Sending the Parties "PAC-ing"? The Constitution, Congressional Control, and Campaign Spending After Colorado Republican Federal Campaign Committee v. Federal Elections Commission

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SENDING THE PARTIES "PAC-ING"? THE CONSTITUTION, CONGRESSIONAL CONTROL, AND CAMPAIGN SPENDING AFTER COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE V. FEDERAL ELECTIONS COMMISSION

I. INTRODUCTION

Politicians, a wit once said, are so good at campaigning and so lousy at governing because they have so much experience with the former and so little experience with the latter. All humor aside, to many, one of the least desirable effects of the American Experiment begun over two hundred years ago is the advent of the campaign. The complaints about campaigns range from them being too long to them being too nasty. Many of the complaints, however, distill to these two related charges: too much money is "in politics" and, as a result, those with money play too large a role in the political process. In essence, the suspicion is that

1. Louis Harris, Reform Now: S.100 and Beyond, 8 J. L. & PUB. POL'Y 253 (1992) (advocating a dedicated, three-week campaign similar to those used in the United Kingdom).
2. Editorial, The Awful Price of Political Apathy, BUS. WEEK, Nov. 11, 1996, at 4 (arguing that the 1996 presidential candidates—Bill Clinton, Bob Dole, and Ross Perot—had the highest negative voter ratings ever recorded because of negative advertising); Bruce B. Auster & Josh Chetwynd, Accentuating the Negative, U.S. NEWS & WORLD REP., Sep. 30, 1996, at 45-47 (describing the "kinder, gentler attack ad" that the presidential campaigns used in 1996).
3. Indeed, much of the initial attempt at systematic regulation of how campaigns are financed focused on these two aspects: reducing the amount of money spent in total and reducing the influence of those with money by limiting expenditures and contributions. See infra notes 30-44 and accompanying text. Further, current proposals for new systematic regulation focus on both elements. See Sen. Russell D. Feingold, Editorial, Reform Vital: Campaign Finance System No Longer Tolerable, MONTGOMERY ADVERTISER, Nov. 17, 1996, at 3D. For example, in the 1996 election year, combined Republican and Democratic expenditures for both congressional and presidential elections totaled over $1.6 billion, up 72% from 1992. Laurie Kellman, Balanced Budget, Other Reforms Will Try Bipartisan Spirit, WASHINGTON TIMES, January 7, 1997, at E8. Although this is a great deal of money, it should be put into proper context. The total moneys spent in one two-year election cycle is roughly comparable to what two to three major U.S. corporations alone spend annually on their advertising budgets. See Bradley A. Smith, Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform, 105 YALE L.J. 1049, 1060 (1996) [hereinafter Smith, Faulty Assumptions]. Perhaps the American system does not spend enough on electing its officials:

The estimated $175 million spent in 1960 at all levels of American politics represents
the presence of massive amounts of money corrupts the political process by determining which persons get heard, and as a result, what issues get heard. The scandal surrounding the Democratic National Committee’s (successful) efforts at fundraising during the 1996 presidential campaign

only 0.0003 percent of that year’s Gross National Product, only 75 percent of what we spend to clean and repair our shoes, and only twice the amount spent by the Red Cross. The estimated $35 million spent on the 1964 Presidential race is less than one-tenth what was spent that year on spectator sports; and the total campaign bill of $200 million is only one-fifth the sum we spent that year on movie tickets. The estimated $12.5 million spent in 1968 to advertise Richard Nixon is less than what was spent that year in promoting deodorants. The $58.9 million spent on television at all levels . . . is slightly less than the cost of one Lockheed C5-A military transport plane. The $300 million total campaign spending in 1968 is 25 percent less than what the top two corporate advertisers, General Motors and Procter & Gamble, spent flogging their wares, and is 16 percent less than what tobacco manufacturers spent advertising their products.


4. The argument usually is not that those with money somehow "bribe" a politician into acting in a certain way. Bribery of a public office is a crime independent of any campaign finance law. 18 U.S.C. § 201 et seq. (1996). Rather, the typical argument is more subtle and occurs earlier in time: Money influences which candidates will run, what their agendas will be, or which speeches they will give. Bradley A. Smith, Money Talks: Speech, Corruption, Equality, and Campaign Finance, 86 GEO. L.J. 45, 59 (1997) [hereinafter, Smith, Money Talks].

Another formulation of this argument is that money buys access to politicians which allows the politician to hear the agenda of the “buyer.” Professor Lowenstein has expanded upon this idea, arguing that essentially two contribution strategies exist: the “electoral” and the “legislative.” Daniel Hays Lowenstein, On Campaign Finance Reform: The Root of All Evil is Deeply Rooted, 18 HOFSTRA L. REV. 301 (1989). Under the “electoral” strategy, the contributor will make contributions to those candidates who “are likely, if they are elected, to pursue the policies the contributor favors.” Id. at 308. This strategy will not contribute either to sure winners or to sure losers, because to do so would be a waste of time and money; however, this strategy works best when an election is close and the contributor stands to gain substantially if the “correct” candidate wins. Id. Conversely, under the “legislative” strategy, the contributor donates to the candidate who likely will win, hoping that, out of gratitude for the contribution, the candidate will pursue beneficial policies to the contributor. Id. Use of the “legislative” strategy has serious consequences and “raises issues that go to the heart of democratic theory.” Lillian R. BeVier, Campaign Finance Reform: Specious Arguments, Intractable Dilemmas, 94 COLUM. L. REV. 1258, 1273 (1994) [hereinafter BeVier, Specious Argument]. Though the reformist arguments usually target the “legislative” strategy, the few studies that exist are inconclusive as to whether the money follows the votes (electoral strategy), or the votes follow the money (legislative strategy). See FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE 164-70 (1992) [hereinafter SORAUF, INSIDE CAMPAIGN FINANCE].

Such criticism concludes that only the people who get access get results, meaning that those without money are, in effect, excluded from the political debate. For example, Derek Bok of Harvard University stated that the removal of money from politics “would lessen the disadvantages of the poor and other unorganized groups in defending their interests in Washington.” The Inauguration: Voices; Priorities for the Nation: Education and Housing, N.Y. TIMES, Jan. 21, 1997, at A16. See generally J. Skelly Wright, Politics and the Constitution: Is Money Speech?, 85 YALE L.J. 1001 (1976) [hereinafter, Wright, Is Money Speech?].
may have thrown new gasoline onto an old fire.\footnote{5}

The current regulatory scheme for financing political campaigns is mainly a result of the Watergate crisis.\footnote{6} After Watergate, the populace was so thoroughly repulsed by the apparent corruption of the Washington elite that Congress—quintessentially Washington elites if ever they existed—enacted the most comprehensive accumulation of campaign finance laws to date. The Supreme Court, however, not amused by the infringement of the new laws against the First Amendment rights of politically active persons, struck down a good portion of the regulatory scheme.\footnote{7} The wisdom (or lack thereof) of both the current regulatory scheme and the \textit{Buckley v. Valeo} decision has been the subject of much debate and disagreement.

This Comment seeks to refrain from entering that fray as much as is possible. Rather than further criticizing the wisdom of the current campaign finance law as it stands since \textit{Buckley}, this Comment instead discusses whether, given the current status of both the campaign finance laws enacted by Congress and the judicial gloss of those laws, one can constitutionally justify the campaign expenditure regulations applied to political parties. In essence, this Comment does not argue for a new regulatory or judicial framework from which to judge how campaigns ought to be financed.\footnote{8} Rather, this Comment discusses whether, given

\footnotesize
\textit{THAYER, supra note 3, at 284.}

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\textit{See infra, Part III, notes 30-35 and accompanying text.}

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\textit{Such articles and books are already abundant. More often, the criticism of the current regulatory scheme is leveled not at Congress for passing the Federal Election Campaign Act of 1971, but rather at the Supreme Court for invalidating much of that Congressional action. See, e.g., OWEN M. FISS, THE IRONY OF FREE SPEECH 17-19, 80 (1996) (arguing that}
the current status of campaign finance laws, political parties constitutionally fall within the present scheme.

To accomplish this task, three steps are necessary. First, one must understand what political parties are, where it is that they came from, and what it is that they do. Therefore, a brief history of American political parties—from the Revolution until the late 20th Century—follows in Part II. While looking at the history of American political parties, Part II also discusses the varying historical methods of financing campaigns throughout the history of the United States. Second, one must understand the attempts by Congress to regulate the way campaigns are financed. Most notably, Part III focuses on the current Congressional attempt at regulation, the Federal Elections Campaign Act (FECA) of 1974, and its subsequent treatment by the courts. Third, once an understanding of both the history of political parties and the current regulatory scheme is obtained, the question of the applicability of the regulation to political parties can be discussed. Part IV examines this question. This analysis hinges on whether the rationale allowing the regulation of campaign activities of individuals and corporations is cogent when applied to political parties.

II. A BRIEF HISTORY OF AMERICAN POLITICAL PARTIES

The Constitution is silent on the subject of political parties probably free speech demands that the state must "lower the voices of some in order to hear the voice of others"); LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 13-27 to 13-31 (1988) (arguing that limiting contributions levels the playing field between the affluent and the non-affluent); Vincent Blasi, Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate the First Amendment After All, 94 COLUM. L. REV. 1281 (1984) (arguing that "protect[ing] the time of elected representatives and candidates for office" from fund raising should be a major goal of campaign finance reform); J. Skelly Wright, Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, 82 COLUM. L. REV. 609 (1982) (arguing that the Supreme Court in Buckley failed to realize that "political equality and individual participation" are hallmarks of the First Amendment); Marlene Arnold Nicholson, Campaign Financing and Equal Protection, 26 STAN. L. REV. 815 (1974) (arguing that large political contributions violate the equal protection rights of non-affluent voters).

However, the debate has not been entirely one-sided. Those who believe that the limitation of campaign spending is not only bad policy, but unconstitutional, are not without a voice. See, e.g., Smith, Faulty Assumptions, supra note 3, at 1049 (arguing that campaign finance laws are counter productive to the goals for which they strive); George F. Will, Civic Speech Gets Rationed, NEWSWEEK, April 15, 1996, at 80 (arguing that the Constitution, being a political document, most fundamentally protects speech related to political advocacy); Lil- lian R. BeVier, Specious Arguments, Intractable Dilemmas, 94 COLUMB. L. REV. 1258 (1994); Martin H. Redhish, Campaign Spending Laws and the First Amendment, 46 N.Y.U. L. REV. 901 (1971) (arguing that laws limiting political spending violate the First Amendment).
because in 1787 parties as we now think of them did not exist. Indeed, when the new federal government was created, any differences between political leaders were a result of regional and personal differences and not from anything resembling party identification. These circumstances did not substantially change until sometime near the end of George Washington’s second term as president. However, by the time that Washington gave his farewell speech in 1796, clear “party” divisions were appearing with Alexander Hamilton and John Adams on one side and Thomas Jefferson and James Madison on the other. Washington and many of his contemporaries saw this emerging party structure as remarkably distasteful, and as a result, gave the young nation this warning about the political party:

It serves always to distract the Public Councils and enfeeble the Public administration. It agitates the Community with ill founded jealousies and false alarms; kindles the animosity of one part against another; foments occasionally riot and insurrection. It opens the door to foreign influence and corruption . . .

There is an opinion that parties in free countries are useful

9. ROBERT J. DINKIN, CAMPAIGNING IN AMERICA: A HISTORY OF ELECTION PRACTICES 1-11 (1989) (noting that parties did not exist in the colonies and were not immediately present in the new Republic).

10. See ROBERT KELLY, THE CULTURAL PATTERN IN AMERICAN POLITICS 82 (1979). Kelly argues that, in contrast to the political leaders in the Western European nations, all the principle political figures in the early United States were Whigs at heart. As such, all believed that government existed to serve the public, that power ought to be decentralized, and that individual liberty was essential. Id. However, within this overarching Whig tradition, Kelly argues that four different regional “modes of republicanism” developed: (1) the “moralistic” republicanism in the New England States, (2) the “libertarian” republicanism in the South, (3) the “egalitarian” and the (4) “elitist” republicanism in the Middle Atlantic States. Id. at 83-85. Within these four regional factions arose much of the political conflict of the post-Revolutionary period.

Further, even accounting for these regional differences, those who voted in a partisan fashion in the capital city were generally unwilling to extend that ideological fervor when the election season rolled around. At “work” legislators could be partisans; at home candidates needed to be independents. DINKIN, supra note 9, at 12.

11. However, even during Washington’s presidency, one could see the sign of things to come. More and more elections featured multiple candidates—candidates who organized bands of supporters (what might be called a precursor of the political machine) and who actually “ campaigned” by giving speeches and traveling throughout the district. DINKIN, supra note 9, at 11-18.

12. JOHN H. ALDRICH, WHY PARTIES? 77 (1995); KELLY, supra note 10, at 110. Although most politicians were either Federalists or (Jeffersonian) Republicans, Kelly argues that neither party considered a multiple party system natural or sustainable. Since only one party could in the end survive, elections gained added importance. KELLY, supra note 10, at 110.
checks upon the Administration of the Government and serve to keep alive the spirit of Liberty.... [I]n those [governments] of the popular character, in Governments purely elective, it is a spirit not to be encouraged.... A fire not to be quenched; it demands a uniform vigilance to prevent its bursting into flame, lest instead of warming it should consume.  

Along with the advent of dual parties came the quickening of the campaign. Although Washington was a nearly unopposed choice for the first president, his successors, beginning in 1796 with John Adams, did not have that luxury. The campaign—especially at the national level—was born, albeit in an infant state. One result of campaigns was the generation of public interest in politics. As a result, eligible voter participation grew from 25% in the 1790s to nearly 70% in some states by 1808. Considering the monumental stature of these candidates—Adams, Jefferson, Madison—it is more accurate to state that they “stood” for office rather than “ran” for office. As a result, the early campaigns consisted of little more than recommendation and reputation. What little cost was incurred as the result of such a campaign—an occasional leaflet or food and alcoholic drink, for example—was usually paid for by the aristocratic candidate himself.  

When Jefferson defeated Adams in 1800, the Federalists were dealt a blow from which they would not recover. Over the course of the next quarter century, the (Jeffersonian) Republicans, without any serious “external” enemy to unite it, disintegrated into rival factions. By the early 1820s, the first party system was all but dead. Out of this chaos arose a new candidate with a new method of campaigning: Andrew Jackson.

14. DINKIN, supra note 9, at 18.
15. KELLY, supra note 10, at 119. Of course, it is always important to remember that the only eligible voters at the time were propertied white males—a rather small and homogeneous segment of the overall population. Smith, Faulty Assumptions, supra note 3, at 1053.
16. See Smith, Faulty Assumptions, supra note 3, at 1053. Indeed, when James Madison sought re-election to the House of Representatives in 1790, he wrote to a few genteel acquaintances, asked for their support, and let his reputation and association go from there. DINKIN, supra note 9, at 12. Remnants of this simpler, if not nobler, time remained at least until the sixth president, John Quincy Adams, who argued, “To pay money for securing [the presidency] either directly or indirectly [was] incorrect in principle.” Quoted in HERBERT E. ALEXANDER, FINANCING POLITICS 5 (3d ed. 1984).
17. See Smith, Faulty Assumptions, supra note 3, at 1053.
By the time of the 1828 Presidential elections, suffrage had been extended to nearly all free white males without regard to property ownership. In light of this change, Martin Van Buren, coming to the aid of Jackson, organized the first Presidential campaign directed toward the popular masses. However, such a campaign required two features before unseen: extensive fundraising and substantial political organization. To get his message out to the masses, Jackson required a network of supporters scattered throughout the country. Additionally, during an era limited in its means of mass communication, Jackson needed campaign materials—newspaper advertisements, pamphlets, and rallies—extolling the virtues of his candidacy. All of these things—the political "machine," rallies, advertisements, pamphlets, and the like—while necessary to get his message beyond the aristocracy to the general public, required significant capital outlays. Enter the political party.

19. Id. at 503.
20. Id.
21. Interestingly, the notion of the candidate himself traveling throughout the country "campaigning" was relatively unheard of until this century. Even Jackson, the man of the people, retired to his house upon receiving word that he was the Democratic nominee. ALEXANDER, supra note 16, at 6. Most of the actual campaigning was done by members of the candidate's party. The candidates themselves would at times appear at rallies to greet crowds of supporters, even embarking on special trips to promote their candidacy. DINKIN, supra note 9, at 44. However, even though they might be seen, it was not unusual for candidates not to be heard. Id. (noting that Andrew Jackson gave no speeches on his campaign trips). A few notable exceptions existed to this "non-campaign campaign"—Stephen Douglas and William Jennings Bryan, for example—but even William McKinley in 1896 sat on his front porch and let the citizens come to him. ALEXANDER, supra note 16, at 6. See also President's Commission on Campaign Costs, Financing Presidential Campaigns, in THE AMERICAN PARTY SYSTEM 264, 265 (John R. Owens & P.J. Staudenraus eds., 1965) (comparing the campaign differences of Abraham Lincoln who never left Springfield, Illinois, nor gave a speech during his 1860 campaign to John Kennedy who traveled 44,000 miles and gave 360 speeches during his 1960 campaign).
22. See Smith, Faulty Assumptions, supra note 3, at 1053. See also ROBERT V. REMINI, THE ELECTION OF ANDREW JACKSON 76-77 (1963) (noting that under Van Buren's leadership, the Democratic party established a nationwide network of 600 newspapers as a means of blanketing the country with pro-Jackson rhetoric).
23. Holt, supra note 18, at 503. Not surprisingly, the democratization of the election process required campaigns. Campaigns required campaign expenditures. These expenditures necessarily drove up the cost of obtaining office. For example, by the 1830s a candidate could expect a run for Congress to cost between $3,000 and $4,000. DINKIN, supra note 9, at 40. Statewide offices such as governor could easily cost more—sometimes double or triple the amount it took to run for the House of Representatives. Id. Indeed, Professor Dinkin estimates that by the middle of the Nineteenth Century, a presidential campaign cost $50,000 without including the costs incurred by the state parties for promoting the party's entire ticket. Id.

Even the simplest form of communication—the newspaper—that Jackson's Democrats employed in the hundreds required an annual budget of $500,000. REMINI, supra note 22, at
Most of the campaign funds were not raised from the general public, however. Beginning with Jackson and continuing until the civil service reforms of the Pendleton Act in 1883, the burden of financing a campaign fell on those federal bureaucrats whose jobs—under the "spoils system"—hinged on the reelection of their benefactor. To accomplish this, a portion of the bureaucrat’s salary was deducted, much like modern day income tax withholding, to support the reelection of the officeholder. The period from the 1870s until the 1920s has been labeled the "Golden Age of Parties" mainly because the political parties—more accurately, the local political bosses—effectively controlled the candidates because the parties effectively controlled the social welfare benefits that many citizens, especially immigrants, desperately needed. With the federal social welfare guarantees of the New Deal years away, new immigrants turned to the local political party bosses for everything from entertainment to employment.

All of that began to change with the passage of the Pendleton Act in 1883 that replaced much of the old spoils system with non-political civil servants. The removal of the main source of campaign funds, however, did not remove the necessity of raising those funds. Candidates and parties still needed sources of income to finance mass campaigns but found that local control and patronage were not nearly as effective as they once were. Propitiously at this same time, the modern corporation emerged onto the American landscape. Because of its size and potential for generating wealth, the corporation had a distinct interest in the government’s actions since quite often the government was one of the only checks on corporate power. Consequently, corporations seeking to in-

77. Newspapers, of course, were not the sole expense of these campaigns. Not terribly unlike today, party leaders and officeholders sought to have the federal government assume as much of this cost as possible, mainly through the franking privilege. DINKIN, supra note 9, at 40-41.
25. Paul S. Herrnson, The High Finance of American Politics: Campaign Spending and Reform in Federal Elections, in CAMPAIGN AND PARTY FINANCE IN NORTH AMERICA AND WESTERN EUROPE 17, 18 (Arthur B. Bunlicks ed., 1993). See also Smith, Faulty Assumptions, supra note 3, at 1053. Smith, citing various primary sources, notes that by 1878, beneficiaries of the "spoils system" financed nearly 90% of Republican congressional campaigns. Additionally, "would-be officeholders" associated with the "would-be benefactor" also had the responsibility of financing the challenger's campaign. Id.
26. Smith, Faulty Assumptions, supra note 3, at 1053.
28. Id.
29. For example, the emerging corporation benefited from the high tariff that kept cheaper foreign competition from affecting the United States market. See Smith, Faulty As-
fluence policy and parties seeking to find new methods of campaign finance found one another—and found that each could provide benefits for the other. The result: By 1904, corporations financed over 73% of Theodore Roosevelt's presidential campaign. While corporations played a major role in financing campaigns, wealthy individuals also became an integral part of campaign financing by contributing large sums to many candidates' campaigns.

Alarmed at the influence—or at the very least, the potential influence—corporations and wealthy individuals exerted over politicians, state governments, led by Progressives such as Robert LaFollette, in the early part of this century passed laws regulating political parties and campaign financing. The federal government, followed the lead of the states, although to a lesser extent, by passing laws regulating campaign financing. Federal regulation began with the passage of the Tillman Act

sumptions, supra note 3, at 1054; see also Daniel K. Tarullo, Law and Politics in Twentieth Century Tariff History, 34 UCLA L. REV. 285, 286 (1986) (noting that in the late nineteenth and early twentieth centuries, the tariff would rise if Republicans were in office and fall if Democrats were in office—practices that reflected the philosophies of each party). Congress was not entirely benevolent, however. In response to the inequities and excesses of the late 19th century corporate culture, Congress passed legislation such as the Sherman Antitrust Act which allowed the federal government to regulate, at least to some extent, the corporate monopoly. See VIRGINIA BERNHARD ET AL., FIRSTHAND AMERICA: A HISTORY OF THE UNITED STATES 525 (1991). Politicians, faced with the costs of campaigning without the revenues generated by patronage, used their advantageous position to "fry the [corporate] fat"—meaning to strike enough fear in the heart of corporate interests over what Congress could do to entice those interests into regularly contributing to the party. THAYER, supra note 3, at 46.

30. Smith, Faulty Assumptions, supra note 3, at 1054. While the Republican Party was the natural beneficiary of corporate contributions because of its pro-business philosophy, many corporations contributed freely to both parties in an effort to insure that, whichever party was in power, their interests would be considered. See EDWIN M. EPSTEIN, CORPORATIONS, CONTRIBUTIONS, AND POLITICAL CAMPAIGNS 11 (1978).

31. Smith, Faulty Assumptions, supra note 3, at 1054. See also Herrnson, supra note 25, at 18.

32. The state progressive reforms included making the election for certain local offices non-partisan so that the "rascals" (political bosses) were not only kept "out of selecting local leaders... [but] kept... out of the game altogether." XANDRA KAYDEN & EDDIE MAHE, JR., THE PARTY GOES ON 41 (1985). Other progressive reforms included regulating various aspects of political parties. This was accomplished through extensive codification of what "committees and conventions" the parties needed to exhibit, how party leadership was chosen, and what persons were permitted to make party decisions. AUSTIN RANNEY, CURING THE MISCHIEFS OF FACTION 18 (1975). See also JEANE KIRKPATRICK, DISMANTLING THE PARTIES: REFLECTIONS ON PARTY REFORM AND PARTY DECOMPOSITION 7 (1979) (noting that the LaFollette Progressives embodied the "persistent American suspicion of organization"). The most dramatic and long-lasting of the progressive reforms, however, was "Wisconsin's great contribution for the art of governance—the direct primary." Id. at 81.
in 1907, that banned a narrow category of corporate contributions to candidates for President and Congress. Additionally, in the first part of this century, Congress occasionally passed measures increasing its regulation of campaign financing methods. These Congressional regulations focused on the disclosure of financial contributors as well as on the limitations of financial contributions and spending. However,

34. Herrnson, supra note 25, at 18; Epstein, supra note 30, at 11-12.

Interestingly, the history of political action committees (PACs) began with the Smith-Connally and Taft-Hartley Acts. As noted above, the Tillman Act banned direct corporate contributions to political campaigns. See Pub. L. No. 59-36, 34 Stat. 864 (1907). At that time no similar restriction existed for labor unions. Not surprisingly, organized labor in the 1920s and 1930s began to exercise clout by contributing large amounts of money to political campaigns. For example, some have estimated that labor unions contributed nearly $800,000 in the 1936 election to help re-elect FDR. Alexander, supra note 16, at 83. In addition, organized labor engaged in a series of controversial work stoppages during the Second World War. Larry J. Sabato, PAC Power: Inside the World of Political Action Committees 5-6 (1984) [hereinafter Sabato, PAC Power]. These highly public acts of large campaign contributions and strikes drew attention to organized labor and not all of it was positive. Id.

As a result, in 1939 Senator Carl Hatch of New Mexico offered an amendment to the Pendleton Act that extended its prohibitions against political activity to “virtually all government employees.” Id. at 71. Labor’s opponents were not finished, however. Over the veto of FDR, an alliance of Republicans and Southern Democrats passed the war time Smith-Connally Act, which brought the campaign activities of unions in alignment with corporations. Id. at 73; Sabato, PAC Power, supra, at 6. Once the War ended, the Taft-Hartley Act made permanent the Smith-Connally Act’s wartime restrictions. Id.; Thayer, supra note 3, at 73.

Out of these restrictions emerged the first PAC—organized labor’s Committee for Industrial Organization Political Action Committee (“CIO-PAC”). In 1955 when the American Federation of Labor (“AFL”) and the CIO merged, so did their PACs. The resulting PAC—the Committee on Political Education (“COPE”)—quickly emerged as arguably the “most important and effective PAC” of all time. Sabato, PAC Power, supra, at 6.

Business interests did not follow the unions’ lead until the early 1960s. Id. In fact, it is only a rather recent phenomenon that business organizations have had more and better funded PACs in comparison to labor. See Carl T. Bogus, Excessive Executive Compensation and the Failure of Corporate Democracy, 41 Buff. L. Rev. 1, 23 (1993) (noting that in 1974 corporate PACs numbered 89 while labor PACs numbered 201; by 1989 corporations had over five times as many PACs as unions—1,745 versus 339).
these early attempts at campaign regulation were doomed to fail because they lacked an effective supervisory body that could force compliance with the law and because they were easily circumvented. As a result, most of these early reform attempts were summarily ignored by both the candidate and contributor.

The most comprehensive—and to date, the latest—law attempting to reform the financing of political campaigns occurred with the passage of the Federal Election Campaign Act in 1971 and with its 1974 amendments (hereinafter “FECA,” referring to the 1971 act as modified by the 1974 amendments). Congress passed FECA in response to allegations of large campaign contributions by one wealthy individual to President Nixon’s successful campaign and passed the 1974 amendments in the wake of the Watergate scandal. FECA comprehensively regulated nearly all aspects of modern campaigning imposing disclosure requirements; contribution limitations to both candidates, PACs, and parties; expenditure limitations on candidates and parties; and partial public financing of presidential elections. Considering the encompassing nature of the FECA regulatory scheme and considering that significant remnants of it still remain the current regulatory scheme, a discussion of FECA’s impact warrants a separate discussion below.

36. See Herrnson, supra note 25, at 19. See also SORAUF, INSIDE CAMPAIGN FINANCE, supra note 4, at 5; THAYER, supra note 3, at 284-88.

37. See Nahra, Political Parties, supra note 35, at 62. The main problems with these early attempts were twofold: they were easy to avoid and no one effectively enforced them. Id. For example, disclosure and contribution limitations were easily circumvented by establishing “independent committees” from the candidate. FRANK J. SORAUF, POLITICAL PARTIES IN THE AMERICAN SYSTEM 141 (1964) [hereinafter SORAUF, POLITICAL PARTIES]. Additionally, enforcement of the early acts was nonexistent. Despite gargantuan violations of the Federal Corrupt Practices Act, for example, not a single person was prosecuted under its penalty provisions. See SORAUF, INSIDE CAMPAIGN FINANCE, supra note 4, at 6.


40. Smith, Faulty Assumptions, supra note 3, at 1055; SORAUF, INSIDE CAMPAIGN FINANCE, supra note 4, at 6-7.

41. 2 U.S.C. § 434 (1976)

42. Id. § 441a(a).

III. FECA, BUCKLEY V. VALEO, AND THE CURRENT REGULATORY MESS

A. The Congressional Plan

Building from a similar regulatory scheme established in the Corrupt Practices Act, FECA established an elaborate and comprehensive system of federal campaign financing. FECA, however, went far beyond any prior attempt at regulation. Indeed, FECA for the first time transformed "running for federal office [into] 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."44

First and foremost among the regulatory trappings was a limitation on the amount of money that a contributor—individual, political party, or "political committee" (more commonly known as a "political action committee" or "PAC")—could give. An individual contributor could give a maximum of $1000 to any one candidate, $20,000 to a committee established by a national party but not at the disposal of one candidate, and $5,000 to a PAC per calendar year.45 Additionally, a PAC could give a maximum of $5,000 to a candidate, $15,000 to a political party established by a national party, and $5,000 to any other political committee per calendar year.46 In addition to the limits on contributions to these entities, the maximum amount that any one individual could give in total to all political organizations during a calendar year was $25,000.47 Second, FECA limited the amount of money that a candidate could spend on a campaign. These expenditure limitations were accomplished either by establishing a maximum total dollar amount48 or by multiplying a state's eligible voters by some monetary amount.49

46. Id.
47. Id.
48. FECA, Pub. L. No. 93-443, 88 Stat. 1263, § 101(c)(1)(A), (B). The maximum dollar amount limitations applied to persons running for the office of the President. FECA even divided the total spending amount into money spent to win the party's nomination ($10,000,000) and money spent to win the White House ($20,000,000). Id.
49. FECA, Pub. L. No. 93-443, 88 Stat. 1263, § 101(c)(1)(C)-(F). The "per-eligible voter" method might be employed for candidates running for either the Senate or the House of Representatives. For example, a candidate running for the Senate or the House (in a state with more than one House member) could spend the greater of $100,000 or $.08 per eligible voter on her campaign. Id. Similarly, the candidate running for the Senate or the House (in a
Moreover, under FECA's expenditure limitations, a candidate could spend at most $50,000 of her own money on her own campaign.\(^5\) Third, FECA limited to $1000 the amount of money groups not affiliated with the candidate or the campaign could spend in support of the candidate. These were expenditures made without the candidate's knowledge or authorization but expenditures, nonetheless, which a third party authorized to aid a candidate's campaign. Fourth, FECA imposed disclosure requirements on the contributors to a campaign or PAC, as well as disclosure by persons who independently—meaning without the knowledge of or coordination with the candidate—expended funds on behalf of the candidate.\(^5\) Fifth, FECA established a partial system of public financing for presidential elections.\(^5\) Sixth and finally, FECA created the Federal Election Commission ("the Commission") to enforce the provisions of FECA.\(^5\)

Shortly after its passage, a "diverse group of political actors"\(^5\) from the ACLU and presidential candidate Eugene McCarthy to the American Conservative Union and Senator James Buckley—challenged the constitutionality of FECA. The Supreme Court, in *Buckley v. Valeo*, \(^5\) upheld certain provisions of FECA and struck down other provisions of FECA. While *Buckley* has been strongly criticized from the time of its state with only one House member) could spend the greater of $150,000 or $.12 per eligible voter on her campaign. *Id.*

50. FECA, Pub. L. No. 93-443, 88 Stat. 1263, § 608(a)(1)(A). The breakdown is as follows: $50,000 for the Presidency, $35,000 for the Senate, and $25,000 for the House. *Id.*


Since FECA's passage in 1974, repeated efforts by reformers to expand the current public financing beyond Presidential elections to Congressional elections have, at least to date, fallen on deaf ears. See, e.g., Susan Manes, *Up for Bid: The Common Cause View, in Money, Elections, and Democracy* 17 (Margaret Latus Nugent & John R. Johannes eds., 1990).


delivery,\textsuperscript{56} understanding the Court's approach and rationale in \textit{Buckley} is crucial to understanding both the interpretation of the First Amendment as it relates to political speech and the relationship between that interpretation and political parties.

\textbf{B. The Supreme Court Response: Buckley v. Valeo}

Faced with FECA's myriad of regulations regarding political advocacy, the Court chartered a middle course in its decision. The Court recognized two potentially polar propositions, namely that Congress has the "constitutional power . . . to regulate federal elections"\textsuperscript{57} and that the First Amendment provides the "broadest protection to . . . political expression."\textsuperscript{58} Faced with these propositions, the Court determined that its task was not to decide the legitimacy of congressional regulation of federal elections \textit{in toto}, but rather to decide whether Congress' attempt through FECA unduly burdened the First Amendment rights of citizens.\textsuperscript{59} With this mandate in mind, the Court's most notable—and influential—principle from \textit{Buckley} is that, in politics at least, money is speech.\textsuperscript{60} The Court summarily rejected the notion that restrictions on the amount of money persons can give or spend in a federal election are merely time, place, and manner restrictions.\textsuperscript{61} Rather, noting that in a vast, modern society, the communication of ideas requires the expenditure of money, the Court held that limiting spending in federal elections was a direct burden restricting core conduct and consequently was sub-

\begin{footnotesize}
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\item \textsuperscript{56} See, e.g., Wright, \textit{Is Money Speech?}, supra note 4.
\item \textsuperscript{57} \textit{Buckley}, 424 U.S. at 13.
\item \textsuperscript{58} \textit{Id.} at 14.
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.} at 19. The Court in \textit{New York Times v. Sullivan} opined essentially the same principle when it held that the Times did not lose its First Amendment protections merely because an allegedly libelous statement appeared in an editorial advertisement. 376 U.S. 254, 266 (1964). The Court noted that to hold otherwise would be to discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.
\item \textit{Id.} The point is obvious: The First Amendment protections do not lessen merely because the actual production of the speech—printing, broadcasting, and the like—are farmed out to another and that other is paid for her services. \textit{But see}, Wright, \textit{Is Money Speech?}, \textit{supra} note 4, at 1005.
\item \textsuperscript{61} \textit{Buckley v. Valeo}, 424 U.S. 1, 17-18 (1976) (per curiam). Categorizing FECA as time, place, and manner restrictions would allow the government latitude to regulate the activity so long as it does not discriminate on the basis of content. \textit{See Erznoznik v. City of Jacksonville}, 422 U.S. 205, 209 (1975).
\end{itemize}
\end{footnotesize}
ject to strict scrutiny. Therefore, the Court analyzed FECA to determine if its regulations impermissibly burdened the exercise of First Amendment rights, resulting in different answers for different provisions.

Of the justifications the government offered for FECA’s regulations of constitutionally protected activity, the Court recognized the prevention of corruption—whether real or imagined—as the sole valid compelling government interest. Further, the Court limited its definition of “corruption” to quid pro quo transactions between the candidate and contributor. With this one compelling interest as the standard, the Court went about the business of analyzing FECA to see if it indeed was narrowly tailored to achieve the goal of preventing corruption. In dissecting FECA’s two most controversial provisions—the limitation on contributions to candidates and the limitations on independent expenditures on behalf of a candidate—the Court created the standard by which later campaign finance challenges would be judged. Specifically, the Court drew a distinction between making a contribution to a candidate, PAC, or political party and making an expenditure of personal funds independent of any coordination with the candidate, PAC, or political party. In drawing this distinction, the Court held that, due to the po-

62. Buckley, 424 U.S. at 19. The Court stated that restricting the expenditure of money in campaigns reduces the “quantity of [political] expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” Id. Certain costs have always been necessary to get one’s message out. Even the simplest forms of communication in the nation’s history—the publication of Thomas Paine’s Common Sense tract, for example—required some capital outlay by someone. See supra note 23 (noting that in the 1820s, Andrew Jackson’s network of newspapers cost nearly $500,000 annually to operate).

In addition, in the late twentieth century, the most effective means of communication (i.e., television and radio) are also the most expensive. See CONGRESSIONAL QUARTERLY, CONGRESSIONAL CAMPAIGN FINANCES: HISTORY, FACTS, AND CONTROVERSY 20-22 (1992); Bill Thomas, Ads Could Be Regulated in the Last 90 Days of Election, ROLL CALL, January 9, 1997, at 26 (noting that the AFL-CIO alone spent between $35-53 million on TV ads in the 1996 elections); see also Wright, supra note 8, at 620 (noting that the cost of a thirty second television ad in Portland, Oregon, jumped from $55 in 1974 to $3,000 in 1982).

63. Buckley, 424 U.S. at 25-26. The other “ancillary” justifications the government offered for FECA’s regulations were limiting the disproportionate influence of the affluent and slowing the increasing costs of federal elections. Id. The Court did not find these two justifications compelling.

64. Id. at 26-27. This narrow definition of “corruption” has drawn the ire of many of Buckley’s critics. See supra, note 8 and accompanying text; see also Smith, Money Talks, supra note 4, at 55; BeVier, Money and Politics, supra note 8, at 1081-83; Note, Campaign Contributions and Federal Bribery Law, 92 HARV. L. REV. 451 (1978).

65. See infra Part III(C).

66. Buckley, 424 U.S. at 29, 45. The distinction between a contribution and an expendi-
tential for a quid pro quo exchange of campaign money for political favor, the limitation on the amount a person could contribute to a campaign, PAC, or political party passed constitutional muster. Conversely, the Court held that the limitation on independent political expenditures—made in support of a candidate by a third party or by the candidate herself out of personal funds—were not constitutionally permissible. The Court reasoned that an expenditure, made without the direction or control of any candidate, was "core First Amendment expression" free from any quid pro quo danger. The Court noted that such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

Similar reasoning, when applied to FECA's limitations on spending personal wealth, revealed that such a regulation violated the Constitution because the notion that a candidate could corrupt herself from the expenditure of her own money was absurd.

While Buckley established the framework from which to view the regulation of campaign financing, it nonetheless left many questions unanswered. These questions centered around the constitutionality of FECA's provisions regarding non-candidates: PACs and political par-

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68. Id. at 45.
69. Id. at 47-48.
70. Id. at 47.
71. Buckley, 424 U.S. at 52.
ties. The cases that follow outline the Court's application of *Buckley* in response to the challenge of different provisions of FECA.

C. Post-Buckley: FECA's Constitutionality as Applied to PACs

Shortly after the Court decided *Buckley*, both the Democratic and Republican parties, seeking flexibility in the manner in which they made their contributions to their candidates and expenditures on behalf of their candidates, utilized national party committees as the conduit for channeling national money to local candidates. Specifically, both the Democrats and the Republicans, based upon a Commission advisory opinion, designated their respective national party committees to be the national party's agent for purposes of campaign finance distribution to local Senatorial candidates. Under FECA, such national party committees (for example, the National Republican Senatorial Committee) are authorized to make contributions up to $17,500 to a Senatorial candidate. However, FECA itself is silent on whether the national party committees can make expenditures on behalf of Senatorial candidates.

In response to this silence, in April of 1977, the Commission issued a regulation that allowed the national parties to channel money to either national or state political committees, in 1978, the Republicans sought to do just the opposite: allow the state parties to channel money to the national party committees. The Democrats were not amused with this variation on a theme and filed a complaint with the Commission; eventually the complaint's substance reached the Supreme Court. At issue in *F.E.C. v. Democratic Senatorial Campaign Committee* was whether given the silence of section 441a(d)(3), the national committees could act as agents of the state parties.

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74. *Id.* § 441a(d) (1996).
77. *Id.* at 33-34.
A unanimous Court determined that the silence of FECA Section 441a(d)(3) did not preclude the national party committees from acting as the agents of the state parties. In reaching its holding, the Court noted that striking down the agency relationship between the state parties and the national party committees—a practice that only the Republicans employed at the time—would necessitate striking down the agency relationship between the national party and the national party committees as well—a practice in which both parties engaged. The only point of contention among the Court related to the ability of the national party committees under FECA to make expenditures on behalf of the Senatorial candidates. The Court noted that “[p]arty committees are considered incapable of making ‘independent’ expenditures in connection with the campaigns of their party’s candidates.” In his concurrence, Justice Stevens took issue with that assumption, noting that, with the facts of this case, he was not “entirely sure that the expenditures at issue... ‘otherwise would be impermissible.’” Unresolved after Democratic Senatorial Campaign Committee is whether the political committees could make expenditures on behalf Senatorial candidates that exceeded FECA’s amount limitation—in essence, whether the FECA provision violated the First Amendment. Such question did not reach the Court until 1996.

Also in 1981, the Court heard a challenge to FECA’s provision limiting the amount a person can contribute to a political committee to $5,000 annually. In California Medical Association v. F.E.C., the California Medical Association (“Medical Association”) argued that the $5,000 annual limit on the amount it could contribute to the California Medical Political Action Committee (“CALPAC”) was unconstitutional. In challenging this provision of FECA, the Medical Association argued first that its “contributions” to CALPAC were actually expendi-
tutes and therefore, under *Buckley*, immune from regulation. CALPAC was a PAC formed by the Medical Association and received substantial, but not all, of its funding from the Medical Association. It existed to engage in political advocacy on behalf of the Medical Association. The Medical Association argued that, because of its close relationship with CALPAC, any moneys it gave to CALPAC ought to be treated the same for purposes of constitutional analysis as if the Medical Association had skipped the CALPAC "straw man" and spent the money itself. The Court was unpersuaded by this "speech by proxy" argument, noting that contributions to PACs—apparently even those with whom the contributor created and controlled—were not the type of activity "entitled to full First Amendment protection" under *Buckley*.

Failing with its first argument, the Medical Association next argued that the sole justification for upholding the regulations in *Buckley*—*quid pro quo* corruption—was not present in its contributions to CALPAC. The Medical Association argued that neither actual nor apparent corruption was possible when a PAC was the recipient of the contribution because Congress, in enacting FECA, was attempting to prevent the corruption of politicians, not contributors. The Court did not agree, noting that such an exception would make the "legitimate" limitation on contributions by individuals to candidates easy to avoid by merely channeling the money through a "straw man" PAC.

Having upheld a contribution limitation in *California Medical Association*, the Court in 1984 heard a challenge to a regulation limiting the amount PACs could independently spend in presidential races where the candidate had accepted public funding. The purpose of the PAC at issue in this case, the National Conservative Political Action Committee ("NCPAC"), was to promote the election of conservative persons to

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86. *Id.* at 195.
87. *Id.* at 184. While the Medical Association formed CALPAC, CALPAC was a “separate legal entity that [received] funds from multiple sources.” *Id.* at 196.
88. *Id.* at 184.
89. *Id.* at 196. Justice Blackmun found this mechanical application of *Buckley* unappealing, stating that "speech by proxy" was indeed "entitled to full First Amendment protection." *Id.* at 202-03 (Blackmun, J., concurring in part and concurring in judgment). Nonetheless, he agreed with the Court that section 441a(a)(1)(C) was constitutional because it "impl[icated] the governmental interest in preventing actual or potential corruption." *Id.* at 203 (Blackmun, J., concurring in part and concurring in judgment).
90. *Id.* at 195.
91. *Id.* at 197.
92. *Id.* at 198.
federal office. In 1983, NCPAC announced that it was preparing to expend considerable amounts of money in the 1984 presidential election to encourage the re-election of President Reagan.94 The Democratic Party and others brought suit seeking a declaratory judgment that the Presidential Election Campaign Fund Act ("PECFA")95 was constitutional, and thus limited the allowable expenditures of NCPAC in the 1984 election to $1,000 because Reagan’s campaign had opted to accept public funding.96 The Court noted that NCPAC had spent significant amounts of money urging the election of President Reagan in 1980 and that none of NCPAC's 1980 expenditures were made in conjunction or consultation with the Reagan campaign.97

The Court reiterated its Buckley rationale—noting that, although the members of NCPAC were indeed seeking "speech by proxy" similar to that sought by the Medical Association in California Medical Association, NCPAC nonetheless was entitled to full First Amendment protection because, contrary to California Medical Association, the regulated activity was not a contribution, but an expenditure.98 Further, the Court reaffirmed that prevention of corruption was the only compelling government interest in campaign finance regulation, stating that "[t]he hallmark of corruption is the financial quid pro quo: dollars for political favors."99 As before, the type of activity was again the determining factor, not the amount of money in question. The Court was not impressed that NCPAC might increase the potential for corruption because they spent more money than the individuals at issue in Buckley.100 Indeed,

94. Id. at 483. Democrats were not entirely irrational in their reaction to NCPAC in 1983. NCPAC first became active in the 1978 election year but in 1980 it spent a record $3.3 million in the congressional and presidential races. Specifically, NCPAC spent $1.1 million independently against six liberal Democratic senators—Senators Birch Bayh of Indiana, Frank Church of Idaho, Alan Cranston of California, John Culver of Iowa, Thomas Eagleton of Missouri, and George McGovern of South Dakota—and all but Cranston and Eagleton were defeated. SORAUF, INSIDE CAMPAIGN FINANCE, supra note 4, at 180. How much of the other four Senators’ defeat actually could be attributed to NCPAC’s efforts is debatable; nevertheless NCPAC’s tactics were new and effective—and at the time, only utilized by conservative groups. Nahra, Political Parties, supra note 35, at 104

95. Pub. L. No. 92-178, 85 Stat. 563 (1971) (codified at 26 U.S.C. §§ 9001-9013 (1987 Supp.). Although PECFA is different than FECA, the two acts attempt to accomplish similar ends. While FECA affects all federal elections, PECFA only affects those Presidential candidates who choose to receive public funding—and then only from the period covering the nomination until thirty days beyond the general election.

97. Id. at 490.
98. Id. at 494-95.
99. Id. at 497.
100. Id. at 498.
the Court was satisfied 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 quid pro quo for improper commitments from the candidate."\textsuperscript{101}

D. Colorado Republican Federal Campaign Committee v. F.E.C.

In 1996, the Court in Colorado Republican Federal Campaign Committee v. F.E.C. had yet another opportunity to assess the constitutionality of a provision of FECA. Though prior to this case the Court had never ruled on the constitutionality of the specific provision, the Court was not venturing into uncharted territory. At issue in Colorado Republican was FECA section 441a(d),\textsuperscript{102} a provision known as the "Party Expenditure Provision." This provision exempted political parties from the spending limitations FECA imposed on PACs and other multi-candidate political committees.\textsuperscript{103} Merely because section 441a(d) exempted political parties from the contribution limitation levels FECA imposed on PACs does not mean that FECA gives political parties a blank check to contribute to their candidates. Rather, FECA provides a more generous separate formula to limit the amount of money political parties can spend in conjunction with a candidate's campaign.\textsuperscript{104}

Under this more generous party formula, FECA authorized the Colorado Republican Federal Campaign Committee ("Colorado Republican Party") to spend a total of $103,000 in conjunction with its senatorial candidate in 1986.\textsuperscript{105} During the election cycle of 1986, then-

\begin{itemize}
  \item \textsuperscript{101} (Id.)
  \item \textsuperscript{102} 2 U.S.C. § 441a(d) (1994).
  \item \textsuperscript{103} See id. § 441a(a)(2)(A), (7)(B)(i). Without section 441a(d), FECA would treat political parties exactly as it treats PACs—meaning that political parties could only contribute $5,000 to any one candidate's campaign. See Colorado Republican Federal Campaign Committee v. F.E.C., 116 S. Ct. 2309, 2313 (1996).
  \item \textsuperscript{104} 2 U.S.C. § 441a(d)(3):
    The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—
    (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—
    (i) 2 cents multiplied by the voting age population of the State . . . ; or
    (ii) $20,000; and
    (B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.
  \item \textsuperscript{105} Colorado Republican, 116 S. Ct. at 2314.
\end{itemize}
Representative Timothy Wirth announced his intention to campaign for one of Colorado's senate seats. Before the Republicans chose their candidate to oppose Wirth, the Colorado Republican Party began to run a series of radio advertisements critical of Wirth's record in Congress. The Colorado Democratic Party filed a complaint with the FEC arguing that the Colorado Republican Party violated section 441a(d) because it had assigned its entire $103,000 to the National Republican Senatorial Committee and therefore had no money left to spend on the anti-Wirth radio advertisements.

As it had done so often before in FECA cases, the Court drew tight factual distinctions and hinged its decision on factual conclusions. In Colorado Republican, the variation on Buckley's theme focused on a political party's coordinated expenditures made in conjunction with the candidate's campaign versus a political party's independent expenditures made on behalf of the candidate without the candidate's knowledge.

In reviewing the record, the Court noted the dearth of factual evidence for the notion that the Colorado Republican Party did anything but make expenditures independent of the Republican senatorial candidate. Rather, all evidence pointed to the fact that the Colorado Republican Party acted without any consultation with its candidate. Having disposed of the factual notion that coordination between the party and the candidate occurred, the Court next tackled the FEC's argument that political parties were either disallowed by law or considered legally incapable of making independent expenditures. The Court could find no persuasive support for these propositions in any controlling precedent or in any act of Congress. Furthermore, if Congress did enact some sort of legal bar on independent political party spending, the Court noted that its post-Buckley FECA rulings have all consistently concluded that restricting any independent expenditures

106. Id.
107. Id.
108. Id. See also supra notes 57-77 and accompanying text.
110. Id.
111. Id. On its face, the notion that the Colorado Republican Party consulted the Republican senatorial candidate borders on the absurd since the Republican senatorial candidate had not yet been selected at the time the radio advertisements were broadcast. Id.
112. Id. at 2318. See, e.g., 11 CFR § 110.7(b)(4) (1995) (prohibiting political parties from making "independent expenditures" in any "general election campaign").
113. Colorado Republican, 116 S. Ct. at 2318.
would violate the First Amendment.\textsuperscript{114} To hold differently for political parties would put them at a disadvantage to both PACs and individual candidates.\textsuperscript{115} As a result, the Court could not find any evidence, nor could they be persuaded by any argument, to find that the Colorado Republican Party acted any way but independently when it ran the anti-Wirth radio advertisements.

Having rested its decision on those grounds, the Court refused to consider the further question of whether the limitation of \textit{any} campaign expenditure—whether made independently or in coordination with a candidate—violated the First Amendment.\textsuperscript{116} With this inaction, Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas could not agree.\textsuperscript{117} These four justices argued that the Colorado Republican Party adequately raised and preserved the larger constitutional question.

Further, these Justices argued that, however compelling might be the prevention of \textit{quid pro quo} corruption in the context of limiting contributions to political parties and PACs, limiting contributions by political parties to candidates could never withstand constitutional scrutiny.\textsuperscript{118} For these justices, \textit{quid pro quo} corruption in the party-to-candidate contribution situation fails because candidates and political parties are so intertwined as to be essentially a single entity.\textsuperscript{119} Thus, the party-to-candidate contribution situation is most similar \textit{not} to the PAC-to-

\textsuperscript{114} \textit{Id.} at 2316 (citing \textit{Eu v. San Francisco County Democratic Central Comm.}, 489 U.S. 214 (1989); National Conservative Political Action Committee v. F.E.C., 470 U.S. 480 (1985)).

\textsuperscript{115} \textit{See} Nahra, \textit{Political Parties}, supra note 35, at 98-99; \textit{Colorado Republican}, 116 S. Ct. at 2318 (noting how separating independent from coordinated expenditures in PACs is no more different or difficult than doing so for parties).

\textsuperscript{116} \textit{Colorado Republican}, 116 S. Ct. at 2320. Indeed, the Court noted that \textit{Colorado Republican} was the “first case in the 20-year history of [FECA] to suggest that in-fact coordinated expenditures by political parties are protected from congressional regulation by the First Amendment.” \textit{Id.}

\textsuperscript{117} \textit{Id.} at 2321 (Kennedy, J., concurring in part and dissenting in part) (noting that the political party “in its pleadings in the District Court and throughout this litigation, has preserved its claim that the constraints imposed by ... [FECA], both on its face and as interpreted by the [Commission], violate the First Amendment”); \textit{Id.} at 2323 (Thomas, J., concurring in part and dissenting in part). In addition, Justice Thomas joined the roll of Justices unable to understand the “contribution” versus “expenditures” dichotomy. \textit{See} F.E.C. v. National Conservative Political Action Committee, 479 U.S. at 480, 518, 519 (1985) (Marshall, J., dissenting); Buckley v. Valeo, 424 U.S. 1, 235 (1976) (per curiam) (Burger, C.J., concurring in part and dissenting in part); \textit{Buckley}, 424 U.S. at 257 (White, J., concurring in part and dissenting in part); \textit{Buckley}, 424 U.S. at 290 (Blackmun, J., concurring in part and dissenting in part).

\textsuperscript{118} \textit{Colorado Republican}, 116 S. Ct. at 2322.

\textsuperscript{119} \textit{Id.}
candidate contribution, but rather to the candidate financing her campaign with her own funds.\textsuperscript{120} \textit{Buckley v. Valeo} held that a candidate cannot be restricted in the use of her own money, "and this is what political parties do when they make the expenditures FECA restricts."\textsuperscript{121} The \textit{Buckley} Court's rationale for this was, of course, that it would be impossible for a candidate to "corrupt" herself through the use of her own funds.\textsuperscript{122} But for these four justices in \textit{Colorado Republican}, the political party cannot corrupt a candidate because the candidate and the party are essentially the same entity.\textsuperscript{123} Articulating this point, Justice Kennedy noted:

\begin{quote}
[A political] party can give effect to their views only by selecting and supporting candidates. A political party has its own traditions and principles that transcend the interests of individual candidates and campaigns; but in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa.\textsuperscript{124}
\end{quote}

* * * * *

The party's speech... cannot be separated from speech on the candidate's behalf without constraining the party in advocating its most essential positions and pursuing its most basic goals. The party's form of organization and the fact that its fate in an election is inextricably intertwined with that of its candidates cannot provide a basis for the restrictions imposed here.\textsuperscript{125}

For Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, candidates and political parties inhabit the same space, share the same existence. Because of this same existence, the political party cannot corrupt the candidate any more than the candidate can corrupt herself.

IV. IS THE QUID PRO QUO JUSTIFICATION FOR LIMITATIONS ON CAMPAIGN CONTRIBUTIONS COMPPELLING WHEN APPLIED TO CONTRIBUTIONS MADE BY POLITICAL PARTIES?

To be clear, this section is not a general critique of the \textit{Buckley} scheme of analyzing campaign finance cases. Indeed, after over twenty

\begin{itemize}
\item \textsuperscript{120} \textit{Id.} at 2321-22.
\item \textsuperscript{121} \textit{Id.} at 2321.
\item \textsuperscript{122} \textit{Buckley}, 424 U.S. at 51-54.
\item \textsuperscript{123} \textit{Colorado Republican}, 116 S. Ct. at 2322 (Kennedy, J., concurring in part and dissenting in part).
\item \textsuperscript{124} \textit{Id.} at 2322.
\item \textsuperscript{125} \textit{Id.} at 2323.
\end{itemize}
years of the Court's repeated application of the *Buckley* rationale without radical deviation from it, one can be fairly sure that *Buckley* will remain good law for some time.\textsuperscript{126} As a result, this discussion will not take sides on such issues as whether *quid pro quo* corruption ought to be the only allowable compelling interest or whether political equality between the rich and poor ought also be a compelling interest.\textsuperscript{127} 

Instead, this section argues that the dollar limitations FECA section 441a places on the ability of political parties to make expenditures on behalf of their candidates, when analyzed through the lens of *Buckley* and its progeny, cannot pass constitutional muster. Moreover, even if such a restriction were constitutional, its effects would also be politically undesirable. In essence then, this section argues that not only is section 441a fundamentally impermissible, it is also unwise policy.

**A. Constitutional Questions: The Place of the Party in the Regulatory World of PACs and Candidates**

Political parties are curious creatures. Since FECA case law has sprouted everywhere except around the barren soil of political parties, one is left to take concepts derived in other contexts and extrapolate them into the world of the political party. The question of political parties and speech limitation can really be reduced to this *Buckley* formula—

\textsuperscript{126} Colloquia, *Constitutional Implications of Campaign Finance Reform*, 8 ADMIN. L.J. AM. U. 167 (participant noting that "[a]n honest assessment of the state of the law reveals that the prospects for overturning [Buckley] are virtually nonexistent").

\textsuperscript{127} Some academics have claimed that the current system of campaign finance not only is immoral, but also unconstitutional because it violates the Equal Protection rights of the poor segments of society. See Wright, *supra* note 8, at 625-42 (arguing that by "equating political spending with political speech and according both the same constitutional protection, the Court placed the first amendment squarely in opposition to the democratic ideal of political equality"); Nicholson, *supra* note 8, at 821-25; Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986). Some have even argued that the fact that few poor persons are in the halls of Congress signifies that the current system is violative of Equal Protection. Colloquia, *supra* note 137, at 174-77. In this regard, the current system is equated with the unconstitutional poll tax, Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966), filing fee, Bullock v. Carter, 405 U.S. 134 (1972), or white primary, Terry v. Adams, 345 U.S. 461 (1986). To engage in this argument is tempting; however, it is outside the ambit of this Comment. See BeVier, *Specious Arguments, supra* note 4, at 1268-69 (arguing that treating income classes as "monolithic groups at best oversimplifies the problems that the political process must solve"). Indeed, when one looks at the seven wealthiest members of Congress in 1994—Representative Amo Houghton (R-NY), Senator Herb Kohl (D-WI), Senator Jay Rockefeller (D-WV), Representative Michael Huffington (R-CA), Senator Diane Feinstein (D-CA), Senator Frank Lautenberg (D-NJ), and Senator Edward Kennedy (D-MA)—it certainly cannot be considered a "monolithic group." Colloquia, *supra* note 137, at 177-78.
tion: Are political parties by nature more like candidates expending resources for their own campaign or are they more like PACs contributing resources to another's campaign? The conceptual formulation is no different from the post-FECA election law cases; only the focus is different. But as the discussion above has shown, on the result of that seemingly insignificant semantic question hangs a multitude of important ramifications.128 On the result of that question rests the answer to whether party speech and candidate speech are one in the same and unlimitable by Congress.

1. The Political Party and the PAC: Separate Members of the Same Family?

Strictly speaking, the political party and the PAC resemble one another to a great extent.129 Both are primarily political organizations, both endorse and support candidates, and both pool the physical, mental, and financial capital of many individuals so as to achieve greater results.130 However, to say that political parties are nothing more than larger-than-usual PACs is to not understand the place and role of the political party, both in American history and today. This is to say that, although political parties resemble PACs in significant ways, the differences between the two are great enough to be more than differences of degree but rather of kind.

Perhaps distinguishing between political parties and PACs is inherently difficult because no universal definition of a political party exists.131

128. Supra Parts III(B)-(D).

129. See LEON D. EPSTEIN, POLITICAL PARTIES IN THE AMERICAN MOLD 284-94, 296 (1986) (noting that PACs are not solely a phenomenon of the past twenty years and that they have taken over some of the traditional party functions).

130. Another, less flattering similarity is that both political parties and PACs are rather unpopular organizations in American life. See, e.g., SABATO, JUST BEGUN, supra note 27, at 5; Gerald M. Pomper, The Contribution of Political Parties to American Democracy, in PARTY RENEWAL IN AMERICA: THEORY AND PRACTICE 1 (Gerald M. Pomper ed., 1980) (noting that "Americans do not like political parties"); See also SORAUF, INSIDE CAMPAIGN FINANCE, supra note 4, at 161-62 (relating a network television news broadcast that decried the corruption of the political system by "special interests"); Manes, supra note 52, at 20-23; Fred Wertheimer, The Dirtiest Election Ever: The Spending Abuses of 1996 Should Shame Us into Reform, WASH. POST, Nov. 3, 1996, at C1.

131. Professors Beck and Sorauf distill the differing views of political parties down to three basic conceptions. PAUL ALLEN BECK & FRANK J. SORAUF, PARTY POLITICS IN AMERICA 7-16 (7th ed. 1992). First, some argue (e.g., Edmund Burke) that the political party is an association of members with a common ideological bent. Id. at 8-9. Beck and Sorauf note that this conception has not been a favorite of scholars of American political parties for a variety of reasons—not the least of which is such a conception "makes it difficult to distinguish parties from factions." Id. at 9. Second, some conceive of the political party as a
Quite possibly, it is easier to detail what a political party is not—especially in comparison to PACs—than what a political party is. Professors Beck and Sorauf in their book, Party Politics in America, set forth a useful list of activities which uniquely identify a political party in comparison to similar organizations such as PACs.

First, political parties are different because their efforts are concentrated in the "contesting of elections." In the American system, political parties have the responsibility for fielding candidates in local, state, and federal elections. Of course, many PACs are also highly active in the election season, supporting candidates and promoting candidates to the public. However, in general terms, a PAC's support for a candidate is secondary to that of the political party. Put another way, in most cases PACs offer support to candidates—meaning persons already engaged in the process of attaining (or retaining) elective office under the auspices of the political party.

Second, parties must be broad and inclusive groups of individuals to be successful. In order to obtain governance, parties must marshal enough public support so as to attain a majority of the voting public. The need to obtain such wide public support necessitates that parties cannot be beholden to a narrow range of concerns or an exclusive band of followers and expect electoral success. The contrast to PACs in this regard is striking. PACs are quite often political arms of interest groups that only focus on issues involving that organization's interests.
need for parties to obtain wide public support also results in another distinguishing feature: the importance of "bodies" over "brains." The sheer number of votes needed for parties to succeed puts a premium on masses of people rather than on a band of a few creative entrepreneurs and their motivated clientele. ¹³⁸ Parties may not have the "sex appeal" of a well-funded PAC, but they certainly are the work horses of American politics.

Third, political parties "operate solely as political organizations, solely as instruments of political action." ¹³⁹ Parties exist entirely for political purposes. Certainly, some of the actions a party may take—such as "urban 'club' parties" in some cities that "cater to the social and intellectual needs of a mobile, educated, ideological, often isolated upper middle class" ¹⁴⁰—do not immediately strike one as inherently political in nature. Nonetheless, parties engage in these actions for the sole purpose of translating those associations into electoral support at some later point in time. ¹⁴¹ Conversely, PACs are in many situations political "arms" of some otherwise non-political enterprise. PACs normally arise because the underlying organization perceives a need to advocate for their interests in the political arena. For example, the primary purpose of labor unions—obtaining increased compensation and improved working conditions for members ¹⁴²—need not necessarily be political. However unions, finding that they can reap additional benefits from engaging in expressly political activities, create PACs. ¹⁴³ Unions of course

pra note 32, at 153 ("If the interests cannot act alone, then they must combine, but if they combine they must have something to offer each other and trades of that sort must at some point mean compromise."); Fred Wertheimer & Susan Weiss Manes, Campaign Finance Reform: A Key to Restoring the Health of Our Democracy, 94 COLUM. L. REV. 1126, 1139-40 (giving examples of specific and narrow PAC issues and influence). But see SABATO, PAC POWER, supra note 35, at 30 (noting that not all PACs form around specific and narrow interests).

¹³⁸. BECK & SORAUFSUPRA note 142, at 18-19. See also Everett Carll Ladd, Jr., Party "Reform" Since 1968, in THE AMERICAN CONSTITUTIONAL SYSTEM UNDER STRONG AND WEAK PARTIES 81, 89-92 (Patricia Bonomi, et al. eds., 1981) (arguing that successful parties are able to take diffuse and difficult ideas and, through its members arrive at some solution).

¹³⁹. Id. at 19.

¹⁴⁰. SORAUFSUPRA note 37, at 4.

¹⁴¹. Id. at 5.

¹⁴². See Amalgamated Meat Cutter and Butcher Workmen of North Am. v. Jewell Tea Co., 381 U.S. 676, 723 (Goldberg, J., concurring in part and dissenting in part) ("for the object of a union is to band together the individual workers in an effort, by common action, to obtain better wages and working conditions—i.e., to obtain a higher price for their labor").

¹⁴³. ALEXANDERSUPRA note 16, at 84-85. Indeed, union leaders (rightfully) argue that the government has the power to either significantly enhance labor's position through legislation—or that it has the power to significantly diminish labor's position through legislation.
are not alone. Corporations, agriculture, professional associations, and virtually any and every non-political organization may likely find it worth their time to create a political wing.

Fourth, political parties endure and persist over stretches of time while PACs "by contrast [appear to be] almost political will-o'-the-wisps, which disappear as suddenly as they appear." As Part II illustrated, political parties have been a part of the American political landscape for almost as long as that landscape has existed itself. Further, the current two party system can trace its existence to the Civil War. As Beck and Sorauf put it, "The parties are there as point of reference—year after year, election after election, and candidate after candidate—giving continuity and form to the choices Americans face and the issues they debate." While some PACs may be able to trace their existence back to the New Deal, many PACs have a much more transient lifecycle. Knowing which PACs will wield influence—let alone exist—in the next decade requires a talent bordering on the clairvoyant.

Fifth and finally, parties act as "cues or symbols" for many voters' candidate or issue selections. Modern life is consumed by work and family obligations, desires for leisure, and other drains upon the totality of time. At the same time government, despite President Clinton's rhetoric from a few State of the Union speeches ago, is still "big" and "active" and nothing appearing on the horizon looks to radically alter that reality. When these two observations connect, they produce a

See Alexander Heard, The Costs of Democracy 180 (1962). Further, labor argues that because other competing organizations seek to influence the political agenda, they must also do so or be doomed to irrelevance in policy debates. Id.


145. See Gais, supra note 148, at 35 (relating that agricultural giant Archer-Daniels-Midland contributed over $1.3 million to both parties in the 1992 election).


147. See Sabato, PAC Power, supra note 35, at 25-26 (noting that one "might quickly conclude that every conceivable group has" a PAC); but also see id. at 32-33 (noting that Fortune 500 companies were as likely to not have a PAC as they were to having one).


149. Id.

150. Id.

151. See Sabato, PAC Power, supra note 35, at 5-6. The phenomenon that PACs represent—factions—of course trace their history long before the New Deal. See James Madison, The Federalist No. 10.

152. See Gais, supra note 148, at 65-68 (relating the volatile nature of many PACs).


154. For the text of President Clinton's 1996 State of the Union Speech, see <http://
paradoxical result: At the same time government seeks to do more (and therefore more possibilities arise for differing political opinions) the citizenry has less time to fully contemplate those positions. Political parties offer the voter a reasonably simple way to filter issues. Republicans by and large hold certain positions; Democrats by and large hold other positions. The ability for a general voter to quickly summarize a candidate's positions—to "label" her—based upon party affiliation is a tremendously useful tool.

PACs do not offer such opportunities. Initially it must be said that PACs operate in many circumstances in a pragmatic rather than a principled manner. PACs like to support candidates who will win. Additionally some PACs, especially business ones, can be rather bipartisan. They will give money both to Republican candidates and Democratic candidates depending upon the individual candidate's positions on issues. Some PACs will even contribute to the "general funds" of both political parties, although usually the amounts given to each are not equal. In a sense, this strategy might well be characterized as a "hedging all bets" strategy: PACs want to be sure that they do not end up entirely on the wrong side of the election so they will contribute to both candidates.

155. Most persons would instinctively think this a bad thing, especially if less opportunity to contemplate candidate positions translates into political apathy resulting in low voter turnouts. If low voter turnouts, however, are not such a terrible thing for republican government, could this also mean that the citizenry's decreased ability to contemplate different positions in a complex world is also not as bad as instincts might suggest? See SEYMOUR MARTIN LIPSET, POLITICAL MAN 183-89, 226-29 (4th ed. 1959).

156. For a variety of reasons, incumbency often times makes winning easier. See Smith, Faulty Assumptions, supra note 3, at 1073-74 (noting that incumbents have name recognition, press coverage, staffs, and franking privileges among other things). This is born out in the re-election data. From 1972 to 1990 nearly 94% of incumbents who ran for re-election were successful in their bid. L. Sandy Maisel, The Incumbency Advantage, in MONEY, ELECTIONS, AND DEMOCRACY 119, 121 (Margaret Latus Nugent & John R. Johannes eds., 1990. See also GEORGE F. WILL, RESTORATION 87-89 (1993) (citing NORMAN J. ORNSTEIN ET AL., VITAL STATISTICS ON CONGRESS 1991-1992 58-59 (1992)). Not surprisingly, PACs are more likely to heavily contribute to incumbents than to challengers. SABATO, PAC POWER, supra note 35, at 73-74; Colloquia, supra note 137, at 179 (noting that in 1992, PACs gave $89 million to incumbents in the House of Representatives compared to $11 million to challengers).

157. Id. at 142-43.

158. See, e.g., GAINS, supra note 148, at 35 (relating that agricultural giant Archer-Daniels-Midland contributed to both parties in the 1992 election).

159. SABATO, PAC POWER, supra note 35, at 147 (quoting Democratic political director Ann Lewis in the early 1980's as indicating that businesses might well want to consider that the Democrats hold the House, will regain the Senate, and might take the White House when they make their campaign contributions).
These five areas taken individually may not forcefully distinguish the differences between the political party and the PAC. However, when one looks at them in total, political parties are revealed to be something similar yet substantively different than the PAC. Such an analysis really only answers half of the question, because to say that political party action is not akin to PAC action is not to necessarily say that political party action is akin to individual candidate action. That candidate-party similarity must be shown separately.

2. Political Parties and Candidates: Essentially Twins?

*Buckley* clearly set forth the principle that Congress cannot restrict a candidate's use of her or her family's own wealth because a candidate's own wealth could not act as *quid pro quo* corruptive activity. Corruption, as always, is the lodestar in these matters. In *Colorado Republican*, Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas essentially argued that the political party is "extended family" to the candidate, and therefore, the party's expenditures on behalf of the candidate cannot be limited in any way. Though the words were not spoken in Justice Kennedy's concurrence, these justices necessarily meant that a political party cannot corrupt a candidate. Rather, Justice Kennedy's description can be summarized in this manner: Contribution limitations by parties to candidates improperly burden the First Amendment rights of political parties.

The Kennedy and Thomas concurrences make sense in light of *Buckley* only if candidates and parties are considered to be subdivisions of an indivisible whole. Parties cannot function without candidates and candidates cannot function without parties. What is to be made of this assertion?

From the vantage point of the political party, the "indivisible unit" argument appears plausible. Remember that the party exists solely for electoral and political action. In order for the political party to speak when it must speak (*i.e.*, at an election) it must have candidates to articulate its message. To accomplish this task, the party selects candidates.

162. *Id.* at 2323.
163. Or in Justice Kennedy's language, "in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa." *Id.* at 2322.
164. Supra note 145 and accompanying text.
165. Perhaps the phrase "the party selects" was more vividly true back in the days when...
candidates to be the spokespeople of the party's ideas. By virtue of attaining
the nomination, the candidate is rewarded with the party's financial
support, its organization, and perhaps most importantly, its label.166
Without candidates the political party would be awash in messages with
no messenger to deliver them.167

From the perspective of the candidate, however, the "indivisible
unit" rationale may at first glance have some reasonable objections to
overcome. First and foremost is this: Is the political party indispensable
to the candidate? In the abstract, the answer undoubtedly is that they
are not. One can certainly imagine a world in which formal parties do
not exist and candidates instead run solely upon their personal merits
and accomplishments. But one need not only theorize about such a
world for it has existed, albeit briefly, in the United States.

When the Electoral College met to cast votes for the first President
of the United States, the delegates acted without considering the con-
cept of "party."168 Indeed, the majority of the Founders thought parties
to be detestable and dangerous to the maintenance of a free society.169

political bosses exercised significant clout at the local and state party level, and hence at the
Because both major parties reformed their structure in the 1960s and 1970s, much of the con-
trol of the party lies in the hands of the national committees. See generally Charles Longley,
Party Reform and Party Nationalization: The Case of the Democrats, in THE PARTY SYMBOL
21 (William Crotty ed., 1980); see also Charles H. Longley, National Party Renewal, in PARTY
RENEWAL IN AMERICA 69, 69-71 (Gerald M. Pomper ed., 1980). Nevertheless, "the party"—
albeit in a different and perhaps more democratic way—still selects its candidates. See
RANNEY, supra note 32, at 2 (noting the differing methods for states to conduct party nomi-
nation primaries).

166. See supra notes 162-66 and accompanying text. Perhaps here the difference be-
tween the party and the PAC is more striking. Candidates are known by their party label—
e.g., "the Democratic candidate for the 1st district"—in a way that is completely foreign to a
PAC. Candidates are not (except when opponents do so in derisive terms) known as the
"(Tobacco, Union, Anti-Abortion—fill in the blank) Candidate for the 1st district." The dif-
fERENCE is simple yet striking.

167. See Nahra, Political Parties, supra note 35, at 102. This assumes that the party
would even exist without candidates—a doubtful proposition if Professors Beck and Sorauf
are correct. See supra notes 145-53 and accompanying text.


169. See id. at 25-31. Such sentiment did not die with the close of the eighteenth cen-
tury. The Progressive sentiments of the early twentieth century can be traced as descendants
of this thought. See William J. Crotty, The Philosophies of Party Reform, in PARTY
RENEWAL IN AMERICA 31, 33 (Gerald M. Pomper ed., 1980). Indeed, the same spirit is alive
and well even in our own time. See generally MOISEI I. OSTROGORSKI, DEMOCRACY AND
THE ORGANIZATION OF POLITICAL PARTIES II: THE UNITED STATES (Seymour Lipset
trans., 1982); ROBERT MICHALS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE
OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY (Eden Paul & Cedar Paul trans.,
1962).
Such general sentiments were systematically reflected in the new government. For example, the Electoral College was created to function as an "elaborate version of a civic club's nominating committee or an institution's search committee." The College met in order to select the most able persons among all the nominees, name the candidate with the highest vote total as President and name the runner-up as Vice President. The system "worked" once—Washington's election as the first President. However, by the election of 1796, the College adopted a more modern approach, mainly because a noticeable two-party system had developed.

Aside from this eight-year occurrence at the origination of the nation, parties have been an integral part of the political exercise. But this should not come as a surprise since opinions on topics will vary and people will naturally migrate to others with whom they are in general agreement on basic principles. Moreover, in a democratic system, these groups of people who share basic opinions on fundamental principles have the opportunity to implement their opinions into law. The party is essential to the orderly operation of democratic governance because without it, individuals would need to re-create coalitions with every new election.

170. Id. at 35 (quoting James Sundquist, Strengthening the National Parties, in ELECTIONS AMERICAN STYLE 198 (A. James Reichey ed., 1987)).
172. Id. See also supra notes 11-14 and accompanying text. Perhaps the parties existed prior to the election of 1796 but Washington's status as the "Father of the Country" and his steadfast personality placated the party factions for his years in office. See MARTIN VAN BUREN, INQUIRY INTO THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES 7 (Augustus M. Kelly Publishers, 1967) (1867) ("The two great parties of this country, with occasional changes in their names only, have, for the principal part of a century, occupied antagonistic positions upon all important political questions.").
173. Indeed, Edmund Burke thought it impossible for republics to avoid parties and imprudent for a political leader to shun party association:

Party is a body of men united, for promoting by their joint endeavours the national interest, upon some particular principle in which they are all agreed. For my part, I find it impossible to conceive, that any one who believes in his own politics, or thinks them to be of any weight, who refuses to adopt the means of having them reduced into practice. . . . It is the business of he politician, who is the philosopher in action, to find out proper means toward those ends, and to employ them with effect. Therefore every honourable connexion will avow it is their first purpose, to pursue every just method to put the men who hold their opinions into such a condition as may enable them to carry their common plans into execution, with all the power and authority of the state.

174. See, e.g., Pomper, supra note 141, at 11-15.
This fact is easily overlooked in a society where the Progressives' attitude—"Vote for the Candidate not the Party" or "There is no Democratic or Republican way to run the schools"—has swept the populace. But there is a Republican way to "run" the Senate or a Democratic way to "run" the White House, even if at times the differences do not seem large. The American system of government was established so that no one person, acting alone, could effect dramatic or irreversible change. The system is designed to require coalitions to accomplish governance. The party is the indispensable force that creates protracted coalitions and hence gives government the ability to function.

But this is putting the cart before the horse, for parties are the necessary vehicles for candidates to attain electoral victory. Parties offer the candidate much needed funds for the campaign to be sure. However, as was noted above, parties offer the candidate access to the preexisting organizational network of party supporters. Without these very practical organizations in place, every candidate for every office at every election would need to re-create the "machine" in order to produce a campaign. Such an undertaking would not only require huge start-up costs in order to get an organization initially in motion, but would be an extremely inefficient method of campaigning. Faced with these costs, it would not be an unremarkable turn of events to find individual candidates "joining forces" to capitalize on the economies of scale inherent in a campaign—which in essence means creating political parties.

Further, such a non-party system could likely produce a less democratic method for selecting candidates. In a system (or more accurately a non-system) where parties do not exist as a leavening force between individuals, certain individuals will undoubtedly assume the inside track. Such a system works to the advantage of the wealthy who have no need

175. Id. at 13.

176. Consider James Madison's classic formulation in Federalist Number 51: "in framing a government which is to be administered by men over me, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself." JAMES MADISON, FEDERALIST NO. 51 (emphasis added).

177. See supra notes 137-66 and accompanying text.

178. Focusing solely on the presidency for a moment, examples of recent "independent" candidates are sparse—John Anderson in 1980 and Ross Perot in 1992. Both failed to garner even a single electoral vote and their total vote percentages were not terribly impressive in comparison to their Democratic and Republican opponents. Perhaps Perot learned his lesson after the 1992 elections: When he ran again in 1996, he no longer ran as an independent, but rather formed the "Reform Party" that—not surprisingly—selected him as its candidate. Apparently one attempt at "independence" was enough for Perot to recognize the burdens of recreating his organization every four years and the corresponding benefits a party provides in this area.
for outside campaign financing.\textsuperscript{179} It also gives an advantage to the candidate who has some form of "celebrity" status by virtue of her occupation\textsuperscript{180} or is the descendant of a prominent person or family.\textsuperscript{181} Parties are a force that negates these inherent advantages, at least to some degree.\textsuperscript{182}

Thus, although in the abstract, a candidate does not need the political party, the American democratic experience—if not the democratic experience in general\textsuperscript{183}—reveals that political parties are indispensable to the election of candidates. Furthermore, parties and the sustained coalitions they provide are necessary for the functioning of a governmental system that spreads power into the hands of many.

B. Policy Questions: The Place of the Party in Strengthening Republican Government

In addition to the Constitutional case for removing the restrictions on the amount which political parties can spend on behalf of their candidates, a secondary—and strongly secondary—policy argument also favors the removal. That argument is this: If political parties are not restricted in the amount they can contribute to their candidate, the political party might become the preferred vehicle for campaign contributions from the public.\textsuperscript{184} To many critics, one of the most unfortunate

\begin{footnotes}
\footnote{179}{Smith, \textit{Faulty Assumptions}, supra note 3, at 1081-82.}
\footnote{180}{\textit{Id.} at 1077-81; Smith, \textit{Money Talks}, supra note 4, at 92-95.}
\footnote{181}{NELSON W. POLSBY, \textit{CONSEQUENCES OF PARTY REFORM} 148-49 (1983). For example, one would reasonably assume that John F. Kennedy, Jr. would have an instant advantage over his opponent were he to run for state or federal office in light of his family name and his position as editor in chief of \textit{George} magazine (a position his family name and lineage, one could speculate, played no small role in landing). Similarly, one would also reasonably assume that former President George Bush's two sons—Jeb and George W.—who are actively engaged in politics received at least initial notoriety from their father's notoriety.}
\footnote{182}{Of course, part of the drive to reform party behavior and campaign finance was a direct result of the perception by some that the parties were non-representative organizations controlled by the whims of party elites. \textit{See} RANNEY, supra note 32, at 101-04; Carol F. Casey, \textit{The National Democratic Party, in PARTY RENEWAL IN AMERICA} 87 (Gerald M. Pomper ed., 1980); John F. Bibby, \textit{Party Renewal in the National Republican Party, in PARTY RENEWAL IN AMERICA} 102 (Gerald M. Pomper ed., 1980). The point, however, is that a world in which parties do not exist might not remove elites from positions of power, only perhaps reshuffle which elites are in power. \textit{See}, e.g., KIRKPATRICK, supra note 32, at 12-13 (1979) (noting that national convention delegates of both parties after the reforms of the 1960s and 1970s were substantially drawn from educated and professional classes and exaggerated the "gap between [the] elite and rank and file" members).}
\footnote{183}{REICHLEY, supra note 168, at 31.}
\footnote{184}{It is important to reiterate that this Comment, working within the bounds of Buckley, is not stating that the public would be able to give limitless contributions to either the}
facets of the current system is the increased role that PACs play in political funding,\textsuperscript{185} mainly because PACs are seen to have no other purpose than exercising a corrupting and illegitimate influence over politicians.\textsuperscript{185} Buckley itself, followed by the Court's extension of Buckley in \textit{F.E.C. v. National Conservative Political Action Committee},\textsuperscript{187} leaves little room to restrict the independent expenditures of any person or organization—be that an individual, party, or PAC. Further, as FECA is currently constituted, PACs and political parties are treated virtually as equals insofar their ability to receive contributions from donors or spend money on candidates.\textsuperscript{188} Buckley did little to change this virtual equality. Numerous critics have noted that since Buckley's rather favorable treatment of PACs in 1976, the number of PACs has skyrocketed—along with the amount of money that they have contributed.\textsuperscript{189} For example, in 1974, 608 PACs were registered by the Federal Elections Commission; by 1987, that number rose to 4,211.\textsuperscript{190} At that same time, the total amount of PAC contributions increased from $11.6 million in 1974 to over $150 million by 1987.\textsuperscript{191}

\begin{thebibliography}{99}
\bibitem{185} See, \textit{e.g.}, Manes, supra note 52, at 20-23.
\bibitem{186} \textbf{Sabato}, \textit{Paying for Elections}, supra note 126, at 10 (noting that PACs "are best described as agents of pseudo corruption"). However, Professor Sabato argues that, in many cases, PACs do not have any noticeable impact on elected officials. Instead critics who see PACs influencing legislators behind every vote fail to take into account non-corruptive factors for the vote—like political conviction or political compromise. \textit{Id.} at 13-14.
\bibitem{188} At the time of FECA's passage, the political parties were lumped in along with everything else political as part of the problem. \textbf{Sabato}, \textit{Paying for Elections}, supra note 126, at 49. As a result, the reformers treated the political party and the PAC alike. For example, Under FECA, both the PAC and the political party are limited to giving a $5,000 contribution in House races. \textit{Id.} However, through the exploiting of "loopholes"—or the clever reading of the law, depending upon how one views it—political parties are usually able to give a total of $30,000: $15,000 in the primary and $15,000 in the general election. \textit{Id.}
\bibitem{189} \textbf{Sorauf}, \textit{Inside Campaign Finance}, supra note 4, at 102-103. \textit{See also} Cass R. Sunstein, \textit{Political Equality and Unintended Consequences}, 94 COLUMB. L. REV. 1390, 1396, 1403-1410 (1994) (noting that "[t]he early regulation of individual contributions had an important unintended consequence: It led directly to the rise of the political action committee"); Wright, supra note 8, at 614-620 (comparing PACs to "a form of multiple voting" and \ldots a form of legalized bribery").
\bibitem{191} \textbf{Larry J. Sabato}, \textit{PACs and Parties}, in \textit{Money, Elections, and Democracy} 187, 188 (Margaret Latus Nugent and John R. Johannes eds., 1990). Not frequently noted among the increased number of PACs and PAC spending, however, is the fact that, at least in 1992,
By placing political parties and PACs on equal ground, FECA encouraged this growth in PAC numbers and contributions. Part of the solution must include the removal of this parity. The constitutional mandate that political parties cannot be limited in their contributions to their candidates would accomplish a partial removal of the parity between political parties and PACs. Instead, because of the political parties’ unlimited ability to financially support their candidates, parties could well become the preferred vehicle for candidates to seek and obtain campaign funds.

This policy argument rests on the presupposition that in a healthy republic political parties are to be preferred to PACs. Perhaps an unreflective response would disagree with this presupposition and instead hold parties equally culpable for perceived political ills. However, among those persons who study politics and political theory—namely political scientists—prefer political parties to PACs with few exceptions. Those same persons nevertheless readily admit that the political party has not fared all that well of late, although some argue that the tide possibly is turning. As argued above, political parties are argued to be more conducive to good governance than PACs mainly because party interests, in order to garner sufficient numbers of voters to elect candidates, are wide, diffuse, and consensus-building institutions in an otherwise Balkanized nation. Additionally, political parties arguably promote civic duty (“the chores of democracy”), inform the public of issues, promote stability in the political order, and with a two party system, provide for lasting coalitions which last beyond individual issues. All of these things counteract the “general political decay” which some critics see as a debilitating disease not only on political parties, but also

one-third of all PACs contributed nothing and 92% of all PACs contributed less than $100,000 each. Lee Ann Elliott, The Facts & Figures About Campaign Finance: A View From Inside the Federal Election Commission, 8 J. L. & PUB. POL’Y 311, 311 (1992).

192. See KAYDEN AND MAHE, supra note 32, at 30-51 (arguing that a host of internal factors—the Pendleton Act and other Progressive reforms—combined with external factors—the New Deal federalizing traditional party social welfare functions, the reduction of immigration, a lack of confidence in institutions, and the rise of PACs—were devastating to the political parties). See also SABATO, PAYING FOR ELECTIONS, supra note 126, at 47. See generally DAVID BRODER, THE PARTY’S OVER (1972).

193. See SABATO, JUST BEGUN, supra note 27, at 177.

194. See supra notes 143-70 and accompanying text.

195. SABATO, JUST BEGUN, supra note 27, at 5. Professor Sabato notes that, while parties normally are accused of dividing public opinion, in reality, they congregate public opinion—opinion which would otherwise be left solely to smaller individualistic factions. Id.

196. REICHLEY, supra note 168, at 414.

197. SABATO, PAYING FOR ELECTIONS, supra note 126, at 44-45.
on society as a whole. As a result of this preference for political parties over PACs, many commentators include in their call for reforms, a less restrictive regulatory scheme for political party contributions so that PACs, put at a disadvantage, lose some of their importance. Proposals range from significantly increasing the dollar contribution allowed to a political party to removing any restriction altogether.

If political parties are indeed healthier than PACs to a functioning republican government, real reform might be found in a rather odd place. That reform would most certainly not be found in FECA, or most likely in any bill likely to be introduced in Congress at present. Rather, real reform would occur with the court that strikes down party contribution limitations to candidates because such a "reform" would have the effect of strengthening political parties over PACs. The irony cannot be overstated: Critics of Buckley and its progeny have argued that the Court has stood in the way of reform; perhaps the Court will inadvertently bring reform about through Buckley and its progeny. Standing alone, this policy rationale should not dictate the Court's reasoning nor the outcome of any case. Nevertheless, a constitutional ruling that also promotes sound public policy should be wholeheartedly welcomed and encouraged.

V. CONCLUSION

Political parties are unique entities in the American political system. Originating shortly after the founding of the nation, the political party has had a varied, yet continuous impact on the electoral process. In light of the Supreme Court's much criticized, but steadfast methodology in analyzing Congressional attempts at regulating the financing of campaigns, FECA's restrictions limiting the amount that political parties may contribute to their candidates must be unconstitutional. Under the test established by Buckley v. Valeo, for the regulation to withstand Constitutional scrutiny, it must combat either actual or perceived corruption. However, a candidate running for office under the banner of a political party cannot be corrupted by that political party. Further, because the candidate and the political party share such an intertwined relationship, any contribution that the political party makes toward its candidate is best categorized as an expenditure on behalf of itself.

While this Constitutional analysis may well cause considerable con-

198. Wilson Carey McWilliams, Parties as Civic Associations, in PARTY RENEWAL IN AMERICA 51, 61 (Gerald M. Pomper ed., 1980).
199. See Sabato, PACs and Parties, supra note 202, at 200-203.
cern among those who seek to reform the financing of federal elections, such concern may be largely unwarranted. Various political scientists have for some time argued that a key to reforming federal campaigns is to inflate the importance of the political party while at the same time deflate the importance of the PAC. While striking down FECA’s contribution regulations between a political party and its candidate might not have been the vehicle the reformers had in mind when they thought of reform, it nonetheless could produce the desired result.

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