Democracy for Sale: The Need for Campaign Finance Reform

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Democracy for Sale: The Need for Campaign Finance Reform

Cover Page Footnote
Illustration by Arnie Bagchi
DEMONCACY FOR SALE:
THE NEED FOR
CAMPAIGN FINANCE REFORM

Kathleen A. Welch

Representative democracy in America is up for sale. Like farmers at a livestock auction, special interest groups are clamoring to place their bids on the members of Congress most likely to produce the best return on their investment. The present system of financing federal elections in this country has effectively placed Congress on the auction block, resulting in a dangerous erosion of our democratic institutions.

The influence of special interest money in electoral campaigns perverts the democratic process and seriously undermines principles of political participation and equality that are at the heart of the American system of government. The ability of organized interests to aggregate wealth and political power through political action committees (PACs) not only affects the outcome of elections and policy debates, but also vitiates legislative accountability. Perhaps the most insidious threat to democracy posed by the union of money and politics is the growing cynicism and diminished political participation among individual voters.

Congressional efforts to curb the negative influence of special interest money in American politics have been severely impeded by the Supreme Court and have thus been largely ineffective. The Court's landmark decision in Buckley v. Valeo essentially granted constitutional protection to the polluting role of concentrated wealth in elections. Under the present campaign finance system, the notion of "one person, one vote" has been rendered meaningless. An urgent need exists for broad reforms in campaign spending laws, as well as a re-evaluation of the Supreme Court's precedents in this area. This article examines the history and judicial review of federal campaign finance laws, analyzes the effect of uncontrolled campaign spending on the democratic process, and offers proposals for reform.

History of Campaign Finance in America

Although campaign financing emerged as a major issue in the 1832 presidential race between Andrew Jackson and Henry Clay, it was not until 1867 that Congress enacted the first restrictions on campaign activity. The Naval Appropriations Bill of 1867 prohibited government employees from soliciting money for political purposes from workers in the naval yards. Ongoing concern over the effects of the spoils system in federal employment led to enactment of the Civil Service Reforms Act in 1883. This law made it illegal for any federal employee to solicit campaign funds from another federal employee.

The "muckraking" era of the early twentieth century led to passage of the Tillman Act in 1907 which prohibited a corporation or national bank from making contributions from their treasuries to campaigns for federal office. During the next several years, requirements for campaign contribution disclosures were enacted, as well as the first expenditure limits for congressional candidates.

Congress revised the campaign finance system by enacting the Federal Corrupt Practices Act of 1925, which remained the principal campaign finance law until the early 1970's. The Act "continued the existing prohibitions on contributions by corporations and banks, and required the reporting of campaign receipts and expenditures, but...was infinitely evadable and was never really enforced." The discovery of massive campaign abuses during the Watergate scandal, and the skyrocketing costs of campaigns, prompted a government reform movement that culminated in the passage of sweeping campaign finance laws in the early 1970's. The Federal Election Campaign Act (FECA), enacted in 1971 and amended in 1974, created a comprehensive system of campaign finance restrictions. The Act contained six primary features:

(1) rigid spending limits for federal candidates;

(2) limits on the amounts any individual or committee could contribute to any candidate;

(3) public financing in presidential campaigns;

(4) requirements for disclosure and reporting of campaign contributions and expenditures.
The Act had a tremendous impact on the financing of American politics. In particular was the dramatic growth of PACs, entities which represent the economic, ideological or other interests of people by pooling money and distributing it directly and indirectly to the campaigns of individual candidates. Many PACs are affiliated with labor unions or corporations, although there are a large number affiliated with trade associations, membership organizations, ideological groups, and groups representing a particular cause such as the environment.13

According to Philip Stern, director of Citizens Against PACs, an organization that vigorously supports comprehensive campaign finance reform, "the 1974 law set off a PAC explosion."14 The Center for Responsive Politics, a national organization that conducts research on congressional and political trends, reports that "the number of PACs grew from 608 in 1974 to 4,828 by the end of 1988. Their total contributions to congressional candidates skyrocketed from $12.5 million in 1974 to more than $151 million in 1988."15

**Judicial Review of Campaign Finance Laws**

The campaign finance structure designed by Congress in FECA was dismantled by the Supreme Court's 1976 decision in *Buckley v. Valeo*.16 The *Buckley* Court equated campaign spending with speech and declared that the FECA restrictions affected "an area of the most fundamental First Amendment activities."17 Regulation of campaign spending should, in the Court's view, be "subject to the closest scrutiny,"18 but a compelling government interest could nonetheless justify burdens on free speech. The Court sought to balance the First Amendment rights of free speech and free association against the power of Congress to enact laws designed to protect the integrity of federal elections.19

Specifically, the *Buckley* decision struck down three of FECA's spending restrictions: (1) the limitations on independent expenditures made by individuals or groups on behalf of a candidate; (2) the limits on the amount of personal or family funds a candidate can spend on her/his own campaign; and (3) the aggregate limit on campaign expenditures.20 The Court upheld the restrictions on direct contributions to candidates,21 the disclosure requirements,22 and the establishment of the Federal Election Commission.23 The system for public financing of presidential elections was also left intact,24 and the Court explicitly stated that Congress could condition acceptance of those funds with spending limits.25

In declaring major provisions of FECA unconstitutional, the Supreme Court drew a highly questionable distinction between the effect of limits on direct contributions to a candidate — which were held permissible — and restrictions on "independent" expenditures — which were rejected. "Independent" expenditures included money given to and spent by "independent" individuals or organizations, principally PACs.26 In contrast to direct contributions to candidates, "independent" expenditures were, in the eyes of the Court, made without coordination with the candidate.

In upholding the limitations on direct contributions, the *Buckley* Court stated that such limits "entail[ed] only a marginal restriction upon the contributor's ability to engage in free communication."27 Moreover, the Court concluded that Congress' interest in preventing "the actuality and appearance of corruption resulting from large individual financial contributions" was a "constitutionally sufficient justification for contribution limitations."28 Acknowledging the corrosive influence of campaign contributions, the Court stated, "to the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of the system of representative democracy is undermined."29 Although the Court recognized the difficulty in proving the scope of such "pernicious practices,"30 it concluded that the problem was "not an illusory one."31

The Court further emphasized the danger of "the appearance of corruption stemming from public awareness of the opportunities for abuse"32 in a system allowing large financial contributions. According to the *Buckley* Court, it would be legitimate for Congress to conclude that "the avoidance of the appearance of improper influence is also critical if the confidence in the system of representative government is not to be eroded to a disastrous extent."33

Expenditure limitations, according to the Court, "represent[ed] substantial rather than merely theoretical restraints on the quantity and diversity of political speech" and thus violated the First Amendment.34 The Court, in apparent contradiction, found that the ceiling on independent expenditures failed to "serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process"35 and therefore, did not justify an infringement of the First Amendment.

The *Buckley* Court based its conclusion in part on the lack of empirical evidence of the effect of independent expenditures. The Court stated, "independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption compared to those identified with large campaign contributions."36

The *Buckley v. Valeo* decision has been met with considerable criticism by many commentators and advocates of campaign finance reform.37 U.S. Court of Appeals Judge J. Skelly Wright, who decided *Buckley* in the lower court and was a vociferous advocate of campaign spending limits, described the Supreme Court's decision as "tragically misguided."38 Indeed, the Court's rationale for the direct contribution-independent expenditure distinction is ex-
tremely weak and does not appear to be grounded in the reality of contemporary American politics. Nevertheless, the Buckley decision continues to be the leading judicial precedent governing campaign finance restrictions.

Subsequent Supreme Court reviews of campaign finance laws have reinforced the First Amendment protections granted in Buckley. The collective jurisprudence in this area suggests, however, that if it could be shown that campaign expenditures, like contributions, pose a serious threat of actual or potential corruption, the Supreme Court might reconsider the Buckley doctrine.

In First National Bank of Boston v. Bellotti, the Court struck down a Massachusetts ordinance limiting corporate expenditures on ballot initiatives. Significantly, the Court stated that if it could be shown that corporate advocacy "threatened imminently to undermine the democratic process...these arguments would merit our consideration." In a 1986 case, FEC v. Massachusetts Citizens for Life, the Supreme Court again recognized the potential for corruption arising out of corporate advocacy:

This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of ideas...Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace.

In Massachusetts Citizens for Life (MCFL), the Court found unconstitutional the requirement in FECA Section 316 that ideological nonprofit corporations create PACs in order to make independent campaign expenditures. According to the Court, such groups are formed to disseminate political ideals, not to amass capital, and thus do not pose the danger of corruption that justifies regulation of expenditures from their treasuries. In lengthy dicta, however, the five member majority explained why such a restriction on business corporations would be constitutional. According to one commentator, the Court's opinion, "says as much about why the political expression of business corporations may be regulated as it says about why the expression of MCFL was not." The dicta in MCFL suggests additional regulation of corporate PACs—like limits on expenditures—might be upheld if it could be demonstrated that corporate PAC expenditures resulted in corruption through the "unfair deployment of wealth for political purposes."

However, in Federal Election Commission v. National Conservative Political Action Committee (NCPAC), the Court made it clear that demonstrating the corrupting effect of independent expenditures would be extremely difficult. The Court declared unconstitutional a $1,000 limit on expenditures by PACs for the benefit of presidential candidates who voluntarily accepted public financing. The Supreme Court based its decision on the lack of compelling government interest since there was "no potential for corruption" related to the PAC expenditures. According to the majority in the NCPAC decision:

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

As in Buckley, the NCPAC Court further found that because the expenditures were made "independently" rather than by the candidate, there was no danger of corruption sufficient to justify the limitation. In the Court's view, 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 a quid pro quo for improper commitments from the candidate." This decision was reached in spite of extensive evidence presented by the FEC which demonstrated the corrupting influence of PAC expenditures.

Reconsidering the Buckley v. Valeo doctrine

Future efforts by Congress to reform campaign finance laws will continue to be significantly constrained by the Supreme Court's decisions in Buckley and more recent campaign finance cases. Nonetheless, at least two limited opportunities for judicial reconsideration emerge. First, a case could be made to demonstrate, based on new and more extensive evidence, the actuality and appearance of corruption that arises from the present campaign finance system. Second, other compelling government interests might convince a majority of the Court to allow greater restrictions on financing.

A. The corrupting effect of the present campaign finance system on the democratic process.

Democracy in America is perceived as a system of representative government, where individual citizens choose leaders to represent their interests by exercising their right to vote. Participation in politics, beyond the vote, is widely valued as important to the proper functioning of democratic government.

At the root of American democracy is the ideal of political equality. In the Federalist Papers, James Madison described the nature of political equality in what would become this country's system of government.

Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more
As Chief Justice Warren wrote in *Reynolds v. Sims*,55 "Representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies."56

The unfortunate reality is that the dramatic rise in the price of campaigns and the influence of special interest money in politics have severely distorted the political process and destroyed notions of political equality supposedly inherent in American democracy. Rather than representing the constituents who voted for them, members of Congress seem to be in the business of raising money, assuring reelection, and representing the concerns of the special interests who line their campaign coffers. Uncontrolled campaign spending — the legacy of Buckley — has created a system dependent upon PAC money that favors incumbents and candidates with personal wealth. The voices of individual citizens have been seriously diluted by the influence of those with organized economic power.57

Campaign spending has risen enormously since the 1970s, particularly among candidates for the Senate and House of Representatives. In the 1988 election cycle, congressional candidates spent a total of $457.7 million, up from $115.5 million in 1976.48 The costs of electoral campaigns has diminished the responsiveness of members of Congress to the individual voter. Many members have been forced to become professional fundraisers first and democratic representatives second. In 1988, the average cost of winning a campaign for a seat in the House of Representatives was $399,000, and just over $4 million for the Senate.59 This means that each member of the House would have to raise nearly $17,000 per month during a two-year term, and Senators would be required to raise almost $56,000 per month during their six-year term. One former Congressman estimated that Senate candidates spend roughly 80-90 percent of their time raising money, rather than truly discussing the issues with voters.60 These fundraising demands have made it extremely difficult for members of Congress to be truly responsive to the individual voting constituent.

There is a direct correlation between the amount of money spent in an election and the result. For example, in more than half of the races for the U.S. House of Representatives in 1988, the winner outspent the loser by a factor of ten to one or greater.61 The rising costs of elections and the inherent advantages of incumbency have led to what one watchdog group calls "the permanent Congress."62 More than 98 percent of incumbents in the House of Representatives won reelection in both 1986 and 1988.63 Incumbents in congressional races have a seemingly insurmountable ad-

vantage over challengers, in large part because of their ability to raise special interest money and to "stockpile" campaign funds.

As of January 1989, House members of the newly elected 101st Congress had amassed more than $67 million — an average of $154,000 each — in their campaign war chests for future elections.64 According to Public Citizen's Congress Watch:

Large campaign "war chests" ... often discourage otherwise likely and qualified challengers from running . . . . Because the American public is offered few options among candidates, it can expect limited debate on the issues as well as diminished accountability. As a result, incumbents are reelected at unprecedented rates, creating a 'permanent' Congress — one which often fails to represent the prevailing views of the American public.65

Competition in the political marketplace is at an all time low. In a report on campaign spending in the 1988 elections, the Center for Responsive Politics pointed to a range of reasons for this situation:

Considering a variety of factors — the record low number of new members elected, the gap in spending between winners and losers, the vast disparity in fund raising between incumbents and challengers, and the highest incumbent reelection rate since 1792 — the congressional elections of 1988 may well have been the least competitive in the history of the United States.66

Further tainting the electoral process is the fact that the source of much of these campaign funds are the special interest PACs, who seem to have an unlimited capacity to raise money.67 In the first six months of 1987, the leading corporate, labor, trade association, and professional PACs (i.e. those that solicited over $100,000 in contributions) raised nearly $30 million, more than double the amount raised over the same period in 1983.68

There is little doubt that the aim of the PACs is to buy access and influence votes. According to Archibald Cox, Chairman of the citizen watchdog group Common Cause and one of the lead attorneys in the *Buckley* case, "it is universally agreed that money buys access to legislators and executive officials."69 Efforts by the PACs to control the democratic process through elections and policy debates are well-documented and accepted in political circles.70 Larry Sabato, a political scientist who has written extensively on PACs, asserts, "Members of Congress have themselves frequently offered the harshest interpretations of the effect of PAC money on their voting proclivities."71
Senate Minority Leader Robert Dole of Kansas has observed, “When these PACs give they expect something in return other than good government.” Representative Tom Downey of New York put it even more bluntly, “You can’t buy a congressman for $5,000. But you can buy his vote. It’s done on a regular basis.”

Even PAC representatives themselves admit that their goal is to further their own group’s special interests. The director of the American Trucking Association made this clear when he stated, “We'll buy a ticket to anyone's fundraising event, as long as he [sic] didn't vote the wrong way on trucking issues.”

Looking at PAC giving patterns, their influence-buying motives are readily apparent. PACs have a remarkable pattern of favoritism toward incumbents. In 1988, PACs gave approximately 74 percent of their contributions to incumbents. PACs attempt to ensure access by giving to both candidates in a contest, contributing to candidates whose philosophy they don't necessarily share and, after elections, giving to a winning candidate they had previously attempted to defeat. It is difficult to imagine any other motive for PAC giving than what amounts to legalized bribe. It certainly seems improbable that PACs would have expended such large sums of money if they didn't think it would purchase something.

Although it is not easy to empirically document a quid pro quo connection between PAC contributions and expenditures and legislative outcomes, there are innumerable examples that suggest a strong correlation.

Studies of issue after issue demonstrate that a much higher percentage of legislators who voted with a PAC's position received money from that PAC in the previous campaign than those who voted the other way, and among the beneficiaries of PAC money, those supporting the PAC position had received a substantially higher average contribution.

PACs tend to concentrate their giving on members of Committees with jurisdiction and control over their interest. For example, a 1987 study by Common Cause revealed that the top ten defense industry contractors concentrated 41 percent of their 1986 contributions and three-quarters of their 1985 honoraria on the 18 percent of lawmakers who make up the defense-related committees of Congress. On the average, PACs contribute 20 percent more to the Chairs of House Committees than other representatives.

The tactics of PACs are not necessarily subtle or hidden in the record books of the Federal Election Commission. In 1981, the National Conservative Political Action Committee (NCPAC), sent the following message to a member of Congress:

If you will make a public statement in support of the President's tax cut package and state that you intend to vote for it, we will withdraw all [independent, hostile] radio and newspaper ads planned in your district. In addition, we will be glad to run radio and newspaper ads applauding you for your vote to lower taxes.

Such evidence suggests that prearrangement and collaboration between PACs and official candidate campaigns is common. “In actual practice, the activities of candidate-oriented PACs are coordinated and integrated with the official campaign effort.” Proof that coordination between “independent” spenders and campaigns certainly weakens the Buckley Court’s rationale that “independent” expenditures do not threaten to corrupt the political system. Furthermore, in today’s sophisticated media oriented campaign process, direct coordination is no longer necessary for “independent” expenditures to directly influence campaign outcomes and for candidates to recognize a PAC’s efforts on her behalf.

The effect of PAC influence-peddling on legislative and electoral outcomes raises serious questions about just who Congress represents. One result of this distortion of representative government is often that when special interest groups prevail, huge costs are shouldered by the rest of the citizens. For example, in the late 1980's, the financial lobbying tactics of one special interest left the American taxpayer holding an enormous bill. During what has become known as the savings and loan (S&L) scandal, an owner of a failed S&L and his associates directed $1.3 million to the campaigns and political causes of five U.S. Senators. These Senators intervened on behalf of the failing S&L to discourage banking regulators from taking action. The Senators later became the subject of ethics investigations. As a consequence, taxpayers will be forced to pay more than $2 billion to bail out the bank.

Legislators who have been the beneficiaries of spending by outside special interest PACs (collections of individuals who cannot vote for them) may become less accountable to their true constituents:

The PACs and their lobbyists are often able to push their way in through the turnstiles ahead of a lawmaker's own constituents, even though they do not live, vote, or pay taxes in the lawmaker's state or district. To the extent that this is so, the influence of local voters is diluted.

According to Representative Leon Panetta of California, "It's now tough to hear the voices of the citizens in your district. Sometimes the only things you can hear are the loud voices of the three-piece suits carrying a PAC check."

Defenders of PACs suggest that the evolution of PACs is simply a manifestation of pluralism. Herbert Alexander, an expert in the field of campaign finance points out that, "PAC proponents stress that contributions are made by em-
ployees, of their own free will, and that their aggregate political voice, meeting with other such voices in the political arena, form something close to the textbook ideal of pluralist democracy. It has also been argued that "PACs provide an effective voice for people who would not otherwise be heard." Those who advocate "PAC democracy" also point out that PACs have "mobilized a substantial number of Americans to participate in politics," thus enhancing participatory democracy.

These claims of "PAC democracy" are ill-founded. PAC participation in politics falls so far short of the pluralistic ideal of political equality through competing interest groups, because many segments and interests of the electorate are not represented. As Senator Robert Dole has said, "There aren't any Poor PACs or Food Stamp PACs or Nutrition PACs or Medicare PACs."

Furthermore, political participation in PACs hardly reflects the traditional notion of participatory democracy:

PACs tend to be bureaucratically organized and centralized, often at the national level. The voice of the PAC is not that of its small givers whose participation is extolled by PAC pluralists, but of its leadership who decide where to bestow the money.

This point has been further emphasized by David Adamany, a legal scholar and political scientist who has written extensively on campaign finance: "The real or effective financial constituency in these circumstances is the PAC and its leadership, not the small givers to the PAC campaign war chests. The candidate knows the programs and objectives of the PAC officers that [sic] preferred access is given."

The ability of PACs to aggregate wealth and magnify their political influence without regard to the size of their membership, results in a form of "multiple voting." Multiple voting is an effort to expand "influence beyond the single ballot to which all citizens are legally entitled." It is precisely this undue influence that poses such a grave threat to political equality and American democracy. According to Adamany, "money's extreme potential for multiple voting points to an important issue of political finance policy in democracy: preventing gross inequalities in the meaning of the vote."

Contrary to the Supreme Court's conclusion in Buckley and its progeny, it is widely held in the academic and political worlds alike that "money is a corrupting influence and that PAC money, being the most concentrated and the most blatant, is the most dangerous of all." The accumulation of evidence demonstrating the actuality of corruption stemming from PAC contributions and expenditures since the Buckley decision merits reconsideration by the Court.

Additionally, the documented effects of the present system on public confidence in government illustrate that the appearance of corruption, an interest the Supreme Court declared significant enough to allow First Amendment infringement, has not been avoided. Statements made frequently by members of Congress indicate that elected officials themselves believe the present system creates both the appearance and actuality of corruption. The most convincing evidence of the public's concern for the corrupt nature of campaign financing can be found in survey research. In an independent poll sponsored by national citizen groups in March 1990, 30 percent of voters polled said that their own member of Congress is "caught up and corrupted by the system of money and politics" and another 27 percent stated that they did not know. Previous survey research has also reflected the public's concern for the influence of special interest money.

B. Other compelling government interests

The Buckley decision indicated that further regulation of campaign spending could be upheld if other significant government interests were demonstrated. In the years following Buckley, at least two critical government interests have become apparent: the preservation of representative democracy and the restoration of the electoral process as the primary means by which individual citizens participate equally in politics. Although the Supreme Court failed in Buckley and subsequent cases to identify these interests as compelling, current evidence indicates that they may be significant enough to support additional campaign finance restrictions.

The escalating cost of campaigns and candidates' increasing dependence on special interest funds have distorted representative democracy. An even greater threat to the future of American democracy is the growing cynicism and apathy of the American voter toward the electoral process. Former Senator Charles McC. Mathias, a Republican from Maryland, pointedly raised the issue of public confidence when he stated:

Almost as bad as the potential for inequity and corruption in the current system of campaign finance is the general perception of undue influence. The latest Harris poll shows that 84 percent of Americans...believe that 'those who contribute large sums of money have too much influence over the government.' Now, I have no doubt that this cynicism contributes to our terrible state of voter apathy, apathy to the extent that over half of the eligible voters do not bother to turn out for congressional elections.

According to Archibald Cox, "The close correlation between PAC contributions and legislation breeds cynicism and then alienation from the political process." Existing statistical evidence exists which indicates that increasing apathy and alienation of the general public has resulted in a dramatic decline in voter turnout. In testimony on cam-
campaign financing before a Senate Judiciary Subcommittee, Senator Alan Cranston (D-CA) stated:

With each drop in public confidence or each increase in public cynicism we run the risk of irreparably damaging our democratic system. It is no coincidence that voter participation, which has steadily declined during the second century of our democracy, has done so during a time of rising campaign costs and public lack of confidence. So dire is the situation that more people watched the Superbowl this year than voted in the 1988 Presidential elections.105

Elizabeth Drew, a noted author and political journalist, effectively summed up the real costs of the current system of campaign finance in her book, Money and Politics:

We are paying in the declining quality of politicians and of the legislative product and in the rising public cynicism. We have allowed it to become increasingly difficult for good people who remain in politics to function well. What results is a corrosion of the system and a new kind of squalor....As the public cynicism gets deeper, the political system gets worse. Until the problem is dealt with, the system will not get better. We have allowed the basic idea of our democratic process — representative government — to slip away.106

As Dean Rosenthal of Columbia University described the interest in restoring the electoral process:

The goal of enriching the electoral system, through broadening the base of citizen influence and reducing inequities in the opportunities of candidates and their supporters to persuade the electorate, is a worthy one; it is not only consistent with but indispensable to the attainment of one of the most fundamental purposes of the Constitution.107

The Buckley doctrine that prohibits limitations on "independent" expenditures should be overruled and further campaign finance restrictions should be allowed. Based upon the convincing evidence that actual and perceived corruption have not been avoided, the Supreme Court should also acknowledge other compelling government interests that justify more stringent regulations of campaign financing.

Reforming the Campaign Finance System

The aim of efforts to restructure our present system of financing election campaigns should be to lessen the influence of "interested money," that is, money spent with the expectation of some type of direct or indirect return. Another important goal should be to reduce the costs of campaigns. Candidates and elected officials need to be freed from the constant demands to raise exorbitant sums of money. Elected officials should be responsible to the constituents who vote for them, not to those special interests who finance their campaigns. The campaign finance system should encourage political competition, allowing candidates without personal wealth a fair opportunity to run for office. Finally, campaign finance reforms should encourage open public debate on the issues, and individual citizen participation in the democratic process.

Any attempts by Congress to reform the campaign finance system will be subject to the restrictive constitutional guidelines laid down by the Supreme Court in Buckley and its progeny. Mounting evidence of the corrupting influence of money on politics and the emergence of additional compelling government interests could move a majority of the Court to allow limitations on "independent" expenditures and further limitations on direct contributions. Such limitations are essential to effectively loosen the stranglehold special interests appear to have on members of Congress and the democratic process.

Any legislative reforms of the campaign finance system will undoubtedly be met with political as well as constitutional obstacles. While many members of Congress decry the high costs of elections and influence-peddling of the PACs, many continue to be resistant to changing the system that elected them. Nevertheless, the political climate in Washington seems to be ripe for change. The recent savings and loan scandal and the extensive ethics investigations of members of Congress over the past few years, have underscored the urgent need for an overhaul of the campaign finance system.109 President Bush is the first Republican President since Teddy Roosevelt to declare campaign finance reform a priority issue, and both the Senate Majority Leader and the Speaker of the House of Representatives have pledged to bring this matter to a vote. 110

The demand for broad campaign finance reforms is widespread. A coalition of 56 national organizations was formed in February 1990 to advocate for comprehensive changes in the present system.111 Surveys also indicate strong and rising support for campaign finance reforms among the American electorate. In a poll released in March 1990, 58 percent of American voters stated that they would support public financing for candidates for Congress and a ban on private contributions; only 33 percent expressed opposition. The poll also found that 77 percent of those surveyed supported an overall spending cap on congressional campaigns, and 71 percent favored severe restrictions on contributions by PACs.112 Finally, many academic and legal commentators have pointed to the need for a new system for financing elections in order to prevent political money from distorting legislative decisionmaking.113

A comprehensive package of legislative reforms — designed to abide by the Supreme Court's doctrine on cam-
campaign finance — should include four major components: 1) public financing and overall spending caps in congressional elections; 2) measures to reduce the costs of campaigns; 3) limits on PAC contributions; and 4) measures to close certain loopholes in existing campaign finance laws. Additionally, Congress should strengthen the enforcement powers and independence of the Federal Election Commission, the agency in charge of overseeing the implementation of campaign finance regulations.¹⁴

1) Public financing of congressional campaigns

A system of public financing for congressional races, like the system now in place for presidential elections, would reduce the influence of PACs in House and Senate elections.¹⁵ It could also help to restore real competition in the political marketplace. In general, a public financing system would allow a candidate to receive public funds once she raised a threshold amount of small private contributions and agreed to adhere to voluntary spending limits. According to Fred Wertheimer, President of Common Cause, the advantages of public financing are:

(1) Candidates would be less dependent on special interest groups' contributions because they would have an alternative way to finance their races.

(2) Incumbents would have less of a financial advantage than they now have. Challengers would be able to have small contributions collected from supporters matched by public funds. The amount of funds available to challengers should increase substantially.

(3) It would be to a candidate's advantage to try to get as many small individual contributions as possible, because each of these small contributions would be matched by public funds.¹⁶

Public Citizen has argued that, "the effort to drive special interest money out of the system will only succeed if it is replaced by untainted funds" and that public financing is the best mechanism to achieve that goal.¹⁷ Public Citizen also argues that public financing will benefit incumbents and challengers alike.¹⁸

Public financing of congressional races has received wide support.¹⁹ In the words of Judge J. Skelly Wright, "with one stroke public financing could do much to remove the poison of money from the political bloodstream — even within the confines of the narrow constitutional limitations the present Supreme Court imposes on us."²⁰

2) Measures to reduce costs of campaigns

In order to dilute the influence of special interest money on elections, it is necessary to lessen the need for politicians to raise enormous sums for their campaigns. Public financing coupled with voluntary spending limits is one way to do this.²¹ Congress should also enact measures which would help to bring down the costs of campaigns, particularly media costs. Campaigns have become increasingly dependent upon costly television advertising, which has become the primary source of the rising cost of campaigning.²² In the past, Congress has required television stations to provide air time to candidates at reduced rates prior to primary and general elections.²³ It has also been proposed that Congress require broadcasters to allow for a specified amount of free air time for candidates.²⁴ Free air time could be utilized as a forum for substantive public debate of the issues facing voters. Congress could also lower postal rates for congressional campaigns, thus allowing candidates to communicate directly with individual voters at reduced costs. Although incremental in nature, such cost reduction measures could do much to mitigate the burden of rising campaign costs.

3) Limits on PAC contributions

Further limiting the amount that PACs can directly contribute to candidates would help to diminish their undue influence. Under the FECA, PACs may now contribute up to $5,000 to each candidate; individuals may contribute up to $1,000. There is no limit on the overall amount a candidate can receive from all PACs.²⁵ Proponents of limits on PAC contributions believe more restrictive limits need to be placed on both individual PAC contributions and the aggregate amount of PAC money a member of Congress can receive.²⁶ In support of the aggregate contribution limit, David Adamany has stated, "this kind of aggregate contribution limit addresses the danger of a coalition contributing in which many corporations, trade associations and unions with similar interests dominate the financial constituency of members of Congress who hold key leadership or committee seats."²⁷

4) Measures to close loopholes in existing law

Under FECA, a loophole currently exists that allows unlimited contributions from corporations, unions, and wealthy individuals to political parties, as long as they are directed into "soft money" accounts. "Soft money" consists of funds used for such activities as voter registration, get-out-the-vote campaigns and other party building efforts. According to Public Citizen, "soft money" presents two major problems:

First, since many of the "soft money" activities are designed to influence federal elections, it represents a flagrant evasion of spending limits. Second, it is a vehicle for corporations, unions and wealthy individuals to give tremendous sums of money (sometimes exceeding $100,000) with the hope of later gaining influence and access.²⁸
Public Citizen has proposed that "soft money contributions intended to affect federal elections should be subject to the same limits placed on contributions made directly to federal candidates." 

Achieving a political consensus on comprehensive campaign finance reforms within the Congress will no doubt prove extremely difficult. Since the Buckley decision, many unsuccessful attempts at reform have been made. However, in light of growing public support for changes, and recent political scandals, the prospects for reform may be better than ever. In the 101st Congress, more than 30 pieces of legislation dealing with some aspect of campaign finance reform were introduced. These legislative proposals addressed a wide range of campaign finance reforms; some of the bills included many of the elements necessary for comprehensive reform.

In March 1990, a bipartisan panel of experts appointed by Congress released a compromise package of proposals that some politicians believed could be a catalyst for a final legislative consensus on this issue. Although the compromise package may break a political logjam, it has been widely criticized as too weak to resolve our present crisis in the financing of elections.

Unfortunately, the nature of the political process suggests that whatever reforms Congress enacts will likely be incremental in nature. If Congress expects to restore public confidence in the political process, however, it should move expeditiously to enact a bold and comprehensive package of campaign finance reforms.

Conclusion

The political experiences in the intervening years since the Supreme Court first established the doctrine governing campaign finance in Buckley v. Valeo have brought us to a point of urgency. Judge J. Skelly Wright eloquently described our present crisis in democracy more than seven years ago:

When money becomes more important than people, when media mastery weighs more heavily than appeals to judgment, when opportunities to communicate with voters are extremely unequal, the result is a cynical distortion of the electoral process. The people's choices are not based on their informed preferences among ideas and candidates and government of the people, by the people, and for the people becomes an empty shibboleth.

Democratic institutions in America are more accurately characterized as government of the PACs, by the PACs, and for the PACs. Restoring representative democracy and enhancing political participation and equality requires that the influence of special interest money in politics be significantly diluted, if not eliminated. It is time for Congress to muster up the political will to enact strong new campaign finance reforms. Moreover, it is time for the Supreme Court to abandon the misguided doctrine of Buckley v. Valeo.
The activities of the 1972 campaign to re-elect Richard Nixon were financed largely by unreported campaign contributions. According to John Gardner, head of a citizens watchdog group, Common Cause, in 1973, *Watergate is not primarily a story of political espionage, nor even of White House intrigue. It is a particularly malodorous chapter in the annals of campaign financing. The money paid to the Watergate conspirators before the break-in — and money passed to them later — was money from campaign gifts.*

This charge was later proven accurate when tape recordings of Nixon's conversation with staff revealed that Nixon knew of — and agreed to cover up — the use of campaign funds in the Watergate break-in. Cong. Q., Inc., supra note 3, at 10, 11.


PACs are not easily categorized. The category 'political action committee' actually encompasses an enormously diverse set of organizations. The FECs categories — labor, corporate, trade/member/health, non-connected, cooperative, and corporation without stock — only begin to suggest the variety. Even within each of these categories, PACs differ widely. Some are little more than entrepreneurs with mailing lists; others are adjuncts of large corporations or labor unions. In some, all contribution decisions are made centrally; others encourage extensive input from members. Some have immediate, narrow, self-interested goals; others pursue long-term objectives involving widely shared values or collective goods. Most PACs only give money; but a few of them also supply campaign workers, work to get out the vote, produce advertising, advise on campaign strategy, and recruit and train candidates...
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40. See Cox, supra note 37, at 418. Cox explains that in the future the connection between corruption and expenditures might be recognized by the Court. "Although it would seem difficult, if not impossible, to prove categorically that the factual condition that Justices Marshall, Blackmun and O'Connor found not to have been demonstrated, it seems quite probable that judicial understanding may change as the public comprehension of the evil increases . . . ."

See also, White's dissent in FEC v. National Conservative Political Action Committee, 470 U.S. 480, 510 (1985), "The possibility was left open, and remains open, that unforeseen developments in the financing of campaigns might make the need for restrictions on "independent" expenditures more compelling. The time may come when the governmental interests in restricting such expenditures will be sufficiently compelling to satisfy not only Congress but a majority of this Court." See also supra note 36.

42. Id. at 789.
43. 479 U.S. 238 (1986).
44. Id. at 257, 258. The Congress and the Supreme Court have long supported the need for some regulation of corporate political activity. Since the Tillman Act of 1907, corporations have been prohibited from making contributions from their treasuries to campaigns for federal office. Section 316 of FECA (2 U.S.C. Section 441b) prohibits corporations from using treasury funds to make independent expenditures and requires the use of separate segregated funds for such purposes. The rationale behind regulation of corporate political activity has been described by the Supreme Court as the need to "eliminate the effect of aggregated wealth on federal elections," (Pipefitters v. U.S., 407 U.S. 385, 416 (1972) to curb the political influence of "those who exercise control over large aggregations of corporate funds in connection with any election); Austin v. Michigan Chamber of Commerce, supra note 39, upheld a Michigan law that prohibited corporations from using general treasury funds for independent expenditures in connection with state candidate elections. Similar to Section 316 of FECA, the Michigan law required corporations to create separate segregated funds from which to make independent expenditures. According to the Court, "they are justified by a compelling state interest: preventing corruption or the appearance of corruption in the political arena by reducing the threat that huge corporate treasuries, which are amassed with the aid of favorable state laws and have little or no correlation to the public's support for the corporation's political ideas, will be used to influence unfairly election outcomes." Id.

46. Nicholson, Basic Principles or Theoretical Tangles: Analysing the Constitutionality of Government Regulation of Campaign Finance, 38 Case Western L. Rev. 589, 596 (1988). The constitutionality of regulating the political expression of business corporations was recently upheld by a six-member majority of the Supreme Court. On March 27, 1990, the Court in Austin v. Michigan Chamber of Commerce, supra note 39, upheld a Michigan law that prohibited corporations from using general treasury funds for independent expenditures in connection with state candidate elections. Similar to Section 316 of FECA, the Michigan law required corporations to create separate segregated funds from which to make independent expenditures. According to the Court, "they are justified by a compelling state interest: preventing corruption or the appearance of corruption in the political arena by reducing the threat that huge corporate treasuries, which are amassed with the aid of favorable state laws and have little or no correlation to the public's support for the corporation's political ideas, will be used to influence unfairly election outcomes." Id.

47. 479 U.S. 238, 259. According to Marlene Nicholson, a legal scholar who specializes in campaign finance, a reasonable argument could be made that the lack of [campaign expenditure] limitations have made it nearly impossible to curb the "corrosive influence" they spoke of in
the more they spend because their campaign expenditures purchase the attention of voters." The effect of money is most clear-cut in elections for open seats, where there is no incumbent. Money is not as critical a factor for the success of incumbents who have other advantages of office-holding. Id. at 48-49.

62. Public Citizen’s Congress Watch, House Insurance How the Permanent Congress Hoards Campaign Cash (1989). Public Citizen is a citizen watchdog organization founded by consumer advocate Ralph Nader. Public Citizen’s Congress Watch is a leading advocate for campaign finance reform. Because incumbents have a record of service, regular news coverage and, as a result, name recognition, they have a natural advantage over challengers. Congressional incumbents also enjoy the congressional franking privilege which allows them to communicate regularly with their constituents, postage free.

63. Id. at 2.
64. Id. at 1.
65. Id. at 3.
66. L. Malkinson, supra note 15 at 3.
67. See L. Malkinson, supra note 15. According to the Center for Responsive Politics, "The proportion of PAC receipts to total receipts has been on the rise since the early 1970s, while the share from all other sources — including individuals and political parties — has been declining. In 1974 PAC contributions accounted for only 17 percent of the campaign receipts going to House candidates. By 1988 that proportion had risen to 37 percent." Id. at 9.
68. P. Stern, supra note 14, at 195.
69. Cox, supra note 37, at 410.
70. See generally P. Stern supra note 14; E. Drew, supra note 9; G. Jacobson, supra note 61; B. Jackson, Honest Draft, (1988); Cox, supra note 37; Cong. Q., Inc., supra note 3; Common Cause, How Money Talks in Congress, (1979). As a former lobbyist for a consumer and environmental group in Washington, DC, the author confirms that the conventional view of national politics is that the primary purpose of the PACs is to purchase access and votes.
71. L. Sabato, supra note 13, at 127.
72. Cox, supra note 37, at 401, citing Running With The PACs, Time Magazine, October 25, 1982, at 20.
73. Id. Many members of Congress have been quoted complaining about the influence of money on the voting process. For example: "Anytime someone, whether a person or a PAC gives you a large sum of money, you can’t help but feel the need to give the extra attention, whether it is access to your time or, subconsciously, the obligation to vote with them." Rep. John Bryant (D-TX); "We are the only human beings in the world who are expected to take thousands of dollars from perfect strangers on important matters and not be affected by it." Rep. Bamey Frank (D-MA); "I fear we could become a coin-operated Congress. Instead of two bits, you put in $2,500 and pull out a vote." Rep. Barbara Mikulski (D-MD); "The only reason it isn’t considered bribery is that Congress gets to define bribery." Rep. Andrew Jacobs (R-NJ). L. Sabato supra note 13, at 126, 127.
74. L. Sabato, supra note 13, at 136. See also P. Stern, supra note 14, at 123-127.
76. P. Stern, supra note 14, at 5.
77. Wright, supra note 37, at 618. See generally supra note 70; Wertheimer and Hovva, Campaign Finance Reform: Past Accomplishments, Future Challenges, 10 NYU Rev. of Com. and Soc. C. 43, Notes 40, 41, and accompanying text (1980-81); Wertheimer. The PAC Phenomenon in American Politics, 22 Arizona Law Rev. 603 (1980); P. Stern, supra note 14. For specific examples, see A. Allen, PAC Contributions Influence Clean Air Act Votes (1989) (unpublished manuscript available from U.S. PLRG); K. Welch, Nuclear Power Industry PAC Study (1987) (unpublished manuscript available from U.S. PLRG). This author notes from personal experience (detailed in part in the preceding study) that PAC activities do appear to have an effect on legislative outcomes. For example, it is not uncommon for certain industry PACs to schedule fundrais-
ing events for individual members of congressional committee just before or after key committee votes. In Washington lobbying circles the correlation between PAC activities and legislative outcomes is quite obvious, rarely disputed, and accepted as part of "playing the game" But see, Wright, PACs, Contributions, and Roll Calls: An Organizational Perspective, 79 American Political Science Review 100 (1985); Budde, The Practical Role of Corporate PACs in the Political Process, 22 Arizona Law Rev. 55 (1980). For a discussion of both viewpoints, see Kessler, Running From the PAC, 22 Arizona Law Rev. 627, 643-644 (1980). Also see generally, L. Sabato, supra note 13. Sabato concludes that "the available evidence seems to be that PAC contributions do make a difference, at least on some occasions, in securing access and influencing the course of events on the House and Senate floors." Id. at 135. Sabato points out, however, that the occasions are more limited than PAC critics and members of Congress suggest.


77. P. Stern, supra note 14, at 5-6.

78. Cox, supra note 37, at 411 (citing 127 Cong. Rec. H 4911 (July 27, 1981)).

79. Bernhardt, supra note 37 at 739. See also supra notes 36, 52. A television interview during the 1980 Presidential campaign with Senator Jesse Helms, chairman of the independent North Carolina Congressional Club, which made expenditures on behalf of President Reagan, points further to the problem of coordination. "Well, as you may know, we have an independent effort going in North Carolina. Uh, the law forbids me to consult with him [Mr. Reagan], and it's been an awkward situation. I've had to, sort of, uh, talk indirectly with Mr. 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...." O'Neill, Independent Spending, Political Action Committees, and the Need for Further Campaign Finance Reform, 37 Depaul L. Rev. 611, 633 (1988), citing Brief for Appellants at 31, Common Cause v. Schmidt, 455 US. 129 (1982).

80. O'Neill, supra note 81, at 633.


82. P. Stern, supra note 14, at 15.


87. E. Drew, supra note 9, at 96.

88. Wight, supra note 37, at 619. Not all commentators agree that PACs are undemocratic. See generally Budde, supra note 77. Adaman, PACs and the Democratic Financing of Politics 22 Ariz. L. Rev. 569, 596 (1980).

89. D. Adamany, supra note 88, at 1014 (citing D. Adamany, Financing Politics 12 (1959)).

90. Id.

91. Adamany, supra note 92, at 571.

92. See supra notes 6-52, and accompanying text.

93. Bernhardt, supra note 37, at 742, note 111. See also P. Stern supra note 14.

94. See supra note 28, and accompanying text.

95. See supra note 73, and accompanying text.


The American public has turned against Washington and the Congress in the past year— and are increasingly doubtful of congressional ethics and the role of money in politics. Voters are in an anti-political mood. They are prepared to think the worst of politicians and respond to attacks that highlight how members, obliged to special interests, have lost touch with people. The scandals surrounding the savings and loan industry. In particular, have created a political moment where voters are able to make a conceptual link between campaign money and their own interests and quality of representation. The overwhelming majority of voters believe the current system for financing campaigns is basically un- sound, and an increasing number are prepared to turn to a new system, including one based on public financing. Id. at 1.

100. See generally, O'Neill, supra note 81, at 638, n. 213.

101. See supra note 53.


103. Cox, supra note 37, at 401.

104. Bernhardt, supra note 37, at 746, citing Packwood, Campaign Finance, Communications and the First Amendment, 10 Hastings Cont. L. Q. 745, 783-84. See also, Ladd, Opinion Roundup, Public Opinion 32 (Apr./May 1980). Also, note that in 1986 only 33.4 percent of those old enough to cast ballots actually did so for House candidates, the lowest turnout since 1930. B. Jackson, Honest Graft (1988), 84 percent of Americans between the ages of 18-21 who were eligible to vote in the 1986 House elections failed to do so. "Testimony of Senator Alan Cranston (D-CA), before the Senate Judiciary Subcommittee on the Constitution, February 28, 1990 at 3. See generally, W. Crotty & G. Jacobson, American Politics in Decline (1986). The authors note that, "American voting turnout over time is decreasing and it has reached unusual lows... Nonvoters are basically inactive on all levels. If people do not vote, the chances are excellent that they will not participate in any other form of the political process. In effect they remain outside the political system, unrepresented and ignored." Id. at 6, 13.


106. E. Drew, supra note 9, at 156.


108. See supra note 73.

109. Political scandals in recent years have shaken the top leadership in both the Senate and the House of Representatives. The savings and loan scandal (see supra note 83, and accompanying text) resulted in the ethics investigation of five Senators. In addition, Senators Dave Durenberger (R-MN) and Alfonse D'Amato (R-NY) were also investigated for campaign and other financial improprieties. House Speaker Jim Wright (D-TX) and House Majority Whip Tony Coelho (D-CA) resigned under the pressure of Ethics Committee investigations of their financial dealings.


111. Testimony of Joan Claybrook, President of Public Citizen, before the Senate Committee on Rules and Administration, March 1, 1990. The coalition includes Public Citizen, Common Cause, American Association of Retired Persons, National Association for the Advancement of Colored People, Episcopcal Church, National Farmers Organization, National Urban League, The American Jewish Committee, People for the American Way, the United States Student Association, Environmental Action, and many others.


113. See supra note 37.

115. F. Wertheimer, supra note 77, at 617.
116. Id.
117. Claybrook, supra note 111.

119. Public financing has received broad support. See generally supra notes 14, 37, 77, 87, 91, 94, 111, 115; Testimony of the American Civil Liberties Union before the Senate Judiciary Subcommittee on the Constitution, February 28, 1990.

120. Wright, supra note 37, at 643. See also Wertheimer, supra note 77, at 619 (stating that the Supreme Court would uphold public financing as constitutional).

121. It should be pointed out that in order for spending limits to be constitutional, they must be voluntary. It is also important to allow viable candidates a realistic chance to compete. The coalition of national organizations supporting campaign finance reforms advocates spending limits, but not without substantial public financing. "If spending limits are imposed, but inadequate public benefits are provided, candidates will still be forced to spend too much time fundraising." Supra note 111.

123. See Wertheimer and Huwa, supra note 77, at 58.
124. F. Stern supra note 14; Wright, supra note 37, at 644; Rosenthal, supra note 107.
125. See supra note 12.
127. Adamany, supra note 88, at 1025.
129. Id.
130. According to the Washington Post, "the Senate has debated campaign finance revision proposals for years without reaching a consensus both parties could support. Republican leaders blocked the last effort in 1988 over Democrats insistence on public financing." Babcock, supra note 83.

131. As of the writing of this paper, action on campaign finance reform legislation was not complete. This paper does not attempt to analyze any of these proposals in detail as the legislative picture is changing on a daily basis. Of the more than 30 bills introduced, those that received the most legislative attention included S 137 (introduced by Senators Boren, Mitchell and Byrd), and HR 14 (introduced by Representatives Synar and Leach). These bills included, inter alia, restrictions on PACs, spending limits, reductions in mail and media costs, and limitations on the use of soft money. The Bush Administration and Senator DeConcini (R-AZ) also drafted a proposal which addressed many of these issues. As of this writing, additional proposals were also in the drafting stage. Although the bills tended to address the same issues, the specific treatment of the issues varied greatly. Of particular interest was Senate Joint Resolution 48, introduced by Senator Earnest Hollings (D-SC). S.J. Res. 48 proposed a constitutional amendment to restore to Congress the power to establish expenditure limitations in federal campaigns. If ratified by the states, the amendment would overrule the Supreme Court's decision in Buckley.

132. According to the Washington Post, "With ethics investigations pending against seven senators, some involving campaign contributions, senators were united in a desire for action but locked into entrenched positions, reinforced by suspicion, competitiveness and concern over loss of face. The solution had to be a new formulation, originated by outsiders' and unsullied with either hostile camp in the Senate" Dewer, Finally, Campaign Fund Reform?, Washington Post, March 12, 1990 at A13. Senate Majority Leader George Mitchell (D-ME), Senate Minority Leader Robert Dole (R-KS) and other Senate leaders on this issue expressed optimism about the proposal. Id.

133. The panel's proposals were described as a political compromise with insufficient public financing, inadequate spending limits, and weak provisions to curb PAC activities and other fundraising loopholes. Conversation with Craig McDonald, Campaign Finance Reform Coalition Coordinator, March 13, 1990.

134. Wright, supra note 37, at 631.
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