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Election Law: Limitations on Independent PACs Held Unconstitutional. Federal Election Commission v. National Conservative Political Action Committee, 105 S. Ct. 1459 (1985)

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NOTE

ELECTION LAW: Limitations on Independent PACs Held Unconstitutional. *Federal Election Commission v. National Conservative Political Action Committee,* 105 S. Ct. 1459 (1985).

Section 9012(f)[1] of the Presidential Election Campaign Fund Act (Fund Act)[2] prohibits unauthorized committees[3] from making expenditures exceeding $1,000 to further the election of a publicly funded presidential candidate in the general election.[4] In *Federal Election Commission v. National Conservative Political Action Committee* (*FEC v. NCPAC*),[5] the United States Supreme Court found[6] that the expenditures

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1. 26 U.S.C. § 9012(f) (1982). This section provides in part:

> [I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000. . . .

It further provides for criminal penalties in the form of fines and imprisonment for violators of this section. A political committee shall be fined up to $5,000 for violation and any officer or member of a committee who knowingly and willfully consents to such a violation, and any other individual who knowingly or willfully violates this section shall be fined up to $5,000 or imprisoned not more than one year or both. *Id.*

2. Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 (1982). This statute offers the Presidential candidates of major political parties the option of receiving public financing for their general election campaigns. If a Presidential candidate elects public financing, § 9012(f) makes it a criminal offense for independent "political committees," such as the National Conservative Political Action Committee, to expend more than $1,000 to further that candidate's election. FEC v. NCPAC, 105 S. Ct. 1459, 1461 (1985).

3. FEDERAL ELECTION COMMISSION RECORD (GPO), at 6 (May 1985). Unauthorized committees are defined as those which are independent from a candidate's chosen committee. *Id.*

4. *Id.*

5. 105 S. Ct. 1459 (1985). Two separate actions were consolidated in this case. *See infra* text accompanying notes 15-23.

6. This decision consisted of two parts. The first issue concerned whether the Democrats had "standing" to bring suit against NCPAC and FCM. The Supreme Court held that they lacked standing. For further information as to the Court's opinion on this issue, see FEC v. NCPAC, 105 S. Ct. at 1462-65. The second issue involved the constitutionality of § 9012(f), which is the focus of this article. *Id.* at 1465-71.

at issue constituted speech; therefore, they were protected under the first amendment.[7] The Court, in a seven to two decision,[8] declared section 9012(f) unconstitutional because the prohibited conduct was entitled to first amendment protection[9] and no compelling state interest justified the prohibition.[10] The provision was also found to be overbroad.[11]

This note begins with a synopsis of the facts in *FEC v. NCPAC*. Next, the development of campaign finance regulations is discussed, followed by an analysis of the Court's decision in *FEC v. NCPAC*. Finally, this note considers the impact of this decision within the electoral process and suggests that the Court adopt a more consistent approach in this area of election law.

I. STATEMENT OF THE CASE

Section 9012(f), the provision limiting political expenditures at issue in *FEC v. NCPAC*, was previously challenged and found invalid in *Common Cause v. Schmitt*.[12] The Supreme Court affirmed the judgment of the district court in *Schmitt* by a four to four vote.[13] *Schmitt*, therefore, had no precedential value.[14]

In May 1983, the Democratic Party, the Democratic National Committee (DNC), and Edward Mezvinsky[15] filed suit against the National Conservative Political Action Committee

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7. *Id.* at 1467.

8. Justice Rehnquist delivered the Court's two part opinion. Justices Burger, Blackmun, Powell, and O'Connor joined in Part I. Justices Burger, Brennan, Blackmun, Powell, Stevens, and O'Connor joined in Part II. *Id.* at 1459.

9. *Id.* at 1467-68.

10. *Id.* at 1469-71.

11. *Id.* at 1469-70.

12. 512 F. Supp. 489 (D.D.C. 1980), *aff'd per curiam*, 455 U.S. 129 (1982) (4-4 decision).

13. Justice O'Connor took no part in the consideration or decision. Common Cause v. Schmitt, 455 U.S. at 129.

14. Peck, *Statutory Limits on Campaign Financing: A Boon or A Boondoggle?* 7 PREVIEW OF UNITED STATES SUPREME COURT CASES 153, 154 (1984).

15. FEC v. NCPAC, 105 S. Ct. at 1462. Edward Mezvinsky served as Chairman of the Pennsylvania Democratic State Committee at the time of this litigation. He sued in his individual capacity as a citizen eligible to vote for President of the United States. *Id.* Mezvinsky did not pursue an appeal to the Supreme Court, though his name was inadvertently included in the notice of appeal filed by the Democratic Party and the DNC. *Id.* at 1462 n.1.

(NCPAC)[16] and the Fund for a Conservative Majority (FCM),[17] which had announced their intention to spend large sums to help bring about the reelection of President Ronald Reagan in 1984.[18] They sought a declaration that section 9012(f) was constitutional.[19] The FEC along with the political action committees (PACs),[20] intervened for the sole purpose of moving, to dismiss the complaint for lack of standing.[21]

The FEC brought a separate action against the same defendants seeking identical declaratory relief in June 1983.[22] The two cases were consolidated by a three-judge district court.[23] The district court held that the Democratic Party and the DNC had standing to sue and that section 9012(f) abridges the first amendment freedoms of speech and association and is substantially overbroad.[24]

The FEC appealed that part of the judgment which held that the Democratic Party and the DNC had standing.[25] The Democratic Party and the DNC challenged that part of the holding concerning section 9012(f).[26] The United States

16. *Id.* at 1465. NCPAC is a nonprofit, nonmembership corporation formed in August 1975 and registered with the FEC as a political committee. It is governed by a three-member board of directors which is elected annually by the existing board. Its contributors have no direct role in the decisions concerning campaign strategies or which candidates the NCPAC will support. It raises money through direct mail solicitations. *Id.*

17. *Id.* FCM is registered with the FEC as a multicandidate political committee. Its organization is similar to the NCPAC. *See supra* note 16.

18. 105 S. Ct. at 1462.

19. *Id.* In the 1980 election, the Presidential Election Campaign Fund made $29.4 million available in public funds to each of the two major party candidates. In addition, independent political committees spent $13.7 million on behalf of the two candidates. $13 million of these independent expenditures were used to support the election of Ronald Reagan. Peck, *supra* note 14, at 153.

20. LEAGUE OF WOMEN VOTERS EDUCATION FUND, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, PUB. NO. 297, FACTS ON PACS: POLITICAL ACTION COMMITTEES AT AMERICAN CAMPAIGN FINANCE 3 (1984) [hereinafter cited as FACTS ON PACS]. The term "political action committee" refers to nonparty, noncandidate political committees which are referred to as "nonconnected committees" in the Federal Election Campaign Act (FECA) of 1971. The FECA also speaks of "separate, segregated funds" which also refers to the PACs. *Id.*

21. FEC v. NCPAC, 105 S. Ct. at 1462.

22. *Id.*

23. *Id.* at 1461. The companion law suits were brought before a three-judge District Court in the Eastern District of Pennsylvania.

24. *Id.* at 1462.

25. *Id.* at 1461.

26. *Id.*

Supreme Court noted probable jurisdiction pursuant to the statutory appeal provision of section 9011(b)(2).[27] The Court reversed the judgment of the district court on the issue of standing but affirmed its judgment as to section 9012(f), thus holding that section unconstitutional.[28]

II. BACKGROUND

A. Development of Campaign Regulations

The Progressives ushered in the first major campaign finance regulations in the United States.[29] During the 1970's, increased media costs,[30] the Watergate scandal,[31] and a growing desire to provide equal access to the electoral process[32] provided further impetus for reform.[33] By the middle of the decade, three major pieces of campaign finance legislation had been passed.[34]

The Federal Election Campaign Act of 1971 (FECA) was the first major piece of federal campaign legislation since the

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27. *Id.* at 1462. 26 U.S.C. § 9011(b)(2) (1982), provides in part:

> The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise the same without regard to whether a person asserting right under provisions of this subsection shall have exhausted any administrative or other remedies that may be provided at law. Such proceedings shall be heard and determined by a court of three judges . . . and any appeal shall lie to the Supreme Court.

Id.

28. FEC v. NCPAC, 105 S. Ct. at 1459.

29. D. ADAMANY & G. AGREE, POLITICAL MONEY: A STRATEGY FOR CAMPAIGN FINANCING IN AMERICA 43 (1975) [hereinafter cited as POLITICAL MONEY].

30. H. ALEXANDER, FINANCING THE 1980 ELECTION 103 (1983). Political campaigning consists largely of communications. Communication costs have grown in the last two decades as has all political spending. *See also* CONGRESSIONAL QUARTERLY INC., DOLLAR POLITICS 1-27 (3d ed. 1982) [hereinafter cited as DOLLAR POLITICS].

31. ALEXANDER, *supra* note 30, at 7. The Watergate scandal and its aftermath created the environment for Congress to strengthen the campaign fianance laws through the enactment of a series of amendments. The 1974 FECA amendments provided for public funding, presidential prenomination campaigns and national nominating conventions. The amendments also established a number of contribution and expenditure limits for federal candidates and political committees. *Id.*

32. For a discussion of the first amendment interest in equal access, see Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 77 WIS. L. REV. 323, 334-40 (1977).

33. CONGRESSIONAL QUARTERLY, INC., ELECTIONS '84, at 147 (1984) [hereinafter cited as ELECTIONS '84].

34. *Id.*

1925 Corrupt Practices Act.[35] FECA was amended in 1974, 1976 and 1979.[36] The present role of PACs in the political process is the result of the interaction of numerous factors, one of which includes legislative acts and the courts' interpretation of them.[37]

B. Development of PACs

1. Pre-FECA

The connected PACs developed as a result of the federal prohibition against direct corporate, national bank and labor union contributions to federal candidates.[38] The first modern PAC was organized in 1943.[39] Following the success of these early committees, the number of labor union PACs increased.[40] To a lesser degree, corporate and other business-oriented PACs developed committees of their own.[41]

2. Post-FECA

FECA authorized the establishment and administration of separate, segregated funds by unions and corporations.[42] This institutionalized the PAC concept. It wasn't until FECA was amended in 1974, however, that PAC growth occurred.[43] An advisory opinion issued in 1975 by the FEC legitimized corpo-

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35. FACTS ON PACS, *supra* note 20, at 1.

36. *Id.* at 1-2.

37. *Id.* at 2. For further discussion of this interaction, see DOLLAR POLITICS, *supra* note 30, at 79-89.

38. FACTS ON PACS, *supra* note 20, at 3. Connected PACs are those which have a sponsoring organization such as a labor union or corporation.

39. *Id.* The first modern political action committee was organized by the Congress of Industrial Organizations and was called the CIO-PAC. *Id.*

40. *Id.* at 4. By the time FECA was enacted, there were nearly 40 national labor PACs as well as many other PACs organized at the state and local levels. *Id.*

41. *Id.* Before the campaign finance reforms of the 1970's, the common pattern for corporate executives was to make political contributions on a personal basis. Corporations were prohibited from giving directly to federal candidates. *Id.*

42. *Id.*

43. *Id.* In 1971, there were 113 PACs. In 1975, that number had grown to 608 PACs. However, the 1974 Amendent eliminated corporate concern about the legality of corporations with government contracts establishing political action committees using corporate funds. Therefore, by 1983 the number of PACs had risen to 3,525. *Id.*

rate PAC activity.[44] This led to a greater expansion of the use of PACs in the American electoral process.[45]

Another important event in the development of PACs was the *Buckley v. Valeo*[46] decision in 1976. The *Buckley* Court upheld FECA's limitations on contributions to candidates and struck down, as unconstitutional, its limitations on independent expenditures.[47] Since that time, this system of campaign financing has been challenged in the courts on numerous occasions.[48] Recent attempts to change these laws have not been very effective.[49] Therefore, further reforms are unlikely.[50]

C. *Influence of Ideological PACs*

About 500 political committees fall within a unique, catch all category called non-connected PACs.[51] Unlike most other PACs,[52] the principal interests of the leading non connected PACs are ideological.[53] This has added a different flavor to the campaigns and elections of the 1980's.[54] Today's ideological PACs are larger and raise more money than most other types of PACs.[55] Ideological PACs tend to spend less on campaigns but incur greater debts than other other types of

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44. *Id.* at 5. This advisory opinion was issued in response to a query from Sun Oil Company. The FEC assured the corporation that its SunPAC was a legal separate, segregated fund and that it could solicit voluntary contributions from its employees as well as make contributions to federal candidates. *Id.*

45. *Id.* at 5-6.

46. 424 U.S. 1 (1976). For a more comprehensive coverage of the various issues in *Buckley*, see Comment, *Buckley v. Valeo: The Supreme Court and Federal Campaign Reform*, 76 COLUM. L. REV. 852 (1976).

47. FEC v. NCPAC, 105 S. Ct. at 1466.

48. For a discussion of this election law litigation, see Alexander, *supra* note 30, at 67-95.

49. *See* DOLLAR POLITICS, *supra* note 30, at 17-27.

50. For a discussion of the recent legislative initiatives concerning campaign finance reform, see ELECTIONS '84, *supra* note 33, at 149-55.

51. *Id.* at 143.

52. Other types of PACs include those organized by unions, corporations, cooperatives, trade, membership, and health associations. *Id.*

53. *Id.*

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

55. *Id.* at 143-44. For more information on expenditures by political action committees during the 1983-84 election cycle, see FEDERAL ELECTION COMMISSION, 18-MONTH PAC STUDY (1984).

PACs.[56] This is not surprising since the other types of PACs are permitted to have their fund-raising and overhead costs paid by their sponsoring organizations.[57]

Another major difference between ideological and other PACs is that ideological PACs are more willing to conduct independent expenditure campaigns.[58] The Supreme Court in *Buckley* struck down a 1974 provision of FECA which had restricted independent expenditures to $1,000 per candidate. Recently, this has been viewed by some to be a loophole in FECA and certain ideological PACs have extensively used independent expenditures to further their objectives.[59] This extensive use of independent expenditures in the electoral process, especially in publicly funded presidential campaigns, is the central issue in *FEC v. NCPAC*.[60]

III. THE *FEC V. NCPAC* OPINIONS

A. The Majority

Justice Rehnquist, writing for the majority, first established that the independent expenditures made by the PACs in this case were prohibited by section 9012(f).[61] The Court then considered whether this section violates the first amendment.[62] Drawing a parallel between this case and its earlier decision in *Buckley v. Valeo*,[63] the Court found that the expenditures at issue constituted "speech"[64] and, therefore, deserved protection so that various political views could be adequately expressed.[65]

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56. Latus, *supra* note 54, at 144. Ideological PACs mainly use direct mail fundraising which usually requires spending at least 50 cents to raise a dollar. *Id.* The PACs in FEC v. NCPAC used this technique to raise money. 105 S. Ct. at 1465.

57. Latus, *supra* note 54, at 144.

58. *Id.* at 149.

59. *Id. See also* DOLLAR POLITICS, *supra* note 30, at 99.

60. *See infra* text accompanying notes 61-68.

61. FEC v. NCPAC, 105 S. Ct. at 1466-67. For a discussion of the Court's analysis, see *id.* at 1465-67.

62. *Id.* at 1467-68. For a discussion of the *Buckley* decision and the constitutionality of FECA as well as a scholarly reaction to it, see generally Nicholson, *supra* note 32.

63. 424 U.S. 1 (1976). *See* FEC v. NCPAC, 105 S. Ct. at 1467.

64. 105 S. Ct. at 1467.

65. Today, effective political speech depends upon the use of expensive modes of media. For further explanation of the Court's view on this topic, see *id.*

The Court noted that not only are these independent expenditures necessary to be politically effective, but they also represent an individual's right to free speech and association.[66] The Court rejected the notion that the PACs' form of organization or methods of solicitation diminished their entitlement to first amendment protection.[67] The Court also rejected the argument that these contributions were "speech by proxy" and, therefore, not entitled to the protection guaranteed to individual speech.[68] Of particular concern to the Court was the potential inability of individuals with modest means to effectively broadcast their political views.[69]

The Court distinguished *FEC v. NCPAC* from other cases in which FECA restrictions on corporate contributions were upheld.[70] This is consistent with the Court's past decisions which have held that legislative regulation of corporate contributions to candidates is constitutional.[71]

Having concluded that the independent expenditures deserved first amendment protection, the Court turned its attention to whether there was a sufficient government interest served by section 9012(f) to justify its prohibitions.[72]

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66. 105 S. Ct at 1467-68. For further discussion as to the protection given speech so as to assure the unfettered interchange of ideas, see Roth v. United States, 354 U.S. 476, 484 (1957).

67. 105 S. Ct. at 1467. The Court said that freedom of association was certainly implicated in this case. NCPAC and FCM are mechanisms by which large numbers of individuals with modest means can join together to be politically effective. *Id. See also* Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 295-96 (1981); Buckley v. Valeo, 424 U.S. 1, 22 (1976).

68. 105 S. Ct. at 1468. The FEC advanced this theory based on California Medical Ass'n v. FEC, 453 U.S. 182 (1981). The Court rejected this argument on the basis that the present case involved limitations on expenditures by PACs, not on the contributions they receive. Also, the contributions to NCPAC and FCM were relatively small and thus did not raise the same concerns as the sizeable contributions involved in *California Medical Ass'n.* FEC v. NCPAC, 105 S. Ct. at 1467-68.

69. 105 S. Ct. at 1467. *See also supra* note 67.

70. The Court considers its prior holding in FEC v. National Right to Work Comm. 459 U.S. 197 (1982) to be distinguishable from its determination in the present case. It points to the historical differences between the treatment accorded corporations and other organizations. In return for the special advantages given to individuals acting jointly through corporations, those individuals forego some of the rights they would have had if they had acted in their individual capacity. FEC v. NCPAC, 105 S. Ct. at 1468.

71. 105 S. Ct. at 1468.

72. *Id.* at 1468-69.

In *Buckley*, the Court held that "preventing corruption or the appearance of corruption are the only legitimate and compelling governmental interests thus far identified for restricting campaign financing."[73] Applying the same standard in the present case, the Court found that the restriction imposed by section 9012(f) could not be upheld[74] as there appeared to be no "*quid pro quo*."[75] Even if NCPAC and FCM were a potential source of corruption, section 9012(f) was found to be fatally overbroad.[76] The Court determined that it could not limit section 9012(f) in order to save it.[77]

Finally, the Court discussed the role of the legislature in determining what measures are necessary to control campaign finance and its corrupting influence.[78] The Court drew a distinction between groups that are organized expressly to participate in political debate and those which are formed for economic gain.[79] While noting that at times the Court does defer to the legislature, it found no justifiable reason to do so in this situation and struck down section 9012(f) as unconstitutional on its face.[80]

B. The Dissents

1. The White Dissent

Justice White, in his dissenting opinion, states that he believes that *Buckley* was incorrectly decided.[81] He believes that

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73. Buckley v. Valeo, 424 U.S. at 22. *See also* Citizens Against Rent Control v. Berkley, 454 U.S. 290, 297 (1981). Of course, as Justice Marshall indicates in his dissenting opinion, there is perhaps a legitimate governmental interest in promoting equal access to the political arena. FEC v. NCPAC, 105 S. Ct. at 1481 (Marshall, J., dissenting).

74. 105 S. Ct. at 1468-69. Weighing heavy in the majority opinion was the absence of prearrangement and coordination between the PACs and the candidates which they chose to support or oppose. *Id.* at 1469.

75. *Quid pro quo* is defined here to mean dollars for political favors. *Id.*

76. The Court found § 9012(f) fatally overbroad because it not only applied to "multimillion dollar war chests" but also to informal neighborhood organizations. 105 S. Ct. at 1470.

77. For a discussion of the ways the Court considered limiting § 9012(f) and their rationale for determining that such a limitation was not possible, see *id.*

78. 105 S. Ct. at 1470-71.

79. *Id.*

80. *Id.* at 1471.

81. 105 S. Ct. at 1474 (White, J., dissenting).

governmental interests justify congressional regulation of the amassing and spending of money in political campaigns.[82]

Next, White contends that even if *Buckley* was correct, the majority misapplied it to the present case.[83] He believes that section 9012(f) more closely resembles the contribution limitations upheld in *Buckley* than the limitations on uncoordinated individual expenditures that were struck down.[84] White also believes that the entire public financing scheme is injured by the majority's holding.[85] He asserts that by striking down one part of an integrated and comprehensive statute, the Court has "transformed a coherent regulatory scheme into a nonsensical, loophole-ridden patchwork."[86]

2. The Marshall Dissent

Justice Marshall, in his dissenting opinion, indicates his change in position on the contribution/expenditure distinction.[87] He cites two factors which were used to justify this distinction in *Buckley*: first, that independent expenditures offer significantly less potential for abuse than contributions;[88] second, that protected constitutional interests exist under the first amendment.[89]

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82. Justice White agrees that this case involves first amendment concerns, but believes that there are other interests to justify restrictions. *Id.*

83. *Id.* A major distinction between the majority and dissenting opinions in this case involves the classification of the independent expenditures at issue. The majority considers them to be similiar to the "expenditures" struck down in *Buckley*. *Id.* at 1466. Justice White considers them to be more like "contributions." *Id.* at 1474 (Marshall, J., dissenting). Marshall no longer believes any distinction should be drawn between expenditures and contributions and thus their classification does not matter. *Id.* at 1486 (White, J., dissenting). *See generally id.* at 1465-81.

84. *Id.* at 1474. One of the most common criticisms of the *Buckley* opinion is its distinction between expenditure and contribution limitations. *See* Nicholson, *supra* note 32 at 323-33; Comment, *supra* note 46, at 874.

85. 105 S. Ct. at 1480.

86. *Id.*

87. *Id.* at 1480-81 (Marshall, J. dissenting).

88. Justice Marshall rejected the notion that a distinction exists between contributions and expenditures. Realistically, he does not believe such a distinction can be drawn. *Id.* at 1481.

89. Justice Marshall believes that the limitations on contributions and expenditures have a similar impact on first amendment freedoms. Therefore, to say that one can be restricted and the other cannot be restricted is inconsistent. *Id.*

Marshall is no longer convinced that this distinction is accurate.[90] He believes that the independent expenditures challenged in *Buckley* and *FEC* v. *NCPAC* can be justified by the governmental interests in promoting equal access to the political arena.[91]

IV. ANALYSIS

In the United States, as in other democratic nations, political activity has traditionally been financed through private, voluntary contributions.[92] Therefore, the concept of public funding in political campaigns has met with strong opposition.[93] In recent years, the Court has played a greater role in the development of this area of election law.[94] *FEC* v. *NCPAC*[95] indicates the difficulty the Court has had in developing a consistent approach toward the role of public financing in the American electoral process.[96]

A. Equal Access

One criticism of the *Buckley* decision was its failure to address the first amendment interest in equalizing access and input into the political arena.[97] The Court failed to adequately address this issue in *FEC* v. *NCPAC* as well.

While a major impetus for the reforms of the 1970's was the desire to prevent corruption, it was not the only one.[98]

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90. *Id.* In *Buckley*, three of the eight Justices who heard the case agreed that contributions and expenditures should be treated the same for first amendment purposes. *See* 424 U.S. 1.

91. 105 S. Ct. at 1481.

92. POLITICAL MONEY, *supra* note 29, at 2.

93. For a discussion of the role of money in a democratic society, see *id.* at 1-27.

94. For other recent cases involving similiar issues, see California Medical Ass'n v. FEC, 453 U.S. 182 (1981); Citizens Against Rent Control v. Berkley, 454 U.S. 290 (1981); Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980), *aff'd per curiam*, 455 U.S. 129 (1982) (4-4 decision).

95. 105 S. Ct. 1459 (1985).

96. *See supra* text accompanying notes 61-91. The Court is correct in its conclusion that first amendment rights are at stake in FEC v. NCPAC, and its evaluation of the freedom of association implications are appropriate. Where the Court falls short in its analysis is in its failure to take a comprehensive view of the situation. The independent expenditures at issue represent the interaction that exists between contributions and expenditures. Therefore, the Court's failure to fully address that interaction in its opinion only serves to further confuse the law surrounding campaign finance regulations.

97. Comment, *supra* note 46, at 854.

98. *See supra* text accompanying notes 30-33.

The dissenting opinions[99] express a greater understanding of the complexities behind the campaign reform movement.

Certainly a valid consideraton is the practical effect of several significant parts of FECA and the Fund Act being declared unconstitutional. The loopholes which remain can create an undesirable political climate. Even worse, however, is the legal environment which emerges. Money, time and effort are channeled into legal battles with little remaining for the effective and complete discussion of the issues and candidates. Other repercussions, mostly undesirable, are also felt throughout the electoral process.[100] As a result, access is decreased.

The Court needs to recognize that there are other legitimate governmental interests for restricting campaign finances.[101] Failure to recognize these competing interests shows the Court's failure to completely address the issues involved in this case.

B. Contribution and Expenditure Limits

In *FEC v. NCPAC*, the Court considered the independent expenditures at issue to be similiar to the expenditures struck down in *Buckley*.[102] Marshall's dissenting opinion directly attacks the artificial nature of the distinction drawn between contributions and expenditures.[103] White, in his dissenting opinion, further confuses the distinction by claiming that the expenditures at issue are really "contributions."[104]

It appears that the issue is not whether the independent expenditures are really contributions or expenditures, but rather whether the Court wishes to declare them constitutional or not. If the Court believes that the restrictions should remain part of the statutory scheme, it will call them contribu-

99. The dissenting opinions in FEC v. NCPAC were given by Justices White and Marshall. *See supra* text accompanying notes 81-91.

100. The reforms were criticized because they diverted campaign funds from communicating with voters to complying with the law. They also were seen as a boon to incumbents and were responsible for longer campaigns. ELECTIONS '84, *supra* note 33, at 149.

101. FEC v. NCPAC, 105 S. Ct. at 1468.

102. *Id.*

103. *Id.* at 1480-81 (Marshall, J., dissenting).

104. *Id.* at 1477-78 (White, J., dissenting).

tions. If not, it will call them expenditures. What the Court fails to realize is the interrelationship between contributions and expenditures.[105] It is this interrelationship that makes it difficult to know how to categorize some of the financial transactions which occur during a campaign. It is for this reason that the Court should decline the future use of this distinction and apply, on a case-by-case basis, factors which represent the legitimate governmental interests served by such restrictions.

In deciding what campaign regulatory scheme will apply, the Court must first balance the interests of society against the rights of the individual. It must then determine if the current means of effectuating that balance is proper.[106] Among the factors to be considered are:

(1) The individual's rights to participate in political activity and freely express his or her political viewpoints;
(2) The individual's constitutional rights of freedom of speech and association;
(3) The prevention of corruption or the appearance of such corruption;
(4) Society's interest in providing equal access to the political arena for all individuals;
(5) The desire to establish a system of public financing in campaigns that is both effective and fair; and
(6) The legislative intent behind any statutory section at issue.[107]

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105. Comment, *supra* note 46, at 874.

106. Although the Constitution does not explicitly authorize the national regulation of campaigns, the Supreme Court has employed several constitutional provisions to justify its decisions in this area. For a discussion of campaign regulation and the Constitution, see POLITICAL MONEY, *supra* note 29, at 62-64.

107. These factors represent the basic concepts the Court should consider in its determinaton of whether the legislature has chosen the proper means to regulate campaign financing. *See generally* POLITICAL MONEY, *supra* note 29, at 187.

The Court does consider the first amendment and its application to the PAC expenditures in this case. FEC v. NCPAC, 105 S. Ct. at 1467-68. Yet, the Court falls short in its consideration of first amendment rights by not clearly identifying whose interests it is protecting. *Id.* at 1477 (White, J., dissenting).

The majority compares the limitations imposed by the statute at issue to "allowing a speaker in a public hall to express his views while denying him the use of an amplifying system." *Id.* at 1467. The majority contends that the first amendment affords broad protection of political expression in order to assure the unfettered interchange of political and social ideas. *Id.*

White, in his dissent, agrees with the majority that the expenditures in this case "produce" speech but explains that to "produce" speech is not "speech" itself. There-

C. Impact

FEC v. NCPAC will have an impact upon potential expansion of ideological PACs in the electoral process. Without doubt, the Court's ruling in this case strengthened and further legitimatized the "ideological" PACs.[108] It is too early to predict what type of influence these PACs will have on the electoral process. To date, conservative ideological PACs have been more visible and active than their liberal counterparts. However, the liberal activists have seen the influence that ideological PACs can have on elections and are likely to become more active in this way.[109] After all, the decision in *FEC v. NCPAC* applies not only to conservative ideological PACs but to liberal ones as well.[110]

V. CONCLUSION

FEC v. NCPAC represents a difficult proposition which currently confronts our elected officials and judges. How can one balance the rights of the individual against the interests of society and yet provide an effective and fair electoral process? The Court's decision in *FEC v. NCPAC* to declare section 9012(f) unconstitutional is a poor decision because the Court failed to use a reasonable and comprehensive approach to reach its decision. The Court should strongly consider devel-

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fore, White argues that the first amendment protections should not extend to the expenditures at issue in this case. *Id.* at 1475 (White, J., dissenting).

The prevention of corruption, or appearance thereof, has long been considered a legitimate government function. *Id.* at 1469. *See also* text accompanying notes 73-79. In this case, the Court places an overriding emphasis on this factor and fails to consider other factors which are also legitimate and substantial.

Marshall, in his dissent, notes the congressional interest in promoting "the reality and appearance of equal access" in the American political system. 105 S. Ct. at 1481 (Marshall, J., dissenting) (quoting Buckley v. Valeo, 424 U.S. 1, 23 (1976)).

The White dissent further notes that the desire to maintain public confidence in the integrity of federal elections equalizes the resources available to candidates and holds the overall amount of money devoted to campaigns at a reasonable level. This creates a public financing system that is both effective and fair. These objectives are considered both legitimate and substantial. *Id.* at 1475 (White, J., dissenting).

108. The ideological PACs were legitimized by this decision much like earlier corporate and labor PACs were legitimized by other Court decisions and FEC advisory opinions. *See supra* text accompanying note 44.

109. Latus, *supra* note 54, at 165-66.

110. The ruling in FEC v. NCPAC will likely encourage greater activity by both liberal and conservative ideological PACs in the 1986 and 1988 elections. An equalization between the relative strengths of the various PACs is likely to occur.

oping an approach that would balance the competing interests involved in campaign finance regulations and apply it on a case-by-case basis. No longer should the artificial distinction drawn between expenditures and contributions be used to make this determination. A consistent approach by the judiciary could help to stabilize this area of election law.[111]

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111. There are various factors which the Court could consider in balancing the competing interests involved in campaign finance regulations in order to develop a more consistent approach in evaluating cases in this area of election law. *See supra* text accompanying note 107.