. The Supreme Court's Decision in Buckley v. Valeo

With congressional goals clearly presented in FECA, the Supreme Court was confronted almost immediately with a major challenge to the wide-ranging statute. Pursuant to the statute's expedited review provisions, a diverse group of political actors, including Senator James Buckley, liberal activist Stewart Mott, the American Civil Liberties Union, and Eugene McCarthy, brought suit. The action challenged virtually every provision of FECA on first amendment, equal protection, and other grounds.

The Supreme Court faced a wide range of problems in Buckley. The first amendment issues raised in the case had never before been presented

hensive system of public campaign financing." Id. at 5591; see also id. at 5617 (statement of Sen. Pell).
102. See supra note 100 and accompanying text.
104. Because of questions regarding the constitutionality of the Act's provisions, Congress inserted a provision that allowed for quick resolution of these issues. See 2 U.S.C. § 437h (1982); see also California Medical Ass'n v. Federal Election Comm'n, 453 U.S. 182, 188-89 (1981) (§ 437h enacted to provide alternative method of obtaining expedited review of constitutional challenges to FECA).
105. See Brief for Appellants at 14-24, Buckley v. Valeo, 424 U.S. 1 (1976) (describing appellants and their interest in the case). For the purposes of this Article, it is important to note that the plaintiffs were primarily independent of the traditional party structure.
In addition, the Court confronted many other difficult issues in *Buckley*, few of which were easily resolved from either a constitutional or a policy perspective. Furthermore, the nature and extent of the Watergate scandal presented a major crisis for the constitutional system, producing a "political climate in which wholesale invalidation of the 1974 reforms could have brought about widespread distrust of the Court as an institution." Given the significant limitations imposed on political spending and activity by FECA, however, blind acceptance of the statute's flaws in exchange for its soothing effect on the public would have involved equally undesirable effects. Thus, the Court was confronted with balancing difficult issues while attempting to allay public fears of political corruption; in trying to do both, the Court achieved an uneasy compromise with which it has continued to struggle.

The lower appellate court decision in *Buckley* favored the political process reformers, upholding almost every provision of FECA. The Supreme Court, in an extensive *per curiam* opinion, however, poked a

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107. See Note, *The Constitutionality of Limitations on Individual Political Campaign Contributions and Expenditures: The Supreme Court's Decision in Buckley v. Valeo*, 25 Emory L.J. 400, 407 (1976) (Until *Buckley*, "the federal courts had not ruled directly on whether limitations placed on individual political expenditures and contributions unconstitutionally infringed an individual's First Amendment freedoms."). This absence of constitutional decisions is easily explained, as "those subjected to the campaign finance restrictions that were in effect prior to enactment of the FECA had lacked the incentive to press their constitutional claims, since the restrictions either could be readily avoided or had been emasculated by courts." BeVier, *supra* note 25, at 1053.

108. See Brief for the Attorney General as Appellee and for the United States as *amicus curiae*, in *Buckley*, at 7 n.3 ("Standing alone, each of the constitutional issues presented here is of paramount importance to the future governance of the United States; with these issues combined in one lawsuit, the task of adjudication pressed upon this Court is one of enormous proportions.").


110. One commentator has stated that

[the other extreme—rationalization of the legislation's shortcomings in the name of a public response to Watergate—is equally undesirable. The character of political financing is far too important to the long-term survival and healthy functioning of democracy for the Court to allow the passions and pressures of the moment to perpetuate what appear to be seriously faulty modes of dealing with it.]

Fleishman, *supra* note 35, at 853. See also BeVier, *supra* note 25, at 1090 ("The fact is that had the Court yielded to the reformer's insistence that it relax its customary First Amendment vigilance, the gain to political equality would have been highly problematic, if not wholly fortuitous. The loss of political liberty, on the other hand, would have been swift and certain.").

large hole in the structure of the finance system designed and envisioned by Congress. \(^{112}\) Faced with the dramatic problems created by the nature of the case, the Court was forced to reconcile the concerns created by the Watergate scandal with the constitutional concerns present in any massive reordering of the political system. As such, *Buckley* represents not so much a consistent, constitutional opinion as a political decision, designed to pacify the cries for reform while maintaining full protection for basic constitutional freedoms. \(^{113}\) As a political decision, the Court cut some constitutional corners in trying to reach a pragmatic middle ground, yet it also, at times, ignored aspects of the political reality that had mandated the efforts at reform. \(^{114}\)

In *Buckley*, the Court confronted several threshold issues. The Court of Appeals for the District of Columbia had treated the spending of money in campaigns as conduct, rather than speech, \(^{115}\) which subjected the law to the lesser scrutiny of the *O'Brien* \(^{116}\) test. The Supreme Court, however, rejected this reasoning. Acknowledging that “virtually every means of communicating ideas in today’s mass society requires the expenditure of money,” \(^{117}\) and that the 1974 Act’s limitations affect an area of fundamental first amendment activities, \(^{118}\) the Court stated that “[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” \(^{119}\) The Court

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113. In *Buckley*, the Court “back[ed] off grandeur or exuberance of expression at every opportunity, preferring to affect its driest persona, studious to find a middle way between the extremes of the FECA amendments and no election reform at all.” Polsby, supra note 7, at 17. See also Fleishman & McCorkle, *Level-Up Rather Than Level-Down: Towards a New Theory of Campaign Finance Reform*, 1 J. L. & Pol. 211, 222-23 (1984) (*Buckley* represents attempt by Court to “forge a King Solomon’s policy compromise.... [cutting] right down the middle of the issue rather than presenting a closely-argued constitutional analysis that clearly came down on one side or the other.”) (footnote omitted).
114. In criticizing the Supreme Court’s opinion, Judge Leventhal of the D.C. Circuit stated that the Court failed to appreciate “any sense of the history of campaign reform legislation, of the grievous abuses that prompted it, the frustration that accompanied it, the evasion and political pressures that have undermined all less-than-comprehensive measures of reform.” Leventhal, supra note 111, at 362.
116. In United States v. *O'Brien*, 391 U.S. 367 (1968), the defendant claimed that the first amendment prevented his prosecution for burning his draft card, arguing that the burning was symbolic speech. *Id.* at 376. The *O'Brien* Court rejected this claim, holding that the government possessed a sufficient interest in regulating the non-speech elements of the draft card burning to allow the incidental restriction on speech-related activity. *Id.* at 376-77.
118. *Id.* at 14.
119. *Id.* at 19. The Court distinguished political spending from conduct, noting that [t]he distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate’s increasing dependence on television, ra-
refused to equate the expenditure of money with political conduct as defined in *United States v. O'Brien* and, accordingly, imposed strict first amendment scrutiny on FECA's direct restrictions on the expenditure of money.

Once it had resolved this issue, the Court distinguished contribution limitations from expenditure limitations. The Court said that "[t]he expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech."

Contribution limitations, on the other hand, "entail[ ] only a marginal restriction upon the contributor's ability to engage in free communication." The Court believed that the contribution limitations imposed by the Act would have little impact on the funding of campaigns and political associations. The result of the distinction was that the contribution limitations received less constitutional scrutiny, and, since *Buckley*, they have been upheld by the Court.

Given these initial decisions on the level of scrutiny involved, the Court moved on to evaluating the constitutionality of the specific provisions of the 1974 Act. As it examined individual parts of FECA, the Court tended to uphold those sections that appeared to be contribution limitations designed to prevent corruption. With one exception, however, it struck down spending limitations intended to equalize the modes of communication indispensable instruments of effective political speech.

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120. *Id.* at 16. The Court also stated that the restrictions could not stand, even under the *O'Brien* test, "because the governmental interests advanced in support of the Act involve[d] 'suppressing communication.'" *Id.* at 17. See *Winter, Political Financing and the Constitution*, 486 Annals 34, 37 (1986) ("If the speech protected by the First Amendment is legally distinct from the use of money or resources to speak, then there simply is no effective First Amendment protection for speech."). The issue of symbolic speech may present an even more critical issue in the party context, as the parties do not possess the full spending alternatives that are open to the other groups in the political process. See *infra* note 331 and accompanying text.

121. See *Buckley v. Valeo*, 424 U.S. 1, 18-19 (1976) (per curiam). Justice White, however, continues to hold the position that "[t]he First Amendment protects the right to speak, not the right to spend, and limitations on the amount of money that can be spent are not the same as restrictions on speaking." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 508 (1985) (White, J., dissenting).


123. Id. at 20-21.

124. Id. at 21. In language that would have a substantial impact on the activities of political groups in raising funds, the Court said that "[t]he 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 . . . ." *Id.* at 21-22.

125. See *infra* notes 176-79 and 194-210 and accompanying text.

126. See *Buckley*, 424 U.S. at 23-38 (upholding the Act's $1,000 limitation on individual contributions, the $5,000 limitation on contributions by PACs, the limitation on volunteers' incidental expenses, and the $25,000 limitation on total contributions in one calendar year).

127. The Court upheld the public funding provisions of FECA, which provided funds to presidential candidates. See *Buckley*, at 85-108. Spending limits were imposed on candidates who accepted these funds. In *Republican Nat'l Comm. v. Federal Election*
resources available to candidates. The Court upheld the validity of limitations on individual and group contributions to candidates or political groups. The Court found that "[i]t [was] unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation." The Court found that these limitations effectively eliminated the problem of corruption "while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." While restrictions that were successfully characterized as contribution limitations received a sort of constitutional immunity, much of the Buckley opinion involved striking down various spending limits imposed by FECA. In so doing, the Court specifically rejected two primary goals of Congress in limiting campaign spending: the overall reduction of expenditures in political campaigns, and, more generally, the equalization of expenditures among political candidates.

Second, the Court rejected the limitations placed on total campaign expenditures as an unjustified restriction on political expression. The Court emphasized that the first amendment prevents the government from deciding that money spent to advance one's political views is a constitutional condition. The Court affirmed a lower court decision that allowed a spending limit where the presidential candidate had accepted public funding. Despite the strong argument that these limitations comprise an "unconstitutional condition," Nicholson, Political Campaign Expenditure Limitations and the Unconstitutional Condition Doctrine, 10 Hastings Const. L.Q. 601, 601-02 (1983), the Court has not re-examined this view.

See Buckley, 424 U.S. at 39-59 (striking down the Act's $1,000 limitation on expenditures "relative to a clearly identified candidate," the limitation on expenditures by candidates from personal or family resources, and the limitations on campaign expenditures).

Buckley, 424 U.S. at 26. To date, this anti-corruption rationale has been the only one accepted by the Court for limiting political freedom in the campaign finance context. Seeinfra text accompanying notes 185-93. As this Article will argue, the parties simply do not present a comparable threat of corruption, and therefore these limitations should be struck down. See infra text accompanying notes 312-35.

Buckley, 424 U.S. at 28. Chief Justice Burger, dissenting on this point, argued that "[l]imiting contributions, as a practical matter, will limit expenditures and will put an effective ceiling on the amount of political activity and debate that the Government will permit to take place." Id. at 242 (Burger, C.J., concurring in part, dissenting in part).

See, e.g., 424 U.S. at 54 (striking down § 608(a) limiting expenditures by candidates from personal funds); id. at 58 (striking down § 608(c) limiting overall expenditures by candidates).

"mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending").

See id. at 55 ("[n]o governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by [the Act]").
"wasteful, excessive, or unwise" expenditure. 134 Despite the continuing rise of campaign costs, the Court has shown no inclination to reconsider this part of the holding. 135

Third, the Court invalidated the limitations the 1974 Act placed on independent expenditures by committees or groups, holding that "the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." 136 This holding paved the way for the growth of independent expenditure committees, such as the National Conservative Political Action Committee, that subsequently have begun to play a much larger role in political campaigns. 137

Fourth, the Court rejected the limits placed on a candidate's ability to spend on behalf of his or her own campaign. The Court held that "[t]he candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." 138 When candidates can finance their own campaigns with unlimited personal funds they are less likely to become dependent on outside contribu-

134. See id. at 57. This is perhaps the area where the legitimacy of congressional goals has been most clearly refuted. Despite the dramatic increases in campaign spending since the 1960s, there is a strong argument that American campaign expenditures are small relative both to other countries and to other measures of spending. See D. Adaman y & G. Agree, supra note 2, at 26-7; A. Heard, supra note 40, at 371-75; G. Thayer, supra note 57, at 274-75.

135. Although costs continue to rise, there is some evidence that campaign costs will level off, as returns from spending may begin to diminish at some level. See Jackson, New Congress Relied Heavily on PAC Donations, But Much of Spending Had Little Effect on Results, Wall St. J., Dec. 24, 1986, at 32, col. 1. In the 1986 elections, while Republican senatorial candidates had a substantial spending advantage, the Democrats won 20 of 34 races, regaining the Senate majority. This election provides additional data for the position that the primary element in becoming a competitive candidate is not spending parity, but the ability to campaign with a significant base of funds. See Berke, G.O.P. Lost Senate with $107 Million, N.Y. Times, Feb. 8, 1987, at 28. The parties can help provide this base of funds if the spending limits are eliminated. See infra notes 337-49 and accompanying text.

136. Buckley v. Valeo, 424 U.S. 1, 46 (1976) (per curiam). As discussed infra at text accompanying notes 209-10, this holding does not seem accurately to reflect political reality, either in the potential for corruption or the ability of these expenditures to assist a candidate. Cf. Senate Report, supra note 89, at 5604 ("to prohibit a $60,000 direct contribution to be used for a TV spot commercial but then to permit the would-be contributor to purchase the time himself, and place a commercial endorsing the candidate, would exalt constitutional form over substance"). As demonstrated by NCPAC, however, the Court has been protective of the rights of political committees to spend in ways other than through contributions, even in the publicly-funded presidential race. See Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 501 (1985) (upholding on first amendment grounds the right of political committees to incur expenditures with respect to presidential and vice-presidential candidates). The avenue involved in NCPAC is not open to political parties. See infra text accompanying note 331.


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tions and less susceptible to corruption by big contributors. Thus, the
use of personal funds furthers the policy goals underlying the Act's con-
tribution limitations. This holding has resulted in a dramatic increase
in the amount of personal money that has been spent in campaigns, which in turn has led to increased concern that the campaign for federal
office is becoming even more exclusively a privilege of the wealthy.

B. The Supreme Court's Role in the Evolution of the Current System

Since Buckley, the Supreme Court has addressed the constitutional-
ity of various other limitations placed on financial participation in cam-
paigns. Despite the range of issues it has confronted in the campaign
finance context, the Court has failed to develop a consistent structure for
resolving the dominant issues in this area. Accordingly, these cases have
formed a hesitant, step-by-step progression that has not addressed many
of the concerns present in the campaign process. The Court's failure to
recognize political reality and its inability to determine the level of defer-
ence owed to congressional expertise have resulted in a campaign finance
system that fully satisfies few people—a result foreshadowed by Chief
Justice Burger in Buckley. The Court's decisions since Buckley indi-

139. Id. at 53. This logic and policy should be extended to cover the parties in spend-
ing on behalf of their own candidates. See infra text accompanying notes 341-44.
140. See Bonafede, Some Things Don't Change—Cost of 1982 Congressional Races
Higher than Ever, 1982 Nat. J. 1832 (Oct. 30, 1982) (observing the steady increase in
political contributions and the great number of wealthy candidates).
141. In Buckley, the Court discussed other issues dealing with the specific provisions of
FECA; the above-mentioned holdings are the ones that are the most relevant to the argu-
ments presented in this Article. Of most immediate importance to Congress was the
Court's decision that the composition of the Federal Election Committee was unconstitu-
tional. See Buckley, 424 U.S. at 109-43. The Court stayed its decision on the FEC for
thirty days to allow Congress to reconstitute the Commission. Id. at 143. Aside from
being required for the general enforcement of FECA, a reconstituted FEC was necessary
to certify that presidential candidates had qualified for public financing funds. Congress
took more than one hundred days to reconstitute the FEC. During this period, several of
the candidates were forced, in the absence of public funds, to curtail severely their cam-
paign activities.

The delays that occurred in passing the 1976 amendments contributed to some of the
concerns with public financing, as there was concern that Congress' political interests
contributed to the delay in recreating the FEC. See Polsby, supra note 7, at 35-41. Eventu-
ally, Congress passed the Federal Election Campaign Act Amendments of 1976, Pub.
142. See infra notes 158-210 and accompanying text.
143. For some recent critiques of the state of the campaign finance system, see Bing-
ham, Democracy or Plutocracy? The Case for a Constitutional Amendment to Overtur
Buckley v. Valeo, 486 Annals 103 (1986); Mathias, Should There Be Public Financing of
Congressional Campaigns?, 486 Annals 64 (1986) (advocating public financing); Wert-
heimer, Campaign Finance Reform: The Unfinished Agenda, 486 Annals 86 (1986) (Congres
should enact public financing for congressional campaigns as it did for presidential
campaigns and place restrictions on PAC funding of congressional campaigns).
144. In his separate opinion, Chief Justice Burger warned that

[b]y dissecting the Act bit by bit, and casting off vital parts, the Court fails to
recognize that the whole of this Act is greater than the sum of its parts. Con-
gress intended to regulate all aspects of federal campaign finances, but what
cate the difficulties it faces in this area. As one commentator has stated, "[t]he Court's approach to constitutional challenges to attempts to regulate political funding have not resulted in a model of judicial clarity."¹⁴⁵

In attempting to oversee the congressional efforts to design a campaign finance system, the Court has failed to treat the campaign finance system as an integrated structure, despite urgings by finance scholars¹⁴⁶ and pe-

remains after today's holding leaves no more than a shadow of what Congress contemplated. I question whether the residue leaves a workable program.


¹⁴⁵. Nicholson, supra note 127, at 605. See also Smolka, The Campaign Law in the Courts, in Money and Politics in the United States: Financing Elections in the 1980's 214, 214 (M. Malbin ed. 1984) ("The more the courts look at the [FECA], the less they see that can pass constitutional muster.").

The Court, in recent cases, clearly has been troubled by the Act's various restrictions on the ability of groups and individuals to express political opinions. For example, in Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985), the Court struck down limits on independent expenditures made by NCPAC in conjunction with the publicly funded presidential race. See id. at 497-98; infra text accompanying notes 185-93. In Federal Election Comm'n v. Massachusetts Citizens for Life, 107 S. Ct. 616, 624 (1986), the Court rejected, as applied, 2 U.S.C. § 441b (1982), which bans corporate expenditures in conjunction with federal election campaigns. See id. at 631; infra text accompanying notes 170-74.

Slowly, the Court may be moving toward a campaign finance system anchored by effective disclosure of campaign contributions and expenditures, rather than the full panoply of regulations present today. Such a system would meet all the requirements of Congress' desired finance system except for the need for an independent policing officer. The FEC could fulfill this requirement, although the FEC has come under significant challenge. See Edsall, Is the FEC Undermining Campaign Law?, The Wash. Post, Oct. 22, 1986 at A23 (discussing the rulings of the FEC); Jackson, Election Commission, Set Up as a Watchdog, Has Become A Pussycat, Wall Street. J., Oct. 19, 1987 at 1, col. 1.

In various forms, this policed disclosure position has been urged by finance scholars since the earliest regulations. See supra note 93 and accompanying text; see also Winter, supra note 120, at 45 ("So far as corruption is concerned, it is difficult to perceive why full disclosure of contributions and their sources to the electorate is not an adequate deterrent . . . ."). But see Mathias, supra note 143, at 65 ("In the real world, campaign finance laws are necessary rules of behavior designed to protect the political process and promote certain basic democratic values. These laws and their enforcement help ensure that elections and government itself are free of abuses that would subvert democratic society.").

This type of system would probably offer the most effective means of fulfilling the policies of the first amendment, as it would minimize legislative interference with the marketplace of ideas and would allow the public to choose candidates based on full information regarding campaign contributions. Because this step has not been taken, however, the Act, as it has been interpreted by the Courts, fails to fulfill the primary purposes of FECA. See Fleishman & McCorkle, supra note 113, at 212; see also Smolka, supra, at 214 ("Congress has been left with a law that conforms to no one's idea of sound public policy . . . .").

¹⁴⁶. See, e.g., Fleishman, supra note 35, at 865-66. As Professor Fleishman put it, the entire election reform law must be viewed as a whole. The principal governmental objectives which campaign finance regulations are directed at attaining . . . interact so sensitively that it is impossible, in fact, to evaluate separately the constitutionality of particular instruments for achieving them . . . . Because of these interdependencies, and in view of the fact that Congress enacted the various provisions as a single, unified regulatory scheme, it would be unfair for the Court to assess the constitutionality of component parts in isolation from other pertinent elements of the scheme. As the Court itself has observed on several
This failure has led to a gradual destruction of Congress' carefully-drawn balance between protecting first amendment rights and eliminating corruption. Although the Court appears, at times, to acknowledge congressional expertise in this area, it has not attempted, for the most part, to evaluate its own interpretations of specific sections of the finance system in light of the integrated, statutory system.

Buckley presented a difficult case, given the interaction of public outrage, significant constitutional infirmities, and the extreme self-interest of Congress in passing the law. As costs continue to rise in political campaigns, however, and political action committees ("PACs") continue to provide large percentages of candidates' receipts, with incumbents receiving a disproportionate amount of contributions, it is clear that both Congress and the Court must take some responsibility for the system as it now stands.

Id. (footnotes omitted); cf. Buckley v. Valeo, 424 U.S. 1, 255 (1976) (per curiam) (Burger, C.J., concurring in part, dissenting in part) ("To invoke a severability clause to salvage parts of a comprehensive, integrated statutory scheme, which parts, standing alone, are unworkable and in many aspects unfair, exalts a formula at the expense of the broad objectives of Congress.").


149. See Fleishman, supra note 35, at 852-53 ("[I]ndignation and outrage, while frequently necessary to energize legislative action, are rarely the most favorable auspices for constructive, carefully considered lasting change. And that is even more the case when the legislative subject matter is one in which every member of Congress has a direct personal interest . . . .").

150. A preliminary study of the 1986 elections indicates that campaign costs continue to rise at high rates. Winning candidates in races for House seats spent an average of $340,000, an increase of 17% above 1984 amounts and a four-fold increase above 1976 amounts. See Jackson, New Congress Relied Heavily on PAC Donations, But Much of Spending Had Little Effect on Results, Wall St. J., Dec. 24, 1986, at 32, col. 1. Winning senatorial candidates spent, on average, approximately $3 million, a five-fold increase over 1976 figures. Id. PACs contributed more than $126 million to federal candidates in 1986, up 25% from 1984 contributions. Id. At least $98 million of this amount went to winning candidates. Id. PAC receipts constituted 42% of the funds for winning candidates for the House, and 27% for victorious senatorial candidates. Id. The mean spending for major-party senatorial candidates in 1986 was $2,681,639, up from $2,201,037 in
This system grew out of the Supreme Court's inability to come to grips with a few fundamental issues in the campaign finance context. Perhaps the most troublesome dilemma for the Supreme Court has been the issue of whether the concept of undue influence has any role to play in the context of regulating campaign finances. Since Buckley, "[t]he question is not whether individual free speech is an absolute value, but whether individuals [or groups] may be prevented from acquiring too much political influence by a too-vigorous exercise of the individual right to free speech."151

The undue influence issue takes one of two forms. The first involves concern that undue influence could amount to the ability of a certain group to spend so as to dominate the campaign process and drive opposing views from the political marketplace.152 The second blends into the corruption analysis by looking at certain spending as so extensive that it would give the spender too much influence with the candidate.153

1. Distortion of Political Arena

In support of the view that disproportionate wealth distorts the political process to a point that regulation is required, many commentators have urged the Court to adopt a "level-down" theory, designed to equalize the resources of candidates by limiting the amounts that wealthy or well-funded candidates can spend on their campaigns.154 The Court di-


  In my view Congress can no more ration political expression than it can ration religious expression; and limits on political or religious contributions and expenditures effectively curb expression in both areas. There are many prices we pay for the freedoms secured by the First Amendment; the risk of undue influence is one of them, confirming what we have long known: Freedom is hazardous, but some restraints are worse.

Id. at 256-57 (Burger, C.J., concurring in part, dissenting in part).
154. Judge Skelly Wright has forcefully articulated this position, see Wright, Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, 82 Colum. L. Rev. 609 (1982); Wright, Politics and the Constitution: Is Money Speech?, 85 Yale L.J. 1001 (1976); see also E. Drew, Politics and Money: The New Road to Corruption (1983); Cox, Constitutional Issues in the Regulation of the Financing of Election Campaigns, 31 Clev. St. L. Rev. 395 (1982); Wertheimer, Campaign Finance Reform: The Unfinished Agenda, 486 Annals 86 (1986). See generally Fleishman & McCorkle, supra note 113 (describing the "level-down" and "level-up" theories). While the "level-down" view advocates limits on campaign expenditures so that there can be a general
The Court's position on this issue has met with substantial approval, as "[g]overnmental abridgements that are aimed at enlarging the collective interest by suppressing individual expression, even in the presence of massive documentation that the two interests are in hopeless conflict, are unconstitutional." The issue next presented itself in *First National Bank v. Bellotti*, the first campaign finance case following *Buckley*. *Bellotti* involved a challenge to a Massachusetts law that prohibited corporations from spending in referendums unless the spending was on issues that related to the operations of the business. Proponents of the law argued that the concentration of corporate wealth threatened to distort the public debate on referendum issues.

equality of spending, see *id.* at 229, the "level-up" advocates argue that limited public subsidies should be used to increase the speech abilities of lesser-financed candidates, rather than limiting the speech opportunities of better-financed candidates. See *id.* at 215. The author of this Article is in substantial agreement with the policy goals of the level-up proponents, but this Article urges that the parties be allowed to perform the "level-up" aspects of the campaign finance scheme, rather than the public treasury.

155. The Court stated that

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


156. See, e.g., Fleishman & McCorkle, *supra* note 113, at 214 ("Yet the Level-Down vision is not only inconsistent with *Buckley* but also enjoys almost no support in the modern First Amendment tradition."); *Powe*, *supra* note 89, at 246 (This Level-Down theory "has developed over the years on foundations that are foreign to the First Amendment; the theory has no place in any sensible treatment of the First Amendment and should, in the future, be summarily rejected."); *Winter*, *supra* note 120, at 38 ("Rarely has so sinister a proposition been so attractively packaged, for if government may silence certain speakers in the name of equality, constitutional protection for political communication would soon cease to exist.").


159. *Id.* at 767.

160. See *id.* at 789-90. While several of the major election law cases involve provisions of state law, these provisions possess direct relevance to the constitutionality of FECA because the first amendment applies in exactly the same manner to both state and federal election laws. *See Fiske v. Kansas*, 274 U.S. 380, 387 (1927) (incorporating first amendment free speech protections into fourteenth amendment). In addition, precedents such as *Bellotti* and *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), will provide guidance for any future FECA amendments.
In a five-to-four decision, the Court struck down the Massachusetts restriction. In contrast to the Massachusetts Supreme Judicial Court, which focused on the existence and extent of corporate first amendment rights, the Supreme Court saw the issue as a possible statutory limitation on first amendment rights to free expression. By posing the question in this way, the Court focused on the nature of the speech and the gain to the potential listeners from this speech.

The Court rejected the government's claim that the restrictions were necessary to prevent a "drowning out" effect caused by corporate speech so extensive that other voices could not be heard. The Court said that "if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment." To the Court, the fact that the electorate could be persuaded by good advocacy hardly was reason to suppress political speech.

162. Id. at 776.
163. Id. at 777. To the Court, the restrictions "amount[ed] to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication." Id. at 784. As discussed infra at text accompanying notes 297-306, this language can be applied to the content-based restrictions that inhibit the speaking abilities of the political parties.
164. The concept of "drowning out" flows from the rationale enunciated by the Court in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

By attempting to equalize the resources of the candidates, Congress sought to ensure that a candidate could not obtain an undue advantage through excessive media exposure. Accordingly, the First Amendment would be enhanced by legislatively imposed equality, since neither side would be in a position to overwhelm the other quantitatively in the mass media.

Powe, supra note 89, at 251. The spending limitations "flowed from the implicit conclusion of Red Lion that in a mass society there is reason to fear the drowning out of voices in the marketplace of ideas." Id.

165. First Nat'l Bank v. Bellotti, 435 U.S. 765, 792 (1978). The Court's holding provoked a vigorous dissent from Justice White, who has been the strongest critic on the Court of the Court's direction in campaign finance cases. To Justice White, "the restriction of corporate speech concerned with political matters impinges much less severely upon the availability of ideas to the general public than do restrictions upon individual speech. . . . [I]t is unlikely that any significant communication would be lost by such a prohibition." Id. at 807.


166. Bellotti, 435 U.S. at 790 ("The Constitution 'protects expression which is eloquent no less than that which is unconvincing.'" (quoting Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959))). In Bellotti, the Court appeared to leave open the possibility of showing undue influence with better evidence. See Bellotti, 435 U.S. at 789-90. Despite this language, the Court has not been receptive to this kind of evidence. See
In *Federal Election Commission v. National Right to Work Committee*, the Court addressed the constitutionality of a FECA provision that limited corporate PACs to soliciting contributions from "members." Despite the strong considerations favoring rejection of this provision as applied, the Court deferred to Congress' judgment on the need for such a provision in the overall campaign finance scheme, given the historical concern with the threat of corporate and union money in federal elections.

Most recently, in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, the Court rejected a ban on corporate expenditures where the corporation was an ideological, nonprofit corporation formed

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168. 2 U.S.C. § 441b(b)(4)(C) (1982). Membership organizations can solicit contributions from "members of such organization[s]." *Id.* § 441b(b)(4)(C). Similarly, the election laws prohibit solicitations for PACs set up by labor organizations to "any person other than its members and their families." *Id.* § 441b(b)(4)(A)(ii). Under FECA, corporations may establish "separate segregated fund[s]" which can receive and make contributions on behalf of federal candidates. *See id.* § 441b(b)(4)(C). This fund may be controlled completely by the corporation, *see Federal Election Comm'n v. National Right to Work Comm.,* 459 U.S. 197, 200 n.4 (1982), but the "'fund must be separate from the sponsoring union [or corporation] only in the sense that there must be a strict segregation of its monies'" from the other assets of the sponsoring organization. *Id.* (quoting Pipefitters v. United States, 407 U.S. 385, 414-17 (1972)).

169. *See Right to Work*, 459 U.S. at 210 ("[W]e accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."); *cf.* Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 500-01 (1985) (rejecting as overbroad a provision applied against all independent expenditures in presidential races, despite arguments as to potential corruption from certain large expenditures).

The National Right to Work Committee was a nonprofit corporation without capital stock, that was organized "'[t]o help make the public aware of the fact that American citizens are being required, against their will, to join and pay dues to labor organizations in order to earn a living.'" *Right to Work*, 459 U.S. at 199-200 (quoting Committee's stated purpose in corporation's Virginia articles of incorporation, App. to Pet. for Cert. 17a). Because the Right to Work Committee was a nonprofit organization that solicited funds to publicize its views, some of the logic behind limiting corporate spending was not applicable. This organization was an ideological one to which people contributed because of sympathy with the ideology, and therefore no valid concerns existed regarding economic power being used in the political marketplace.

In *Federal Election Comm'n v. Massachusetts Citizens for Life*, 107 S. Ct. 616, 631 (1986), the Court rejected the application of a related statute to a similar corporation. While stating that it was in no way overruling *Right to Work*, *see id.* at 631 n.13, it is difficult to see how that holding can remain good law. Massachusetts Citizens for Life was a non-profit corporation that distributed voting-related literature. *Id.* at 619-20. In distinguishing between traditional business corporations and the ideological, nonprofit corporation involved in the case, the Court somewhat ignored its approach in *Right to Work*. *See id.* at 631. It seemed hesitant to strike down the entire statute, yet the arguments for allowing Massachusetts Citizens for Life to engage in the speech it did were very strong. *See id.* at 631.

to spread the views of the organization on specific issues. The Court acknowledged that this statutory prohibition forcing corporations to establish PACs to participate in federal campaigns infringed on first amendment activities, yet it refused to strike down the whole statute. Instead, the Court rejected the justifications for the statute in this context, stating that "[v]oluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form." This holding clearly conflicts with the logic of Right to Work, illustrating some of the difficulties the Court has had in deciding how much it will defer to congressional concerns that corporate spending might dominate the political debate.

2. Corruption

Apart from addressing concerns that massive spending by certain groups could distort political debate, the Court has also struggled with the fear that financial contributions to campaigns might corrupt candidates for elective office. This fear, heightened by Watergate, clearly motivated the 1974 Act. The Court has remained relatively receptive to limitations justified by the threat of corruption. In its decisions, however, the Court has maintained a somewhat narrow view of the areas in which this threat exists, and, consequently, the Court's jurisprudence in this area is not especially consistent.

In California Medical Association v. Federal Election Commission, the Court addressed the issue of what limitations could be placed on the ability of groups to contribute to PACs. The appellants asserted that because such contributions are made to a political committee, rather than to a candidate, the threat of corruption of the political process is eliminated and limitations on contributions, therefore, are unjustified. The Court rejected this challenge, however, stating that because limitations on individual contributions to an organization that backs a single candidate do not infringe the first amendment rights of contributors, limitations on contributions to "multicandidate political committee[s]" similarly do not impair the rights of such contributors.

In other contexts, the Court has proved less willing to defer to legislative judgments on the need for campaign regulation, even when such regulation arguably diminishes the threat of corruption. In Citizens Against Rent Control v. City of Berkeley, the Court addressed a California law,

171. Id. at 628-29.
172. Id. at 626-27.
173. Id. at 630.
174. See supra text accompanying notes 167-69.
175. See supra notes 89-95 and accompanying text.
177. Id. at 193-201.
178. Id. at 195.
179. Id. at 196 n.16.
adopted by referendum, that limited to $250 the amount that groups could spend in a referendum campaign. In an eight-to-one decision, with Justice White as the lone dissenter, the Court struck down the law. Arguing that contributions by individuals to a committee advocating a particular position on a ballot is a legitimate and significant form of political expression, the Court concluded that “[t]o place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association.”

Perhaps the most important campaign finance case concerning the threat of corruption from political spending is Federal Election Commission v. National Conservative Political Action Committee (“NCPAC”). This case challenged section 9012 of the Presidential Election Campaign Fund Act, which limited independent expenditures in the publicly-financed presidential race to $1,000. Once again, the Court struck down the provision. Reaffirming the principle that “preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances,” the Court held that the anti-corruption aspects of section

181. Id. at 292.
183. Id. at 298.
184. Id. at 296. In language that the Court has not clarified in later cases, the majority also concluded that “[p]lacing limits on contributions which in turn limit expenditures plainly impair freedom of expression. The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions.” Id. at 299-300. This approach differs from the Court’s feeling in Buckley, where it stated that Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.

187. 2 U.S.C. § 431(17) (1982) defines independent expenditures as follows:
an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.


9012 did not justify the significant burden on protected first amendment rights.\textsuperscript{190}

In resolving the case, the Court gave a narrow construction to the term “corruption,” stating that, “[t]he hallmark of corruption is the financial \textit{quid pro quo}: dollars for political favors.”\textsuperscript{191} With this definition, the Court rejected the expenditure limitation because the hypothetical possibility\textsuperscript{192} of corruption through independent expenditures was insufficient to allow the significant restriction on protected first amendment rights.\textsuperscript{193}

3. The Contribution/Expenditure Distinction

One important factor in the resolution of these cases involves the level of scrutiny to be given to the various portions of FECA. The level of scrutiny, while often not clearly delineated,\textsuperscript{194} usually has depended on whether the Court has defined a regulation as inhibiting contributions or expenditures.\textsuperscript{195} The Court developed this distinction in \textit{Buckley} and ultimately upheld contribution limits, while rejecting limitations on expenditures.\textsuperscript{196}

The Court’s rationale for the distinction rests on shaky grounds and from the start this distinction has drawn a substantial amount of criticism.\textsuperscript{197} Most recently, in \textit{NCPAC}, a dissenting Justice Marshall aban-

\begin{enumerate}
\item[190.] \textit{Id.} at 501.
\item[191.] \textit{Id.} at 497. The Court therefore felt that “the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a \textit{quid pro quo} for improper commitments from the candidate.” \textit{Id.} at 498.
\item[192.] The Court recognized the possibility that “candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages. . . . On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more.” \textit{Id.}
\item[193.] \textit{Id.} Justice White fired off an angry dissent, arguing that “[b]y striking down one portion of an integrated and comprehensive statute, the Court has once again transformed a coherent regulatory scheme into a nonsensical, loophole-ridden patchwork. . . . In overzealous protection of attenuated First Amendment values, the Court has once again managed to assure us the worst of both worlds.” \textit{Id.} at 518 (White, J., dissenting).
\item[194.] See \textit{BeVier, supra} note 31, at 1052; Nicholson, \textit{supra} note 127, at 603-04, 607.
\item[195.] See \textit{supra} notes 122-125 and accompanying text.
\item[196.] \textit{Buckley v. Valeo}, 424 U.S. 1, 21 (1976) (per curiam). The Court has decided that contributions consist of “proxy speech,” and thus limits on contributions do “not in any way infringe the contributor’s freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other then the contributor.” \textit{Id.}
\item[197.] See \textit{id.} at 241 (Burger, C.J., concurring in part, dissenting in part); see also \textit{id.} (“For me contributions and expenditures are two sides of the same First Amendment coin.”); id. at 290 (Blackmun, J., concurring in part, dissenting in part) (“I am not persuaded that the Court makes, or indeed is able to make, a principled constitutional distinction between the contribution limitations, on the one hand, and the expenditure limitations, on the other . . . .”); \textit{The Supreme Court, 1975 Term}, 90 Harv. L. Rev. 1, 179 (1976) (“The distinction ignores the functional similarity of contributions and uncoordinated political expenditures.”).
\end{enumerate}
doned this view, saying that the distinction made no constitutional difference. What this distinction has meant is that the Court is much more likely to uphold limitations that are fashioned as contribution limits, rather than expenditure limitations. Nevertheless, the Court does not consider campaign contributions to be a form of political expression other than a "general expression of support for the candidate and his views." Limitations, therefore, can be placed on contributions, as "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.

Commentators have challenged this argument, and even Justice White, the Justice most strongly supportive of campaign spending limits, apparently has rejected this rationale for the distinction. There are two primary challenges to this distinction. First, given the nature of political campaign speech, it is difficult to accept the view that contributions do not measure the intensity of support or that the quantity of communication does not increase with the size of the contribution. Similarly, the Court's rationale for allowing limits on contributions might justify stricter limits on expenditures as well, because the nature of the speech arguably is the same.

The inability of the Court to reach a principled resolution of the con-

199. See supra notes 125-128 and accompanying text.
201. Id. "At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate." Id.
202. See, e.g., Friedman, A New Approach to the Dilemma of Campaign Finance Reform, 62 A.B.A. J. 72, 72 (Jan. 1976) ("Political contributions are a form of political expression—for many people, indeed, the most effective form—and a ceiling on individual contributions prevents them from expressing themselves as much as they may wish."); The Supreme Court, 1975 Term, 90 Harv. L. Rev. 1, 179 (1976) (functional similarity between contribution and expenditure limits demands same degree of scrutiny).
203. First Nat'l Bank v. Bellotti, 435 U.S. 765, 810 (1978) (White, J., dissenting) ("Ordinarily, the expenditure of funds to promote political causes may be assumed to bear some relation to the fervency with which they are held.").
204. As Professor Powe puts it, [a]ll of the campaign finance cases involve speech by another. . . . The reason professionals are used is that they are thought to know what is the most efficacious speech. But we do not conclude that a candidate's ad is proxy speech simply because someone else wrote it for him and perhaps delivered it for him. An individual choice to have a message with which he agrees prepared by professionals is no less speech. Proxy speech is simply a pejorative name for a political commercial. It is still speech.

Powe, supra note 89, at 258-59. See also Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 495 (1985) ("Another reason the 'proxy speech' approach is not useful . . . is that the contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money."); cf. Buckley v. Valeo, 424 U.S. 1, 243 (1976) (per curiam) (Burger, C.J., concurring in part, dissenting in part) ("the contribution limitations will, in specific instances, limit exactly the same political activity that the expenditure ceilings limit . . . ") (footnote omitted).
tradictions inherent in the contribution/expenditure distinction reflects a broader confusion that has plagued the Court throughout these cases. The issue, simply put, is when should the Court allow political reality to influence its first amendment analysis. From the start, the Court has faced the issue of how much deference it owes to Congress' judgment on the political risks presented by the potential for campaign abuse, and the Court has shown a wavering deference to Congress' arguable expertise.

In addition to this varying deference, the Court has been inconsistent in its recognition of the realities of practical politics. In *NCPAC*, the Court struck down the limitations on independent expenditures in presidential campaigns as applied to political action committees. The Court, however, ignored the evidence presented by the government that the issue at hand really involved whether the expenditures in question were independent of the candidates they were designed to help. Instead, the Court almost blindly accepted the classification of the expenditures as independent, even though the Court's rhetoric about the differential impact of independent contributions made no real sense.

205. Compare *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.") with *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985) ("We are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct.").

206. One issue that makes this area different from the usual analysis of congressional expertise is the amount of self-interest present in these cases—perhaps more so than in any other area where Congress legislates. Given this self-interest, first amendment concerns stand most important, as "[f]reedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.' " *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) (quoting T. Emerson, Toward a General Theory of the First Amendment 9 (1966)). While it is true, as Justice White has argued, that Congress does have more expertise in the nitty-gritty of electoral politics, it is also true, however, that campaign finance represents one of the areas where we should most appreciate the risk of those in power acting so that they can remain in power and keep others out. See generally, J. Ely, supra note 38, at 106-07 (arguing that courts must pay special attention to legislative activity that might close channels of political change).


208. See id.; see also id. at 502-04 (White, J., dissenting) (striking down section of Act will cause individuals to pursue the status quo through more expensive avenues).

209. As the Court noted in *NCPAC*, "[t]he PACs in this case, of course, are not lone pamphleteers or street corner orators in the Tom Paine mold; they spend substantial amounts of money in order to communicate their political ideas through sophisticated media advertisements." *NCPAC*, 470 U.S. at 493. The briefs supporting the law documented the interaction of NCPAC personnel and Reagan campaign officials, but the Court refused to consider that evidence. See id. at 490. In addition, given the relatively closed nature of the professional campaign consultant business and the easy discernability of the major campaign themes of the Reagan campaign, to say that the expenditures in *NCPAC* would "provide little assistance to the candidate's campaign and indeed may prove counterproductive," *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam), is to ignore the reality of the political campaign.
In *Buckley*, the Court more appropriately recognized the nature of political campaigns, saying that "[i]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." The ability of political groups to navigate the maze of spending regulations indicates that the Court is not consistently accepting political reality. With this understanding, the task remains to develop a system that best meets the legitimate goals of campaign finance reform. This system must avoid the pitfalls that have hindered all previous efforts at reform, where broad statutory schemes have presented the image of effective control without the reality. Because of the loopholes for narrow, special interest speech that the Court, through its decisions, has left open, the role of the political parties in the campaign finance scheme must be examined. An investigation of the parties' functions indicates that expanding their ability to support candidates of their choice can provide a rough equality of spending for legitimate candidates, without giving rise to the threats created by narrow, special interest domination of federal campaigns.

**III. THE POLITICAL PARTIES AND THEIR PLACE IN AMERICAN CAMPAIGNS**

At this point, it is easy to see where the major problems for the campaign finance system lie. While the rise in campaign costs by itself is not something to fear, the public must be concerned that the amount of special interest contributions continues to rise dramatically. Despite the apparent rise in the availability of funds, challengers still have a difficult time raising the money necessary to run a competitive race. In addition, the volume of regulations, coupled with the desire of individuals and groups to spend money on political campaigns, results in a system

210. *Buckley*, 424 U.S. at 45. In *NCPAC*, Justice White launched a similar attack on the Court's assumptions about political reality. *NCPAC*, 470 U.S. at 510 (White, J., dissenting). White stated that "[t]he credulous acceptance of the formal distinction between coordinated and independent expenditures blinks political reality." *Id.* According to Justice White, "[t]he candidate cannot help but know of the extensive efforts 'independently' undertaken on his behalf. In this realm of possible tacit understandings and implied agreements, I see no reason not to accept the congressional judgment that so-called independent expenditures must be closely regulated." *Id.* at 510-11 (White, J., dissenting).

Justice Marshall, joining Justice White in the dissent in *NCPAC*, argued that

[i]t simply belies reality to say that a campaign will not reward massive financial assistance provided in the only way that is legally available. And the possibility of such a reward provides a powerful incentive to channel an independent expenditure into an area that a candidate will appreciate. Surely an eager supporter will be able to discern a candidate's needs and desires; similarly, a willing candidate will notice the supporter's efforts.

*Id.* at 519-20 (Marshall, J., dissenting).

211. *See supra* note 150.

212. *See infra* notes 337, 341-46 and accompanying text.
where the disclosure laws are not as effective as they could be in a more streamlined system because groups manipulate the regulatory scheme to expend all available resources. The parties present an avenue of improvement for the finance system. The parties possess the potential to fulfill the goals of FECA while allowing the system to work more in line with the primary first amendment ideal.

Running a winning campaign at the federal level takes a significant amount of money that is not easily available to any but the wealthiest candidates. Because the parties can ensure that legitimate candidates in federal races have a base of funds with which to run their campaigns, the parties can fulfill the policy goals of both congressional reformers and the level-up advocates who argue that the necessity of raising funds should not make public service an undesirable alternative for otherwise qualified and capable candidates. Party sponsorship may also go a long way to diminish the potential for corrupting influence from single-interest groups. By lessening the reliance of candidates on money from these groups and eliminating the limitations on party spending, party sponsorship will meet the goals of those who desire to diminish the role of special interests in campaigns. In addition, the parties can satisfy those who argue that the legislature should avoid interfering with the operations of the political marketplace, while still encouraging a spending system that facilitates the policies behind both the first amendment and FECA.

From a constitutional viewpoint, the limitations on political party

213. See infra note 259 (discussing soft money).
214. See supra note 150.
215. See Senate Report, supra note 89, at 5592 (FECA “embodies the ... principle that once someone becomes an unquestionably serious candidate, by virtue of his being a major party nominee, he should be assured of adequate financing to run a fully informative and effective campaign.”).
216. According to Fleishman and McCorkle,

[a] Level-Up approach . . . advocates only the absolute enhancement of political speech opportunities. This requires the use of public subsidization to establish a floor of wealth for candidates but no overall ceiling on expenditures from private sources of support. Level-Up subsidies do not directly open up the avenues for more political speech production by ordinary citizens, yet they increase the speech-wealth of candidates so that a greater quantity and diversity of political speech can flow to citizen-consumers in the marketplace.


This theory finds substantial support in Bellotti and Red Lion, which state that it is the listeners' first amendment interests that are paramount, rather than the speakers. See First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) (discussing the first amendment's role in "affording the public access to discussion, debate, and the dissemination of information and ideas"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (discussing the right of the public to receive suitable access to ideas). The Court has also relied on the benefits to consumers in a number of its cases granting protection to various forms of commercial speech. See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757, 765 (1976) (striking down state statute prohibiting the advertising of prescription drug prices); Bigelow v. Virginia, 421 U.S. 809, 822, 829 (1975) (upholding newspaper's right to publish advertisement for abortion service). This view may be discussed more simply as a right to know principle. See L. Tribe, supra note 1, at 674-82.
spending that exist currently under FECA violate the first amend-
ment.\textsuperscript{217} Allowing the parties to expand their role in federal campaigns
will promote many of the same policies that Congress sought to advance
in the 1974 Act, without raising the constitutional concerns described by
the Supreme Court in \textit{Buckley} and subsequent cases.

In order to accept the arguments for eliminating the limits on party
spending in federal campaigns, it is necessary to understand the role that
the parties have played in our political and constitutional history. Amer-
ican political parties have a long and checkered history in American poli-
tics. Political parties have existed virtually from the start of the
Republic, despite the strong opposition to parties felt by many of the
Founding Fathers.\textsuperscript{218} These parties emerged

precisely because individuals realized greater benefit from adhering to
these collective institutions than from acting alone to nominate leaders
or advance policies . . . . Parties bound people emotionally to leaders
and created a sense of public involvement in government that provided
legitimacy for the institutions of the written constitution. Parties, even
more importantly, developed the institutional means for the coordinat-
ing of elections, of communications between electors and officials, and
of legislative behavior.\textsuperscript{219}

Once the party system developed, it proved to be an effective mechanism
for "aggregating individual interests and resources into coherent pro-
grams—especially in the larger arenas of state and national politics."\textsuperscript{220}

The parties of today differ dramatically from their predecessors. The
parties of the early 1900s relied on mass participation and patronage to
keep the party machinery well-oiled.\textsuperscript{221} The local party structure domi-

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\textsuperscript{217} See infra notes 262-311 and accompanying text.
\textsuperscript{218} The Constitution does not address political parties, and "early post-revolutionary
sentiment disfavored the practice of politics by small cohesive groups." Brisbin, \textit{Federal
Courts and the Changing Role of American Political Parties}, 5 N. Ill. U.L. Rev. 31, 32
(1984). Accordingly, "[p]artisan politics bears the imprimatur only of tradition, not the
the early roots of party regulation as follows:

The first eighty years of this nation's existence was politically a laissez-faire era
during which legislators and judges kept their distance from political parties. A
perusal of state codes in the mid-nineteenth century indicates rather complete
disinterest on the part of lawmakers with the organization and activities of par-
ties. Legislative codes in this era imitated the United States Constitution, which
totally ignores parties. As unregulated private associations, the parties were
presumptively free to organize and function without government supervision.

Fay, \textit{The Legal Regulation of Political Parties}, 9 J. Legis. 263, 263 (Book 2 1982) (foot-
notes omitted).
\textsuperscript{219} Brisbin, \textit{supra} note 218, at 34.
\textsuperscript{221} See Adamany, \textit{Political Finance and the American Political Parties}, 10 Hastings
Const. L.Q. 497, 513-14 (1983) ("[T]here is recognition among scholars that the pa-
tronage system was the glue that held the political machine together in the heyday of
party strength."). According to Justice Powell, "[p]atronage practices broadened the
base of political participation by providing incentives to take part in the process, thereby
increasing the volume of political discourse in society. Patronage also strengthened par-
nated American politics; the national party existed merely to nominate a President and had few additional powers. The party used its local base and the patronage system to develop a strong loyalty to the party, which manifested itself in success on election day.

Today, by contrast, the parties' social service functions have been supplanted by the welfare benefits widely provided by the federal government, and the parties no longer can rely on strong party attachments for automatic support from the voters. Instead, by becoming national organizations that focus on providing campaign services rather than distributing the spoils of local government elections, the parties have created a new role for themselves over the past decade—one that has made them the single most important player in the federal campaign process.

The parties have developed their role in federal campaigns through a renewed focus on party organization and providing political services to candidates. The parties have developed a centralized structure that ties, and hence encouraged the development of institutional responsibility to the electorate on a permanent basis." Elrod v. Burns, 427 U.S. 347, 379 (1976) (Powell, J., dissenting).


223. It is impossible to ignore the detrimental aspects of the political party machines in the early part of the twentieth century. Despite some arguments that the machines played a valuable role in our political system, see Merton, The Latent Functions of the Machine, in Urban Government 223 (E. Banfield ed. 1969); Wol finger, Why Political Machines Have Not Withered Away and Other Revisionist Thoughts, 34 J. Pol. 365, 383-85 (1972), the machines clearly presented a significant threat to the legitimate operations of the democratic system. The role of the party in today's politics has changed to such an extent, however, that the threats of corruption present with the old local political machines simply are not present in the operations of today's national party organizations. See infra notes 224-37 and accompanying text.


225. The generally accepted view on voter allegiance to parties is that there has been a "dealignment" in the past decade, rather than any lasting realignment. See generally Ladd, On Mandates, Realignments and the 1984 Presidential Election, 100 Pol. Sci. Q. 1 (1985); Ladd, The Brittle Mandate: Electoral Dealignment and the 1980 Presidential Election, 96 Pol. Sci. Q. 1 (1981); Schneider, Antipartisanship in America, in Parties and Democracy in Britain and America 99 (V. Bogdanor ed. 1984). A "dealignment" occurs when "voters move away from parties altogether; loyalties to the parties, and to the parties' candidates and programs, weaken, and more and more of the electorate become 'up for grabs' each election." Ladd, The Brittle Mandate, supra, at 3.

226. The existing party is a new animal, dependent on different resources, performing different tasks. . . . It is a professional organization that provides more resources to campaigns than any other single participant in the electoral process. No individual, no group can compete with the party's ability to raise and spend money, and to provide a host of other services from polling information to press releases.

X. Kayden and E. Mahe, Jr., supra note 224, at 4.

227. See generally Hadley, The Nationalization of American Politics: Congress, the
has made the party the most significant provider of campaign funds and support.\textsuperscript{228} This transition has been a difficult one, and the parties, even today, are still battling to define fully their role in American politics.\textsuperscript{229} It is clear, however, that parties today focus their primary attention on providing campaign services to party candidates.\textsuperscript{230}

One constant confronting the parties throughout the twentieth century has been the prospect of reform of the party system from the outside through legislation and judicial acts.\textsuperscript{231} In the early parts of the twentieth century, reform centered on trying to weaken the often-corrupt aspects of local parties.\textsuperscript{232} A number of these reforms, such as the Australian ballot,\textsuperscript{233} primary elections, and nonpartisan local elections permanently transformed the parties.\textsuperscript{234} Perhaps the most influential reform in terms of permanently weakening the parties involved the expansion of the Civil Service system, which diminished the ability of the parties to use patronage as a means of controlling the party machine.\textsuperscript{235}

In the 1960s and 1970s, however, the reform movement took a different turn, focusing instead on changes in the presidential nominating pro-

\textsuperscript{228} According to Kayden and Mahe:
Today's political party is stronger, not only because it is more professional and has more money, but because it is now in a relatively better position to influence the outcomes of elections and the behavior of government than it was before, and more than any other single actor on the political scene.

X. Kayden & E. Mahe, Jr., supra note 224, at 183.

\textsuperscript{229} See generally Note, A Brave New Role: The Fall and Rise of American Political Parties, 23 Harv. J. on Legis. 645 (1986) (authored by Kirk J. Nahra) (describing the new role of the parties in today's politics). The view of the public towards parties forms one consideration in defining this role. As one scholar put it, "Americans have denounced parties in theory, restricted them in legislation, almost eliminated them in reform, and scorned them in opinion polls. Nevertheless, [they] have continued to employ them, and even to cherish them, in practice." Pomper, The Contribution of Political Parties to American Democracy, in Party Renewal in America 1, 4 (G. Pomper ed. 1980). The role of the party today is not the same as it was earlier in the century, because public attachment to a specific party has weakened dramatically. See sources cited supra at note 225. Instead, to maintain a prominent place in the American campaign scheme today, a party must provide effective campaign services.

\textsuperscript{230} See sources cited infra at note 261 (describing party activities in recent elections).

\textsuperscript{231} See Fay, supra note 218, at 269 ("To summarize the scope of legislative and judicial controls over parties up to the 1970s would be to describe, with some minor exceptions, the weaving of a thicker web of statutory and case law controls over parties and their activities.").

\textsuperscript{232} See X. Kayden & E. Mahe, Jr., supra note 224, at 36-44.

\textsuperscript{233} Prior to the early 1900s, voters would ask for and receive ballots designated by party. Under this system, ticket-splitting was impossible, as voters could only select the candidates of one party. The Australian ballot, introduced during the Progressive Era, was printed by the government, rather than a party, and included candidates of all parties, allowing voters to cast their ballots for candidates from different parties. See id. at 38-39.

\textsuperscript{234} See id. at 36-44.

\textsuperscript{235} See id. at 44-45.
cures. In light of debate at the 1968 Democratic National Convention, the Democratic Party, through a series of reform commissions, moved to take the presidential nomination from smoke-filled rooms to a much broader public forum. Many commentators believe that these reforms have weakened the party organizations by reducing the role that the party plays in selecting the presidential nominee.

During this reform era, political commentators bemoaned the weakness of American parties. They attribute many of the Watergate events to the fact that President Nixon's personal campaign committee, the unfortunately acronymed CREEP, ran the re-election effort, shutting out the Republican Party establishment in the process. The prognosis for the weakened parties ranged from slim to terminal, and commentators emphasized the problems that would be faced by American politics without a party system.

This was the scene that confronted the parties at the time of the 1974 Act. Historically, the parties largely had escaped federal statutory regulation. Although the parties did become the subject of several important court cases, primarily involving equal protection challenges to various party practices, little regulation of the party role in federal campaigns existed.


238. See D. Broder, The Party's Over: The Failure of Politics in America (1972); W. Crotty, American Parties in Decline (2d ed. 1984); E. Ladd, Jr., Where Have All the Voters Gone? The Fracturing of America's Political Parties (1978).

239. For examples of some of the CREEP abuses, see United States v. Finance Comm. to Re-elect the President, 507 F.2d 1194 (D.C. Cir. 1974); Ranney, supra note 237, at 241 ('The 'Watergate' crimes of 1972-1974 were perpetrated entirely by the nonparty Committee to Reelect the President . . . , and the Republican party organization had nothing to do with them. Indeed, had the party been as powerful as it was in . . . the 1950s, it might well have prevented them.') (emphasis in original).

240. According to one overexuberant scholar, "[n]o America without democracy, no democracy without politics, no politics without parties, no parties without compromise and moderation." C. Rossiter, Parties and Politics in America 1, 1 (1960).


242. See infra note 269.

243. See generally Brisbin, supra note 218, (discussing cases developing constitutional standards for political parties and defining their role); Fay, supra note 218, at 263-69 (regulation of parties up until 1970s).
FECA, which imposed widespread regulations on all players in the political marketplace, changed this approach. By imposing restrictions ranging from disclosure requirements to spending limitations, FECA placed important limits on party involvement in federal campaigns.\textsuperscript{244} Although it provided the first important statutory limits on party activity, the 1974 Act respected the role of parties in American politics by separating the parties from other political actors and allowing them a special role in campaigns.\textsuperscript{245}

The party regulations were not a significant concern of the Court in \textit{Buckley}.\textsuperscript{246} This anomaly can probably best be explained by the nature of the plaintiffs in \textit{Buckley}—non-party groups who were challenging, in part, the preferences given to major parties through FECA.\textsuperscript{247} Accordingly, although the parties' arguments in \textit{Buckley} did not require this result,\textsuperscript{248} the Court, for the most part, ignored the parties in its lengthy analysis.

The system set up by \textit{Buckley} and its follow-up statute,\textsuperscript{249} however, have played a significant part in redefining the parties' role in federal campaigns. Since the mid-seventies, the political parties have become the most effective fund-raising sources in American politics by following FECA's prescription of small contributions from a wide range of contributors.\textsuperscript{250}

The parties' fund-raising efforts have proved remarkably successful.\textsuperscript{251}

\textsuperscript{245} See Adamany, supra note 221, at 518-19. Among other things, a party can receive larger contributions from individuals than can non-party committees, see 2 U.S.C. § 441a(a)(1) (1982), and can give $17,500 directly to senatorial candidates, id. at § 441a(h), compared with a $1,000 limitation on what individuals can give directly to candidates, id. at § 441a(1)(A), and a $5,000 limit on what non-party committees can give to candidates. Id. at § 441a(2)(A).
\textsuperscript{247} Non-participation by the major parties in significant litigation affecting their rights has been a recurring pattern in these cases. See Brisbin, supra note 218, at 37. As a result of this non-participation, "cases were adjudicated and precedents set with concern more for immediate demands of the litigants rather than the long-term constitutional status of American political parties." Id. at 37-8.
\textsuperscript{248} See Freeman, supra note 246, at 274-75.
\textsuperscript{250} The \textit{Buckley} Court recognized that the result of its decision would be "merely to require candidates and political committees to raise funds from a greater number of persons." See Buckley v. Valeo, 424 U.S. 1, 22 (1976) (per curiam). Most of the Republican party fund-raising success has been built on raising small contributions from a large pool of donors. See Adamany, Political Parties in the 1980s, in Money and Politics in the United States: Financing Elections in the 1980s 70, 76 (M. Malbin ed. 1984).
\textsuperscript{251} For example, during 1982, the two major parties raised more than all the PACs combined. L. Sabato, PAC Power: Inside the World of Political Action Committees 152 (1984). Receipts for Republican committees at the national level increased from $45,705,888 in 1976 to $215,049,508 in 1982. By comparison, Democratic committee
While significantly limited in the direct contributions they can make to candidates, the parties have used a range of methods to provide funds to their candidates. In addition to the limited direct contributions that FECA allows and the spending by the national party for general party themes, the parties have utilized alternative means of spending additional money for their candidates. The most important is "coordinated" spending, which is, essentially, in-kind contributions to candidates, made by party committees in cooperation with the candidate. Although limited by statute, these expenditures allow the parties to spend significantly more than is permissible through direct expenditures.

The 1979 FECA amendments played an important role in strengthening the parties' financial reach, and, in the process, created new opportunities for parties to spend large amounts of money in political campaigns. Responding to concerns raised about the stability of the parties, Congress intended the 1979 amendments to strengthen the ability of state and local parties to assist their candidates. This incentive was provided primarily by expanding the opportunity for state and local parties to participate in the financing of federal campaigns.


252. See Adamany, supra note 221, at 533-53. Professor Adamany discusses the party role in providing a wide range of campaign services, including polling, political advertisements, fund-raising advice, get-out-the-vote drives, and political strategy.

253. See infra note 301.


256. For example, in 1982 the Democratic Party, at the national level, gave $579,337 directly to candidates for the Senate, while spending $2,265,197 in coordinated expenditures. The Republicans gave $600,221 to its senatorial candidates, while spending $8,715,761 in coordinated expenditures. See Statistics on Congress, supra note 251, at 84.


259. See Adamany, supra note 221, at 521. The 1979 law also allowed the use of "soft money," which is "defined as contributions made to state or local political parties that are legal under state law, but would not be legal under federal law, and that can be used for federal campaign purposes." Barone, Campaign Finance: The System We Have, 486 Annals 158, 160 (1986). The use of soft money has been extensive, see Brownstein, Soft Money, 1985 Nat’l J. 2628 (Dec. 7, 1985), and its use has been criticized extensively. See Barone, supra, at 160 (problem of soft money is "chief fault of our system today"); 50 Fed. Reg. 477-78 (1985) (Common Cause petition for FEC to promulgate restrictions on soft money). The FEC rejected the Common Cause petition for restrictions on soft money because it failed to "present[] evidence of instances in which 'soft money' has been used to influence federal elections sufficient to justify the stringent rules proposed in its petition." See 51 Fed. Reg. 15915 (1986).
The direct impact of FECA on the parties is the subject of much debate. Certainly, FECA has imposed statutory limits on party spending. It has also played a role in federal campaigns by providing public funds to presidential candidates directly, rather than channelling these funds through the parties and by encouraging the development of alternative sources of funds. There is no question, however, that the parties play a much stronger role in campaigns today than they have in the past twenty years. In addition, the parties have adapted to the modern campaign practices and rules to become the most effective source of political skills on a permanent basis and, as such, have become an essential part of most political campaigns.

IV. EXPANDING THE ROLE OF THE PARTIES IS A CONSTITUTIONAL NECESSITY AND A POLICY IMPERATIVE

Given the role of the parties as it has developed in recent years, substantial constitutional and policy arguments exist for lifting the limitations on the parties' ability to assist their candidates. Constitutional and political theory requires that these limitations be struck down and that parties be able to use their increased ability to participate in federal campaigns to strengthen their role in the political system.

A. The Current Laws Unconstitutionally Restrict the Associational Rights of the Parties

The limitations on the ability of the political parties to spend on behalf of their candidates infringe on the associational rights of the parties.

260. See, e.g., Commentary of M. Winograd, in Parties, Interest Groups and Campaign Finance Laws 305, 307 (M. Malbin ed. 1980) (most provisions of current federal law have negative effects on political parties); X. Kayden & E. Mahe, Jr., supra note 224, at 183 ("Today's political party is stronger, not only because it is more professional and has more money, but because it is now in a relatively better position to influence the outcomes of elections and the behavior of government than it was before . . ."); Malbin, What Should Be Done About Independent Campaign Expenditures?, 6 Reg. 41, 45 (1982) (stating that "[f]or the most part, the law has neither helped nor hurt the parties . . ." and disagreeing with proposals by Herbert Alexander & David Adamany to permit private contributions to publically-funded presidential candidates in the general election). For a discussion of the party-PAC relationship, see Sabato, The Political Parties and PACs: Novel Relationships in the New System of Campaign Finance, 3 J. L. & Pol. 423 (1987).


262. See Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981) ("[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. . . Its value is that by collective effort individuals can make their views known, when, individually, their voices
The right of association is not absolute, and the Court has been somewhat hesitant in the campaign finance context to reject statutory limitations on contributions and expenditures on associational grounds.\(^{263}\) The Court, however, has been very protective of the associational rights of political parties, as evidenced by a series of cases dealing with the ability of political parties to control their own organizations.\(^{264}\) The combination of these holdings with the rationale of the Court’s campaign finance arguments in the context of political parties indicates that the current restrictions violate the associational rights of the parties.

As the Court has noted, “[t]he right to associate with the political party of one’s choice is an integral part of this basic constitutional freedom.”\(^{265}\) Thus, “[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.”\(^{266}\) Moreover, the right of association extends not only to theoretical discussion of political views, but to the more concrete aspects of political control.\(^{267}\) Still, the Court has struggled to define the constitutional role of parties and the limits of the parties’ associational rights.\(^{268}\)

The cases involving the associational rights of political parties can be broken down into three general categories. The earliest set of cases involved equal protection challenges to the racist practices of some state parties in the first half of the twentieth century.\(^{269}\) In these cases, the
Court invoked the proscriptions of the fourteenth and fifteenth amendments to limit the abilities of the parties to design their own associations.270 An essential element of these cases consisted of a finding that the activities of the parties in nominating candidates constituted state action, therefore bringing the actions within the ambit of the fourteenth amendment.271 These cases went a long way towards limiting the freedom of the parties by restricting their ability to exclude on the basis of constitutionally improper purposes.

The second set of cases involved access to the ballot. Minor parties challenged state laws under the equal protection clause, charging allegedly unconstitutional favoritism towards the major parties.272 These decisions struggled to define the constitutional role of the parties but largely failed, leaving a trail of unclear results and faulty logic.273 In Williams v. Rhodes,274 for example, the Supreme Court invalidated an Ohio law that

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270. See Gray v. Sanders, 372 U.S. 368, 376-81 (1963) (equal protection clause prohibited use of Georgia's county-unit system as a basis for counting votes in a primary election); Smith v. Allwright, 321 U.S. 649 (1944) (holding that political primaries that are part of the machinery for choosing state officials would be considered state action); United States v. Classic, 313 U.S. 299, 318 (1941) (same). "By ruling that political party activities involved state action, the Court narrowed the private character of parties and recognized their public function as an integral part of the electoral process." Brisbin, supra note 218, at 43.

271. See, e.g., Smith v. Allwright, 321 U.S. 649, 663 (1944). The finding of state action, while usually operating to limit the freedom of political parties, also provides a rationale for separating the parties from other interest groups in the campaign finance scheme. See infra text accompanying notes 288-92.

272. See Anderson v. Celebrezze, 460 U.S. 780 (1983) (Ohio statute imposing filing deadline on independent candidates for President held to have placed an unconstitutional burden on candidate's supporters); American Party v. White, 415 U.S. 767 (1974) (denial of absentee ballot to minor parties and their candidates violated equal protection clause, but requirement of nomination by convention, financing scheme of primary elections excluding small parties, minimum signature provisions and deadlines upheld); Storer v. Brown, 415 U.S. 724 (1974) (upholds statute regulating nomination process of independent candidates); Lubin v. Panish, 415 U.S. 709 (1974) (filing fee requirement unconstitutional as applied to indigent candidate); Williams v. Rhodes, 393 U.S. 23 (1968) (restrictive state election laws held to be invidiously discriminatory and violative of the equal protection clause because they gave the established parties a decided advantage).


274. 393 U.S. 23 (1968).
made it "virtually impossible" for any candidate to gain access to the ballot unless she was a candidate of the Republican or Democratic party. Prior to Williams, the Court had not allowed a non-racial claim of discrimination to stand. Accordingly, Williams "swept away precedent by allowing challenges to state ballot access laws that allegedly violated the equal protection guarantee of the fourteenth amendment." Again, these cases limited the ability of the state to design electoral systems that excluded parties or others from the ballot in violation of the speech and associational rights of the excluded person.

The third set of cases involved the ability of the national parties to control the state parties in the context of the associational rights of the national parties. One result of these cases has been an expansion of the ability of the national parties to control the activities of the state and local parties. In these cases, the exclusionary issue was somewhat different. The Court allowed the party, at the national level, to prefer its own rules over those of the state where the individuals who would be excluded had, in effect, chosen to play by the rules of the national party.

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275. Id. at 25.
276. Brisbin, supra note 218, at 44.
277. Id. at 44.
278. The Court has continued to struggle with defining the legitimate role of the state in protecting the integrity of the ballot and preventing voter confusion while still allowing adequate access to the political system for minor parties. See Munro v. Socialist Workers Party, 107 S. Ct. 533, 538 (1986) (state’s interest in restricting access to general ballot outweighed burden on first amendment rights of minority party candidates). These cases are relevant primarily for defining the limits of governmental action designed to foster a two-party system. The arguments advocated in this Article will benefit those parties with significant funds to spend on party candidates. The effect of these arguments will be to benefit the Republican and Democratic parties at this point in time, but, because other parties will have the opportunity to spend when they have available funds, no problems of unequal treatment among parties will be present. Cf. Williams v. Rhodes, 393 U.S. 23, 31-34 (1968) (rejecting Ohio’s system for ballot access because it protected two particular parties). See also Buckley v. Valeo, 424 U.S. 1, 90-108 (1976) (per curiam) (upholding the public financing provisions for the presidential race, that provided funds primarily to major party candidates).
280. See Democratic Party, 450 U.S. at 123-24; Cousins, 419 U.S. at 489-90; O’Brien, 409 U.S. at 5. This development in the cases has coincided with, and contributed to, the increased nationalization of the party system, which has been a major factor in the increased strength of the parties over the past decade. See supra text accompanying notes 225-29.
281. These cases were often decided in a very rapid fashion, often in the context of an upcoming political convention. In Cousins v. Wigoda, 409 U.S. 1201 (1972), which involved a credentials challenge in the 1972 presidential nomination process, Justice Rehnquist, sitting as circuit justice, refused to call a special session of the Supreme Court to consider the issue, leaving the legal questions to the convention itself. 409 U.S. at 1205. Later, the full Court reconsidered the decision without making any significant changes. See Cousins v. Wigoda, 419 U.S. 477, 491 (1975). For the most part, these decisions
These cases display a somewhat inconsistent view of the role of the parties when an evaluation of the associational claims of parties is involved. A general result may be that the Court has forced the parties to be inclusive, in terms of allowing all interested persons to participate in party activities, but, in return, has given the parties broad leeway to structure their own internal activities. The Court has balanced several competing considerations. An important concern has been to give the voters a choice of candidates. Hence, the Court has been inclined to allow minor parties and independent candidates a reasonable opportunity to participate on the ballot. The Court, however, has recognized a legitimate interest of the state in controlling the size of the ballot and preserving the integrity of elections and has, therefore, allowed some restrictions to remain. Thus, while the Court has allowed the major parties some leeway, the extent of permissible discrimination against minor parties remains unclear.

The campaign finance issues throw an additional twist into this confused scenario, as the limits on party spending reduce the ability of parties to participate in elections through support of their candidates. To date, the Court has not looked kindly on associational claims of groups in campaign finance cases. The Court has combined its contribution/expenditure distinction with the ability of various political groups to express fully their views through independent expenditures to conclude that there has been no infringement of associational rights.

Such arguments, however, will not work in the context of political parties. The inability of the parties to make independent expenditures makes their associational arguments stronger, while the inclusionary nature of the parties minimizes the threat of corruption that causes the Court to uphold limits in the first instance. In the campaign laws and in our political history, parties have been granted a well-deserved special presence in our political system. The inclusive aspects of the Supreme Court cases, which mandate an open policy for the parties, coincide with the generally inclusive nature of American parties throughout their

reflect a reluctance on the part of the Court to interfere with the operations of the national political conventions. See Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 124 (1981); Note, "It's My Party and I'll Cry If I Want To": State Intrusions Upon the Associational Freedoms of Political Parties—Democratic Party of the United States v. Wisconsin ex rel. La Follette, 1983 Wisc. L. Rev. 211 (1983).

282. The most recent case in this area presents a slightly different issue. In Tashjian v. Republican Party of Connecticut, 107 S. Ct. 544 (1986), the state Republican party desired to allow independent voters to participate in its primaries. Stating that "[t]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution," the Court struck down the Connecticut ban on open primaries. Id. at 554.


284. See Lubin v. Panish, 415 U.S. 709, 715 (1974) (state has "interest in keeping its ballots within manageable, understandable limits").

285. See supra note 263.

286. See id.
existence.\textsuperscript{287}

This inclusive nature of American parties represents only one of the areas that distinguishes the parties from other groups in the political spectrum. The parties form the only group that is allowed to nominate candidates for elections. Because of this focus on electoral activity,\textsuperscript{288} the parties are forced to look for ways of attracting as many people as possible to the party's slate of candidates.\textsuperscript{289} As one scholar argues, the major differences between parties and other interest groups fall into five categories: the extent to which parties pursue their organizational activities through contesting elections; the breadth and inclusiveness of the party organization and membership; the sole concentration of the parties on political activities for achieving their goals; the demonstrated stability and longevity of the parties; and the strength of the parties as cues and reference symbols for the electorate at large.\textsuperscript{290}

In addition to the above differences from other groups operating in the political marketplace, the parties represent the only organizations that play so significant a role in American elections that they may be deemed state actors.\textsuperscript{291} As state actors in some contexts, the parties stand separate from other political groups, and the responsibilities and duties that this status brings justify different constitutional treatment as well.\textsuperscript{292}

Despite these significant differences, the parties remain the only political actors not allowed the freedom to spend as they wish in support of their candidates.\textsuperscript{293} Allowing the parties to participate more fully in

\textsuperscript{287} See Rosario v. Rockefeller, 410 U.S. 752, 769 (1973) (Powell, J., dissenting) ("Political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership"); see also Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 131 (1981) (Powell, J., dissenting) ("It can hardly be denied that [the Democratic] ... Party generally has been composed of various elements reflecting most of the American political spectrum.") (footnote omitted).

\textsuperscript{288} See Winter, "The New Age of Political Reform": Looking Back, 15 Ga. L. Rev. 1, 4-5 (1980) ("For parties, winning elections is the principal goal.... Where the political party is concerned, there is generally no substitute for victory.").

\textsuperscript{289} See F. Sorauf, Party Politics in America 16 (5th ed. 1984) ("The political parties, in order to win elections, must depend less on the intricate skills and maneuverings of organizational strategists and more on the mobilization of large numbers of citizens."). Similarly, "[p]arty appeals must be broad and inclusive; the party cannot afford either exclusivity or a narrow range of concerns." Id. at 16.

\textsuperscript{290} See F. Sorauf, supra note 289, at 15-18. As discussed infra in the text accompanying notes 312-35, the inclusiveness and necessary breadth of the parties' interests indicate that the party cannot present the threat of corruption necessary to justify limitations on the speech rights of parties in campaigns because the parties cannot make the kind of\textit{ quid pro quo} arrangements with candidates that meet the Court's definition of corruption. For the Court's definition of political corruption, see supra note 191 and accompanying text.


\textsuperscript{292} The state action issue for political parties is a complicated one. The party is a state actor only in certain circumstances, and the extent of these circumstances is not clear. See Cousins v. Wigoda, 419 U.S. 477, 492-96 (1975) (Rehnquist, J., concurring); O'Brien v. Brown, 409 U.S. 1, 4-5 (1972).

\textsuperscript{293} FEC regulations prevent the parties from engaging in independent expenditures
electing candidates, however, would have the effect of strengthening the party organizations to the benefit of the political system and the electorate at large. In addition, the differences between parties and other groups and the special place of the parties in our constitutional structure indicate that the associational claims of the parties should be given greater weight. The parties, therefore, have a stronger associational claim than, for example, political action groups. Accordingly, given the special characteristics of parties and their special place in our constitutional and political system, the current restrictions on the parties' ability to participate in elections infringes on the associational rights of the party members, as the parties do not have sufficient alternative outlets available for the expression of party views. A functioning democracy must encourage people to associate—to spread their ideas through the political marketplace, but restrictions on group spending do not allow these associations to be realized fully.

B. Current Laws Unconstitutionally Discriminate Based on the Content of Party Speech

The campaign laws as they currently exist also infringe on the first amendment rights of parties because they constitute an impermissible content discrimination in the area of political speech, an area where content discrimination is given strict scrutiny. Given the concerns with government involvement in limiting political speech, the current campaign finance laws involving parties constitute impermissible content discrimination. Despite the confusion sur-

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Involving candidates. 11 C.F.R. § 110.7(b)(4) (1986). Similarly, while the parties can spend unlimited amounts to support general party and party-building themes, they are not able to spend as they wish on behalf of specific candidates. Cf. Buckley v. Valeo, 424 U.S. 1, 28 (1976) (per curiam) (limitations on contributions acceptable where they leave individuals and groups free to spend independently as they wish to support or oppose candidates). See also infra at note 302.

294. See infra text accompanying note 349.

295. An example of such a political action group was that formed by the California Medical Association (CMA). The CMA was an unincorporated association of approximately 25,000 California doctors who had formed a political action committee to express their views. See California Medical Ass'n v. Federal Election Comm'n, 453 U.S. 182, 185 (1981).

296. The arguments regarding the parties' rights of association cannot be separated completely from the free speech arguments, as "[t]he two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression." Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 300 (1981).

297. Political speech is clearly protected under the first amendment:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of . . . candidates, structures and forms of government, the manner in which [the] government is operated or should be operated, and all such matters relating to political processes. Mills v. Alabama, 384 U.S. 214, 218-19 (1966).

298. The principle that government may not engage in content discrimination is one that is often repeated by the Supreme Court, but it is a principle that has little continuing
rounding the reach of this principle, the Court remains concerned with laws that distinguish among types of speech based on the content of the speech. Most allowable content discrimination has involved speech that somehow deserves less constitutional protection than prototypical first amendment speech.299

The political speech engaged in by political parties, however, cannot be considered unprotected speech or speech that is deserving of anything less than the fullest first amendment protection.300 The laws sharply discriminate against the parties, however, on the basis of the content of their speech. For example, the parties can engage in unlimited speech as long as the speech is restricted to general party themes or party-building activities.301 As soon as the parties begin to speak about specific candidates, however—either their own or the opposing parties302—the expenditure...
limitations imposed by FECA are triggered.\textsuperscript{303}

In \textit{First National Bank v. Bellotti},\textsuperscript{304} the Court struck down similar content discrimination. The Court said that the first amendment prohibits legislation in the protected speech area.\textsuperscript{305} The Court, therefore, struck down the restrictions in that case as impermissible legislative prohibitions.\textsuperscript{306} Similarly, the restrictions on spending by parties are based on specifically what the parties can say and how they can say it, which is impermissible under the first amendment. Therefore, the spending limitations as they now stand must be struck down as impermissible content-regulation.

\textbf{C. The Constitution Requires that Parties be Able to Spend for Their Candidates as Individuals Can Spend on Their Own Campaigns}

The Court in \textit{Buckley} strongly rejected the notion that a candidate could be statutorily limited in what he could contribute or spend on behalf of his own candidacy.\textsuperscript{307} The language rejecting this portion of

\textsuperscript{303} Some courts have interpreted provisions of FECA in a way that might allow a broad construction of when party speech involves specific candidates. Such an interpretation would further diminish the speech opportunities of the political parties. \textit{See, e.g., Federal Election Comm'n v. Furgatch}, 807 F.2d 857 (9th Cir.), cert. denied, 108 S. Ct. 151 (1987).


\textsuperscript{305} \textit{Id.} at 784-85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. . . . Such power in government to channel the expression of views is unacceptable under the First Amendment." (citation omitted)).

\textsuperscript{306} The restrictions "amount[ed] to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication." \textit{Id.} at 784.

\textsuperscript{307} \textit{See supra} notes 138-39 and accompanying text.
FECA was possibly the strongest in the lengthy opinion. Accordingly, given the nature of political parties, a party constitutionally cannot be limited in what it can spend on behalf of its own candidates.

American parties are little more than loose confederations of similarly-thinking people. Given the diversity of political thought inherent in the nature of the party, which must elect candidates to achieve party goals, the party has no intrinsic existence outside of its candidates, as the party can fulfill its goals and express its opinions only through its candidates. Accordingly, spending for its candidates should be equated, for constitutional purposes, with a candidate spending on her own behalf. Therefore, allowing the party to spend unlimited amounts for its candidates would not in any way affect the amount of corruption in the electoral process. As with the use of personal funds, the use of party funds "reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed." The limits on party spending, therefore, should be struck down on these grounds.

D. The Parties Do Not Present the Threat of Corruption Required to Infringe on First Amendment Rights

As the Court reemphasized in Federal Election Commission v. National Conservative Political Action Committee, preventing corruption or the appearance of corruption is the only legitimate rationale for limiting the exercise of fundamental first amendment rights in the campaign context. In many ways, the Court's decision to employ a narrow definition of corruption has been a dominant reason for Congress' inability to strengthen the election laws along the lines of the level-down position. Despite ample opportunity to develop a broader definition of "corruption," the Court has only defined corruption as an explicit quid pro quo arrangement. This definition places significant limits on Congress' ability to regulate contributions and independent expenditures—what many see as the most pervasive influence in the political system. Within this narrow definition, the parties do not present a sufficient threat of corruption to justify such limits on party activity.

The Court has not looked kindly on claims of corruption as a rationale for finance regulation. While the Court at times has paid lip service to potential corruption claims, NCPAC basically eliminated the possibility of using corruption as a rationale for limiting the exercise of first

308. See Polsby, supra note 7, at 26.
309. See supra note 287.
310. See supra note 288 and accompanying text.
313. Id. at 500-01.
314. See supra note 191 and accompanying text.
315. See Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197,
amendment freedoms, except to bar the most blatant, explicit arrangements of money for specific votes. The Court has chosen to ignore what the level-down advocates see as the corrupting influence of money generally in the political process.

In NCPAC, the Court was confronted with the issue of corruption surrounding the massive expenditures of NCPAC in the election efforts of President Reagan. In Buckley, the Court explicitly held that independent expenditures could not be limited constitutionally. Later, the Court upheld expenditure limitations in the presidential race because of the availability of public financing. Thus, the major issue in NCPAC was whether the independent expenditure rationale of Buckley would govern or whether the limitations on first amendment rights allowed in the presidential race would prevent NCPAC's expenditures.

With a different lead player, NCPAC could have been an easy case. As FECA existed, it made illegal the independent expenditure of more than $1,000 in the presidential race. Because the statutory spending level was so low compared to the financial ability of so many political groups across the country, enforcing this prohibition would have suppressed a wide range of valuable speech. While NCPAC was perceived to be a greater evil because of the potential size of its financial involvement in federal elections, the $1,000 limit would have excluded speech from state and local groups across the country because the statutory limitation did not differentiate between speakers. Given the wide range of possible expression that this legislation outlawed, the Court clearly was justified

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316. See Note, Campaign Contributions and Federal Bribery Law, 92 Harv. L. Rev. 451 (1978) (discussing the relation between FECA and bribery law). For a strong critique of the Court's position in this area, see Weeks, Bribes, Gratuities and the Congress: The Institutionalized Corruption of the Political Process, the Impotence of Criminal Law to Reach It, and a Proposal for Change, 13 J. of Legis. 123 (1986).

317. For the definition of "independent expenditures," see supra note 187 and accompanying text.


320. NCPAC, 470 U.S. at 482.

321. As the Buckley Court noted in striking down the $1,000 independent expenditure limitation, the purchase of "one full-page advertisement in a daily edition of a certain metropolitan newspaper" cost almost $7,000 in 1975. Buckley, 424 U.S. at 20 n.20.

322. A "political committee" was defined by the NCPAC Court to be "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." 26 U.S.C. § 9002(9) (1982). Therefore, the Court found that the statute "applied equally to an informal neighborhood group that solicits contributions and spends money on a Presidential election as to the wealthy and professionally managed PACs involved in this case." NCPAC, 470 U.S. at 496.
in invalidating the law on constitutional grounds. 323

However, the facts of the case complicated the issue. NCPAC was not a small association of local individuals who had banded together to buy a full-page ad in the local newspaper. Instead, NCPAC was a multimillion dollar, nationwide organization that had the potential to play a significant role in elections across the country. 324

Because independent expenditures on the Democratic side were negligible in comparison, 325 NCPAC's spending threatened to disrupt the carefully designed equality in spending. These facts would have made it politically feasible to uphold the law as applied in the case, leaving the constitutional flaws in this result to be remedied when a more attractive challenger to the statute ultimately came along. Nevertheless, the Court invalidated the law. 326

Putting aside these aspects of the case, an easy way for the Court to have upheld the statute in this case would have been to find that the NCPAC expenditures were not really "independent," as required by the campaign laws. At trial, the district court rejected the admissibility of evidence as to the "independence" of these expenditures, a decision that was supported by the Supreme Court. 327 In fact, as Justice White pointed out in dissent, it "blinks political reality" to think that a presidential candidate would not be aware of and appreciate the expenditure of the funds. 328 Because the world of campaign consultants is a relatively closed one, the Court simply is not accepting reality when it argues that there was no coordination between NCPAC and the presidential cam-

323. The NCPAC Court recognized the problems with the small limitation:

[F]or purposes of presenting political views in connection with a nationwide Presidential election, allowing the presentation of views while forbidding the expenditure of more than $1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system.

NCPAC, 470 U.S. at 493. In Buckley, the Court noted that "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." Buckley, 424 U.S. at 19 n.18. Both analogies seem apt.

324. See Ornstein, supra note 251, at 87-88, 92-93 (detailing extent of NCPAC contributions in recent elections).


326. See Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 501 (1985). A less intuitively appealing constitutional claim would have been presented if the statutory limit on independent expenditures had reflected some reasonable amount of spending. Although the constitutional issues would have been exactly the same, the Court most likely would have found it easier to upheld a $1 million spending limit, for example, which would have given groups of all kinds a reasonable ability to express themselves regarding the presidential race.

327. See NCPAC, 470 U.S. at 499. The Court did seem to recognize the potential for corruption because of the size of the expenditures involved, but it stated that the statute was "fatally overbroad" because it applied to "informal discussion groups that solicit neighborhood contributions to publicize their views about a particular Presidential candidate." NCPAC, 470 U.S. at 498.

328. See NCPAC, 470 U.S. at 510 (White, J., dissenting).
The NCPAC Court's finding that the spending limits were not justified makes it very difficult for the government to prove "corruption" aside from the most blatant kinds of bribery. Given the Court's cavalier treatment of the corruption claims in NCPAC, the Court is not likely to find the kind of corruption in unlimited party spending that would justify the current statutory limits on the ability of parties to spend in support of their candidates.\footnote{330}

Under current Federal Election Commission regulations, political parties cannot spend independently on behalf of specific candidates.\footnote{331} This regulation reflects the presumption by the FEC that parties are so involved with their candidates that they could not possibly meet the requirements for independence.\footnote{332} As a result, the parties constitute the only political groups that do not have the opportunity to spend unlimited amounts of money in support of candidates.\footnote{333}

In addition, the corruption rationale that has allowed the Court to uphold limits in specific cases simply is not applicable in the case of political parties. The parties, through their nomination procedures, select a candidate within the electoral district to represent the party in the general election. This ability to run candidates is what sets the parties apart from the myriad of other groups involved in the political process. Accordingly, it is impossible for the parties to "corrupt" the candidates they have chosen, in any kind of general sense, because the candidate has been chosen, at least to some extent, on the basis of his or her agreement with the prevailing party views. Additionally, as required by NCPAC and

\footnote{329} Again, while the constitutional issues would have been the same, there would be a much diminished risk of actual cooperation if the group in question had been a small, community organization that had no connection with national political circles. It is this type of speech that the Court apparently desired to protect, and it found that it had to allow the speech of NCPAC, which presented a much greater risk of actual or implicit cooperation, to do so.

\footnote{330} The lack of sufficient possibilities of corruption supports the argument that the party should be treated as an individual spending on her own campaign. See supra notes 307-11 and accompanying text.

\footnote{331} 11 C.F.R. § 110.7(b)(4) (1986).

\footnote{332} See supra note 187 and accompanying text.

\footnote{333} Because of the proscription against independent party expenditures, the FEC created the category of "coordinated expenditures" so that the parties would be able to spend above the minimal statutory amounts. Coordinated expenditures are basically in-kind contributions from party committees to candidates. See Federal Election Commission, Campaign Guide for Political Party Committees 10-11 (1984). While the coordinated expenditure amounts are substantial in comparison to the amounts allowed in direct contributions to candidates, they are strictly limited by statute. 2 U.S.C. § 441a(d) (1982). Here again, the parties are receiving unique treatment, as they are the only groups that are allowed this category of expenditures.

Allowing coordinated expenditures, however, does not fully protect the ability of the political parties to exercise their protected first amendment rights. Cf. Polsby, supra note 7, at 24 ("At least where the possibility of independent expenditure is preserved, limits on contribution do not impose unacceptable burdens on "true" political speech."). For political parties, support of individual candidates is the only way for the parties to achieve their goals in the political process.
other cases, the party is really incapable of making the specific quid pro quo arrangements that the Court has required to find the threat of corruption.\textsuperscript{334} Parties can be separated from most other political participants by the nature of their interests in the political process. Unlike the PACs, which arouse most of the suspicion in the political arena, the parties cannot be strictly ideological or narrowly bound to specific views because their interest lies in the ability of their candidates to win office rather than in any specific ideological proposition. Thus, the parties cannot pose a threat of corruption as the Court has narrowly defined it.\textsuperscript{335}

E. \textit{Lifting Limits on Party Spending Will Produce a Level of Equality in Campaigns}

While the Court clearly has rejected the arguments of the level-down advocates that expenditure limits should be imposed to equalize spending in federal campaigns,\textsuperscript{336} this goal of equalizing spending still has substantial appeal as a policy aim to be achieved within the boundaries set by the Supreme Court. One of the key components of this issue today is the incumbent/challenger spending disparity that exists in many races because an overwhelming percentage of PAC contributions go to incumbent candidates.\textsuperscript{337} If the spending limitations are dropped, the parties will provide a means for bringing this policy goal to fruition in a fashion that Supreme Court jurisprudence will allow.\textsuperscript{338}

\textsuperscript{334} The \textit{NCPAC} Court stated that

\begin{quote}
[.]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.
\end{quote}

\textsuperscript{335} Based solely on a corruption analysis, it might be constitutionally permissible to limit party contributions and expenditures to candidates in primary elections, as it is in these elections that the party has the power to exercise more control over its candidates. Once the candidate has been nominated by the party, the party's interest shifts away from any ideological tests to winning the race. The arguments presented in this Article focus on general election campaigns.

\textsuperscript{336} See Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam).

\textsuperscript{337} See supra note 150 and infra note 342. Incumbents use their ability to raise funds from PACs to build campaign war chests, even when they are in relatively uncontested races. The amount of these war chests becomes a factor in keeping many challengers out of the race. See Jackson, \textit{New Congress Relyed Heavily on PAC Donations, But Much of Spending Had Little Effect on Results}, Wall St. J., Dec. 24, 1986, at 32, col. 1. Following the 1986 elections, House incumbents maintained aggregate funds of approximately $51 million in unspent contributions. \textit{Id.}

\textsuperscript{338} The Supreme Court has shown some willingness to allow an interpretation of FECA that permits the parties to play a larger role. In Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27 (1981), the Court upheld an FEC
The party treasuries can ensure that competent candidates have the money necessary to run legitimate campaigns. Because "[i]t is a travesty to perpetuate a system of campaign finance that permits the unlimited expenditure of a candidate's personal funds at the same time that it significantly limits sources of funding for other participants," the parties can and should be used to allow all party candidates to run legitimate campaigns. Given that "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms," the creation of a spending floor that ensures candidates a minimum amount of funds is probably the most important policy goal in the campaign context today.

The ability of the parties to provide a floor of funds for their candidates can diminish challenger concerns about raising sufficient funds to run a competitive campaign. According to Professor Jacobson, the amount of money that the challenger has to spend in his or her race is probably the most important variable in congressional campaigns. Incumbent Congressmen have ready access to both funds and publicity because of their incumbent status. With this status, re-election rates for incumbents have remained at extremely high rates since FECA was enacted. Accordingly, "money is a particularly important campaign resource for nonincumbent candidates." Similarly, money is not an especially important factor for incumbents in most races. Thus, in the interpretation of section 441a(d) that allowed the National Republican Senatorial Campaign Committee to act as the agent of state parties in making expenditures on behalf of federal candidates. The Court stated that this provision "fits into the general scheme by assuring that political parties will continue to have an important role in federal elections." 

339. Mathias, supra note 143, at 68.
341. See G. Jacobson, supra note 59, at 49.
342. Perhaps the most disturbing fund-raising statistic today is the disparity in receipts from PACs between challengers and incumbents. From 1977-78 to 1985-86, the percentage of PAC funds received by incumbents has increased steadily from 61% to 81% for House races. Cohen, Incumbent Money, 1986 National Journal 2812 (Nov. 15, 1986). One-third of all PACs gave 80% or more of their contributions to incumbents in the 1986 elections. Total PAC spending in the 1986 elections amounted to $138.1 million, with $95.1 million going to incumbents. See Common Cause Study (Sept. 4, 1987).

343. In 1986, re-election rates for incumbent Representatives reached record highs, as 98% of those seeking re-election were successful. Calmes, House Incumbents Achieve Record Success Rate in 1986, 1986 Cong. Q. 2891. In addition, 85% of these candidates won with at least 60% of the vote or had no major party opposition at all. Id. From 1950 to 1982, the re-election rate for incumbent Representatives never went below 86.6% and reached a high of 96.8% in 1968 that was almost equalled by the 1976 figure of 95.8%. Ornstein, supra note 251, at 49-50. Between 1966 and 1982, more than 66.4% of incumbents seeking re-election received more than 60% of the major party vote. Id. at 53. For Senators, the rates are significantly lower, reaching a low of 55.2% in 1980, but the rates reached a high of 96.6% in 1960 and hit 93.3% in 1982. Id. at 51.
345. "Incumbents do not seem to benefit from campaign spending to anywhere near
creasing the funds available to challengers will have the effect of increasing competition for congressional seats.\textsuperscript{346}

Because of the financial clout wielded by the political parties, they can provide a means of ensuring that legitimate candidates have a base of funds sufficient to run a competitive campaign.\textsuperscript{347} Lifting the limitations on party spending will allow the parties to fulfill many of the equality goals of both the level-down and level-up advocates without raising the constitutional concerns expressed by the Supreme Court.\textsuperscript{348}

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\textsuperscript{347} One political issue that will confront any congressional action in this direction is the current disparity in fund-raising ability between the two major parties. Whether this gap will ever close is, of course, unclear. There are strong arguments, however, that the Republican advantage in fund-raising is a temporary situation, resulting from a decade-long head start for the Republicans in direct mail fund-raising and a temporary surge in fund-raising stemming from the Reagan presidency. See Mathias, supra note 143, at 73 ("Although parity does not now exist between the two major parties in fund-raising ability, it will no doubt come to pass before the decade is out.").

\textsuperscript{348} Some commentators, such as former Senator Charles Mathias, advocate public financing for all federal campaigns on a scale like that already provided for in the presidential races. Under this system, private contributions would play no role in the financing of candidate campaigns. See Mathias, supra note 143, at 71-72; see also Wertheimer, supra note 143, at 90. Other commentators, such as Professor Fleishman, advocate the use of public subsidies as a means of insuring that competent candidates will have a floor of funds from which to run a legitimate campaign. See generally Fleishman & McCorkle, supra note 113, at 294 ("A Level-Up campaign finance system should therefore contribute to a more competitive and pluralistic political process.").

As a policy matter, the public financing provisions advocated by those like Senator Mathias may contain substantial problems, including the concern with having partisan incumbents controlling the amount and timing of the public funds. See Polsby, supra note 7, at 31-41, 42 ("Public financing of elections ... carries serious dangers of excessive entanglement of existing government in the process of choosing new elective officials and the undue domination of the process by people with a personal stake in an election's outcome."). An example of this concern occurred in 1976, when Congress was faced with the task of reconstituting the Federal Election Commission. Despite a mandate from the Supreme Court to pass a bill within thirty days, Congress took more than 100 days to do so, during which time several important primary campaigns had passed, and several candidates had been forced to drop out of the race or to reduce campaign activities severely because of their inability to receive the public funds they had expected. See Polsby, supra note 7, at 35-38. This type of activity might support the concern that we should strive for a campaign system with a minimum of legislative interference with the operations of the political marketplace. See J. Ely, supra note 38.

In addition, public funding of political campaigns might be seen as a direct infringement on political liberty, as the first amendment also ensures citizens the right not to speak in political campaigns. Cf. Wooley v. Maynard, 430 U.S. 705, 713 (1977) (the state cannot require an individual "to participate in the dissemination of an ideological message ... "). The Supreme Court addressed some of these concerns in \textit{Buckley}, where it allowed public funding of presidential campaigns. See Buckley v. Valeo, 424 U.S. 1, 16 (1976) (per curiam). The presidential campaigns are financed from a voluntary tax check-off fund, which would seem to minimize the coercion problems. As Professor Jacobson points out, however, revenues lost through the voluntary check-off must be made up by other taxpayers. See G. Jacobson, supra note 59, at 203. A proposal for full
Lifting the limits on the ability of parties to spend in congressional campaigns simultaneously will strengthen the party organizations and diminish the impact of PACs. Allowing increased support from parties will reduce the almost necessary reliance of candidates on PAC funds and strengthen the parties so that they can better fulfill their role in American politics. As the amount of money contributed by PACs continues to rise, limitations on party contributions become less feasible, as parties should be given the opportunity to match the unlimited total contributions that PACs can make.

CONCLUSION

Despite the extensive litigation fostered by FECA and the significant limitations that the 1974 Act imposes on political party participation in campaigns, the parties have not participated significantly in the court challenges to date. While political parties probably represent the most successful fund-raising players within FECA's system, the parties have not taken advantage of the Supreme Court's apparent distaste for campaign limitations to challenge the laws restricting their ability to support party candidates. Hence, many of the constitutional concerns regarding party involvement in campaigns have not yet been addressed.

The parties' failure to challenge FECA as it applies to them is inexplicably

Another major problem with public financing as the proposals have presented it is that these proposals dictate spending limitations for congressional races. These limitations would have a tendency to increase incumbents' protection, as challengers often need to spend larger amounts of money to reach the name recognition of incumbents and to overcome the beneficial aspects of the office resources received by congressmen as a part of the congressional office. The political value in a campaign of the perquisites of congressional incumbency is extensive. Congressional incumbents receive numerous perquisites of office, including substantial allowances for staff, offices, congressional franking, low-cost television and radio production. For perquisites of congressional offices, see 2 U.S.C. § 46g (1982) (telephone and telegraph expenses); 2 U.S.C. §§ 57-58 (1982 & Supp. IV 1986) (House and Senate allowances for office space, travel, office supplies, etc.); 2 U.S.C. § 332 (1982) (allowances for staff). In 1982, Congressmen were allowed $352,536 for office staff and up to $256,700 in transportation costs, telecommunication costs, and office space costs. See N. Ornstein, T. Mann, M. Malbin, J. Bibby, Vital Statistics on Congress, 1982, 121, Table 5-12. In the same year, senators received up to $1,247,879 for "clerk hire," and an additional $192,624 for "legislative assistance." Id. at 123, Table 5-13. Senators additionally were provided up to $143,000 on an office expense account, and allotted up to 8,000 square feet in office space. Id. In addition, the incumbent usually has a significant advantage in terms of an ability to use her political office to generate free publicity during the course of a campaign.

The level-up subsidies advocated by Professor Fleishman remove some of these concerns but do not seem to be the most effective means of solving these problems. Equality of spending can be better achieved by permitting greater allowances for party spending. 349. See Adamany, PAC's and the Democratic Financing of Politics, 22 Ariz. L. Rev. 569, 597-602 (1980); Alexander, The Future of Election Reform, 10 Hastings Const. L.Q. 721, 736 (1983); L. Sabato, supra note 251, at 176-77. The role of PACs has been a primary focus of congressional debate in recent years. See supra note 29.

public financing of congressional campaigns would increase substantially the amount of funds required, and a public financing program financed directly through the federal budget might not meet with Supreme Court approval.

349. See Adamany, PAC's and the Democratic Financing of Politics, 22 Ariz. L. Rev. 569, 597-602 (1980); Alexander, The Future of Election Reform, 10 Hastings Const. L.Q. 721, 736 (1983); L. Sabato, supra note 251, at 176-77. The role of PACs has been a primary focus of congressional debate in recent years. See supra note 29.
able, as valid grounds exist under the admittedly inconsistent Supreme Court jurisprudence in the campaign finance area to justify a constitutional challenge. If the parties challenge the limits on party spending as they now stand, the Supreme Court should find that these limits significantly infringe upon the first amendment rights of political parties and therefore violate the Constitution. Simply put, political parties do not present the threat of corruption that the Court has sanctioned as the only acceptable justification for limiting first amendment rights in the campaign context. The parties, therefore, can be distinguished from special interest groups also participating in the political process.

In addition, a challenge to the election laws by the parties would allow the Supreme Court to reaffirm first amendment principles. This, in turn, would add a feature to the finance system that would promote the overall goals of the campaign finance system designed by Congress: a decision removing limitations on party spending would allow parties to provide a base of funds for candidates, without bringing on the threats of corruption that Congress fears.

The Court, for the most part, has failed to address the campaign finance laws as an integrated scheme. It has, instead, addressed the constitutional claims step-by-step, without considering the impact of its decisions on the integrated system designed by Congress. By lifting the limitations on a party's ability to assist its candidates in federal campaigns, the Supreme Court can take a giant step toward minimizing the incongruities it has left by its previous campaign finance decisions. Increasing the role of the parties in the finance structure, either through constitutional challenge or congressional action, would result in a system that effectively embodies many of the good intentions demonstrated by Congress in enacting the Federal Election Campaign Act Amendments of 1974.