Campaign Finance Re-Reform: The Regulation of Independent Political Committees

Since the 1976 elections, independent political action committees have become an increasingly important part of the political process. One of the major activities of independent political committees is to spend money to support or oppose candidates for public office. Although independent of the candidates and their respective campaigns, committee activities nonetheless often constitute "parallel" campaigns complete with their own professional managers, fundraising staffs, and media consultants. These parallel campaigns can significantly affect the results of electoral contests.

Reported expenditures reflect the growing importance of independent political committees.[1] Between presidential election years 1976 and 1980, committee expenditures grew by 2000%, from $792,953 in 1976 to $16.1 million in 1980.[2] A similar effect occurred during the off-year campaigns. Independent political committee expenditures increased from $147,000 in 1978 to over $5.6 million in the 1982 election cycle.[3]

---

1. On the growth of independent committees, see generally Epstein, *The Emergence of Political Action Committees*, in POLITICAL FINANCE: SAGE ELECTORAL STUDIES Y.B. 159 (H. Alexander ed. 1979); Malbin, *Of Mountains and Molehills: PACs, Campaigns, and Public Policy*, in PARTIES, INTEREST GROUPS, AND CAMPAIGN FINANCE LAWS 152 (M. Malbin ed. 1980). Their increasingly important role has also led to increased attention from scholars, *see, e.g., Symposium: Political Action Committees and Campaign Finance*, 22 ARIZ. L. REV. 351 (1980), and from the media. *See, e.g.*, Drew, *Politics and Money* (pts. 1-2), THE NEW YORKER, Dec. 6, 1982, at 54, Dec. 13, 1982, at 57.

This Comment expands on part of an earlier study of independent campaign expenditures by the author. *See* A. BUCHSBAUM, INDEPENDENT EXPENDITURES IN CONGRESSIONAL CAMPAIGNS: THE ELECTRONIC SOLUTION (Democracy Project Reports No. 4, 1982) (on file with the *California Law Review*).

2. *See* Light, *Surge In Independent Campaign Spending*, 38 CONG. Q. WEEKLY REP. 1635 (June 14, 1980); FEC, FEC Study Shows Independent Expenditures Top $16 Million, Press Release (Nov. 29, 1981); H. Alexander, Coming to the Aid of the Parties 1, 2 (1980) (unpublished manuscript on file with the *California Law Review*). *See, e.g.*, Democratic Senatorial Campaign Comm., Total Negative "Independent" Expenditures Against Democratic Senators During the 1979-1980 Election Cycle, Press Release (June 11, 1981) (the National Conservative Political Action Committee (NCPAC) spent $1.2 million opposing six incumbent senators, four of whom lost their elections).

3. Telephone interview with Sharon Snyder, Federal Election Commission press office, Washington D.C. (Feb. 23, 1983). The $5.6 million figure represents all independent expenditures made between January 1, 1981, and September 30, 1982, and most expenditures between September 30 and November 22, 1982. Campaign finance experts estimate that over one-fourth of all campaign expenditures in the 1982 election cycle will be financed through political action commit-

Independent committee expenditures have enjoyed this phenomenal growth because, unlike contributions to a candidate or campaign, they are not subject to statutory limitations on amount. Since 1974, the Federal Election Campaign Act (FECA)[4] has limited both individual and committee campaign contributions. FECA originally limited independent expenditures in the same way.[5] In 1976, however, the Supreme Court, in *Buckley v. Valeo*,[6] upheld the contribution ceilings of the Act but found that the expenditure limits violated the first amendment. Following that decision, Congress amended FECA to limit contributions, but placed no ceilings on independent expenditures.[7] Thus, independent committees may make contributions up to statutory limits, and may also make independent expenditures in unlimited amounts for the candidates of their choice.[8]

The growth of independent expenditures by political committees and their protected status under the campaign finance laws have produced both benefits and detriments to the political process. The benefits associated with independent political committees include a better informed electorate and greater opportunities for effective political association.[9] Because these committees can spend unlimited amounts of money to spread their views, they can reach more voters and give them more information about candidates and issues.[10] Moreover, the contributors who finance these political committees may more effectively engage in political activity by pooling their resources in an organization that has a greater voice than any single contributor.[11]

---

tees. *See Money Talks Too Much*, THE ECONOMIST, Nov. 6, 1982, at 26. According to the FEC, from January 1, 1981, to October 13, 1982, political action committees contributed $70.4 million to candidates, and candidates spent $264.4 million. Telephone interview with Sharon Snyder, *supra*.

4. *See* 2 U.S.C. § 441a(a)(1) (1976) (limiting contributions from individuals to $1,000); *id.* § 441a(a)(2) (limiting contributions from multicandidate committees to $5,000).

5. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(e)(1), 88 Stat. 1263, 1265 (repealed 1976).

6. 424 U.S. 1, 19-23 (1976) (per curiam).

7. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 320, 90 Stat. 475, 487-90 (1976) (current version at 2 U.S.C. § 441a (1976)).

8. For example, under the contribution limits, NCPAC in 1980 could have spent $60,000 in contribntions to six candidates ($5,000 per candidate in both the primary and general elections). In fact, NCPAC spent twenty times that amount, or $1.2 million, independently. *See supra* note 2.

9. *See* Clagett & Bolton, Buckley v. Valeo, *Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints On Political Campaign Financing*, 29 VAND. L. REV. 1327, 1367, 1381 (1976); TASK FORCE ON INDEPENDENT EXPENDITURES, DEMOCRATIC NAT'L COMM., LIBERTY OR LOOPHOLE: INDEPENDENT EXPENDITURE COMMITTEES IN FEDERAL ELECTION CAMPAIGNS 2 (1982) [hereinafter cited as DNC REPORT].

10. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 & nn.11-12 (1978); Clagett & Bolton, *supra* note 9, at 1381.

11. *Buckley*, 424 U.S. at 48; H. ALEXANDER, FINANCING POLITICS 265 (1976); Clagett & Bolton, *supra* note 9, at 1367. Because the election laws are so complex, and advertising is so expensive, some commentators have argued that organized efforts are a necessary part of modern campaigns. *See, e.g.*, Comment, *The Federal Election Campaign Act and Presidential Election*

The problems that accompany independent political committees, however, overshadow these benefits.[12] First, because of the size of the independent expenditures[13] and the manner in which they are made, candidates may feel indebted to the committee making the expenditure.[14] Although the expenditures may legally be classified as independent, candidates often establish extensive communications with the independent committee through the media and personal contacts.[15] Some independent committees recruit candidates and persuade them to enter the race.[16] Expenditures made with this degree of coordination

---

Campaign Fund Act: Problems in Defining and Regulating Independent Expenditures, 1981 ARIZ. ST. L.J. 977, 986-88.

12. *See generally* A. BUCHSBAUM, *supra* note 1.

13. The size of the independent expenditures is considered by some to be a problem in itself. *See* Wertheimer & Huwa, *Campaign Finance Reforms: Past Accomplishments, Future Challenges*, 10 N.Y.U. REV. L. & SOC. CHANGE 52-53 (1980-81); Wertheimer, *The PAC Phenomena In American Politics*, 22 ARIZ. L. REV. 603, 608 (1980).

14. For example, according to the popular press, President Reagan introduced conservative social legislation when he would rather have continued to focus on his economic program because of pressure from the leaders of the independent groups that supported him. Peterson, *In the Administration, A Pattern Develops On Conservatives' Agenda*, Wash. Post, Feb. 22, 1982, at A-2, col. 1. The Reagan administration has also decided to give "disgruntled conservatives" direct access to top administration staff. Hilts, *White House Sets Up 'Pipeline' For Disgruntled Conservatives*, Wash. Post, July 27, 1981, at A-8, col. 4. While it is difficult to measure the extent to which these activities were due to the independent spending of these organizations, it is safe to say that many other conservatives with less money to spend have less access to the Reagan administration. *See generally* Adamany, *PAC's and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569, 596 (1980); Wertheimer, *supra* note 13, at 612.

15. For example, five political committees that ran independent campaigns for President Reagan in 1980 had extensive contacts with Reagan's presidential campaign, including shared personnel and officers and common campaign consultants. *See* Brief of Appellant Common Cause at 9, Common Cause v. Schmitt, 102 S. Ct. 1266 (1982) (mem.) [hereinafter cited as Common Cause Brief]. As another example, NCPAC received much of its startup money from a fundraising letter signed by Reagan in 1975. NCPAC director John T. Dolan's brother worked for the Reagan campaign in 1980. Dolan is part owner of an apartment building in Alexandria, Virginia that houses NCPAC and other conservative groups, as well as several Reagan campaign officials, including Lynn Nofzinger (Reagan's top campaign strategist), Paul Russo (a Reagan campaign staffer), and Roger Stone (Northeast regional coordinator for Reagan's 1980 presidential campaign). The building is also the home of the Richard A. Viguerie Co., the direct mail specialist for both NCPAC and the Reagan campaign. *See* MacPherson, *The New Right Brigade*, Wash. Post, Aug. 10, 1980, at F-1, col. 1. According to the Supreme Court and the current standards, these overlaps and contacts do not themselves endanger the independent status of Reagan's campaign and the other political committees. Yet there is little doubt that some communication is taking place. Jesse Helms, chairman of the independent North Carolina Congressional Club, which made expenditures on behalf of Ronald Reagan in 1980, said candidly in a television interview, "Well, as you know, we have an independent effort going on in North Carolina. Uh, the law forbids me to consult with him [Reagan], and it's been an awkward situation. I've had to, sort of, uh, talk indirectly with Paul Laxalt [Reagan's campaign chairman] and hope that he would pass along . . . uh, and I . . . I think the messages have gotten through all right." *Id.* at F-2, col. 3.

16. For example, the Committee For the Survival of a Free Congress recruits candidates, trains them, and later spends "independently" on their behalf. NCPAC in 1980 conducted extensive polling in South Dakota and then used the polls to convince James Abdnor to run against then-incumbent Senator George McGovern. NCPAC continued to make independent expendi-

and mutual awareness may pressure candidates into making improper commitments to the expending committees.[17]

The second problem with independent political committees is their lack of accountability to anyone but their professional managers. Independent political committees are, by definition, not accountable to the traditional political institutions, i.e., parties and candidates.[18] Often, they are also not accountable to the people who finance and support them. Typically, the contributors' only contact with the committees consists of committee fundraising letters.[19] Disclosure to contributors is infrequent, often inaccurate, and free of scrutiny. As a result, many persons lend their names or give financial support to causes or tactics they would object to if they were fully apprised of the committees' activities.[20]

A related consequence of this lack of accountability is that independent political action committees may make accusations of questionable accuracy and ethics without fear of directly harming the candidate they support.[21] While even this type of political speech deserves the constitutional protection given any other political expres-

---

tures for Abdnor during the campaign. National Conservative Political Action Comm., People for an Alternative to McGovern, FEC Matter Under Review No. 1231 (1980). Although these examples focus on conservative committees, liberal and moderate organizations are also beginning to use the same tactics. Moreover, the growth of centralized, hierarchical, independent committees has placed the committee manager, who has unfettered control over the use of contributors' funds, in the role of a power broker. *See* Note, *Independent Political Committees and the Federal Election Laws*, 129 U. PA. L. REV. 955, 977 (1981).

17. Both Democratic and Republican politicians are aware of the link between political committee spending and improper commitments. *See, e.g., Running with the PACs*, TIME, Oct. 25, 1982, at 20. Democratic Representative James Shannon of Massachusetts stated that "PACs are visibly corrupting the system," while Republican Senator Robert Dole of Kansas commented that "When these PACs give money they expect something in return other than good government." *Id.*

18. *See generally GOP Chief Wary of PACs Impact*, San Francisco Chron., Oct. 25, 1982, at 5, col. 1 (Republican National Committee Chairman Richard Richards bemoaning the general unaccountability of independent political committees and concluding that "this makes politics less responsible").

19. For an interesting discussion of the failure of first amendment ideals when communication is so one-sided, see Comment, *Public Utility Bill Inserts, Political Speech, and the First Amendment: A Constitutionally Mandated Right to Reply*, 70 CALIF. L. REV. 1221, 1227-35 (1982).

20. For example, four members of the advisory board of the National Pro-Life Political Action Committee (NPLPAC), an anti-abortion committee planning to make $400,000 in independent expenditures in the 1982 federal elections, resigned from the organization after they learned that NPLPAC issued a "hit list" of four senators and five representatives. Those resigning were leading anti-abortion members of Congress who objected to the use of "hit lists" and negative independent expenditures in campaigns. The Congressmen had not been consulted about the tactics of the organization, and several of the incumbents on the hit list considered themselves opponents of abortion. *See* Peterson, *Anti-Abortion Group Alienates Staunch Supporters In Congress*, Wash. Post, June 4, 1981, at A-1, col. 3.

21. Barbara Burns, political organizer for the National Right to Life Committee, said in an interview, "Maybe the candidate would say, 'Gee, I really don't want to be involved in that. It's like I'm saying he's lying!' So we do it for him. He can say he doesn't know about it, and he'll be

sion,[22] campaign laws protect this expression more than is constitutionally required.

This Comment argues that the exponential growth of political committees claiming to be independent threatens to create the appearance and reality of improper commitments by candidates to independent spenders. At the same time, the growth of independent political committees lessens their accountability to the contributors they nominally represent. Part I of the Comment analyzes the constitutional doctrine that has developed around the regulation of independent expenditures. Application of this doctrine to independent political committees has caused problems in implementing the existing campaign finance laws. Part II examines these problems. Part III proposes an amendment to FECA that would narrow the definition of an independent expenditure and thereby control more closely the unlimited expenditures of an independent political committee. By adopting such a change, Congress could better achieve its legitimate goal of preventing political candidates from making improper commitments while furthering the first amendment's mandate of robust political debate. The proposed amendment also broadens the structural requirements of committees that claim independent status in order to make these committees more accountable to their contributors and thereby to foster more responsible political speech.

---

telling the truth." Telephone interview with Barbara Burns, in Washington, D.C. (July 14, 1981). NCPAC director John T. Dolan admitted:

> Groups like ours are potentially dangerous to the political process. We could be a menace, yes. Independent expenditure groups, for example, could amass this great amount of money and defeat the point of accountability in politics. A group like ours could lie through its teeth and the candidate it helps stays clean.

MacPherson, *supra* note 15. *See also* Kayden, *Campaign Under Seige: Reflections on One Senator's Defeat*, 10 N.Y.U. REV. L. & SOC. CHANGE 67, 68 (1980-81); Malbin, *What Should Be Done About Independent Campaign Expenditures?*, in AMERICAN ENTERPRISE INSTITUTE JOURNAL ON GOVERNMENT AND SOCIETY/REGULATION 41 (Jan.-Feb. 1982).

The 1978 and 1980 elections, for example, indicated that independent political committees frequently spent money for short, emotional television advertisements that contained a number of inaccuracies and distortions. NCPAC, for example, claimed at a press conference that Senator Thomas Eagleton voted to give aid to the "repressive, communist dictatorship" in Nicaragua, when actually Eagleton had neither voted for nor supported such a measure. NCPAC belatedly and ineffectually withdrew the charge. Shields, *Running With NCPAC*, Wash. Post, Apr. 17, 1981, at A-13, col. 6. For more recent examples of NCPAC's false advertising, see *Accentuating the Negative*, TIME, Nov. 1, 1982, at 20.

22. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964); *cf. id.* at 295-97 (Black, J., concurring) (advocating absolute immunity for criticism of public officials).

I
THE CONSTITUTIONAL FRAMEWORK SUPPORTING CAMPAIGN FINANCE LAWS

A. Buckley v. Valeo

Although before 1976 the Supreme Court had considered the constitutionality of numerous congressional attempts to reform the political process through campaign finance legislation,[23] it had not yet had the opportunity to rule on a political reform statute as broad as the 1974 FECA.[24] The 1974 law required detailed disclosure of campaign expenditures and contributions,[25] limited the amount individuals or organizations could contribute to any political candidate,[26] placed a ceiling on independent expenditures for candidates and their campaigns,[27] limited the total spending of candidates and their campaigns,[28] established public financing for presidential elections,[29] and created the Federal Election Commission (FEC) to monitor elections and enforce the laws.[30]

In *Buckley v. Valeo*,[31] the Supreme Court struck down, on first amendment grounds, the FECA limits on candidates' personal spending,[32] total campaign expenditures,[33] and independent expenditures.[34] It upheld the limits on contributions,[35] as well as the provisions for public financing of presidential campaigns.[36] Most relevant for the

23. *E.g.*, United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (federal prohibition of political activities by federal employees not unconstitutionally vague or overbroad); Pipefitters Local 562 v. United States, 407 U.S. 385 (1972) (upholding statute excluding political expenditures by corporations and unions from funds gathered by involuntary contributions); Burroughs v. United States, 290 U.S. 534 (1934) (Congress has the power to regulate political committees to safeguard presidential elections from the improper use of money).

24. Attempts to control the impact of money on electoral politics date back to the beginning of this century. *See* Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 363 (1977). For a history of the legislation leading up to FECA, see Note, *Current Status of the Federal Election Campaign Act:* Buckley v. Valeo *and the Legislative Response*, 45 U. CIN. L. REV. 623 (1976).

25. Pub. L. No. 93-443, §§ 201-210, 88 Stat. 1272, 1272-89 (1974) (current version at 2 U.S.C. §§ 431-439, 451-452 (1976 & Supp. V 1981)).

26. *Id.* § 101(a), 88 Stat. at 1263 (repealed 1976).

27. *Id.* § 101(a), 88 Stat. at 1265 (repealed 1976). *See also Id.* § 101(b)(1), 88 Stat. at 1266 (repealed 1976) (limiting the candidate's expenditure of personal or family funds).

28. *Id.* § 101(a), 88 Stat. at 1264 (repealed 1976).

29. *Id.* §§ 403-404, 88 Stat. at 1291-93 (current version at I.R.C. §§ 9002-9007, 9009-9012 (1976 & Supp. V 1981)).

30. *Id.* § 208(a), 88 Stat. at 1280-82 (current version at 2 U.S.C. § 437(c) (Supp. V 1981)).

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

32. *Id.* at 54.

33. *Id.* at 58.

34. *Id.* at 51.

35. *Id.* at 35-38.

36. *Id.* at 86. *Cf.* Common Canse v. Schmitt, 512 F. Supp. 489, 496 (D.D.C. 1980) (holding independent expenditures by a candidate's supporters constitutional where the candidate has received public financing), *aff'd by an equally dividcd court mem.*, 455 U.S. 129 (1982).

purposes of this Comment, the Court found that expenditures coordinated or planned with the candidate's campaign were not independent, and therefore could be classified as contributions subject to the law's contribution ceilings.[37]

The Court offered several justifications for its decision. First, the Court held that under the first amendment, laws restricting the expenditure of money for speech deserved the same strict scrutiny as laws limiting speech itself.[38] The protection afforded such speech is less exacting, however, when the speech is indirect or is made through another by proxy.[39] By this reasoning, contributions to a candidate or political committee, which are not "direct" speech, deserve less constitutional protection than independent expenditures, which, according to the Court, directly express the views of the persons who made them.[40] Second, applying the strict scrutiny standard in its review of the statute, the Court declared that the prevention of real or perceived corruption in federal elections was the sole legitimate governmental interest justifying the statute's restrictions.[41] The Court upheld the contribution limitations because it found that restricting the size of contributions prevented candidates from making improper commitments to obtain campaign funds.[42] However, the Court struck down the independent expenditure limitations, holding that they did not lead to improper commitments, and thus were unrelated to the government's interest.[43]

B. Is Money Speech?

One of *Buckley*'s basic holdings is that the expenditure of money in elections deserves the same constitutional protection given pure political speech.[44] The Court drew a fine distinction between contribu-

37. 424 U.S. at 46 n.53, 47.

38. *See id.* at 16-17; *see also* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 299 (1981) ("Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression.").

39. 424 U.S. at 21-23. The Court has not made clear whether indirect speech compels the use of a more lenient standard, *see* United States v. O'Brieu, 391 U.S. 367, 376-77 (1968), or whether the restriction of such speech simply constitutes less harm to the speaker, *see Buckley*, 424 U.S. at 23. *See infra* notes 46-48 and accompanying text; Note, Citizens Against Rent Control v. City of Berkeley: *Constitutionality of Limits on Contributions in Ballot Measure Campaigns*, 69 CALIF. L. REV. 1001, 1006 (1981).

40. 424 U.S. at 21-23. *Accord* California Medical Ass'n v. FEC, 453 U.S. 182, 196 (1981) (plurality opinion) (" 'speech by proxy' . . . is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection").

41. 424 U.S. at 25-26, 45. *But see infra* text accompanying notes 59-64, 155-62 (arguing for an expanded view of the state's legitimate interest).

42. 424 U.S. at 28-29.

43. *Id.* at 48.

44. The Court concluded:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting

tions and expenditures,[45] classifying contributions as symbolic acts, deserving less constitutional protection than direct expenditures.[46] According to the Court, "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support . . . . [The] expression rests solely on the undifferentiated, symbolic act of contributing."[47] The law limiting contributions, therefore, "permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's [greater] freedom to discuss candidates and issues [using direct expenditures]."[48]

Judge Skelly Wright, who participated in the circuit court hearing of *Buckley*,[49] argued in an article published after the Supreme Court decision that the Court exaggerated the relationship between money and speech and therefore accorded the expenditure of money excessive protection. Much campaign spending in fact does not result in direct political expression. Some campaign funds are spent, whether independently or by a candidate, on such nonspeech activities as fundraising, polling, consultants' salaries, and computer services.[50] If these nonspeech elements were the targets of legislation, then the intrusion on speech, however substantial, would still be an incidental limitation subject to less exacting scrutiny than that applied to direct intrusions on speech. As Judge Wright wrote after the Supreme Court's disposition

---

the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Id. at 19. This aspect of *Buckley* has received the most significant scholarly attention. *See, e.g.*, Nicholson, Buckley v. Valeo: *The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323, 326-27, 344; Polsby, Buckley v. Valeo: *The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 18-19; Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments*, 86 YALE L.J. 953, 955-56 (1977); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 171-86 (1976).

45. *Buckley*, 424 U.S. at 19-23. *Buckley* distinguished the cases where speech and nonspeech elements mix, resulting in a lesser protection than that afforded pure speech. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376-77 (1968); Cox v. Louisiana, 379 U.S. 559, 563-64 (1965). *But see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-7 (1978) (criticizing the distinction between treatment of speech and conduct).

46. *Buckley*, 424 U.S. at 21.

47. *Id.* For the counterintuitive suggestion that the intensity of opinion on an election issue runs highest on the side of the issue that is outspent, see Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 U.C.L.A. L. REV. 505, 577 & n.267 (1982).

48. *Buckley*, 424 U.S. at 21. *See* Note, *supra* note 39, at 1005-06; Note, *The Constitutionality of Regulating Independent Expenditure Committees In Publicly Funded Presidential Campaigns*, 18 HARV. J. ON LEGIS. 679, 684, 689 n.52 (1981).

49. Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975), *aff'd in part and rev'd in part per curiam*, 424 U.S. 1 (1976).

50. For example, NCPAC spent 79% of its 1980 budget on fundraising, direct mailings, polling, and salaries. Data compiled from NCPAC's monthly FEC reports (1980) (summary on file with the *California Law Review*).

of *Buckley*, "the use of money in political campaigns serves as nothing more than a vehicle for political expression,"[51] and it does not itself constitute political expression.

The Court's assumption that the restriction of expenditures necessarily limits the quantity or quality of speech[52] is also open to criticism. Judge Harold Leventhal, who also heard *Buckley* at the circuit court level, has called that assumption "a factual assertion without factual support."[53] If the quantity of speech is defined by the "number of issues discussed, the depth of their exploration, and the size of the audience reached,"[54] the expenditure of money seems to affect only one of the factors—size of audience—and then only indirectly.[55] The campaigns with the highest expenditures did not discuss more issues, or explore any issues more deeply; they simply spent more money to reach greater numbers of people more frequently.[56] While the limited content of such speech does not entitle it to any less constitutional protection, it does vitiate the Court's assumed relationship between the expenditure of money and the quantity or quality of speech.

Buckley's conclusions that the expenditure of money is the first amendment equivalent of speech, and that contributions are something less than speech,[57] are nonetheless important for election law reform. As the Court has demonstrated in cases since *Buckley*, political reform legislation that regulates spending in any meaningful way will be strictly scrutinized and is unlikely to be held constitutional.[58] Thus,

---

51. Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1007 (1976).

52. *See Buckley*, 424 U.S. at 19.

53. Leventhal, *supra* note 24, at 359.

54. *Id.*

55. The relationship between expenditure and audience size is indirect because advertising media vary in cost and also reach audiences of differing size.

56. As Professor Cox has predicted, the modern explosion of campaign spending has not meant increased discussion of more issues:

> [T]wo . . . consequences . . . seem almost certain to follow [*Buckley* and *Bellotti*]. First, the skill with which the charismatic candidate is packaged and sold would become more and more important, and ideas and reasons would become less and less effective. Second, the influence of organized groups would grow and the voice of the individual would diminish.

Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 70 (1980). *But see supra* text accompanying note 10 (in theory, unlimited expenditures result in more information in addition to a wider audience).

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

58. *E.g.*, Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 293-94 (1981); California Medical Ass'n v. FEC, 453 U.S. 182, 196-97 (1981) (plurality opinion); First Nat'l Bank v. Bellotti, 435 U.S. 765, 776-77 (1978). *See generally* Note, *supra* note 39, at 1002-06. Indeed, statutes that infringe political debate have long been the object of close judicial scrutiny and have been construed narrowly to avoid interference with the political process. *E.g.*, Eastern R.R. Presidents Conference v. Noerr Motor Freight Co., 365 U.S. 127 (1961) (concerted corporate lobbying of the legislature is not an antitrust violation).

Buckley's expanded regulation of contributions is the most promising area for election law reform.

C. *The Government's Legitimate Interest*

The Court in *Buckley* held that the government's interest in preventing real or apparent corruption of candidates could justify the restriction of contributions and expenditures.[59] The government had asserted a second interest: it argued that the statute equalized the political power of citizens who wanted to participate in the electoral and legislative processes. The Court dismissed this interest, holding that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment . . . ."[60] Another legislative goal, which the Court simply ignored, was the stimulation of more "direct, personal forms of political speech."[61] In limiting participation by proxy (i.e., spending money as an expression of support), the campaign laws gave citizens greater incentive to become personally involved in campaigns.[62]

The only legislative purpose approved by the Court was that of reducing the appearance and reality of corruption between candidates and moneyed interests.[63] Contribution limits fulfilled this purpose;[64]

---

59. *Buckley*, 424 U.S. at 26-27, 45. *See also* Let's Help Florida v. McCrary, 621 F.2d 195, 199 (5th Cir. 1980) ("The sole governmental interest that the Supreme Court recognized as a justification for restricting contributions was the prevention of quid pro quo corruption between a contributor and a candidate."), *aff'd mem. sub nom.* Firestone v. Let's Help Florida, 454 U.S. 1130 (1982); C & C Plywood Corp. v. Hanson, 583 F.2d 421, 425 (9th Cir. 1978). *See generally* Leventhal, *supra* note 24, at 367-75; Note, *supra* note 39, at 1003-04.

60. *Buckley*, 424 U.S. at 48-49. *Accord Citizens Against Rent Control*, 454 U.S. at 295-96. *But see* J. RAWLS, A THEORY OF JUSTICE 221-25 (1971) (the principle of fair opportunity to influence the political process is threatened when those with greater private means control the course of public debate); Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815 (1974); Comment, Buckley v. Valeo: *The Supreme Court and Federal Campaign Reform*, 76 COLUM. L. REV. 852, 869 (1976) (arguing that equalizing the voices of political participants is a valid state interest). *Cf.* Comment, *The Constitutionality of Limitations on Corporate Contributions to Ballot Measure Campaigns*, 13 U.S.F.L. REV. 145, 162 n.99 (1978) (*Buckley*'s upholding of the public funding of presidential elections is consistent with the equalizing voices interest).

61. Wright, *supra* note 51, at 1010 n.40.

62. *Id. Cf.* Cox, *supra* note 56, at 70 (concluding that the influence of individuals in organizations will be reduced as a result of *Buckley* and *Bellotti*).

63. *Buckley*, 424 U.S. at 45. Although the Court declared that the prevention of the appearance of corruption and the preservation of public confidence in the electoral process is a valid and compelling state interest, *id.*, no decision has in fact upheld campaign finance restrictions solely on that basis. The reason, as became apparent in *Citizens Against Rent Control*, 454 U.S. at 298-99, is that the government has not been able to show that massive expenditures undermine public confidence in elections. *See* First Nat'l Bank v. Bellotti, 435 U.S. at 789-90. Consequently, the only demonstrable government interest has been the prevention of actual corruption. *See also Citizens Against Rent Control*, 454 U.S. at 306-08 (White, J., dissenting) (proof that heavy spending buys a victory is impossible); Note, *supra* note 39, at 1009; Note, *supra* note 48, at 697-98. *But see*

they did not restrict the contributor's direct speech, only his or her speech through another—the campaign committee.[65] Moreover, the limits caused no "dramatic adverse effect on the funding of campaigns and political associations."[66]

In contrast, the Court in *Buckley* concluded that limits on independent expenditures did not further the valid legislative purpose of avoiding real and apparent corruption. According to the Court, the likelihood of improper commitments between spenders and candidates did not outweigh the first amendment rights of spenders. The Court based its findings on two factors: (1) the lack of coordination between the independent spender and the campaign, and (2) the dubious value of the independent expenditures as opposed to contributions.[67] Thus, independent expenditures could not be constitutionally limited.

The Court's decision that independent expenditures were not as potentially corrupting as contributions rests on two doubtful premises. The first premise is that independent expenditures are generally ineffective. When the Court made this statement in 1976, expenditures were subject to the same ceilings as contributions,[68] and no one could predict the consequences of removing the expenditure ceilings.[69] But increases in the number of independent political committees and their activities in the 1980 and 1982 elections increased their influence and contradict the Court's assumption that these committees "may well provide little assistance to the candidate's campaign."[70]

Adamany, *supra* note 14, at 586 n.135 (arguing that if the prevention of apparent corruption is a governmental interest, then independent expenditures "will be taken by a large segment of the public as evidence of a liaison between officeholders and spenders . . . .").

64. *Buckley*, 424 U.S. at 26.

65. *Id.* at 21.

66. *Id. But cf.* Malbin, *supra* note 1, at 181-82 (attributing growth of direct mail fundraising and less direct citizen participation in campaigns to limitations imposed on contributions to candidates).

67. Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Buckley, 424 U.S. at 47.

68. *See* Pub. L. No. 93-443, § 101(a), (b)(1), 88 Stat. 1263, 1263-66 (1974) (repealed 1976).

69. *Cf. Buckley*, 424 U.S. at 263 (White, J., dissenting) (the Court should defer to Congress' experience in predicting future political activity).

70. *Id.* at 47 (per curiam). It is, of course, difficult to measure the impact of any single organization on the outcome of an election. *See Citizens Against Rent Control*, 454 U.S. at 307-08 (White, J., dissenting). There is some debate in the literature as to whether money spent in a campaign by candidates and political committees correlates well with political victory. *Compare* Malbin, *supra* note 1 *with* Lowenstein, *supra* note 47. Some observers have gauged the influence of independent spending in the 1980 election by comparing the amount spent by independent committees and the candidates' campaigns for Carter and Reagan. For example, under this analysis, the independent committees gave Reagan a $10 million advantage over Carter. *See* Wright,

The Supreme Court's second and equally unsupported premise is that the independence of the expenditures prevents the formation of improper obligations between candidates and spenders.[71] As shown in the previous Section,[72] true independence is rare when the expenditures are large and ongoing. Often, political action committees are independent of the candidates they support or oppose in form only. In fact, the current legal definition of independence—discussed below at Part II, Section A—allows significant communication between political committees and candidates.

D. Defining the Scope of the Government's Interest: The Meaning of Improper Commitments

The *Buckley* Court's discussion of the government's legitimate interest left the definition of "improper commitments" unclear. Campaign contributions[73] or expenditures[74] undoubtedly buy some kind of influence from most legislators. If money does not buy a vote on an issue, at least it buys access to the legislator.[75] Most such influence, short of bribery or extortion,[76] is legal. More difficult is the identification of the types of influence that are legitimate targets for political reform under the Court's conception of "improper commitments."

---

supra note 51, at 1017-18; Note, *supra* note 16, at 958-59. Some commentators believe that large spending, whether or not independent, may prove to be a controlling factor in the outcome of an election. *E.g.*, Getman, *The Process is Part of the Problem*, 29 CASE W. RES. L. REV. 771, 772 (1979).

71. The Court acknowledged that the possible danger of corruption posed by independent committees could become more apparent in future elections. *See Buckley*, 424 U.S. at 46 ("[T]he independent advocacy restricted by the provision does not *presently appear* to pose dangers of real or apparent corruption . . . .") (emphasis added). The Court has also explicitly held open the possibility of later review of its factual assumptions. *See* First Nat'l Bank v. Bellotti, 435 U.S. at 788 n.26.

72. *See supra* notes 15-17 and accompanying text.

73. Contributors certainly perceive that their contributions buy them influence. *See, e.g., Presidential Campaign Activities of 1972, S.R. 60: Hearings Before the Senate Select Comm. on Presidential Campaign Activities*, 93d Cong., 1st Sess. 5494, 5514 (1973) (testimony of George Spater, former Chairman of American Airlines). *See also* Wall St. J., Aug. 15, 1978, at 1, col. 6 (quoting Justin Dart, chairman of Dart Industries: politicians listen to the views of citizens, "but with a little money they hear you better").

74. *See supra* note 14 and accompanying text; *infra* note 97 and accompanying text.

75. For example, Washington representatives and chief executive officers of large corporations gain easy access to members of Congress and the executive branch once they have made large contributions to these officials' campaigns. *See* M. GREEN & A. BUCHSBAUM, THE CORPORATE LOBBIES: POLITICAL PROFILES OF THE BUSINESS ROUNDTABLE AND THE CHAMBER OF COMMERCE 83-100 (1980).

76. *Cf.* L. BERG, H. HAHN & J. SCHMIDHAUSER, CORRUPTION IN THE AMERICAN POLITICAL SYSTEM 138-39 (1976) (the modern campaign contribution has supplanted the old-fashioned bribe); *Hearings on S. 3496, Amendment No. 732, S. 2006, S. 2965, and S. 3014 Before the Senate Comm. on Finance*, 89th Cong., 2d Sess. 78 (1966) (statement of Senator Russell Long) ("in terms of large campaign contributions . . . the distinction between a campaign contribution and a bribe is almost a hair's line difference").

Although the Court has never explicitly addressed the issue, a reasonable definition of the type of influence the state can prohibit is that which poses a high risk of leading to illegal or unethical activity. In the Court's view, making and accepting political contributions amounts to such influence, while making and accepting expenditures does not.[77] However, the Court's definition of improper commitments (i.e., the candidate's promise of a legislative vote or a job in exchange for financial assistance) may cover illegal or unethical conduct "bought" by large expenditures as well as by direct contributions.[78]

Various statements by the Court in *Buckley* support this definition of improper influence. First, the Court recognized Congress' desire to prevent the corruption "spawned by the real or imagined *coercive* influence of large financial contributions on candidates' positions and on their actions if elected to office."[79] The term "coercive" implies that the candidate is forced to take a position or action regardless of other influences or factors. Second, the Court declared that expenditures made without prior arrangement pose no threat of corrupting their beneficiaries.[80] This view implicitly limits the scope of the government's interest to the prevention of legislative vote sales by members of Congress to private interests—an activity already considered criminal.[81] Third, the Court alluded to examples of corruption from illegal activity, such as the slush funds used in the Nixon presidential campaign.[82] Thus, under the *Buckley* definition of improper commitments, the only valid congressional aim in limiting campaign contributions is the prevention and discouragement of commitments leading to illegal and unethical activity.

II
FECA AND ITS IMPLEMENTATION

After *Buckley*, the distinction between contributions and independent expenditures is crucial. FECA limits contributions by multicandidate committees to a maximum of $5000 per candidate per election.[83] In contrast, there is no limit for independent expenditures.[84] Despite this important difference in treatment, the definition of independent expenditures is nebulous, and the FEC's enforcement of the

77. *Buckley*, 424 U.S. at 28, 46.
78. *See infra* notes 133-45 and accompanying text.
79. *Id.* at 25 (emphasis added).
80. *Id.* at 47. *See also* Brown v. Hartlage, 102 S. Ct. 1523, 1531 (1982).
81. *See, e.g.*, 18 U.S.C. § 201 (1976 & Supp. V 1981); MODEL PENAL CODE § 240.1 (1980).
82. *Buckley*, 424 U.S. at 27 n.28.
83. 2 U.S.C. § 441a(a)(2) (1976).
84. *Buckley*, 424 U.S. at 51.

statute is lax.[85]

A. Standards for Defining Independent Expenditures

FECA defines independent expenditures as expenditures[86] made without the cooperation or consultation of any candidate, committee, or agent[87] of the candidate.[88] Expenditures that are not independent under this definition are considered contributions.[89] The FECA regulations define "cooperation or consultation" as "any arrangement, coordination or direction by the candidate or his or her agent prior to" the communication for which the expenditure is made.[90] The FEC presumes that the arrangement, coordination or direction has been made if the candidate or his or her agent provides the spender with information "with a view toward having an expenditure made," or if a

85. Robert Bauer, election law attorney for then-Senator George McGovern in 1980, said, "It's gruesome, unwieldy, and the FEC ducks the issue anyway." Telephone interview with Robert Bauer in Washington, D.C. (June 22, 1981). According to NCPAC director John T. Dolan, "The Federal Election Commission has defined independent expenditure to the degree that it is meaningless." MacPherson, *supra* note 15. *See also* Note, *supra* note 48, at 702-03 & n.123.

86. In the context of independent expenditures, expenditures are defined as communications "expressly advocating the election or defeat of a clearly identified candidate" in a federal election. 2 U.S.C. § 431(17) (Supp. V 1981). *See, e.g.*, FEC v. American Fed'n of State, County & Mun. Employees, 471 F. Supp. 315 (D.D.C. 1979) (poster criticizing President Ford for pardoning former President Nixon was not an expenditure, because it did not actually exhort the viewer's vote).

87. The FEC defines "agent" as "any person who has actual . . . authority . . . to authorize the making of expenditures on behalf of a candidate . . . ." 11 C.F.R. § 109.1(b)(5) (1982). This definition does not apply to someone who has access to campaign strategy sessions or policy decisions, or who records this information. Thus, for example, a press aide for a congressional candidate who placed advertisements for an independent spender was found not to be an "agent"; though he had access to information about the candidate's campaign that was relevant and enabled easy coordination of efforts, the aide had no spending authority. Robert Varley, Nathan Popkin and the Tonry for Congress Comm., FEC Matter Under Review No. 299 (1976).

88. The term "independent expenditure" means 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.

2 U.S.C. § 431(17) (Supp. V 1981).

89. *Id.* § 441a(a)(7) (1976).

90. (4) "Made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agency or authorized committee of the candidate" means —

(i) Any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display or broadcast of the communication. An expenditure will be presumed to be so made when it is —

(A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made;

(B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent . . . .

11 C.F.R. § 109.1(b)(4)(i) (1982).

present or past agent of the campaign made the expenditure.[91]

For example, suppose an individual buys a newspaper advertisement for a candidate. If the candidate tells the buyer what the advertisement should say, it will be regarded as an in-kind contribution from the buyer to the candidate, subject to a $1000 ceiling.[92] The advertisement is an independent expenditure if the buyer purchases it personally without contacting the candidate or the candidate's committee. These definitions are structured so as to ensure that the independent status of any expenditure is threatened only when the candidate or someone imbued with the candidate's authority actively and intentionally cooperates with the spender before the expenditure is made. In practice, however, the standard often operates crudely. Expenditures made by political committees having intimate contacts with the candidate may actually be coordinated with the candidate or campaign[93] and nonetheless meet the legal requirements for independence. For example, the expending committees might not have to ask the candidate what advertisements should say, or where and when they should run. Instead, through polling data, the press, and contacts with sources who are familiar with the candidate's campaign, they can determine the candidate's most pressing needs and spend accordingly.[94]

The rationale behind the existing definition of independence is consistent with *Buckley*.[95] The statutory and regulatory definition of independent expenditures refines and expands the Supreme Court's "absence of prearrangement and coordination" language to prevent certain types of contact between candidates and spenders. However, the definitions ignore the possibility that some expenditures, made without apparent prearrangement or coordination with the candidate, will still be highly valued by the candidate.[96] Consequently, the implied promise of similar expenditures in the future may elicit improper commitments from the candidate as effectively as large monetary contributions.[97]

The FEC has recognized some exceptions to the prearrangement

91. *Id.*

92. *See, e.g.*, Republican Volunteers for a Clean Judiciary and Clean Politics, FEC Matter Under Review No. 940 (1981).

93. *See supra* notes 71-72 and accompanying text.

94. For example, an individual might obtain the candidate's polls and media strategy, and place ads that are calculated to add to the candidate's campaign. The candidate might see the ads and indicate his approval. The buyer would then place more ads. Although the buyer is coordinating his expenditures with the candidate's, the expenditures are still independent because the buyer never made any *prior* arrangements with the candidate. *See supra* notes 15-17 and accompanying text.

95. *Buckley*, 424 U.S. at 45, 47.

96. *See* Adamany, *supra* note 14, at 601.

97. *See id.*

and coordination rule when, in its judgment, there is a great likelihood that the expenditures would be valued by the candidate. First, the FEC defines the dissemination of candidate material by independent committees as a contribution, even when the candidate or candidate's agent has not requested the dissemination or contacted the independent committee in any way.[98] Such expenditures undoubtedly have great value to the candidate. Absent the FEC rule, such disseminations would allow the independent committee to expand the candidate's audience while avoiding the contribution limits.

Second, the FEC has defined as a contribution all expenditures made pursuant to data from a candidate's former pollster.[99] Otherwise, the independent committee's access to the candidate's polling data would improperly increase the likely effectiveness of the expenditures, and the probable gratitude of the candidate.

Third, the FEC has defined certain kinds of independent committee fundraising activities as contributions, even when the candidate does not coordinate or consult with the independent committee.[100] For example, suppose a committee solicits donations made out to a candidate but sent to the committee. It then delivers batches of these checks to the candidate. The costs of this solicitation would not be considered independent expenditures, but in-kind contributions. The committee's ability to extract improper commitments from the candidate would be the same, whether the committee delivered the collected checks or contributed the aggregate sum directly.

B. The FEC's Lax Enforcement of the Statute

The FEC's complicated procedures[101] and ambiguous standards

98. Wilmer St. John Gurwood, FEC Matter Under Review No. 445 (1977). *But see* 2 U.S.C. § 441a(a)(7)(B)(ii) (1976).

99. FEC Adv. Op. No. 1979-80, FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶ 5469 (Mar. 12, 1980).

100. FEC Adv. Op. No. 1980-46, FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶ 5508 (June 25, 1980).

101. 2 U.S.C. § 437(g) (1976) sets forth the FEC's enforcement procedures. The FEC commissioners must vote three times to pursne a matter before concluding that a violation has occurred. At the first level, the complainant must allege facts sufficient to establish the existence of a violation of the law. The respondent has the opportunity to reply, and the commissioners vote on whether there is reason to believe a violation has occurred. If a majority of the commissioners find reason so to believe, then the general counsel initiates a full investigation, which may include issuing interrogatories and subpoenas. The respondent may submit a brief to the commissioners. The commissioners then vote on whether there is probable cause to believe that a violation has occurred. If a majority finds probable cause, the FEC attempts to obtain a binding conciliation agreement; if this attempt fails, a majority must vote to bring civil suit. If the complaint fails to receive a majority vote at any time, the FEC drops the matter. For a detailed discussion of the practical problems facing private groups attempting to enforce the laws, see Ifshin, *Resolving Constitutional Issues Under the Federal Election Campaign Act: A Procedural Labyrinth*, 10 N.Y.U. REV. L. & SOC. CHANGE 101 (1980-81). For the suggestion that these labyrinthian procedures

often lead the Commission to enforce technical rather than substantive and politically sensitive violations.[102] Of 950 cases it investigated between 1975 and 1978, the FEC brought only 55 civil actions; 72% of these were for reporting violations.[103] Moreover, only once between 1975 and 1981 has the FEC characterized an independent expenditure as a contribution, and then only because the spender made a pleading error.[104] Typically, the FEC drops the case when the candidate denies cooperating with, consulting with, giving consent to, or otherwise directing an expending committee.

Several examples illustrate the FEC's reticence in pursuing possible violations of the statute. In one case, a supporter made an expenditure on behalf of Rep. William Green of New York. Several months later, the supporter charged that the expenditure was actually an in-kind contribution because Green had approved it. The FEC dropped the case without further investigation as soon as Green denied that he gave his consent to any spending.[105] In another case, the American Conservative Union (ACU) made expenditures on behalf of Ronald Reagan, claiming that they were independent.[106] Nine top-level employees of the ACU[107] were employed in some capacity by the Reagan campaign. The ACU responded to the accusation of non-independence by asserting that expenditure decisions were guided by a committee composed of three people not on the Reagan campaign payroll. The FEC did not investigate further: it never asked how the ACU made its decisions, whether the staff made recommendations, what dis-

---

may inhibit individual participation in the political process, see, e.g., Comment, *The Federal Election Commission, the First Amendment, and Due Process*, 89 YALE L.J. 1199, 1221 (1980).

102. According to one study, "[t]he FEC emphasized the small, picayune details of administering the law, while passing over the larger systemic questions." CAMPAIGN FIN. STUDY GROUP, INST. OF POLITICS, KENNEDY SCHOOL OF GOV'T, HARVARD UNIV., AN ANALYSIS OF THE IMPACT OF THE FEDERAL ELECTION CAMPAIGN ACT 1972-1978, at 114-15 (1979) (prepared for the Cong. Comm. on House Admin.) [hereinafter cited as HARVARD REPORT]. FEC Commissioner Frank Reiche admitted, "Frequently we as commissioners become caught up in the minutiae of the daily administration of the Act." H. ALEXANDER & B. HAGGERTY, THE FEDERAL ELECTION CAMPAIGN AFTER A DECADE OF POLITICAL REFORM 116 (1981) [hereinafter cited as CITIZENS RESEARCH FOUNDATION REPORT]. *See also* Spiegel, *Our Toothless Watchdogs*, NEWSWEEK, Nov. 1, 1982, at 18.

103. HARVARD REPORT, *supra* note 102, at 134. *See also* Note, *supra* note 16, at 981-82 (FEC's enforcement pace is slow).

104. The 1976 Democratic Presidential Campaign Comm., FEC Matter Under Review No. 473 (1978).

105. Republican Volunteers for a Clean Judiciary and Clean Politics, *supra* note 92.

106. American Conservative Union/Conservative Victory Fund/Citizens for Reagan, FEC Matter Under Review No. 203 (1976) (Staebler, Comm'r, dissenting) [hereinafter cited as American Conservative Union Decision].

107. *Id.* The nine employees included the ACU's legislative director, the political director, four members of the board of directors, the secretary of the board, and a student intern.

cretion the staff had in the timing or making of expenditures, or where the three-person committee obtained its information.

The FEC's difficulty in enforcing the standards for measuring independence is a result of political pressure, agency structure, and legal uncertainty. First, the Commission feels considerable pressure from Congress to let the political process work without interference.[108] Although the FEC regulates the process by which the members of Congress are elected, Congress appropriates money for the agency's budget, approves the appointments of its commissioners, and has a one-house veto over its regulations.[109] Second, the structure of the Commission gives Congress an even greater opportunity to exert pressure. Since the chair of the Commission changes every year, no commissioner can build an independent power base. Because of the even number of commissioners, partisan voting and ties in important decisions are common.[110]

The standards themselves also make enforcement of the statute difficult. Because an expenditure will be classified as a contribution only if the candidate intended that the expenditure be made,[111] the Commission's burden of proof is heavy.[112] To prove the requisite state of mind, the FEC would often have to conduct intensive investigations of candidates, committees, and their communications with each other.[113] Any wholesale federal investigation into the thoughts and motives of participants in the political process, however, would likely chill political activity and violate the first amendment.[114] To avoid

---

108. FEC Chairman John McGarry explained:

> The Commission is in the peculiar position of regulating the campaign activities of all incumbents as well as their challengers. You cannot ignore that incumbents write the laws the commission enforces; they have control over the commission's budget; they have a one-house legislative veto over regulations issued by the commission; and under the 1979 Amendments, Congress can even veto reporting forms prescribed by the commission. If that isn't enough, a congressional oversight committee monitors our performance and activity.

CITIZENS RESEARCH FOUNDATION REPORT, *supra* note 102, at 114. *See also* Curtis, *Reflections On Voluntary Compliance Under The Federal Election Campaign Act*, 29 CASE W. RES. L. REV. 831, 851-53 (1979).

109. *See* 2 U.S.C. §§ 437c, 438(d) (1976).

110. *See* HARVARD REPORT, *supra* note 102, at 114.

111. Coordination is presumed when an expenditure is made "[b]ased on information about the candidate's plans . . . provided to the expending person by the candidate . . . with a view toward having an expenditure made." 11 C.F.R. § 109.1(b)(4)(i)(A) (1982).

112. *See* Note, Woodland Hills v. City Council of Los Angeles: *Electoral Politics and Quasi-Judicial Fairness*, 69 CALIF. L. REV. 1098, 1117-18 (1981).

113. The FEC does send interrogatories to candidates, but usually accepts the response without pursuing the matter if the case is sensitive. *See, e.g.*, Republicans for a Clean Judiciary and Clean Politics, *supra* note 92; American Conservative Union Decision, *supra* note 106.

114. Telephone interview with David Ifshin, election law attorney, Washington, D.C. (July 30, 1981); Clagget & Bolton, *supra* note 9, at 1353-60. Such blunderbuss governmental action has typically been struck down for its chilling effect on the proper exercise of first amendment free-

these undesirable consequences, the FEC cannot enforce the standard as diligently as it otherwise might.

Finally, enforcement is difficult due to the nature of the political committees the FEC seeks to regulate. FECA and its regulations were promulgated in 1976, when the conception of independent expenditures focused on the individual spender. Few people anticipated the growth of political committees that would abuse the independent expenditure laws to set up parallel campaigns.[115] The FEC is thus not equipped to deal with these committees, whose purpose frequently is to find loopholes in the law and exploit them.[116]

III
THE REDEFINITION OF INDEPENDENT EXPENDITURES

A. Proposed Revision of FECA

Buckley v. Valeo draws distinctions between direct and indirect speech, expenditures and contributions, and independent and nonindependent expenditures.[117] It gives Congress the power to regulate indirect speech and nonindependent expenditures, but not direct speech or independent expenditures.[118] It also leaves Congress the authority to impose certain structural requirements on political committees.[119] FECA implements these doctrines by limiting contributions and by classifying certain expenditures as nonindependent and therefore subject to the contribution ceilings.[120] However, FECA does not take advantage of all the regulating authority *Buckley* bestowed on Congress.

This Comment proposes to classify campaign spending by independent committees on the basis of the structure and conduct of independent committees.[121] Presently, FECA classifies campaign activity as a "contribution" or "expenditure" on the basis of each act in question,[122] but it does not define committee activity by the nature of the committee itself. For example, suppose an independent committee,

---

doms. *See, e.g.*, Baggett v. Bullitt, 377 U.S. 360, 372 (1964); Shelton v. Tucker, 364 U.S. 479 (1960).

115. *See supra* notes 1-8 and accompanying text.

116. For example, NCPAC director John T. Nolan told the Washington Post that the FEC is easy to get around because "they're a bunch of mindless bureaucrats who know less about the first amendment than they do politics." MacPherson, *supra* note 15, at F-2, col. 4. On FECA, he said, "It's a stupid law. They're gonna have to take me kicking and screaming to jail before I stop my activities. Look, we're saying, 'come and get us.' That law should go." *Id.* at F-2, col. 1.

117. 424 U.S. at 20, 21, 47.

118. *Id.* at 21, 45, 47.

119. *E.g.*, 2 U.S.C. § 432 (1976); 11 C.F.R. § 102 (1982); *see* Burroughs & Cannon v. United States, 290 U.S. 534, 541-45 (1933).

120. 2 U.S.C. § 441a(a)(1)-(2), (7) (1976).

121. A skeletal outline of this argument is in A. BUCHSBAUM, *supra* note 1, 53-61.

122. *See* 2 U.S.C. § 441a(7) (1976); 11 C.F.R. § 109.1(b)(4) (1982).

whose governing board members are high-ranking officials in a presidential candidate's official campaign, buys an advertisement in support of a presidential candidate. Even though the overlap in personnel means the committee itself may not be entirely independent of the candidate's campaign, the expenditure for the advertisement will be considered independent unless the FEC can show coordination or consultation about that particular campaign activity.[123]

Congress should amend FECA to incorporate two criteria that place further restrictions on political committees. First, Congress should limit spending by committees that exclude their contributors from participating in committee decisionmaking.[124] Second, Congress should amend FECA to prohibit *any* independent expenditures by political committees that establish a course of communication with the candidate or his campaign and thereby maintain such close contacts with the candidate that the potential for corruption is high. These proposed amendments comport both with the reality of the committees' status and with the Supreme Court's opinion as to the proper scope of the government's interest.

I. The Requirement of Contributor Involvement

The structural requirement of member-contributor involvement for committees making independent expenditures would increase the committees' accountability to their contributors. It would require that contributors have an opportunity to provide direct and meaningful input into expenditure decisions. Committees claiming independence from candidates would have to demonstrate that they were not also independent from their own contributors. Committees receiving contributions but not affording their contributors some substantial role in the making of the committees' important decisions would themselves be limited by FECA's contribution ceilings.

The contributors' direct participation in the expenditures must in-

123. *See supra* notes 106-07 and accompanying text.

124. This Comment's proposals would amend 2 U.S.C. § 441a(a)(7)(B) (1976) to read as follows:

(a) Dollar limits on contributions

. . .

(7) For purposes of this subsection—

(B) the following shall be considered contributions to a candidate:

(i) expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents;

(ii) expenditures made on behalf of a candidate by any political committee that has established a course of communication with the candidate, the candidate's authorized committee, or the candidate's agents;

(iii) expenditures made by political committees whose contributors do not participate directly in making expenditures or other major committee decisions.

volve more than the contributors' sending the political committee a preprinted blanket approval of any committee action. Minimally, participation should involve the same level of input that, for example, shareholders or dues paying union members have under the corporate and union model of democracy.[125] That input should include the power to elect a board to oversee committee operations, the authority to make major decisions (such as discontinuing political activities in a certain year or a specific political race), or a voice in the content and form of the expenditures made.[126] The political committees need not formally adopt a charter or constitution, as long as their contributors in fact exercise some meaningful level of control over committee activities. For smaller committees, the formality of a charter may be unnecessary. For committees with many contributors, some written guidelines that provide a structure to the committee may be necessary to outline procedures for contributor participation. Congress or the FEC could even approve model guidelines.

This proposed structural requirement for committees is not unduly harsh. First, no political action committee is absolutely required to extend participatory rights to its contributors. Committees remain free under the proposal to exclude contributors from the decisionmaking process, but the cost of this lack of accountability would be the loss of their independent status.[127] Second, the proposed structural requirement is not severe when viewed against the backdrop of massive federal regulation. FECA already includes significant structural,[128] registration,[129] and reporting[130] requirements for political committees. By leaving with the committees the ultimate decision whether and how to comply with the proposed structural requirement, the proposal is less intrusive on committee operations than other existing requirements.

The structural requirement for independent political committees

125. *See generally* H. HENN, LAW OF CORPORATIONS 358-406 (1970) (discussion of shareholder participation in corporations); C. MORRIS, THE DEVELOPING LABOR LAW 697-746 (1971) (discussion of union member participation in union policy development). The corporate and union democracy analogies were drawn by the district court defining "member" in FEC v. National Right To Work Comm., 501 F. Supp. 422, 430-32 (D.D.C. 1980), for purposes of the membership exception in FECA, 2 U.S.C. § 441b(b)(4)(A), (C) (1976).

126. The district court in *National Right to Work Comm.* outlined the following guidelines for "membership": (i) authority to elect members of the board of directors; (ii) power to formulate policy; (iii) opportunity to serve on the board; (iv) obligation to make regular financial contributions. 501 F. Supp. at 433.

127. The proposed structural requirement may be viewed as requiring that accountability rest ultimately somewhere before independent status may be claimed. If a committee is not directly accountable to its contributors, then the statute would strip the committee of its independent status until the committee can prove that its contributors exercise significant control over its activities.

128. *See, e.g.*, 2 U.S.C. § 432 (1976) (organization of political committees).

129. *See id.* § 433.

130. *See id.* § 434.

would serve two policy goals. First, it would prevent the professional managers of political committees from misusing the money of contributors, since large, centrally run committees would have to both solicit participation by their contributors and give them a detailed disclosure of committee activities.[131] Second, increased disclosure to contributors and greater contributor participation could force the less scrupulous political committees to tone down their emotional attacks on candidates. Otherwise, contributors who agree with the general political sentiments of the committee but disagree with their tactics may divert funds to support other organizations with similar viewpoints but more moderate methods.[132]

2. *Limitation of Independent Expenditures Where There Is a Course of Communication*

a. *Background*

The proposed amendment also redefines "independent" in a manner that effectively limits the danger that political committees will engage in political activity in exchange for improper commitments from the candidate. Unlike the present FECA, it classifies any expenditures by certain committees as contributions subject to the statutory ceilings. Committees establishing a course of communication with the candidate they support would not be able to claim independent status and therefore would not be able to spend without limit on behalf of that candidate. Because all such expenditures would be considered contributions subject to the contribution limitations in FECA, candidates would be less prone, or at least less tempted, to make improper commitments to the committees. Similarly, the committees could exert only limited financial pressure on candidates.

A course of communication between spender and candidate properly precludes independent and therefore unlimited subsequent expenditures, because it increases both the number of spender-candidate contacts and the value of the expenditures to the candidate. A course of communication gives candidates the opportunity to inform political committees about their needs, and to make implicit arrangements and promises in return for expenditures. The information the political committee gathers about the candidate's campaign makes the committee's expenditures more effective and more valuable to the candidate than truly independent expenditures. Often, committees that establish

131. More disclosure would be necessary because contributors need information in order to participate in the committee's decisionmaking. Participation is impossible unless the participants have at least minimal knowledge of the committee's finances and plans.

132. *See supra* notes 20-21 and accompanying text.

a course of communication with the candidate operate parallel campaigns in order to avoid the contribution limits.[133] These expenditures pose the same dangers of real and apparent corruption that large contributions do. Even after an election, the committees often will be able to extract improper commitments from officials because the committees' earlier expenditures for the candidate's campaign create a risk that the candidate will modify his behavior in order to ensure a continued flow of contributions.[134]

b. Proposed Criteria for Showing Course of Communication

To prove a course of communication between the candidate and the "independent" committee, the FEC[135] should use objective criteria rather than a test of the parties' state of mind. The criteria should be easily determinable by the FEC.[136] The purpose of the test should be to establish that a candidate and a political committee exchanged information in a way that increases the likelihood of improper commitments from candidates. There are several factors that the FEC might consider using in a test implementing the course of communication standard.

i. Crossover of former employees. Employees of the political committee may have recently worked for the candidate's campaign. These contacts are likely to increase the value of the expenditures to the candidate[137] and therefore enhance the possibility of improper commitments between committee and candidate.

ii. Concurrent contributions. The committee may have made loans or contributions to the candidate. Committees that give loans or contributions to candidates and then make "independent" expenditures

133. Examples of such parallel campaigning in the past include the American Conservative Union's expenditures for 1976 presidential candidate Ronald Reagan, *see* American Conservative Union Decision, *supra* note 106; NCPAC's expenditures against George McGovern in the 1980 South Dakota senatorial campaign, *see* National Conservative Political Action Comm., People for an Alternative to McGovern, *supra* note 16; and the five organizations that ran campaigns parallel to Ronald Reagan's in the 1980 presidential race, *see* Common Cause Brief, *supra* note 15, at 5-10. Several people predicted that *Buckley*'s result would be evasion of the contribution limitations. *See, e.g., Buckley*, 424 U.S. at 253 (Burger, C.J., concurring and dissenting); Rosenthal, *The Constitution and Campaign Finance Regulation After* Buckley v. Valeo, 425 ANNALS 124, 130-31 (1976).

134. *See supra* note 73.

135. The FEC would promulgate regulations for the enforcement of the amended statute, just as it does for the enforcement of FECA in general. *See* 2 U.S.C. § 437c(b) (Supp. V 1981).

136. To be effective, modern campaign reform cannot draw too extensively on the already anemic resources of the FEC. *See supra* notes 101-10 and accompanying text.

137. *See* NCPAC and the Burcham for Congress Comm., FEC Matter Under Review No. 299 (1976) (Staebler, C., dissenting).

may do so to circumvent the contribution limits. Such "independent" expenditures are actually additional contributions disguised as expenditures. Just as this conduct may lead to improper commitments, so might subsequent expenditures.[138]

iii. Sharing polling data. The committee and the candidate may share their polling data. Shared polling data allow the independent committee and the candidate to coordinate their campaigns precisely, without either party explicitly requesting expenditures by the other. This type of information makes independent committee expenditures highly valuable to the candidate. Data may be shared, plans may be laid, and commitments may be arranged before the expenditure is made.[139]

iv. Shared mailing lists. The committee and the candidate may use the same mailing lists. Shared mailing lists, like shared polling data, allow the political committee to conduct a surrogate campaign for the candidate. Possession of the candidate's mailing lists allows the independent committee to participate in the candidate's fundraising and to mail information to the voters without cost to the candidate. Shared mailing lists therefore free some of the candidate's resources to be spent on other tactics. Accordingly, the candidate would greatly value independent expenditures made on the basis of shared mailing lists.[140]

v. Shared fundraising efforts. The committee and the candidate may share fundraising efforts. These committee expenditures generate contributions from individuals and other committees to candidates. For example, the committee might mail out a fundraising appeal for the candidate, with the candidate's campaign headquarters as the return address. This tactic might generate many contributions worth far more in the aggregate than funds first collected by the committee and then contributed to the candidate. In the latter case, the committee would be subject to the $5000 contribution ceiling. A committee employing this fundraising tactic is in reality responsible for the contributions to the candidate almost as if it had made the aggregate contribution itself. Thus, the committee through use of this fundraising scheme poses as much danger of candidate corruption as any large

138. *See* American Conservative Union Decision, *supra* note 106.

139. *See* FEC Adv. Op. No. 1980-46, FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶ 5508 (June 25, 1980). Recognizing the potential for coordination, the FEC currently restricts independent committees from using the candidate's current or former pollsters. *See* FEC Adv. Op. No. 1979-80, FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶ 5469 (Mar. 12, 1980). This Comment's proposed amendment would also prohibit the independent committee's current or former pollster from working with the candidate, a practice the FEC still allows.

140. *See* American Conservative Union Decision, *supra* note 106.

contributor.[141]

vi. Shared vendors. The committee and the candidate may use a substantial number of common vendors (providers of goods and services to the campaign).[142] The use of common vendors may indicate substantial contact and exchange of information between agents of the candidates and independent campaigns. By itself, this criterion would establish a course of communication only if the nature of the information exchanged increased the value of the expenditures to the candidate and made improper commitments between candidates and spenders more likely.[143]

Unlike the present state-of-mind standard,[144] testing for the above factors involves only a minimal intrusion into electoral politics and effectively protects candidates in national elections from corruption by political committees. The presence of any one factor alone would establish that a course of communication had occurred and subject the expenditure to contribution limits. None of the factors require extensive investigation by the FEC. Information establishing the sharing of polls, vendors, or mailing lists, common employees or directors, and loans or contributions, is all directly available from the reports that candidates and committees currently must file with the FEC.[145] The remaining factor, shared fundraising efforts, would also take little investigation: a copy of the committee's fundraising materials would establish the nature of the committee's fundraising activities.

B. Constitutional Support

The proposed amendments to FECA's definition of independent expenditures meet the constitutional guidelines set out by the Supreme Court in *Buckley v. Valeo* and subsequent cases. The course of communication test seeks to ensure that committees claiming independence are truly independent. It follows the reasoning and intent of *Buckley* by focusing on the potential corruption of political candidates.[146] In-

141. *See* FEC Adv. Op. No. 1980-46, FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶ 5508 (June 25, 1980).

142. For example, the use of the same political consultants or media experts by candidates and independent committees would allow those vendors to coordinate effectively major elements of the separate campaigns.

143. *See* FEC Adv. Op. No. 1980-46, FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶ 5508 (June 25, 1980); American Conservative Union Decision, *supra* note 106.

144. *See supra* notes 105-07 and accompanying text.

145. *See, e.g.*, 2 U.S.C. §§ 433-434 (Supp. V 1981).

146. *See Buckley*, 424 U.S. at 47. The Court discounted the danger of expenditures corrupting candidates only if the expenditures are made in the "absence of any prearrangement or coordination" with the candidate. A course of communication, as defined in this Comment, invariably involves such coordination.

deed, FEC Commissioner Neil Staebler proposed a similar course of communication standard under existing statutes and regulations.[147]

The proposed amendment requiring that a committee purporting to be independent give contributors some direct participation in the committee also withstands constitutional scrutiny. As in *Buckley*, the amendment regulates the expenditure of money for political communication, and so must be examined with the same exacting scrutiny as a regulation of pure political speech.[148] But the actual spenders affected by this provision are the contributors to these committees, who express their views indirectly "through the speech of another"[149]—the committee. The Supreme Court has afforded such indirect or symbolic speech less constitutional protection than direct political speech.[150] As the Court has held in *Buckley* and other cases, because the speech of contributors is symbolic and indirect, a sufficiently important government interest may outweigh the marginal and indirect restrictions on individual contributors' first amendment rights.[151]

The proposed amendment serves two government interests. The first is the avoidance of real or apparent improper commitments between spenders and candidates.[152] Massive expenditures may create implicit commitments from candidates to committees: even where they do not, the public's fear that they might undermines the confidence in democratic institutions necessary to make the political process work.[153] The second government interest served is the protection of contributors to independent committees from the unauthorized use of their money. In passing on the validity and proper interpretation of statutes that

147. *See* American Conservative Union Decision, *supra* note 106.

148. *Buckley*, 424 U.S. at 16. *See also* First Nat'l Bank v. Bellotti, 435 U.S. at 786; Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 449-50 (1980) (a restriction on first amendment liberties must serve a valid state interest in the least restrictive manner possible).

149. *See California Medical Ass'n*, 453 U.S. at 197.

150. *See id.* at 196-97; Lowenstein, *supra* note 47, at 586.

151. *California Medical Ass'n*, 453 U.S. at 197-99; *Buckley*, 424 U.S. at 20, 21; Note, *supra* note 39, at 1005-06. The dominant test in such first amendment analysis is the balancing test, *see* Emerson, *supra* note 148, at 438, though some writers have urged an expansion of the clear and present danger test, *e.g.*, Comment, Brandenburg v. Ohio: *A Speech Test For All Seasons?*, 43 U. CHI. L. REV. 151 (1975).

152. *See Buckley*, 424 U.S. at 25.

153. The Court has a "long-standing concern to eliminate the effects of aggregated wealth on the election process." Epstein, *Corporations and Labor Unions in Electoral Politics*, 425 ANNALS 33, 57 (1976). *See also* 2 S. MORISON & H. COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 355 (4th ed. 1950) (the power of wealth has threatened to undermine political integrity). *See generally* Cort v. Ash, 422 U.S. 66, 82 (1975); Pipefitters v. United States, 407 U.S. 385, 416 (1972); United States v. Auto Workers, 352 U.S. 567, 570 (1957); United States v. CIO, 335 U.S. 106, 113 (1948).

limit the electoral involvement of corporations and labor unions,[154] the Court has gone beyond corruption prophylaxis to recognize an interest in the protection of corporate and union "contributors," i.e., shareholders and dues-paying union members.[155] Thus, there is direct authority for establishing the avoidance of real and perceived corruption and analogous authority for establishing the protection of committee contributors as valid government interests served by the proposed structural regulation.

Although the government interest in avoiding real or perceived corruption is the same in union or corporate campaign spending cases and political committee campaign spending cases,[156] obvious factors distinguish the two situations as far as the interests of member-contributors are concerned. Typically, dues are collected from all union members, including those who do not support the union's political views.[157] The law has therefore recognized the necessity of protecting union members, including minority interest members, from being forced by labor leaders and majority interests to make political contributions.[158] Minority shareholders in corporations have also been protected.[159] On the other hand, the rights of those who contribute to political committees to participate in committee decisionmaking and to be protected from the unintended use of their funds are relatively new concepts. Moreover, although contributors have considerable flexibility in choosing the objects of their donations, they have an economic and political stake in the activity of political committees. When those committees breach their promises or mislead their contributors, the contributors suffer a real injury.

The proposed remedy for protecting those who contribute to independent committees is not as severe as the restrictions placed on unions and corporations for the protection of their members and shareholders. The statutes safeguarding union members and corporate shareholders prohibit unions and corporations from using *any* general funds to finance campaigns.[160] The statutes force unions and corporations to set up separate, segregated organizations (political action committees) to solicit and spend funds.[161] They also describe in great detail

154. *See* Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (current version at 2 U.S.C. § 441b (1976 & Supp. V 1981)).

155. *See supra* note 153.

156. *Compare* Pipefitters v. United States, 407 U.S. at 413 *and* United States v. Auto Workers, 352 U.S. at 570 *with Buckley*, 424 U.S. at 25.

157. *See, e.g.*, United States v. Boyle, 482 F.2d 755, 760-61 (D.C. Cir. 1973).

158. Pipefitters v. United States, 407 U.S. at 421.

159. *See* United States v. Chestnut, 533 F.2d 40, 51 n.12 (2d Cir. 1976); *National Right to Work Comm.*, 501 F. Supp. at 436.

160. 2 U.S.C. § 441b(a) (1976).

161. *Id.* § 441b(b)(2)(C).

the procedures that union or corporate political action committees may use to solicit money from members, employees and shareholders.[162]

In contrast, the amendment proposed in this Comment merely requires independent political committees to abide by general procedural safeguards, in any way that they choose. The amendment only requires meaningful participation of contributors. It does not force independent political committees to adopt fixed structures or detailed procedures. Nor, unlike the disclosure and disclaimer laws[163] does the amendment compel the committees to release specific information in a particular way.

The proposed amendment is the least restrictive means of protecting the government's interests. First, the provision sets out minimal procedural goals rather than specific conduct. It requires that committees afford their contributors the opportunity to participate in committee decisions, but lets the committee decide how to implement the requirement. It is thus no more intrusive than the constitutionally valid structural, reporting, and registration requirements that exist in FECA today. Second, the amendment only affects committees that leave the spending decisions exclusively in the hands of political professionals. It does not restrict individuals or groups from making unlimited independent expenditures, if they themselves decide the manner in which to spend. Nor does it prevent the operation of those committees that lose their independent status. Unlike the expenditure prohibitions for unions and corporations, the provision merely reclassifies the expenditures as contributions and subjects them to the FECA candidate contribution ceilings.

A possible alternative to a requirement of contributor participation would be a disclosure requirement similar to those imposed to protect corporate shareholders. However, a law mandating committee disclosure to contributors would in some circumstances be more intrusive than the contributor participation requirement. To ensure that the level of disclosure is sufficient to protect contributors, a disclosure law, for example, may specify the information the committee must disclose, including the races the committee planned to enter, the candidates it intended to support or to oppose, the tactics involved in that opposition or support, the amount of money to be spent in every race, and possibly its won-lost record in other election years. This information would be provided to all contributors, whether or not they wanted it. In contrast,

162. *Id.* § 441b(b)(3), (4).

163. *Id.* §§ 434 (disclosure requirements), 441(d) (disclaimer provision requiring identification of sponsors of statements and solicitations). The Supreme Court found these disclosure statutes constitutional even though "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66.

the contributor participation amendment may require only a minimal level of participation to ensure accountability. Depending on the circumstances, such participation may be less intrusive than detailed disclosure requirements. While contributors may decide that the detailed information described above would be useful, they may also decide that such in-depth disclosure is unnecessary. Moreover, the committee as a whole, including the contributors, may choose to leave the short- and long-term management of the committee, including all but minimal disclosure, to the committee directors. In short, the proposed amendment gives both the committee and the contributors greater flexibility than a disclosure law to make the committee accountable.

CONCLUSION

Political committees that spend money independent of candidates are constitutionally protected from direct limitations on their expenditures. In spite of their legal independent classification, however, the extensive contacts between their professional staffs and the campaigns of the candidates they support lead to substantial coordination with the candidates' campaigns. This coordination, combined with the vast resources that independent committees spend on elections, leads to improper commitments between committees and candidates. Moreover, the committees' advantageous legal and political status and independent fundraising base allow the managers of the committees to use committee funds without accountability to candidates, parties, or the contributors to the independent funds.

This Comment proposes an amendment to the campaign finance laws that reduces the danger of candidate corruption by committees and increases the accountability of committees to their contributors and the public. The amendment defines as nonindependent all expenditures by political committees that engage in activity resulting in coordination with the candidate's campaign. It also classifies as contributions any expenditures by political committees that do not allow their contributors to participate in committee decisionmaking. Both nonindependent expenditures and contributions are subject to contribution limits under current law. Committees that engage in coordinated expenditures or that exclude their contributors from participation in committee expenditure decisions could therefore spend only limited amounts in any particular federal election. Thus, while the amendment is consistent with the Supreme Court's interpretation of the first

amendment, it also fulfills the legitimate congressional concerns in protecting the electoral process.

*Andrew P. Buchsbaum**

* A.B. 1979, Harvard College; Third-year studeut, Boalt Hall School of Law, University of California, Berkeley.