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Shouting Down the Voice of the People: Political Parties, Powerful PACs, and Concerns About Corruption

Clarisa Long*

The Federal Election Campaign Act limits the amount of financial support that political parties may give to candidates for federal office. Clarisa Long argues that these restrictions violate political parties' First Amendment rights of speech and association. Because the flow of money in the political process is a proxy for speech, the First Amendment requires that political actors have access to at least one unrestricted avenue of communication. While individuals' and PACs' First Amendment rights are protected because they may make unrestricted independent expenditures, parties do not have this opportunity. Courts have failed to protect party speech, rationalizing that the existence of corruption justifies First Amendment restrictions on political parties but not on other entities. Ms. Long argues that parties have unique political messages, that the corruption rationale is flawed as applied to parties, and that the harm arising from limiting party speech outweighs the benefits. She contends that reducing the existence of corruption can be accomplished more effectively through means that do not reduce the amount of speech within the political process, and proposes less restrictive alternatives to the current funding limitations.

INTRODUCTION

Rarely does a federal agency enter court confidently expecting its claims to be affirmed on appeal, only to emerge from the fray to find itself declared unconstitutional. But the Federal Election Commission (FEC) received precisely this surprise when the D.C. Circuit decided *Federal Election Commission v. NRA Political Victory Fund*.¹ Holding the FEC's composition² unconstitutional on separation of powers grounds,³ the court chose not to rule

* Third-year student, Stanford Law School. My thanks to Professor Ed Buscaglia and the editors at the *Stanford Law Review*.

1. 6 F.3d 821 (D.C. Cir. 1993).

2. The FEC's six voting members are appointed by the president, but its two nonvoting members (the Clerk of the House of Representatives and the Secretary of the Senate) are drawn from the ranks of the legislature. 2 U.S.C. § 437c(a)(1) (1988).

3. The NRA Political Victory Fund (NRA-PVF) argued that the presence of the nonvoting members allowed Congress to usurp power from the executive branch. "Even if the *ex officio* members were to remain completely silent during all deliberations (a rather unlikely scenario), their mere presence as agents of Congress conveys a tacit message to the other commissioners." 6 F.3d at 826.

on the claim that the FEC's actions impinged on the NRA Political Victory Fund's First Amendment rights.

This landmark case, although important for what it does say, is also significant for what it overlooks: the impact of federal campaign financing laws on First Amendment rights of speech and association. Because money, especially in the political context, is so closely correlated with speech, a restriction on who may contribute and how much may be spent is a regulation of political speech. Courts have not distinguished between political parties and other entities when addressing First Amendment concerns in campaign finance law.⁴ Ignoring the unique aspects of political parties, courts have instead analogized them to political action committees (PACs) and individuals.⁵ In the election law context, our judicial system needs to directly address and protect political parties' First Amendment rights of political speech and association.⁶

Courts will soon have the opportunity to consider campaign law reform. Shortly after taking office, the Clinton administration announced its intention to revamp campaign finance law,⁷ and Congress reacted swiftly with its own version of election law reform.⁸ In one form or another, litigation over the issue of campaign financing will eventually reach the Supreme Court.⁹ If it would protect free speech within the political process, the Court must carefully consider the financing restrictions that political parties currently face.

To prevent both corruption and the appearance of corruption, Congress passed the Federal Election Campaign Act of 1971 (FECA).¹⁰ In the wake of the Watergate scandal, Congress amended FECA to limit the amount of money political parties can directly contribute to candidates or spend on their behalf.¹¹ These contribution and expenditure limits have had unforeseen impacts on both candidates and parties.¹² Candidates must devote more time than ever to

4. See *Buckley v. Valeo*, 424 U.S. 1, 23 (1976) (per curiam) (noting that FECA "defines 'person' broadly to include" parties).

5. See *id.*

6. See Stephen E. Gottlieb, *Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case*, 11 HOFSTRA L. REV. 191, 200 (1982-1983) ("Limited intrusion on parties, sanctioned by the Court in early cases, has grown into approval of regulation which sharply conflicts with the first amendment.").

7. See Richard L. Berke, *Clinton Rebuffed on Plan to Reduce Election Spending*, N.Y. TIMES, Feb. 4, 1993, at A1.

8. The Senate passed a bill that limits spending on candidates for federal office. S. 3, 103d Cong., 1st Sess. (1993). Public dissatisfaction with the current state of election law is widespread. See, e.g., Junda Woo, *Campaign-Donation Suit*, WALL ST. J., Dec. 27, 1993, at 11 (describing how Virginia voters are suing their legislators).

9. See Rick Wartzman, *Congress's Representative to Election Commission Has Six-Figure Salary, Big Office and Little to Do*, WALL ST. J., Feb. 14, 1994, at A16 (describing upheaval at the FEC as *Federal Election Commission v. NRA Political Victory Fund* is appealed to the Supreme Court).

10. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 18 U.S.C. § 610 (1972) and current version at 2 U.S.C. §§ 431-456 (1988)).

11. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-456 (1988)).

12. See INSTITUTE OF POLITICS, HARVARD UNIVERSITY, 96TH CONG., 1ST SESS., AN ANALYSIS OF THE IMPACT OF THE FEDERAL ELECTION CAMPAIGN ACT 1972-78, at 53-60, 88-92 (Comm. Print 1979) [hereinafter INSTITUTE OF POLITICS] (arguing that FECA has made fundraising more difficult for candidates, and has strengthened the parties in some respects while weakening them in others); Stephen E. Gottlieb, *Fleshing out the Right of Association: The Problem of the Contribution Limits of the Federal*

fundraising, soliciting atomistic groups such as PACs for contributions,¹³ while political parties have lost much of their control over their candidates' actions.¹⁴ Although one of the asserted purposes of the reforms was to give the people more power over the political process,¹⁵ campaign finance laws have not brought about this change.¹⁶ Instead, the purported reforms have shifted the balance of power from political parties to PACs.¹⁷

The limitations that FECA places on the financial support political parties can give their candidates violate First Amendment rights of political speech and association. In Part I of this note, I outline the expenditure and contribution ceilings FECA imposes on parties in the name of preventing the appearance of corruption. I then discuss the Supreme Court's treatment of these limits in *Buckley v. Valeo* and its progeny, and illustrate how this line of cases has bred conflicting constitutional standards.

In Part II, I argue that political parties have unique free speech rights by virtue of their explicit political messages. Campaign finance laws suppress that message when they constrain the amount of money parties may expend. Limiting a party's financial support of its candidates forecloses avenues of political speech that have no effective alternatives.

In Part III, I maintain that FECA's asserted goal of preventing the appearance of corruption does not warrant such severe restrictions on the First Amendment rights of political parties. First, I demonstrate that limits on party financing of candidates must satisfy strict scrutiny because they infringe First Amendment rights. I also suggest how the Court ought to apply First Amendment jurisprudence in the party-candidate context. I then argue that corruption of the sort the Supreme Court and Congress contemplated (an exchange of dollars for political favors) occurs infrequently if at all in party-candidate interactions. Political reality makes it difficult for candidates to make improper exchanges with their parties in the manner that the Court and Congress feared.

Election Campaign Act, 49 ALB. L. REV. 825 (1985) (arguing that the provisions have "balkanized" the American electorate); Gerald M. Pomper, *The Decline of the Party in American Elections*, 92 POL. SCI. Q. 21, 29-31 (1977) (explaining the decline of the party as a response to campaign finance reforms). But see HERBERT E. ALEXANDER, *REFORM AND REALITY: THE FINANCING OF STATE AND LOCAL CAMPAIGNS* 92 (1991) (suggesting that decreases in party control of candidates might be beneficial).

13. See HERBERT E. ALEXANDER, *FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM* 50-51 (4th ed. 1992).

14. See ALEXANDER, *supra* note 12, at 92 (noting how the widespread use of electronic media now allows candidates to bypass the party); WILLIAM CROTTY, *AMERICAN PARTIES IN DECLINE* 277 (2d ed. 1984); Everett Carl Ladd, Jr., *Party "Reform" Since 1968: A Case Study in Intellectual Failure*, in *THE AMERICAN CONSTITUTIONAL SYSTEM UNDER STRONG AND WEAK PARTIES* 81, 85-86 (Patricia Bonomi, James MacGregor Burns & Austin Ranney eds., 1981) [hereinafter *CONSTITUTIONAL SYSTEM*].

15. ANTHONY CORRADO, *CREATIVE CAMPAIGNING: PACS AND THE PRESIDENTIAL SELECTION PROCESS* 14-15 (1992). The Supreme Court reasoned in *Buckley v. Valeo* that contribution limits would promote democratization of the campaign contribution process: "The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons." *Buckley*, 424 U.S. at 21-22 (1976).

16. See generally CORRADO, *supra* note 15 (discussing how campaign reform has caused candidates to alter their campaign strategies so that PACs, not the electorate, play a larger role).

17. See FRANK J. SORAU, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* 15-16 (1992) (illustrating the significant rise in the number of PACs from 608 in 1974—the year of FECA's amendments—to 4172 in 1990).

In Part IV, I propose practical solutions for avoiding unnecessary restrictions on speech in campaign finance. First, I demonstrate that striking down restrictions on party funding of candidates will not exacerbate the soft money problem. Then I argue that Congress must tighten the ends-means fit between avoiding corruption and limiting party contributions. When First Amendment rights are at stake, the government should be required to prove that its regulations represent the least restrictive alternative. Finally, I suggest less restrictive means by which Congress could prevent corruption, so that "power and privilege no longer shout down the voice of the people."¹⁸

I. MONEY TALKS: CONTROLLING THE FLOW OF PARTY-CANDIDATE SPEECH

The health of democracies, of whatever type and range, depends on a wretched technical detail—electoral procedure. All the rest is secondary. If the regime of the elections is successful, if it is in accordance with reality, all goes well; if not, though the rest progresses beautifully, all goes wrong.

—Jose Ortega y Gasset¹⁹

A. *The Federal Election Campaign Act: A Ceiling on Contributions and Expenditures by Political Parties*

Reforms of election law are nothing new, and the impetus to enact them has generally followed on the heels of political scandal.²⁰ Congress passed the Federal Election Campaign Act of 1971²¹ in response to increasing concerns about political corruption.²² Three years later, in the most comprehensive reform of campaign financing law to date,²³ Congress amended the Act in the wake of the Watergate investigation.²⁴ To many, the revelation that large individual contributions made to Richard Nixon's Committee to Re-elect the President were used in part to finance the illegal Watergate activities²⁵

18. President Bill Clinton, Inaugural Address (Jan. 20, 1993), in *"We Force the Spring": Transcript of Address by President Clinton*, N.Y. TIMES, Jan. 21, 1993, at A11.

19. JOSE ORTEGA Y GASSET, *THE REVOLT OF THE MASSES* 171 (1932).

20. See *United States v. UAW*, 352 U.S. 567, 570-76 (1957) (Frankfurter, J.) (recounting the history of campaign finance reforms as attempts to restore faith in the campaign process); ALEXANDER, *supra* note 13, at 23-47 (tracing the history of campaign financing reform efforts); ROBERT R. MUTCH, *CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW* 24-29 (1988); MAUREEN SHEA, *STALLED FROM THE START: A COMMON CAUSE STUDY OF THE FEDERAL ELECTION COMMISSION 65-73* (1981) (describing a history of federal campaign financing reform from the Pendleton Act of 1883 to the Federal Election Campaign Act of 1971); Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 280-83 (1991).

21. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 18 U.S.C. § 610 (1972) and current version at 2 U.S.C. §§ 431-456 (1988)).

22. For a list of the dangers of "unregulated electoral financing," see Gene R. Nichol, *Money, Equality and the Regulation of Campaign Finance*, 6 CONST. COMMENTARY 319, 319 (1989).

23. *Buckley v. Valeo*, 424 U.S. 1, 7 (1976) (per curiam) (quoting lower court opinion, 519 F.2d 821, 831 (D.C. Cir. 1975)).

24. The Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-456 (1988)).

25. See Nelson W. Polsby, *Moving Toward Equality in Campaign Finance? Another Equivocal Encounter Between Theory and Practice*, in *POWER, INEQUALITY AND DEMOCRATIC POLITICS: ESSAYS IN HONOR OF ROBERT A. DAHL* 263, 270 (Ian Shapiro & Grant Reeher eds., 1988) (illustrating how cam-

symbolized an elected officeholder's failure to remain accountable to the electorate.²⁶

The 1974 amendments included, for the first time, limits on contributions from individuals.²⁷ Because large campaign contributions from discrete sources created at least an appearance of corruption or undue influence,²⁸ the 1974 amendments capped the amount of money individuals and political parties could contribute to a candidate²⁹ or spend on her behalf.³⁰ In 1976, Congress amended FECA yet again to comply with *Buckley v. Valeo*'s³¹ holding that the Act's expenditure limits were unconstitutional.³² In the late 1970s, a Harvard commission determined that the Act weakened the political parties and unduly burdened campaigns,³³ and Congress amended the Act once more in 1980 in response to the commission's suggestions.³⁴

The Federal Election Campaign Act, as currently written, still limits the amounts of money that political parties can contribute to, and spend on behalf of, candidates in each national election.³⁵ Different limits apply depending upon whether the money is categorized as a "contribution" or an "expenditure." Money given directly to a candidate by an individual or a political party is considered a contribution,³⁶ while money spent by an individual or party to support the candidate represents an expenditure on the candidate's behalf.³⁷ Independent expenditures are those not subject to the control of the candidate

paig money was used to pay "for the placement of a bug at the Democratic National Committee headquarters"). Three individual donors to Nixon's presidential campaign in 1972 gave \$2.1 million, \$1 million, and \$600,000. BROOKS JACKSON, *BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED* 40 (1990).

26. See James Banner, *Discussion of the Ladd Essay*, in *CONSTITUTIONAL SYSTEM*, *supra* note 14, at 97, 108.

27. Section 101(b)(1) of Pub. L. No. 93-443, 88 Stat. 1263 (1974) states, "no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed \$1000"; section 101(b)(3) mandates that "[n]o individual shall make contributions aggregating more than \$25,000 in any calendar year."

28. *Buckley*, 424 U.S. at 25-27. President Nixon's personal lawyer served a prison sentence for promising to exchange an ambassadorship for a \$100,000 campaign contribution. JACKSON, *supra* note 25, at 40.

29. 18 U.S.C. § 608(b) (Supp. IV 1970) (current version at 2 U.S.C. § 441(a) (1988)).

30. *Id.* § 608(e).

31. 424 U.S. 1 (1976) (per curiam).

32. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 201, 90 Stat. 475 (codified as amended at 2 U.S.C. §§ 431-456 (1988)).

33. INSTITUTE OF POLITICS, *supra* note 12, at vii.

34. Pub. L. No. 96-187, 93 Stat. 1339 (1980) (codified as amended at 2 U.S.C. §§ 431-456 (1988)).

35. 2 U.S.C. § 441a(a) (1988) (limiting contributions from parties); *id.* § 441a(d) (limiting party expenditures); 11 C.F.R. § 110.7 (1994).

36. 2 U.S.C. § 431(8)(A) (1988). Contributions are:

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

Id.

37. *Id.* § 431(9)(A). Expenditures are: "(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and (ii) a written contract, promise, or agreement to make an expenditure."

Id.

or her campaign, made by an individual or organization to advocate a particular candidate or issue.³⁸ Political parties are incapable of making independent expenditures.³⁹

A party typically channels money to a candidate through a maze of committees.⁴⁰ Parties use political committees to distribute contributions,⁴¹ and candidates must maintain at least one committee authorized to receive and spend donations.⁴² FECA limits a political party's direct contributions to \$17,500 per senatorial candidate⁴³ and \$5000 per congressional candidate.⁴⁴ The Act also requires that any money a party contributes to a candidate in a nonelection year be included in its election year contribution totals.⁴⁵

Finally, the Act caps the expenditure levels of national and state party committees in federal elections. On behalf of presidential hopefuls, a party may spend no more than two cents multiplied by the voting age population of the United States plus a cost of living adjustment.⁴⁶ A party can only spend the greater of two cents multiplied by the voting age population of the state or \$20,000 on Senate candidates and House candidates from a state entitled to

38. *Id.* § 431(17). The Act defines independent expenditures as an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

Id.

39. The Federal Election Commission has forbidden independent expenditures related to the general election campaign of federal candidates by party committees. 11 C.F.R. § 110.7(b)(4) (1994).

40. These include "political committees" defined as "any committee, club, association, or other group of persons" that receives more than \$1,000 in contributions or spends more than \$1000 per year, or "any local committee of a political party" that receives more than \$5000 in contributions or spends or contributes more than \$1000 per year. 2 U.S.C. § 431(4) (1988). A "multicandidate political committee" is one that "has received contributions from more than 50 persons, and . . . has made contributions to 5 or more candidates for Federal office." *Id.* § 441a(5). A "principal campaign committee" is "a political committee designated and authorized by a candidate." *Id.* § 431(5). A "connected organization" is "any organization which is not a political committee but which directly or indirectly establishes, administers or financially supports a political committee." *Id.* § 431(7).

41. The political committees of a party include each party's national committee, House campaign committee, and Senate campaign committee. 11 C.F.R. § 110.2(c)(2) (1994).

42. To receive a donation, candidates must establish committees called "principal campaign committees" or "authorized committees" that are entitled to receive contributions and make expenditures on the candidate's behalf. 2 U.S.C. § 431(5), (6) (1988). The Act requires every candidate for federal office to establish at least one such committee within fifteen days of announcing her candidacy. *Id.* § 432(e)(1).

43. *Id.* § 441a(h).

44. *Id.* § 441a(a)(2).

45. *Id.* § 441a(a)(3). ("[A]ny contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held."); see also *Services Employees Int'l Union v. Fair Political Practices Comm'n*, 721 F. Supp. 1172 (E.D. Ca. 1989), *aff'd*, 955 F.2d 1312 (9th Cir.), *cert. denied*, 112 S. Ct. 3056 (1992) (striking down ballot initiative limiting contributions raised per fiscal year rather than per election).

46. 2 U.S.C. § 441a(d)(2) (1988). In 1988 this totalled approximately \$8.29 million. Carol C. Darr, *Contributions and Expenditures by National, State and Local Party Committees*, in *CORPORATE POLITICAL ACTIVITIES 1990: PACs, ETHICS, AND LOBBYING LAWS* 249, 260 (PLI Corporate Law and Practice Course Handbook Series No. 695, 1990).

only one Representative.⁴⁷ Other House candidates can receive no more than \$10,000 in party expenditures in the general election.⁴⁸

"Soft money," or expenditures by state or local committees of a political party for certain activities, such as party-building efforts (e.g., voter-registration drives and campaign materials used in connection with volunteer activities on behalf of the party's nominees), do not count against the national party's expenditure limitations.⁴⁹ The soft money exception is a loophole that political parties have used to full advantage. By funneling money to candidates under state committee auspices, parties effectively skirt the legal federal limits, thus undermining FECA's purpose.⁵⁰

FECA treats political action committees (PACs)⁵¹ decidedly differently from parties. A PAC may contribute up to \$5000 per candidate to an unlimited number of federal candidates.⁵² But while each candidate may receive campaign support from only one party, she may receive financial support from potentially hundreds of PACs. Because a single PAC can contribute as much money to a House candidate as the candidate's political party, PACs carry special clout with House candidates. FECA's contribution limits on political parties have thus redistributed power within the political process away from parties to PACs.⁵³

B. *The Supreme Court's Treatment of Political Speech*

Litigation over FECA has generated numerous opinions from the Supreme Court.⁵⁴ In *Buckley v. Valeo*,⁵⁵ the first and most far-reaching challenge to the Act, the Supreme Court addressed FECA's constitutionality. *Buckley* considered a challenge to the limitation on contributions and expenditures by "persons," a category that implicitly includes political parties.⁵⁶ The case also tackled the constitutionality of ceilings on expenditures that candidates made from their own personal funds.⁵⁷ *Buckley* forced the Court to answer three questions: Did the challenged provisions of the Act violate First Amendment rights of speech and association? If so, did the violation constitute a significant invasion of First Amendment interests, and did a compelling state interest justify it?⁵⁸ Throughout its 294-page opinion, the Court tried to balance the integ-

47. 2 U.S.C. § 441a(d)(3)(A) (1988).

48. *Id.* § 441a(d)(3)(B).

49. *Id.* § 431(9)(B)(ii), (iv), (viii), (ix).

50. See generally JACKSON, *supra* note 25, at 39-57. For a discussion of the soft money problem and how it relates to party contributions to candidates, see text accompanying notes 221-229 *infra*.

51. A PAC is otherwise known as a "multicandidate political committee." ROSS K. BAKER, *THE NEW FAT CATS: MEMBERS OF CONGRESS AS POLITICAL BENEFACTORS* 9 (1989).

52. 2 U.S.C. § 441a(a)(2)(A) (1988).

53. See notes 16-17 *supra* and accompanying text.

54. See, e.g., *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985); *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981).

55. 424 U.S. 1 (1976) (per curiam).

56. *Id.* at 23. The Act defines "person" as "an individual, partnership, committee, association, corporation, labor organization or any other organization or group of persons." 2 U.S.C. § 431(11) (1988).

57. *Buckley*, 424 U.S. at 51-54.

58. *Id.* at 59 n.67.

city of the electoral process and the accountability of elected officials with the need to protect the rights of speech and association.

1. *The constitutionality of contribution and expenditure limits: Buckley v. Valeo.*

The Supreme Court has declared that contributing to or expending money on behalf of a candidate is tantamount to political speech.⁵⁹ Nevertheless, the Court has also found that the interest in limiting actual and apparent corruption,⁶⁰ the possibility of which is "inherent in the process of raising large monetary contributions,"⁶¹ outweighs the First Amendment concerns posed by FECA's contribution ceilings.⁶² Admitting that limits on contributions from "persons" may tread upon the freedom of political association, the *Buckley* Court nonetheless justified burdening that right by finding that the government possessed a substantial interest in squelching any suggestion of corruption.⁶³ The Court also upheld FECA's contribution limits against freedom of speech challenges as "entail[ing] only a marginal restriction on the contributor's ability to engage in free communication."⁶⁴ *Buckley* declared that contributor speech, whether made by an individual or a political party, is simply an expression of support for the candidate made with the first dollar contributed.⁶⁵ Increasing the size of a contribution, according to the Court, did not perceptibly increase the amount of communication.⁶⁶ A contribution was only indirect speech (and therefore entitled to less than full First Amendment protection) because the contributor did not control the communication her money goes to support.⁶⁷

In contrast to contribution limits, the *Buckley* Court held expenditure limits on nonparty entities unconstitutional because they "substantially" restrained political expression⁶⁸ and were not supported by compelling state interests.⁶⁹ Because a candidate cannot bribe herself, limiting a candidate's use of personal or family funds did not satisfy the government's goal of preventing corruption.⁷⁰ The Court's rationale for allowing independent expenditures was a little more complicated. First, the fact that candidates could not control independent

59. *Id.* at 22 ("Making a contribution, like joining a political party, serves to affiliate a person with a candidate. . . . The Act's contribution ceilings thus limit one important means of associating with a candidate or committee.").

60. *Id.* at 26-27.

61. *Id.* at 30.

62. *Id.* at 29.

63. *Id.*; see also *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 788-89 & n.26 (1978) (finding a state interest in preventing electoral corruption or the appearance of corruption).

64. *Buckley*, 424 U.S. at 20-21.

65. *Id.* at 21.

66. *Id.*

67. *Id.*

68. *Id.* at 19. "[T]he Act's limitations on expenditures by campaign organizations and political parties provide substantially greater room for discussion and debate . . . [than limitations on contributions]." *Id.* at 20.

69. *Id.* at 55-58.

70. *Id.* at 53. *Buckley* defined corruption as an improper quid pro quo. *Id.* at 26-27. But see *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990) (Marshall, J.) (stating that corrup-

expenditures reduced the possibility of undue influence.⁷¹ Second, the Court deemed restrictions on independent spending overbroad and incapable of eliminating quid pro quo deals, because persons or groups could always run ads supporting the candidate's view, as long as they did not "in express terms advocate the election or defeat of a clearly identified candidate."⁷²

Buckley implies that spending (as opposed to merely contributing) money constitutes *direct* political speech. Limiting expenditures therefore reduces the "quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."⁷³ With expenditures, unlike contributions, the more you spend, the more you say.⁷⁴ As one Justice quipped, "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."⁷⁵

The Court created a fine distinction.⁷⁶ On the one hand, it decided that the First Amendment prohibits the government from limiting "spending to promote one's political views."⁷⁷ But on the other hand, the Court stated that capping the amount one could contribute restricted free communication only marginally.⁷⁸ The narrow line drawn between expenditure limitations and contribution ceilings led one commentator to note that

Buckley allows Congress to prohibit a \$50,000 offering to a candidate to help defer the costs of a television campaign, but not direct payment by a donor to the station to keep the ads running. The drafters of the FECA were correct in thinking that this "wooden" interpretation of the Constitution renders the Act "virtually meaningless."⁷⁹

Political parties fall between *Buckley*'s cracks. Direct speech by candidates is protected because they may freely spend their own money to advocate their election. Similarly, PACs may engage in direct speech through unlimited independent expenditures. Political parties, however, have no such outlets for

tion includes "the corrosive and distorting effects of immense aggregations of [corporate] wealth," not just quid pro quo corruption).

71. *Buckley*, 424 U.S. at 46-47.

72. *Id.* at 45.

73. *Id.* at 19 (footnote omitted).

[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Id.

74. "It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'" *Id.* at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

75. *Id.* at 19 n.18.

76. For the view that the Court's distinction is "unpersuasive and anomalous," see Nichol, *supra* note 22, at 320.

77. *Buckley*, 424 U.S. at 57.

78. *Id.* at 20-21.

79. Nichol, *supra* note 22, at 321.

direct speech; unlike candidates, parties may not spend their own money freely to advocate their candidates' election, nor can they make independent expenditures. Limited only to the indirect speech of contributions, party communication does not receive the same level of protection as that of other groups within the political process.

Buckley determined the constitutionality of FECA before the 1974 amendments were tested in practice.⁸⁰ The case is a compromise attempting to mitigate the worst excesses of campaign finance law while protecting individual First Amendment guarantees,⁸¹ rather than a concerted attempt to protect the First Amendment interests of the political parties.⁸² By negotiating this balance, claim some authors, the Court relied upon a constitutional view of the First Amendment as specifically "designed to guarantee the free flow of information necessary to an informed electorate."⁸³ But the only thing that seems to flow freely after *Buckley* is PAC money to candidates.⁸⁴

2. *Buckley's progeny: CMA, NCPAC, and CARC.*

The distinction between contributions and expenditures has continued to give the Court considerable trouble. In *California Medical Association v. Federal Election Commission*,⁸⁵ for example, appellant California Medical Association (CMA) challenged the constitutionality of the \$5000 limit on contributions to multicandidate political committees (PACs).⁸⁶

In response to CMA's First Amendment argument, the plurality reasoned that CMA's contribution to a PAC was not direct speech because the PAC expressed views CMA did not control. Because the contribution was merely indirect or "proxy" speech, it merited less than full First Amendment protection.⁸⁷ CMA and its members could still engage in direct speech, as FECA's limitations "did not directly infringe on the ability of contributors to express

80. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1133 (2d ed. 1988). "One consequence of this expedited review [of *Buckley v. Valeo*] was that the Supreme Court, working in a factual vacuum, was forced to indulge in more than a little empirical speculation about such issues as the circumvention of expenditure limits and the impact of those limits on campaign speech." *Id.* at 1131 n.1.

81. See Joel L. Fleishman & Pope McCorkle, *Level-Up Rather than Level-Down: Towards a New Theory of Campaign Finance Reform*, 1 J.L. & Pol'y 211, 222-24 (1984).

82. *Buckley* did not apply First Amendment jurisprudence to political parties. Instead, the Court's analysis focuses on the contributing power of discrete persons or relatively small groups of people.

83. See Irving R. Kaufman, *Electoral Integrity vs. Free Speech*, N.Y. TIMES, Mar. 7, 1988, at A19; see also *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978) (explaining that freedom of political speech is "indispensable to decisionmaking in a democracy"); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) ("Freedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

84. "[I]n 1986 . . . it was estimated that nearly half the Representatives got 50% or more of their money from PACs." K.D. Ewing, *The Legal Regulation of Campaign Financing in American Federal Elections*, 47 CAMBRIDGE L.J. 370, 396 (1988); see also ALEXANDER, *supra* note 13, at 19 ("[A]ll 50 states report ever increasing PAC involvement in the financing of campaigns, both in terms of the PACs and the amounts being contributed.") (citations omitted).

85. 453 U.S. 182 (1981).

86. *Id.* at 198.

87. *Id.*

their own political views.”⁸⁸ While *California Medical Association’s* First Amendment outcome is consistent for individuals and groups that have alternative channels of direct speech open to them, this case, like *Buckley*, fails to protect fully the speech interests of political parties, which have no avenues of direct communication open to them under FECA.

CMA also made a corruption argument, claiming that concerns about the existence of an improper quid pro quo did not apply to contributions made to a committee rather than a candidate.⁸⁹ The Court rejected this argument, fearing that individuals would simply use contributions to multicandidate committees to circumvent the limits on their direct contributions to individual candidates.⁹⁰ Contributions, even when made to a group rather than a single person, still raised the possibility of a quid pro quo and posed a threat of actual or potential corruption that expenditures did not.⁹¹ The contribution/expenditure distinction did not cease to haunt the Court here, nor did later cases clarify the matter.

Four years later, in *Federal Election Commission v. National Conservative Political Action Committee* (NCPAC), the Supreme Court again refused to equate limits on contributions with limits on expenditures.⁹² The Court reaffirmed the unconstitutionality of expenditure limitations, but its rationale still failed to differentiate contribution limitations from expenditure restrictions on either First Amendment or corruption grounds.⁹³ Stating that “[e]lected officials are influenced to act contrary to their obligations of office by the prospect of . . . infusions of money into their campaigns,”⁹⁴ in the very next breath the Court opined that “[t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption.”⁹⁵

When the political process does not involve a candidate at all, the Court has flatly rejected the corruption justification for contribution limits. In *Citizens Against Rent Control v. Berkeley* (CARC),⁹⁶ for example, the appellants challenged the constitutionality of a municipal ordinance that placed a \$250 limit on all contributions to a committee formed to debate a ballot measure.⁹⁷ Because such a committee did not advocate on behalf of a candidate, the concurrence concluded that the ordinance failed both to advance a sufficiently

88. *Id.* at 195.

89. *See id.* at 198.

90. *Id.*

91. *See id.* at 203. “Multicandidate political committees are . . . essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption.” *Id.* (Blackmun, J., concurring in part and concurring in the judgment).

92. 470 U.S. 480, 497 (1985).

93. *Id.*

94. *Id.*

95. *Id.*

96. 454 U.S. 290, 298 (1981). “*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a candidate.” *Id.* at 296-97.

97. *Id.* at 291. The relevant section of the municipal code read: “No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars.” *Id.* at 292.

important government interest and to avoid unnecessary abridgment of freedom of speech.⁹⁸ "The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue."⁹⁹ Because the ordinance provisions requiring disclosure of contributors sufficiently satisfied the state's concerns with corruption, the Court struck down the ordinance as overbroad.¹⁰⁰

Critics may argue that the dismissal of the corruption argument in *Citizens Against Rent Control* should not be extended to party speech about candidates. In contrast to candidates, who may be bribed, referenda possess no such foibles. But the corruption rationale behind the contribution/expenditure distinction ceases to exist altogether when the contributor and candidate share the same overlapping set of interests, thus obviating the need to alter a candidate's position on an issue by infusing cash into her campaign. Nor is the quid pro quo rationale compelling when only one agent is present in the transaction, such as when the candidate contributes to her own campaign.

Buckley's progeny create a delicate distinction between the regulatable proxy speech of contributions to an identifiable candidate and the protected direct speech that expenditures entail. This distinction is critically relevant to political parties. Whether FECA's limits apply to party speech depends upon whether the voting public would associate the party's political message with an identifiable candidate. To illustrate, suppose a political party paid for a television commercial in which one of its candidates discussed an issue but did not advocate her own election. Because the audience can visually identify the candidate, they will probably consider the ad party speech about the candidate rather than party speech about an issue. Hence, a court would count the cost of the advertisement against the party's limits. If the party broadcast the same advertisement over the radio, however, and the candidate did not identify herself or advocate her own election, the First Amendment calculus would turn on how "clearly identified" the candidate was. If a court determined that an audience could not reasonably identify the candidate, the party's message would constitute issue speech and receive full First Amendment protection. But if the party could reasonably expect an audience to identify the candidate (by distinctive voice or accent, for example), the ad would qualify as speech in support of a candidate.

II. LET THE PEOPLE SPEAK: POLITICAL PARTIES AS VEHICLES FOR POLITICAL SPEECH

By tightly capping the amounts political parties may spend in support of their candidates, FECA atomized the process of raising campaign money. As a

98. *Id.* at 302 (Blackmun & O'Connor, JJ., concurring) (citing *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

99. *Id.* at 298 (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790 (1978)). "To place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association." *Id.* at 296 (emphasis added).

100. *Id.* at 298-99.

result, PACs have proliferated like fruit flies on an overripe banana. Ironically, this shift in control undermined FECA's original purpose of giving power back to the people. Political parties are the only institutions large enough to provide a countervailing force to PACs, and they offer a unique avenue for political speech which FECA's contribution limits foreclose. The Supreme Court should reestablish the eroded First Amendment rights of political parties. Unless the courts or Congress abolish or at least raise the limits on party support of candidates, PACs will continue to shout down the voice of the people.

A. *Party Support of Candidates Constitutes Political Speech*

Campaign contributions have long been accepted as an expression of one's political preferences. Because it is nearly impossible to speak effectively in the political process without spending money, the Supreme Court readily concedes that "money is [political] speech."¹⁰¹ Political speech, including that of political parties, serves the crucial function of informing the public. The Court has frequently emphasized the important role the First Amendment plays "in affording the public access to discussion, debate, and the dissemination of information and ideas."¹⁰²

Tight constraints on contributions do not *necessarily* diminish the number or quality of issues discussed in a campaign. But when contribution limits prevent the candidate from raising as much money as she could have absent the limits, political speech diminishes and the electorate suffers.¹⁰³ The *Buckley* Court recognized this danger¹⁰⁴ and noted the importance of preventing any reduction in the "number of issues discussed, the depth of their exploration, and the size of the audience reached."¹⁰⁵

Despite its concern that campaign financing regulations reduce the quantity and quality of political speech, the Court has consistently tilted the balance between First Amendment protection and concerns about corruption in favor of asserted state interests.¹⁰⁶ The Court's conclusions rest on the assumption that funding limits do not fatally abridge the contributor's freedom of speech because she may convey the same information through other avenues of communication.

This assumption does not apply to political parties, however. Limiting the amount a party may contribute or spend in a candidate's election narrows a vital avenue of party communication. Suppose, for example, that the Dubuque, Iowa branch of the Teamster's Union holds a convention. The Teamsters invite

101. See, e.g., *Buckley*, 424 U.S. at 16-17.

102. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

103. *Buckley* briefly addressed the danger that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." 424 U.S. at 21. But it dismissed the danger because "[t]here is no indication . . . that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations." *Id.*

104. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Id.* at 14.

105. *Id.* at 19.

106. *Id.* at 25, 66.

the Democratic party to set up a booth in the convention hall, and the party wants to distribute flyers containing the following announcement: "The Democratic party supports the re-election of candidate Susan Smith for Representative from Iowa's Second District. She is pro-labor and has consistently voted in favor of allocating more of our national budget to improving interstate highways." Undoubtedly these flyers contain informative political speech by the party to the electorate. Yet they are not accorded full First Amendment protection. FECA allows the flyers only if the party includes the cost of producing them against its \$5000 contribution limit or \$10,000 expenditure limit for representatives. If the Democratic party had already reached its spending limit running ads about Smith's record on agricultural issues, FECA would prohibit it from discussing her record on any other issue. Therefore, it cannot be true that limitations on a party's ability "to give money directly to candidates is 'only a marginal restriction upon the ability to engage in free communication.'"¹⁰⁷

One might argue that the restrictions do not diminish speech because the public can anticipate what a party would say about its own candidate. This presupposes that parties always glowingly support their candidates. But this assumption has two flaws. First, it is inaccurate. A political party does not display identical support for all its candidates, nor does it deliver the same message about each. Second, the predictability of a message does not justify limiting it.¹⁰⁸ By closing avenues of political speech by parties, campaign finance legislation impinges on their First Amendment rights without serving the governmental interests that purportedly justify the restriction.

B. *Contribution Limitations Make Candidates Responsive to Special Interests at the Expense of the Electorate*

The *Buckley* Court, in upholding FECA, noted that one of Congress' major purposes in passing the Act was to limit the influence of single contributors.¹⁰⁹ It is ironic that FECA, which sought to prevent the "view of government as responsive only or mainly to special interests,"¹¹⁰ has had precisely the opposite effect. FECA's contribution limitations on parties have given PACs unprecedented power and influence.¹¹¹ Some voters have come to believe that candidates represent special interests better than the electorate as a whole. In December 1993, for example, voters in Virginia filed suit in federal court challenging the constitutionality of out-of-state PAC contributions to candidates.¹¹² These voters claim that PAC support of candidates has reached such propor-

107. *Id.* at 20-21.

108. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790 (1978) (finding that the effectiveness of political speech has no bearing on whether it should be suppressed).

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

110. Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 362 (1977).

111. INSTITUTE OF POLITICS, *supra* note 12, at 2.

112. Woo, *supra* note 8, at 11.

tions that legislators now represent the distinct interests of various PACs rather than the people of their home state.¹¹³

Limits on party contributions are also limits on the political speech of voters. Adequate representation depends on voter communication.¹¹⁴ Especially in politics, money talks both loudly and well. A candidate for the House of Representatives may accept only \$5000 from her political party, but may collect \$5000 per PAC from an unlimited number of PACs. Restricting the power of parties to speak through contributions to their candidates dilutes the voices of the party and the electorate and shuts down a vital channel of political speech.

1. *Parties provide a unique forum for political speech on behalf of the electorate.*

Political parties play a pivotal role in a republican form of government.¹¹⁵ Because they are bodies large enough to translate the people's will into action,¹¹⁶ they bridge the gap between the electors and the government, ensuring that the people have a voice.¹¹⁷ They also perform a crucial role in the electoral process,¹¹⁸ as the courts have recognized on more than one occasion.¹¹⁹

The Founding Fathers distrusted parties, calling them "factions,"¹²⁰ and the Constitution makes no mention of them. Although the United States pioneered the modern party system, Americans often view parties skeptically.¹²¹ In fact, we tend to distrust politicians as a class, a trait some authors have credited to

113. *Id.* As one plaintiff in the suit complained, "[w]e no longer have senators who represent distinct states. We have senators who represent distinct groups. . . . They are free agents to go out and market their representation to anybody they want to." *Id.*

114. *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 137 (1961) ("[T]he whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.").

115. *See, e.g., Smith v. Allwright*, 321 U.S. 649 (1943), *reh'g denied*, 322 U.S. 769 (1944).

116. E.E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* 13-15 (1942).

117. For a view that parties promote popular participation in government, see JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 90-92 (rev. ed. 1992) (summarizing the literature on the theory of party government); C.B. MacPherson, *Social Conflict, Political Parties and Democracy*, in *POLITICAL PARTIES AND POLITICAL BEHAVIOR* 53, 56 (William J. Crotty, Donald M. Freeman & Douglas S. Gatlin eds., 1966) (noting that parties "act as a safeguard against a permanent irresponsible oligarchy").

118. *See JEANE JORDAN KIRKPATRICK*, *DISMANTLING THE PARTIES: REFLECTIONS ON PARTY REFORM AND PARTY DECOMPOSITION* 5 (1978) (describing the importance of parties in organizing democratic competition for public office and in holding leaders accountable); NELSON W. POLSBY, *CONSEQUENCES OF PARTY REFORM* 182 (1983) (describing parties as essential to the nomination process because of their role in mobilizing voters, recruiting candidates, and sponsoring campaigns).

119. *See, e.g., Rosario v. Rockefeller*, 458 F.2d 649, 652 (2d Cir. 1972) ("The entire political process depends largely upon the satisfactory operation of these institutions.").

120. *THE FEDERALIST* No. 10, at 63 (James Madison) (Edward J. Bourne ed., 1937). Not all early statesmen disapproved of parties. Martin Van Buren believed that a bipartisan system provided an outlet for interest groups. *See JAMES W. CEASER*, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* 135 (1979).

121. *See Ladd, supra* note 14, at 85; *see also* AUSTIN RANNEY, *CURING THE MISCHIEFS OF FACTION: PARTY REFORM IN AMERICA* 22-57 (1975) (exploring the persistence in the United States of anti-party thought); Gottlieb, *supra* note 6, at 223-43 (chronicling how parties have come to be associated in the popular mind with corruption and political machines, which has led courts to accept limitations on the right of association). *But see* Lee Benson, *Discussion of the Ladd Essay*, in *CONSTITUTIONAL SYS-*

"the culture's distinctive individualism."¹²² Yet for all our distrust, we also acknowledge that parties play a very valuable role in maintaining a democratic political process.¹²³

The American political system has developed through competition between political parties and the regular tradeoffs of power that this entails.¹²⁴ Electoral competition enhances democracy and provides the electorate with distinct political alternatives that motivate people to express a preference.¹²⁵ To the extent that parties incorporate their differences into their agendas and change their platforms to respond to people's preferences, they facilitate the competition that is central to democratic elections.¹²⁶

Parties present unique opportunities for speech and association that other organizations cannot provide. Unlike PACs, parties have varied and long-term interests that extend beyond the next election. Parties also represent a broader donor base than PACs. They can help assure that groups without financial access to candidates (either because they lack the funds to personally contribute or because they do not have a PAC representing their interests) are not shut out of the system. Whereas interest groups by definition do not attempt to win a majority,¹²⁷ parties provide a means by which the vast majority of people can gain both political identity and political leverage.¹²⁸

Political institutions are more responsive to majorities when interest groups work together strategically to form coalitions.¹²⁹ Strong parties help develop

TEM, *supra* note 14, at 97, 106 (noting that at some points in American history, party affiliation was "a fundamental part of one's personal and group identity").

122. Ladd, *supra* note 14, at 85.

123. Few political theorists deny the importance of political parties to democracy. See, e.g., KIRKPATRICK, *supra* note 118, at 5 (describing the importance of parties in performing critical electoral roles). Political parties are generally recognized as having two roles: containing and damping factionalism by cutting across social groups, and representing the views of citizens and groups by mobilizing people into the political process. MacPherson, *supra* note 117, at 56 ("[T]hese functions . . . must be performed if democracy is to be maintained.").

124. "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

125. "Without competition, no other values can be achieved." Gottlieb, *supra* note 6, at 213 (describing the view that parties give voice to the otherwise unrepresented by aggregating their needs, views, and perspectives). Parties translate popular will into action, act as intermediaries between the citizen and the government, provide a forum to build coalitions and balance political interests, act as a check on presidential power, and integrate a "centrifugally inclined government." CEASER, *supra* note 120, at 16-17; Ladd, *supra* note 14, at 89-92.

126. CEASER, *supra* note 120, at 133 ("[M]ass democracy depends on party competition which alone can provide the means by which citizens determine the direction of public policy."); MONEY, ELECTIONS AND DEMOCRACY: REFORMING CONGRESSIONAL CAMPAIGN FINANCE 12 (Margaret Latus Nugent & John R. Johannes eds., 1990) ("[G]enuine competition seems to be the best guarantee that citizens are actually able to control their government."). Public opinion polls also indicate that the average voter believes strong party competition strengthens democracy. RANNEY, *supra* note 121, at 54-55.

127. See SCHATTSCHEIDER, *supra* note 116, at 187-89.

128. See Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988) (describing how parties improve representation of public views by incorporating sections of the public agenda into their platforms).

129. See POLSBY, *supra* note 118, at 66 (arguing that parties provide a forum within which factions can work together). Political parties can help stabilize the electoral process, and the Court has found a stable political process to be a compelling state interest. *Storer v. Brown*, 415 U.S. 724, 736

the coalitions and voting blocs essential to democratic government.¹³⁰ They facilitate cohesion by offering alternatives to interest groups at odds with each other and by informing voters of candidates' positions.¹³¹ Parties also hold elected officials responsible for their performance.¹³² A politician not facing reelection has much less incentive to be politically responsible than the party she belongs to, which must justify the actions of its members in the next election and beyond.¹³³ Parties are unique institutions in our culture, representing myriad interests in a way that PACs cannot, and the political speech they provide cannot be found elsewhere in our electoral system.

Strong parties are not a positive force in isolation. The benefits they provide derive not just from the parties acting independently, but also from the role they play as interactive units, coalition formers, and faction preventers in the context of a larger system.¹³⁴ A strong party system requires more than one party, each with enough strength so that the nonmajority party poses enough of a credible threat to the majority party to keep it accountable and responsive to the electorate.¹³⁵

2. PACs provide disproportionate representation for small but powerful special interests.

Limiting freedom of speech and association might be one way to keep interest groups from forming, but, as Madison wrote, this remedy would be "worse than the disease."¹³⁶ The more diverse a society, the more interests clamor to

(1974) ("[S]plintered parties and unrestrained factionalism may do significant damage to the fabric of government.").

130. See LARRY J. SABATO, *THE PARTY'S JUST BEGUN: SHAPING POLITICAL PARTIES FOR AMERICA'S FUTURE* 22-23 (1988) (arguing that weak parties fail "to generate sufficient political power to turn the constitutional mill"). But for the view that strong parties do not necessarily govern better, see Benson, *supra* note 121, at 107-08 (comments of David Thelen and Donald Robinson).

131. See Gottlieb, *supra* note 6, at 217-19 (describing the public's reliance interests in parties).

132. See SABATO, *supra* note 130, at 23 (arguing that accountability is impossible without political parties).

133. Alexis de Tocqueville said of presidential races in America:

[As the election approaches, t]he President . . . is absorbed by the cares of self-defense. He no longer governs for the interest of the State, but for that of his re-election; he does homage to the majority, and instead of checking its passions, as his duty commands him to do, he frequently courts its worst caprices.

1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 134 (Henry Reeve trans., rev. ed. 1899).

134. For a discussion of the concepts of "party" and "party system," see SABATO, *supra* note 130, at 5-30 (urging greater party autonomy and freedom from inappropriate state regulation); Austin Ranney, *The Concept of "Party,"* in *POLITICAL RESEARCH AND POLITICAL THEORY* 143-62 (Oliver Garceau ed., 1968); Stephen E. Gottlieb, *The Dilemma of Campaign Finance Reform*, 18 HOFSTRA L. REV. 213, 279-92 (1989) (arguing that both strong and weak party models are appropriate solutions to different political problems).

135. See generally AUSTIN RANNEY, *THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT* 12 (1962) (popular control of government can best be achieved by parties of approximately equal strength who can provide the populace with viable political alternatives); SCHATTSCHEIDER, *supra* note 116, at 199-200, 207 (arguing that although political parties are weak in the U.S., strong parties present the best way to further democracy); Gottlieb, *supra* note 6, at 208-21 (arguing that strong parties with broad interests enhance political stability more than weak, factionalized parties).

136. THE FEDERALIST No. 10, *supra* note 120, at 63.

be heard, and the greater the danger of significant division.¹³⁷ The rise of PACs stems from the campaign finance reforms that legitimated them.¹³⁸ These reforms traded one set of "fat cats" for another, replacing large individual contributors with PACs.¹³⁹ Since FECA's enactment, PACs have become powerful campaign contributors,¹⁴⁰ both in sheer numbers¹⁴¹ and in terms of the total funding they give candidates.¹⁴²

PACs present several normative problems. First, by definition PACs represent a narrow group of interests rather than the public as a whole. Their real danger arises, however, from the disproportionate power they wield by virtue of the sums of money they command and the single issue that unites their members.¹⁴³ As a result, candidates and office holders have difficulty withstanding the onslaught of PAC influence.¹⁴⁴ In the face of such influence, elected officials may bargain among interests, tailoring their speech and actions to please particular PACs rather than representing the broader interests of their electors.¹⁴⁵

137. See Fitts, *supra* note 128, at 1603-09, 1614-15; Richard Jankowski, *Preference Aggregation in Political Parties and Interest Groups: A Synthesis of Corporatist and Encompassing Organization Theory*, 32 AM. J. POL. SCI. 105 (1988); see also POLSBY, *supra* note 118, at 146-52 (hypothesizing the consequences of the elimination of political parties).

138. FECA allows corporations and unions to use funds from their treasuries for the "establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes." 2 U.S.C. § 441b(b)(2)(C) (1988). One of the reasons for the rise of PACs is that individuals with like-minded interests possess more efficient means of communicating, such as electronic mail, computerized databases, and computer networks. M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 242 (1989).

139. See CORRADO, *supra* note 15, at 107-39 (asserting that PACs provide fundraising advantages that parties do not); CROTTY, *supra* note 14, at 133-34 (observing that PACs are taking over the financial roles once played by parties); DAVID B. MAGLEBY & CANDICE J. NELSON, *THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM* 72-97 (1990) (noting that candidates are turning from individual contributors to PACs for campaign money).

140. Ewing, *supra* note 84, at 370. But see CROTTY, *supra* note 14, at 134 ("The chief source of funds remains individual contributions, although these have been in a steady decline since 1974, falling from about three-fourths of the total to something over one-half by 1980.").

141. See Ewing, *supra* note 84, at 395 (noting that the number of PACs rose from 608 in 1974, to 1146 in 1976, 2551 in 1980, and 4567 in 1987). There were 4172 PACs in 1990; no one knows for certain why their numbers levelled off. ALEXANDER, *supra* note 13, at 59-60.

142. PAC support of congressional campaigns swelled from 17% in 1978 to 32% in 1990. SORAUF, *supra* note 17, at 31. But since 1986, PAC support and numbers have declined marginally along with the general fall in candidate spending. *Id.* at 12-16.

143. *Id.* William Crotty notes that:

It is much easier for a candidate to court one of a series of wealthy PACs to acquire the money he or she needs to run an effective race. As the costs of campaigns continue to escalate, there is an attractiveness and economy to fundraising through direct appeals to sympathetic PACs. The PACs, in effect, help minimize one of the most time-consuming and unpleasant aspects of campaigning, raising the money necessary to run for elective office.

CROTTY, *supra* note 14, at 133.

144. Fitts, *supra* note 128, at 1629.

145. Though PACs may ease the burdens on candidates in financing their campaigns, incumbent candidates who depend on PACs may become insulated from the constituents they are supposed to represent. FRANK J. SORAUF, *MONEY IN AMERICAN ELECTIONS* 347-49 (1988). William Crotty explains some recent attempts by PACs to flex their political muscle:

The decline of party influence in campaigns has paralleled the surge in importance of the PACs. As the parties have become less cohesive, PACs have become aggressive in funding campaigns, requiring prospective candidates to pledge to support issues critical to the PAC's constituency (from abortion to curbs on foreign trade), and even supplying media consultants

A study of legislation in New Mexico provides a perfect example of this phenomenon. New Mexico suffers from the highest drunk driving rate in the nation—more than two-and-a-half times the national average.¹⁴⁶ The problem stems in large part from the prevalence of drive-up windows in liquor stores and bars.¹⁴⁷ The state legislature refuses to prohibit the windows, despite a decade of lobbying by voters and citizens groups.¹⁴⁸ The New Mexican legislators are not deaf to the electorate; they are merely marching to the beat of a more moneyed drummer. With the liquor lobby financing up to 25 percent of local legislators' campaigns, "legislation supported by the liquor lobby is roughly four times more likely than other bills to be passed, while bills that [the lobby] opposes are rejected at 10 times the rate of other legislation."¹⁴⁹ The legislature has consistently voted down bills that would have allowed municipalities to raise excise taxes on liquor in order to fund alcohol-treatment programs.¹⁵⁰

Why would voters continue to elect legislators who consistently ignore their needs? The answer lies buried in a mountain of cash. The probability of winning an election correlates with a candidate's ability to raise money.¹⁵¹ Suppose a federal candidate in New Mexico chose to run a campaign against drunk driving. Such a stance would result in the candidate not only losing funding from the mighty liquor lobby, but also incurring its powerful ire. FECA allows the lobby to make *virtually unlimited* independent expenditures on negative advertising against the renegade candidate.¹⁵² The candidate, in contrast, may respond using only her own personal funds, party funds, and contributions from voters and other special interests like Mothers Against Drunk Driving.¹⁵³ FECA limits any response by the candidate's political party. If political parties were better able to fund their candidates, these candidates could afford to stand up to powerful special interests. By offsetting the dire political costs of oppos-

and campaign managers for candidates they favor. In some cases, they have gone so far as to recruit their own candidates and then run their campaigns in primaries against the established party candidate, with whom they differed, or in general elections.

CROTTY, *supra* note 14, at 133.

146. Robert Tomsho, *One for the Road: How Hard it Is to Get Drinkers off Highways Is Clear in New Mexico*, WALL ST. J., Dec. 31, 1993, at A1.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. See GARY C. JACOBSON, *MONEY IN CONGRESSIONAL ELECTIONS* 218 (1980) (finding that absolute, not relative, amounts of money spent determine the outcome of an election). With the amount of funding largely determining the effectiveness of a campaign, candidates are understandably obsessed by campaign fundraising. Money is so connected to campaign activity that it has been called "the mother's milk of politics." ALEXANDER, *supra* note 13, at 1 (quoting Jesse Unruh). As Will Rogers noted, "[p]olitics has got so expensive that it takes a great deal of money even to get beat with." Kaufman, *supra* note 83, at A19 (quoting Rogers).

152. Because negative campaigning "advocat[es] the election or defeat of a clearly identified candidate . . . without cooperation or consultation with any candidate," 2 U.S.C. § 431(17) (1988), it would qualify as an independent expenditure and would not be subject to limits after *Buckley v. Valeo*, 424 U.S. 1 (1976).

153. MADD, however, with few financing resources, has repeatedly failed to stop New Mexico's liquor lobby. Tomsho, *supra* note 146, at 32.

ing a PAC, party funding could free candidates to be more responsive to the interests of the voters.

PACs not only wield disproportionate influence, but their constituencies change the very tenor of politics. As one journalist notes, "the preponderance of PACs representing upper-middle-class donors conspires to tilt the scales of influence heavily against the working middle class and the poor."¹⁵⁴ In recent years, PACs have generated as much as 47 and 29 percent of total contributions to Senate and House incumbent races, respectively.¹⁵⁵ Because campaign finance reform did not limit the total contributions from PACs as it did for individuals and parties, PACs may donate to an unlimited number of candidates.¹⁵⁶ While PACs are not subject to limitations on independent expenditures, they do face caps on the amounts they may contribute to candidates.¹⁵⁷ The large aggregate sums that FECA allows PACs to spend, however, increases the possibility that PACs will exert a corrupting influence on political candidates.¹⁵⁸

In addition, the limits on party financing and the power PACs have gained as a result conspire to encourage incumbency.¹⁵⁹ While FECA does not allow parties to favor incumbent candidates in their financing, PACs prefer incumbents because they view incumbency as an advantage and do not want to risk backing a losing candidate.¹⁶⁰ Approximately three-fourths of the PAC money contributed to Congressional races goes to incumbents,¹⁶¹ and this fraction is

154. Jonathan S. Cohn, *Money Talks, Reform Walks: Why Fundraisers Aren't Too Worried About New Campaign Finance Laws*, AM. PROSPECT, Fall 1993, at 66, 68.

155. MAGLEBY & NELSON, *supra* note 139, at 82. In contrast, party organizations have provided only approximately 2.5% to 10.6% of the total money contributed to campaigns. *Id.* at 102-03.

156. 2 U.S.C. § 441a(a)(2) (1988).

157. PACs can spend only \$5000 per candidate in the general election. *Id.* The NCPAC decision initially caused so much confusion that the FEC and Common Cause rushed reports to journalists to dispel the notion that PACs had been given free rein to contribute money to candidates. Frank J. Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMMENTARY 97, 97 n.2 (1986).

158. Candidates find consolidated sources of contributions tempting because they do not particularly enjoy fundraising. "[T]he most demanding, disgusting, depressing and disenchanting part of politics is related to campaign financing." 120 CONG. REC. 8453 (1974) (statement of Sen. Humphrey). In 1988, the cost of a 30-second television advertisement in Tampa was approximately \$6000. BAKER, *supra* note 51, at 7.

159. See David K. Neidert, *Campaign Reform: Fifteen Years After Buckley v. Valeo*, 17 J. CONTEMP. L. 289, 296-97 (1991) (indicating that in 1988 the average Senate incumbent received more than eight times the amount of PAC contributions than the average Senate challenger and that for House incumbents the ratio was more than 9.3 to one). Democratic incumbents in the House "received almost twenty-five times more money [from PACs] than did Republican challengers." MAGLEBY & NELSON, *supra* note 139, at 81-84.

160. See Richard B. Cheney, *The Law's Impact on Presidential and Congressional Election Campaigns*, in PARTIES, INTEREST GROUPS AND CAMPAIGN FINANCE LAWS 238, 246 (Michael J. Malbin ed., 1980) (noting that PACs "like to have some degree of confidence that a candidate can win before they commit their resources"); see also ALEXANDER, *supra* note 13, at 3-4; MAGLEBY & NELSON, *supra* note 139, at 55 ("PACs often switch sides and contribute to the winning candidate after an election even though they may have contributed to the opponent during it").

161. ALEXANDER, *supra* note 13, at 4. Compare JACOBSON, *supra* note 151, at 194 (arguing that FECA protects incumbents) with *Buckley v. Valeo*, 424 U.S. 1, 32, 33 n.38 (1976) (rejecting argument that campaign finance restrictions protect incumbents).

rising.¹⁶² Since most incumbents eventually win, it is not surprising that these candidates may feel beholden to their PAC contributors.¹⁶³

Many federal incumbents now finance their campaigns primarily through PAC donations rather than through money raised from local constituents.¹⁶⁴ This is most troublesome for candidates when PAC interests conflict with the interests of the district or state they represent. Voters have become increasingly disenchanted with this situation, resorting in one case to suing politicians in federal court for failure to represent their districts.¹⁶⁵

Although many people have denounced PACs, their influence can be beneficial to a democratic society, however. By providing a consolidated source of nonparty funding, PACs supply provide an offsetting influence for those candidates who choose not to follow the party line. PACs also serve important functions that parties cannot, such as giving minority interests a distinct voice and allowing people to rally around a single burning cause.¹⁶⁶ The PACs, for their part, insist that their influence is exaggerated; not only have their numbers dropped since 1987, but there are still so many PACs that competition among them diminishes their influence.¹⁶⁷ But PACs have an incentive to cooperate as well as to compete with each other.¹⁶⁸ Not only are they unable to bring competition to the electoral process in the way that parties do, but no single PAC represents the breadth of interests found in the platforms of political parties. If parties were allowed higher contribution limits, they might be able to wean candidates away from PAC money.

C. *FECA's Contribution Limits on Political Parties Eliminate Unique Opportunities for Speech and Association*

The Court has never directly addressed the constitutionality of the restrictions on party contributions to candidates.¹⁶⁹ Despite the interpretation of some lower courts,¹⁷⁰ the Supreme Court's silence is not necessarily an affir-

162. *It's Time for the Senate to Act on Campaign Finance Reform*, COMMON CAUSE MAG., Mar./Apr. 1989, at 46.

163. *But see* ALEXANDER, *supra* note 13, at 27 (arguing that lobbyists and PACs are "being threatened with adverse legislative action for failure to make sizable campaign contributions").

164. *See* note 84 *supra*. In the wake of the FECA reforms, candidates have come to rely more on their own personal campaign organizations than on their party. ANTHONY GIERZYNSKY, LEGISLATIVE PARTY CAMPAIGN COMMITTEES IN THE AMERICAN STATES 3 (1992); Ladd, *supra* note 14, at 86; *see also* Richard E. Cohen, *Party Help*, 18 NAT'L J. 1998 (Aug. 16, 1986) (arguing that party congressional campaign committees play a powerful role in the political process by directing campaigns and raising money, and that candidates cooperate closely with the party committees).

165. Woo, *supra* note 8, at 11.

166. For a list of positive aspects of PACs, *see* ALEXANDER, *supra* note 13, at 171.

167. *Id.* at 20.

168. *See* JEFFREY M. BERRY, LOBBYING FOR THE PEOPLE: THE POLITICAL BEHAVIOR OF PUBLIC INTEREST GROUPS 254-55 (1977) (observing that 76% of the 83 interest groups polled indicated that coalition activity with other groups was "very important" or "important" and that this figure reaches 83% when including groups that consider coalition activity "important but with qualifications").

169. *See, e.g.,* Buckley v. Valeo, 424 U.S. 1, 23 (1976) (*per curiam*) (deferring to FECA's conflation of political parties and persons).

170. *See* Federal Election Comm'n v. National Republican Senatorial Comm., 761 F. Supp. 813, 822 (D.D.C. 1991) (holding that corruption concerns and contribution limits apply to political party committees, because neither the Supreme Court nor Congress has ever indicated that corruption was *not*

mation of constitutionality. When the constitutionality of a statute is in doubt, courts are to assume Congress did not intend to pass an unconstitutional law.¹⁷¹ The Supreme Court will not defer, however, when Congress overreaches and enacts laws that raise "grave and doubtful constitutional questions."¹⁷² When the quality of political speech is at stake, "new patterns of conduct and new evidence of threats to the electoral process . . . might well cause the First Amendment balance to be struck differently."¹⁷³

Restrictions on party funding of candidates call for the existing constitutional balance to be readjusted. Party contributions differ substantially from the kind of improper contributions Congress intended to restrict under FECA. The Court has generally overlooked this distinction in its rulings on campaign finance law. Concentrating instead on the nature and effect of speech by individual contributors, it has remained silent about party speech.¹⁷⁴ Yet party speech made through contributions to candidates is qualitatively different from the speech of other entities within the political process.

One of the differences lies in the distinction between "speech by proxy" and direct political speech.¹⁷⁵ Speech by proxy—that speech not made personally by a group or candidate—merits less protection than direct speech. Contributions from individual voters are therefore "proxy speech" because someone other than the contributor translates the money into speech. Direct speech by individuals and PACs is still protected, however, because they may speak through unlimited independent expenditures. In order to assure that political actors retain an open avenue of communication, proxy speech can be legitimately restricted only when the contributor may also resort to protected direct speech.

When applied to parties, the "speech by proxy" rationale fails precisely because FECA does not allow parties to make independent expenditures.¹⁷⁶ They cannot advertise on a candidate's behalf, distribute information about a candidate, or otherwise conduct any kind of political speech about a candidate outside FECA's limits.¹⁷⁷ Any message the party wishes to communicate regarding a specific candidate must take the form of a contribution to that candi-

a concern when applied to political party committees). Such an interpretation is dangerous, because, if carried to its logical conclusion, it would presume the constitutionality of every issue not yet ruled on by the Supreme Court.

171. See *Yates v. United States*, 354 U.S. 298, 319 (1957) (indicating that courts should assume that Congress avoids enacting potentially unconstitutional legislation).

172. *Rust v. Sullivan*, 111 S. Ct. 1759, 1771 (1991).

173. Brief of Common Cause as Amicus Curiae at 41, *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985) (No. 83-1032).

174. See, e.g., *Buckley*, 424 U.S. at 21:

A limitation on the amount of money a person may give to a candidate . . . involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe on the contributor's freedom to discuss candidates and issues.

See also *Gottlieb*, *supra* note 6, at 203-08 (maintaining that Supreme Court has an "individualist philosophy of politics").

175. *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 196 (1981).

176. 2 U.S.C. § 441a (1988).

177. *Id.* § 441.

date or an expenditure on her behalf.¹⁷⁸ If limiting the amount of money that a candidate herself can spend in an election unconstitutionally blocks her only avenue of direct communication, then limiting the amount of money that parties can spend on candidates is unconstitutional for the same reason.

Parties offer unique opportunities for *group* political speech. Just as PACs bring individuals together to promote a specific issue,¹⁷⁹ parties gather people together in political association in a way which would be impossible for individuals or smaller groups. As the Supreme Court has noted, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking on the close nexus between the freedoms of speech and assembly."¹⁸⁰ The Supreme Court has even admitted that restricting contributions affects political speech "if the limitations prevent[] candidates and political committees from amassing the resources need[ed] for effective advocacy."¹⁸¹ In contrast to interest groups, parties provide a forum for speech about disparate issues. FECA's restrictions on party speech about a candidate discriminate against parties and inhibit their speech.

It is ironic that in contexts unrelated to campaign financing, individual justices have found that political parties serve a "variety of substantial governmental interests" which do not "justify tangential burdening of first amendment rights."¹⁸² Yet *Buckley* and its progeny have not addressed the effect of FECA regulations on party speech.¹⁸³ As a result, campaign reforms have had dubious,¹⁸⁴ and in some cases harmful, effects.¹⁸⁵ Despite the reformers' good intentions, FECA has *not* succeeded in returning power to the people. Moreover, it is clear that the current state of campaign finance is "a symptom of the broader failure of American political institutions to represent the electorate—a symptom, unfortunately, that contributes to the disease."¹⁸⁶

178. *Id.* In contrast, the Court in *California Medical Association* held that multicandidate PACs are not "mouthpieces" of their contributors. 453 U.S. at 182.

179. See *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 494 (1985) (maintaining that first amendment concerns are "squarely implicated" because PACs serve as amplifiers for political expression). The Court reasoned that financial restrictions on independent expenditures by PACs would reduce the quality of expression and would be "like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system." *Id.* at 493.

180. *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 460 (1958).

181. *Buckley v. Valeo*, 424 U.S. 21 (1976) (per curiam).

182. *Branti v. Finkel*, 445 U.S. 507, 527-28 (1980) (Powell, J., dissenting).

183. See Jo Freeman, *Political Party Contributions and Expenditures Under the Federal Election Campaign Act: Anomalies and Unfinished Business*, 4 *PACE L. REV.* 267, 274-75 (1984).

184. See Gottlieb, *supra* note 6, at 216; Ladd, *supra* note 14, at 83, 93. For the argument that FECA's regulation of campaign expenditures and contributions unjustifiably endangers the political system, see Gottlieb, *supra* note 6, at 191.

185. "The probity of the political system appears to have improved substantially before the most recent great wave of primary reform and little, if at all, after. . . . [T]he effect of campaign disclosure rules has been to increase the perception that politics is crooked." Sorauf, *supra* note 157, at 112-15, 118. Commentators disagree as to the precise effect of FECA. Compare M. Winograd, *Commentary, in PARTIES, INTEREST GROUPS AND CAMPAIGN FINANCE LAWS 305-07* (Michael J. Malbin ed., 1984) (finding that FECA has had a predominantly negative effect on the political parties) with SABATO, *supra* note 130, at 71 (observing that "parties have overcome many obstacles in the campaign finance statutes").

186. Cohn, *supra* note 154, at 72.

III. KNOCKING DOWN THE BARRIERS TO POLITICAL SPEECH

A. *Restrictions on Political Speech Deserve Strict Scrutiny*

The freedoms of speech and association, though treasured features of any democratic political process, do not receive absolute protection; under certain conditions, the government may infringe them.¹⁸⁷ Furthermore, the First Amendment does not protect all forms of speech equally.¹⁸⁸ For example, the Supreme Court accords far greater First Amendment protection to political speech than to commercial speech.¹⁸⁹ When the government regulates public speech not for its content, but in an attempt to preempt a resulting social ill,¹⁹⁰ the regulation must meet three conditions: First, it must be content-neutral; second, it must not foreclose alternative channels of communication; and third, it must serve a compelling government interest.¹⁹¹ Similarly, when the government restricts speech based on its content, and aims the restriction precisely at the communicative impact of the speech, the Court will review the regulation with the highest scrutiny.¹⁹²

Whenever the government intrudes on an individual's right to act under the auspices of her chosen party or political organization, it interferes with her freedom of association and must justify the restraint under strict review.¹⁹³ As such, when legislation abridges freedom of political association, the government must prove that the regulation employs "means closely drawn to avoid unnecessary abridgment" of constitutional rights.¹⁹⁴ Thus, when legislation involves the First Amendment freedoms of political speech and association, the Court must review the challenged acts under strict scrutiny and uphold only those restrictions that are "narrowly drawn" and absolutely necessary to serve a compelling government interest.¹⁹⁵

187. *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478, 1490 (W.D. Wis. 1988) (discussing the right to associate).

188. See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (posing the famous hypothetical of falsely crying "fire" in a crowded theater).

189. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (First Amendment freedoms have their "fullest and most urgent application precisely to the conduct of campaigns for political office."). See generally Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978).

190. See TRIBE, *supra* note 80, at 791-92. Tribe describes such regulations as "aimed at noncommunicative impact but nonetheless having adverse effects on communicative opportunity." *Id.* at 790 (emphasis omitted).

191. See *id.* at 792.

192. See *id.* at 791-92.

193. "[A]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Cousins v. Wigoda*, 419 U.S. 477, 487-88 (1975) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

194. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978); see JOHN HART ELY, *DEMOCRACY AND DISTRUST* 105-06 (1980) ("Judicial review in this area must involve, at a minimum, the elimination of any inhibition of expression that is unnecessary to the promotion of a government interest.").

195. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."). Note the difference between government interference with the right to form political associations and interference with those institutions once they are formed. *Buckley* concerns the latter.

Expenditure limitations, the Court has resolutely declared, demand strict scrutiny.¹⁹⁶ But contribution limitations do not receive this high standard of review. Attempting to explain the tenuous distinction between such similar forms of speech, the Supreme Court has repeatedly stated that contribution limits only marginally impinge on the First Amendment. According to this logic, the communicative importance of a contribution would be limited to the word "yes," a mere nod of support by the contributor, conveyed with equal force whether the speaker contributes one dollar or one thousand.

But concluding that different levels of contributions communicate the same message does not make it so. The Court's logic forces the conclusion that a political party communicates the same approval of a senatorial candidate whether it contributes the statutory limit of \$17,500 or only \$1 to her campaign. In fact, all else equal, the amount of a contribution carries its own message.¹⁹⁷ If \$1 of party money says, "I like Ike," then \$17,500 says, "I like Ike a lot." In this light, the *amount* a party gives a candidate itself represents content worthy of protection, and capping that amount regulates the content of the speech. Any Congressional regulation of campaign finance amounts potentially endangers political speech and association and should receive the strictest judicial review.¹⁹⁸

B. *Concerns About Apparent and Actual Corruption in the Party-Candidate Context Are Not Sufficiently Compelling*

Corrupt: In politics, holding an office of trust for profit.¹⁹⁹

Influence: In politics, a visionary *quo* given in exchange for a substantial *quid*.²⁰⁰

Politics: The conduct of private affairs for public advantage.²⁰¹

—Ambrose Bierce

The Supreme Court has upheld campaign financing restrictions on the grounds that they promote a compelling state interest in preventing actual and apparent corruption.²⁰² Any challenge to contribution or expenditure limits, then, must address this accepted justification. This concern about corruption,

196. See, e.g., *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 299 (1981); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795 (1978); *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (per curiam).

197. The contribution of \$1000 by an individual of modest means may represent an enormous sacrifice whereas the same amount may be negligible to a wealthy individual. For purposes of this note, I assume a \$17,500 contribution by a political party does not represent a sacrifice.

198. See Nichol, *supra* note 22, at 323 ("[F]inancial regulations are also not simply limitations on spending money. They limit the spending of money to engage in a particular activity, and that activity is constitutionally protected. The impact on political expression is intentional, significant, and direct."); Martin H. Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. REV. 900, 907-08 (1971).

199. AMBROSE BIERCE, *THE ENLARGED DEVIL'S DICTIONARY* 48 (Ernest Jerome Hopkins ed., 1967).

200. *Id.* at 156.

201. *Id.* at 222.

202. Leventhal, *supra* note 110, at 356-67, 379-80 (questioning the wisdom of the *Buckley* Court's decision to restrict untested campaign finance laws).

however, is misapplied in the case of a political party's support for its candidates.

The Supreme Court defines corruption in the electoral process as the improper exchange of money for action by an officeholder,²⁰³ or "dollars for political favors."²⁰⁴ Often the Court phrases corruption as a *quid pro quo*.²⁰⁵ Moreover, it has found that concerns about corruption are the "single narrow exception to the rule that limits on political activity are contrary to the first amendment."²⁰⁶ Some commentators argue that courts should use an "undue influence" standard to define corruption, but the Court has rejected this definition as impermissibly vague.²⁰⁷ Of the undue influence standard, Chief Justice Burger said, "[t]here are many prices we pay for the freedoms secured by the First Amendment; the risk of undue influence is one of them, confirming what we long have known: Freedom is hazardous, but some restraints are worse."²⁰⁸

The actual occurrence of corruption hinges on the intent and expectations of the contributor. A contributor engages in corruption when she anticipates that the candidate will change her position on an issue in exchange for the contribution. This creates two conceptual problems, flip sides of the same coin: Is it still corruption if the contribution does not influence the candidate? Or what if the contributor gives innocently but the contribution directly influences the candidate nonetheless? In either case the candidate's actual behavior in response to the contribution is immaterial; only the contributor's subjective intent matters. As one commentator notes:

A "bribe" may take the form of a sum of money exchanged in return for the promise of favorable treatment or to avoid the prospect of unfavorable treatment. Such promises can be implied as well as expressed; such prospects can be imagined as well as real. As a result much money will change hands for reasons that border on, or appear to be, bribery, but are not; much real bribery will not be provable in a court of law.²⁰⁹

203. *Buckley v. Valeo*, 424 U.S. 1, 25-27 (1976) (per curiam); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) ("Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns; *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-97 (1981). The hallmark of corruption is the financial *quid pro quo*: dollars for political favors."). The district court in *Buckley* noted that 1% of the electorate accounts for 90% of the money contributed to candidates, parties, and political committees. *Buckley v. Valeo*, 519 F.2d 821, 837 (D.C. Cir. 1975) (per curiam), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976) (per curiam). The Supreme Court feared "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27.

204. *National Conservative Political Action Comm.*, 470 U.S. at 497. For a discussion of contrasting interpretations of "corruption," see LARRY BERG, HARLAN HAHN & JOHN R. SCHMIDHAUSER, *CORRUPTION IN THE AMERICAN POLITICAL SYSTEM* 3, 7 (1976).

205. See, e.g., *National Conservative Political Action Comm.*, 470 U.S. at 497; *Buckley*, 424 U.S. at 26-27.

206. *Citizens Against Rent Control*, 454 U.S. at 296-97; see also *National Conservative Political Action Comm.*, 470 U.S. at 496-97 (noting that "preventing corruption or the appearance of corruption are [sic] the only legitimate and compelling government interests" in regulating campaign finance).

207. See, e.g., *Buckley*, 424 U.S. at 239 (Burger, C.J., concurring in part and dissenting in part) ("Congress has used a shotgun to kill wrens as well as hawks.").

208. *Id.* at 256-57 (Burger, C.J., concurring in part and dissenting in part).

209. MURCH, *supra* note 20, at 65; see also Dawn Tae Thorsness, *Independent Expenditures: Can Survey Research Establish a Link to Declining Citizen Confidence in Government?*, 10 HASTINGS

What then of a situation where nothing unlawful occurs, but the public finds something malodorous about the transaction? The Court has always equated the appearance of corruption with actual corruption. At first glance this treatment appears counterintuitive. Society justifiably attempts to prevent actual corruption because it threatens the democratic process by distorting the mechanisms of representative democracy and allowing the wealthy to influence candidates out of proportion to the power they would wield in a "one person, one vote" system.²¹⁰ But what damage results from the *appearance* of corruption? In a representative democracy, where the people trust elected officials to assume power fairly, the appearance of corruption can be devastating. Thus, the Supreme Court has always found the interest in preventing both the appearance of corruption and actual corruption sufficiently compelling to justify First Amendment restrictions.

I do not dispute the importance of limiting the appearance of corruption. But I do insist that before we restrict First Amendment freedoms, we be quite certain that there is at least such an appearance. If a reasonable person would not consider a particular transaction corrupt, limiting that transaction to prevent an appearance of corruption is a logical fallacy. Because the Supreme Court has recognized that party support of candidates may actually *reduce* outside corruptive influences, the contribution limits FECA places on political parties perpetuate precisely this logical error.²¹¹ Nonetheless, FECA tightly caps party funding of candidates on the ground that such an exchange might appear corrupt.²¹²

Under the Court's narrow "quid pro quo" definition of corruption, party-candidate relationships present little danger.²¹³ An improper quid pro quo is

CONST. L.Q. 763 (1983) (discussing the kinds of evidence and proof required to convince the Court that corruption exists).

210. See, e.g., Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 302 (1989) ("The payment of money to bias the judgment or sway the loyalty of persons holding positions of public trust is a practice whose condemnation is deeply rooted in our most ancient heritage.").

211. The Court has stated that the use of party funds "reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limits are directed." *Buckley*, 424 U.S. at 53.

212. See *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) (noting the potential for corruption justifies "prophylactic measures"). While there is no proof of outright corruption through campaign financing, the lack of evidence does not resolve the issue. Empirically, it is much harder to prove corruption's absence than its presence. Nevertheless, the fact that the Court is unlikely to look at empirical evidence to determine the potential for corruption actually supports the argument that corruption in the party context is not a danger.

213. For the view that quid pro quo corruption does not exist, see Paul S. Edwards & Nelson W. Polsby, *Introduction: The Judicial Regulation of Political Processes—In Praise of Multiple Criteria*, 9 YALE L. & POL'Y REV. 190, 196-97 (1991). For an opposing view, see Gerald G. Ashdown, *Controlling Campaign Spending and the "New Corruption": Waiting for the Court*, 44 VAND. L. REV. 767, 767-70 (1991) (asserting that *Buckley* and related cases have gutted legislative attempts at campaign reform). Some commentators suggest that one of the benefits of lifting limits on party committee contributions to candidates would be an increase in the electorate's faith in the political process. Evan A. Davis, *Election Law Reform in the State of New York*, 51 ALB. L. REV. 1 (1986) (stating that in the wake of political scandal in New York City, the public viewed campaign finance reform as the most effective way to improve public perception of government). In the context of corporate contributions, where the contributing organization is a profit-making enterprise, as opposed to a political association, the Court applies a

most feasible when an individual or clique in control of party contributions to candidates attempts to use that power to leverage favors from a candidate. Some commentators have argued that using "large contributions to induce candidates to adhere to the party's platform is just the sort of *quid pro quo* bearing 'on candidates' positions and on their actions if elected' that the Court has found to have the potential to undermine 'the integrity of our system of representational democracy.'"²¹⁴ This argument is flawed for three reasons. First, the party remains accountable to the electorate and has group interests that its members do not have individually.²¹⁵ If a party remained so isolated from the electorate that its platform did not reflect the beliefs of its members, it would quickly lose adherents. Because a party needs long term credibility with the electorate, it has a powerful incentive to prevent the appearance of corruption. Second, the danger that a single individual within the party will unduly influence a candidate is ameliorated by the candidate's ability to receive funds from sources outside the party's control. In this way, PACs may even serve a democratizing function. Finally and most importantly, FECA's current disclosure provisions require that an individual who has any "direction or control" over the party's contributions must report the money under her control.²¹⁶ Maintaining such strict disclosure requirements will help avoid the problem of individuals within a party using campaign funding to buy political favors.

Any large contribution from a discrete source could give rise to the appearance of *quid pro quo* corruption. This is precisely why FECA prevents wealthy individuals from bankrolling candidates. In the context of candidates financing themselves with personal funds, however, the Supreme Court has found the opportunity for a *quid pro quo* lacking.²¹⁷ Corruption cannot occur where the receiver already advocates the same views as the giver. For the same reason, concerns about party-candidate corruption do not justify restricting party speech.

Even when the candidate and the party have different views on an issue, it is not a foregone conclusion that the party would use money to influence a candidate's speech.²¹⁸ Cause and effect may be reversed; the party may choose to increase a candidate's funding precisely *because* of her stand on an issue, not to change her stand.²¹⁹ If this is the case, then the corruption rationale behind FECA misses the mark. Use of financial support to encourage adherence to the party platform is not the kind of corruption that concerns the Court. At most, this represents an example of party *qua* party influence, and "[s]trong ties be-

broader definition of corruption. See, e.g., *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1397 (1991).

214. Brief for the Federal Election Commission at 34, *Federal Election Comm'n v. National Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992) (No. 91-5176) (citations omitted).

215. See notes 115-135 *supra* and accompanying text.

216. 2 U.S.C. § 434 (1988).

217. *Buckley*, 424 U.S. at 51-60. The Court stated that use of personal funds diminished a candidate's reliance on potentially corrupting outside influences. *Id.* at 53.

218. See, e.g., *SORAUF*, *supra* note 145, at 312 & n.26 (stating that there is no evidence supporting "the popular assertions about the 'buying' of candidates").

219. *Id.*; cf. *JACOBSON*, *supra* note 151, at 51-104 (exploring theories of who contributes to political campaigns and why).

tween parties and their candidates never have been viewed as corrupt in themselves."²²⁰ Party qua party influence over a candidate also performs the positive social function of labeling a candidate for voters. Since the candidate is allied with the party's established reputation, voters have clearer expectations of what the candidate stands for.

The appearance of corruption hinges on whether the contributor expects the candidate to feel beholden for her largesse. Because a candidate reasonably expects support from her party, the public probably would not conclude that the party gives its support in exchange for the candidate altering her position on an issue. The electorate more likely views party support as normal and anything but corrupt. In the final analysis, concerns about apparent and actual corruption are not sufficiently compelling in the context of party funding of candidates to justify the First Amendment infringements that result from FECA's limitations on party contributions.

IV. SILENCE IS NOT THE ANSWER: PUTTING FREEDOM BACK IN POLITICAL SPEECH

A. *The Soft Money Problem*

The Court's prediction in *Buckley* that "[i]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign"²²¹ was remarkably prescient. As a result of the soft money loophole, parties have been able to skirt FECA's limits by counting money spent for the benefit of federal candidates as a state party expense.²²²

Although a comprehensive discussion of soft money is beyond the scope of this note, soft money can contribute significantly to the appearance of corruption.²²³ Any attempt to reduce this occurrence, therefore, must address the soft money problem. Soft money was sanctioned by the 1979 amendments to FECA,²²⁴ which have been called "a conscious effort by Congress to empower

220. Brief for the Federal Election Commission at 22, *Federal Election Comm'n v. National Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992) (No. 91-5176).

221. *Buckley v. Valeo*, 424 U.S. 1, 45 (1976) (per curiam).

222. See JACKSON, *supra* note 25, at 39-42 (crediting soft money with increasing voter cynicism).

223. As a recent editorial bluntly stated: "Not all issues in the world fit in either/or categories, but this one does. Either you are for campaign reform or you are for the soft-money loophole." *Please Hold for the President*, N.Y. TIMES, Mar. 14, 1993, at 16; see also Charles R. Babcock, *Weighing 'Soft Money' Donations: Candidate Clinton Pledged to Cut the Flow to Party Committees*, WASH. POST, Mar. 8, 1993, at A13 (quoting Fred Wertheimer, Common Cause president: "Ending this system is the threshold test for the president in carrying out his public commitment to real reform of the current, totally discredited campaign finance system.").

224. See 2 U.S.C. § 431(9)(B) (1988) ("The term 'expenditure' does not include . . . (ii) nonpartisan activity designed to encourage individuals to vote or to register to vote . . . ; (iv) the payment by a State or local [party] of . . . the costs of . . . a printed slate card or sample ballot . . . ; (viii) the payment by a State or local [party] of the costs of campaign materials . . . used by such committee in connection with volunteer activities on behalf of nominees of such party . . . ; (ix) the payment by a State or local

state and local party committees in federal campaigns.”²²⁵ FECA exempts from federal contribution and expenditure limits money raised for certain state and local party activities, although such money must come “from contributions subject to the limitations and prohibitions of [FECA].”²²⁶ Money spent on the general activities outlined by the 1979 amendments must be “hard,” and therefore subject to federal limitations on contributions, if it is spent on behalf of federal candidates. And there’s the rub. State committees also conduct these activities on behalf of state and local candidates, often in the form of “mixed” federal-state activities for the party’s candidates. Neither the FEC nor Congress has ever come to grips with the problem of determining which moneys are spent for federal campaigns—and thus counted as “hard”—and which moneys are spent for nonfederal candidates—and thus legitimately considered “soft” money not subject to federal limits.

FEC regulations require that a portion of the soft money which redounds to the benefit of a federal candidate must be counted toward that candidate’s federal limits on a “reasonable basis.”²²⁷ The FEC has never elaborated upon these guidelines. In the ensuing vacuum, individuals have been able to use the party as a conduit for large contributions of soft money to help particular candidates.²²⁸ Both parties’ presidential campaigns in 1984, 1988, and 1992 raised tens of millions of dollars of soft money to improve their election chances.²²⁹ The soft money problem is not one that will be easily solved. Because states’ rights issues are involved, virtually any allocation method devised may cut back on soft money, but will not eliminate the opportunity for millions of dollars to be raised and spent on mixed federal-state activities.

Eliminating or raising the limits on party funding of federal candidates would not exacerbate the soft money problem because the additional money flowing to candidates would be “hard.” Rather than attempt to prevent the appearance of corruption by capping party funding of candidates, the soft money problem can be attacked by banning contributions from individuals to parties *intended to benefit a particular federal candidate*. This does not run afoul of First Amendment guarantees because an individual’s speech is not silenced: She can express her views about a particular federal candidate by contributing directly to that candidate under FECA’s limits or by buying her own ads. Narrowly tailoring the means of reform to the ends of reducing the appearance of corruption requires striking at the source of the soft money problem rather than placing a ceiling on party funding of candidates.

party . . . of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President.”).

225. ALEXANDER, *supra* note 13, at 67.

226. 2 U.S.C. §§ 431(9)(B)(viii), (ix) (1988).

227. 11 C.F.R. § 106.1 (1994).

228. JACKSON, *supra* note 25, at 40.

229. See generally ELIZABETH HEDLAND, CENTER FOR RESPONSIVE POLITICS, JUSTICE DELAYED, JUSTICE DENIED: THE FEDERAL ELECTION COMMISSION’S ENFORCEMENT RECORD (1992); JACKSON, *supra* note 25, at 39-42.

B. Congress Should Tighten the Means-Ends Fit

Regardless of whether the Supreme Court soon confronts the constitutionality of FECA's restrictions on party contributors, Congress will have to face the issue as it tackles legislation this term that attempts to amend FECA.²³⁰ Above all, Congress should ensure a tight means-end fit for reform legislation: Safeguards against corruption must not sweep so broadly that they infringe core constitutional rights.²³¹

Congress badly needs to tighten FECA's current means-ends fit. FECA already contains various narrowly tailored protections against corruption. For example, in an effort to limit undue influence by the wealthy, Congress restricted the amount that individuals can directly contribute to their favorite candidates and political parties. In addition, FECA mandates that party officials who are in a position to direct money to candidates disclose their interests and the money they distribute.²³² These provisions eliminate—or at least severely reduce—the ability of party chieftains to control candidates financially.

With these safeguards in place, the ceiling on candidate support by *parties* is redundant and overbroad; it provides little additional protection against corruption. Furthermore, even if the asserted state interests *were* sufficiently compelling to justify additional protections against corruption, FECA's contribution limits on parties would still be too restrictive of First Amendment rights.²³³ Below I propose some alternatives that restrict party speech and association less than FECA's current limitations. These proposals are not all-encompassing measures; rather, they represent general guidelines for Congress.

1. Vouchers.

In order to avoid the appearance of corruption that often accompanies the exchange of money while simultaneously protecting party speech, Congress could allow political parties to issue an unlimited number of advertising vouchers to their candidates. For example, parties could contract with TV or radio stations to allow candidates to redeem the vouchers in exchange for advertising time. By limiting the vouchers to the production of political speech, the party reduces the chance that they will be transformed into activities outside the scope of the First Amendment. Moreover, vouchers lessen the problem contributors present of appearing to buy a candidate's loyalty. Vouchers protect opportunities for party speech, while limiting the appearance of corruption.

230. See Kenneth J. Levit, Note, *Campaign Finance Reform and the Return of Buckley v. Valeo*, 103 YALE L.J. 460, 470 (1993) (discussing Congress' grappling with campaign finance reform).

231. One must question whether the legislature's ability to amend any statute promotes its members' interests. Surveyed candidates reported that FECA's contribution restrictions favor incumbents by imposing "far more serious strictures on challengers than on incumbents. The challengers in particular find fund raising under the current law very difficult and time-consuming." INSTITUTE OF POLITICS, *supra* note 12, at 7.

232. 11 C.F.R. § 110.6(d)(2) (1994).

233. See *Aptheker v. Secretary of State*, 378 U.S. 500, 508-11 (1964) (holding that where a compelling state interest exists to restrain constitutional freedoms, the regulation must confine itself to the minimum restriction necessary).

2. *A separate fund.*

If Congress is concerned about "the opportunities for abuse inherent in a regime of large individual contributions,"²³⁴ then it could allow parties to provide unlimited funding to candidates out of a fund composed of only small, unearmarked, individual contributions. Currently, individuals may contribute up to \$5000 to political committees.²³⁵ Were Congress to decide that this was too large a sum to be indirectly passed on to a candidate from an individual, it could cap contributions to this fund at \$1000 or some amount small enough to lay to rest concerns about corruption.

3. *Restricting nonspeech activities.*

FECA limits the amount of money parties can contribute to candidates for speech activities, such as advertising, and spend on nonspeech activities, such as the candidate's lodging.²³⁶ It is not necessary to restrict both. Unlike restrictions on contributions to support speech activities, limitations on party expenditures to finance nonspeech activities do not create First Amendment conflicts. Congress should therefore consider amending FECA to eliminate the restrictions on party speech, while maintaining the limits on party expenditures for nonspeech activities. This would effectively guard against corruption without unnecessarily impinging on the First Amendment freedoms of political parties.

4. *Higher limits.*

Raising the limits on the amounts parties can contribute to their candidates is another less restrictive alternative to the current funding levels. Although any restraints arguably impinge on First Amendment rights, higher limits constitute a more narrowly tailored method of promoting the goal of reducing corruption. This approach is also the least likely to destroy the efficacious features of FECA. Finally, because raising the limits presents the least invasive means of amending FECA, Congress might consider this proposal easiest to pass.

The disadvantages of merely increasing the ceilings on party spending, however, are legion. If funding limits are unconstitutional, simply raising them does not address the fundamental constitutional issue. Another problem with raising limits, as opposed to eliminating them outright, is the difficulty of finding a standard by which to set new limits. Congress might choose to fix contribution limits based on the population of the state or district, as it did with expenditure limits.²³⁷ This solution offers an objective way to establish limits, although it also raises several problems. First, the same amount of money may have a different effect in different states. Second, parties would want to spend more money in states with close elections, even though such states may have

234. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam).

235. 2 U.S.C. § 441a(a)(1)(C) (1988).

236. Expenditures and contributions include any payments made "for the purpose of influencing an election for federal office." *Id.* §§ 431(8)(A), (9)(A).

237. *Id.* § 441a(d).

small populations not justifying large expenditures. Third, setting the acceptable ratio of expenditures per person for both House and Senate races would be a hotly contested partisan matter.

Whether *any* limit on funding can avoid infringing party speech depends upon whether the limitation is the least restrictive alternative. Levels of funding closely tailored to the cost of advertising might represent a permissible level of restriction. Ideally, however, a newly amended FECA would end all limits on party contributions to support candidate speech.

CONCLUSION

The Supreme Court has never addressed the constitutionality of limits on direct party funding of candidates, but courts will most likely face that issue soon. When they do, they should apply strict scrutiny in analyzing the asserted government interests, and strike down the restrictions as overbroad. The government's concern about corruption between candidates and parties is overblown. A party and its candidate have neither the opportunity nor the motivation for a quid pro quo, making corruption very unlikely. While money alone does not determine the outcome of an election, limits on party financing drastically affect the political process.²³⁸ These limitations curb party advocacy, potentially alter the content and diversity of candidate speech, and deprive political parties of their First Amendment rights.

Political parties are an integral part of the democratic process; they represent majority interests while protecting minorities and providing a unifying force for interest groups.²³⁹ When parties face limits on the amount they can contribute to candidates, the political process loses the unique opportunities for speech and association that parties provide. PAC speech, in contrast, does not suffer because PACs possess alternative means of communication denied to political parties, such as independent expenditures.

One of the main sources of the appearance of corruption is the prevalence of soft money in the political system, a problem that restrictions on party funding of federal candidate speech fail to address. Congress should therefore consider campaign finance reforms that restrict party speech less than the current limits. Vouchers that can only be converted into speech represent one such option. Other options include funding candidates out of a collection of individual contributions, limiting only that funding which finances nonspeech activities, or raising the existing limits. Political parties provide an important voice for people who lack the financial resources or organization to form PACs to advocate on their behalf. Unless courts protect the First Amendment rights of political parties, the forces of power and privilege will continue to shout down the voice of the people.

238. Polsby, *supra* note 25, at 266-72 (suggesting that the advantages of money in elections may reach a point of diminishing returns and factors other than money may be crucial to the outcome of elections).

239. See KIRKPATRICK, *supra* note 118, at 5 (explaining the role of parties in creating political leaders). See generally SCHATTSCHNEIDER, *supra* note 116.