

PAC'S AND THE DEMOCRATIC FINANCING OF POLITICS

David Adamany*

INTRODUCTION

Political action committees [PAC's] are currently in the limelight.¹ But they are not a new phenomenon in modern American politics.² Nor do PAC's raise new issues for American democracy. The main lines of the argument about political finance were set long ago. PAC's are merely a new source of old concerns. One must therefore consider the recent growth of PAC's in the broader context of money's special place in and special threats to American politics.

Money's Distinctive Character

Campaign giving may, from one perspective, be seen simply as "but one form of participation in politics."³ But the special characteristics of money give it "a unique position in the arsenal of campaign resources."⁴ Money is far more convertible than most other political resources—that is, it can be exchanged more readily for whatever goods or services are needed to wage a campaign.⁵

* Vice President for Academic Affairs and Professor of Political Science, University of Maryland. A.B., 1958, Harvard College; J.D., 1961, Harvard Law School; M.S., 1963, Ph.D., 1967, University of Wisconsin.

1. See generally PARTIES, INTEREST GROUPS, AND CAMPAIGN FINANCE LAWS (M. Malbin ed. 1980) [hereinafter cited as INTEREST GROUPS]; INSTITUTE OF POLITICS, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY, AN ANALYSIS OF THE IMPACT OF THE FEDERAL ELECTION CAMPAIGN ACT, 1972-78 (1979) (prepared for the House Comm. on Administration) [hereinafter cited as CAMPAIGN FINANCE STUDY GROUP REP.].

2. Contemporary PAC's had their roots in labor's Non-Partisan Political League, established by John L. Lewis in the mid-1930's. Epstein, *Business and Labor under the Federal Election Campaign Act of 1971*, in INTEREST GROUPS, *supra* note 1, at 107, 110.

3. A. HEARD, THE COSTS OF DEMOCRACY 38 (1960).

4. McDevitt, *The Changing Dynamics of Fund Raising in House Campaigns*, in POLITICAL FINANCE 129 (H. Alexander ed. 1979).

5. *Id.* at 129-30; D. ADAMANY, CAMPAIGN FINANCE IN AMERICA 2-3 (1972).

While it is not perfectly convertible,⁶ Delmer Dunn was undoubtedly correct when he argued that "candidates' increasing use of high-cost modern technology inevitably will make money more decisive in the future in determining election results."⁷ The rapid shift from traditional political methods to high-technology campaigning makes money more important precisely because it is readily converted into polling, computerized appeals, professional staff, and media messages.

Money is also transferable.⁸ It moves easily across district and state lines. A contributor can influence elections in distant locales which are beyond the reach of his neighbors' more conventional political participation.

Giving money is also less visible than other political acts. While the jury is still out on the success of modern disclosure laws in exposing givers and their interests, preliminary evidence suggests the following: (1) that media, politicians, and voters have difficulty absorbing massive political finance disclosures that occur in the short-run of a campaign; (2) that the reporting of such information is uncertain and often biased; (3) that voters view such information through partisan perceptual screens; and (4) that political money may not be a large enough concern to offset voters' commitments on other issues of national or international scope.⁹ By contrast, the citizen who wears a button, sports a bumper tag, posts a lawn sign, or walks the precinct cannot separate the disclosure of his political preferences from his activity to advance those preferences.

Finally, financial participation in politics is far more expandable than other political activities.¹⁰ Heard has argued that in a polity committed to the principle of "one man, one vote," all political participation beyond casting a ballot may be regarded as "multiple voting."¹¹ But the ability and will to give large sums of money to one or many

6. W. BUCHANAN & A. BIRD, *MONEY AS A CAMPAIGN RESOURCE: TENNESSEE DEMOCRATIC SENATORIAL PRIMARIES, 1948-1964* 87-90 (1966).

7. D. DUNN, *FINANCING PRESIDENTIAL CAMPAIGNS* 9 (1972).

8. D. ADAMANY, *supra* note 5, at 3; McDevitt, *supra* note 4, at 130.

9. D. ADAMANY & G. AGREE, *POLITICAL MONEY* 103-10 (1975); see text & notes 213-16 *infra*.

10. Adamany, *The Sources of Money: An Overview*, 425 *ANNALS* 17, 18 (1976).

11. A. HEARD, *supra* note 3, at 48-49.

A deeply cherished slogan of American democracy is "one man—one vote." . . . By their talents and energies, some men have always taken greater part in government than others and thus, in a way, cast more than one vote. Concern over the private financing of political campaigns stems in significant measure from the belief that a gift is an especially important kind of vote. It is grounded in the thought that persons who give in larger sums or to more candidates than their fellow citizens are in effect voting more than once.

Id. "At the outset, issues of representation in a democratic polity are raised by campaign giving. Those who allocate resources to politics engage in a form of multiple voting; they seek to expand their influence beyond the single ballot to which all citizens are legally entitled." D. ADAMANY, *FINANCING POLITICS* 12 (1969).

candidates who will express one's interests or preferences has greater potential than any other form of political activity for differential participation by presumably equal citizens.

Political Money and American Democracy

The widespread belief that there is an essential connection between equal political participation and democracy has been affirmed in America by the steady extension of the franchise,¹² by the spread of direct elections from the House of Representatives to the Senate,¹³ to presidential electors, and increasingly to delegates to presidential nominating conventions,¹⁴ and by the writings of contemporary political philosophers.¹⁵ At the same time, first amendment freedoms of speech, assembly, and association protect political activity. The ordinary exercise of these rights creates only marginal inequalities in political influence.¹⁶ Because financial participation is expandable, however, it produces inequalities that can be very high and that cannot be ameliorated by real choices open to the citizenry at large. In 1972, for example, W. Clement Stone contributed \$2,000,000 to Richard Nixon's re-election campaign.¹⁷ An ordinary citizen struggles to find the means to contribute \$100. Money's extreme potential for multiple voting¹⁸ points to an important issue of political finance policy in a democracy: preventing gross inequalities in the meaning of the vote.¹⁹

Closely related is a second concern about the impact of political finance: how to curb undue or disproportionate influence by contributors on government and, conversely, how to prevent public officials from bringing undue pressure on citizens for campaign contributions. When social classes, ideological sectors of the population, or groups with common economic interests contribute disproportionately, they not only advantage candidates who share their preferences, but they may also implicitly obligate or influence such candidates, who know they must again seek resources from such groups in the next election.

Contributors may give because they like a candidate or his posi-

12. U.S. CONST. amends. XV, XIX, XXIV, XXVI; Voting Rights Act of 1965, 42 U.S.C. § 1973 (1976).

13. U.S. CONST. amend. XVII.

14. Ranney, *The Political Parties: Reform and Decline*, in *THE NEW AMERICAN POLITICAL SYSTEM* 213, 217-18 (A. King ed. 1979).

15. R. DAHL, A PREFACE TO DEMOCRATIC THEORY 36-44, 64-71 (1963); H. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 62-64, 107-36 (1960).

16. D. ADAMANY & G. AGREE, *supra* note 9, at 2-3.

17. H. ALEXANDER, FINANCING THE 1972 ELECTION 68 (1976).

18. See text & note 11 *supra*.

19. "The American system of government is rooted in the egalitarian assumption of 'one man, one vote,' but, like all democracies, it is confronted with an unequal distribution of economic resources. The attempt to reconcile the inequalities lies at the base of the problem of money in politics." H. ALEXANDER, FINANCING POLITICS 9 (1976).

tions, for reasons of personal friendship, from a sense of civic duty, to support the two-party system, or even to facilitate nonpolitical relationships with friends or business associates.²⁰ But many contributors intend to purchase access—the opportunity to plead a case with public officials. Givers to 1972 presidential candidates reported that they were accustomed to “using their good offices” to contact public officials on behalf of themselves or others.²¹ Dunn interviewed an adviser to several presidential candidates who told him that “‘the very least a contributor expects his contribution to do is to get him access the next time he has a problem he wants to take up with the officeholder.’”²² Since officials often make decisions with limited information, under tight time constraints, and without hearing every viewpoint fully, those whose contributions buy access may significantly influence public policy.

Some giving is less subtle. During the 1972 presidential campaign, many corporations and individuals believed their contributions were influencing government policy, law enforcement, and appointments.²³ Similar practices exist in some states.²⁴ Bribes may be described as campaign contributions.²⁵ Politicians may pressure individuals or firms regulated by government to contribute. More than twenty-one companies were convicted of making illegal corporate contributions in 1972, usually in response to solicitations from Nixon's fundraisers.²⁶ One board chairman explained: “A large part of the money raised from the business community for political purposes is given in fear of what would happen if it were not given.”²⁷

Third, democratic politics requires that voters be presented choices at the polls. For alternatives to be effectively presented, campaign resources—especially money—must be available to candidates in races for all offices.²⁸ Incumbents need not be defeated by challengers to

20. H. ALEXANDER, *MONEY IN POLITICS* 141-42 (1972); Adamany, *supra* note 10, at 28; Brown, Hedges & Powell, *Modes of Elite Political Participation: Contributors to the 1972 Presidential Candidates*, 24 AM. J. POL. SCI. 259, 287-89 (1980).

21. Brown, Hedges & Powell, *supra* note 20, at table 2 and accompanying text.

22. D. DUNN, *supra* note 7, at 20. The National Education Association's chief lobbyist explained his group's contributions to congressional candidates in terms of access: “It doesn't mean we own them. But the door is sure opened a little wider for us to get in and present our problems.” Rosenbaum, *Who is Paying for the Election? People Who Want Something*, N.Y. Times, Nov. 3, 1974, § 4 (The Week in Review), at 1.

23. H. ALEXANDER, *supra* note 17, at 459-60, 486-500, 503-04, 551-57, 564-70.

24. D. ADAMANY & G. AGREE, *supra* note 9, at 39-42.

25. *Hill Probe of Bribery Charges Hurt by Lack of Evidence*, 38 CONG. Q. WEEKLY REP. 323, 323-28 (1980).

26. H. ALEXANDER, *supra* note 17, at 513-24.

27. Adamany, *supra* note 10, at 28. Bribes and kickbacks from architects and engineering firms often take the form of campaign contributions. Karmin, *Throughout the U.S., Public Contractors Tied to ‘Campaign Gifts,’* Wall St. J., Oct. 17, 1973, at 1, col. 1.

28. Very little money is spent in congressional races won by large margins. Jacobson, *The Pattern of Campaign Contributions to Candidates for the U.S. House of Representatives 1972-1978*,

assure responsiveness to voters. It is enough if energetic opponents raise the salience of incumbents' stands on issues, require them to defend those positions, and in election after election expose their weakest points, always posing the threat that under unforeseen circumstances the accumulated criticism may give a vigorous primary rival or a skillful general election opponent an opening. Under such circumstances, incumbents, even in safe districts, are likely to remain carefully responsive to their constituents; and voters, even those strongly committed to the dominant party, are likely to know better the main alternatives available to them.

The importance of vigorous opposition is suggested by studies of voting behavior. Voters often bolt their party when they do not like its conduct of government²⁹ or when its candidates' positions on issues are unacceptable.³⁰ Most voters are also able to identify their own ideological dispositions and those of the parties; voting decisions are usually consistent with those perceptions.³¹ Since 1964, voters may have become more ideologically consistent in their issue preferences, and when given clear choices in elections, they vote accordingly.³²

A recent study of congressional voting downplays such factors as name recall, incumbency, and party affiliation, suggesting instead that voter familiarity with and evaluations of congressional candidates are critical to ballot choices.³³ This would be consistent with persuasive evidence that challengers gain votes as they spend more campaign money, while incumbents do not.³⁴ Voter knowledge and evaluation of incumbents may be largely fixed during their terms; challengers need funds to gain visibility and especially to portray their positions to voters. Hence, effective competition, and thus democratic accountability, turn on the availability of resources to candidates, especially challengers.

A fourth concern about finance practices is their impact on long-

in CAMPAIGN FINANCE STUDY GROUP REP., *supra* note 1, at 2-1, 2-36 to 2-37. The same pattern has been found in state legislative districts. D. ADAMANY, *supra* note 11, at 77-80.

At least a few congressional seats go entirely uncontested in each election. In 1976, 30 House seats and two Senate seats were won by default. Patterson, *The Semi-Sovereign Congress*, in THE NEW AMERICAN POLITICAL SYSTEM, *supra* note 14, at 125, 146. It is not clear, however, that the availability of modest amounts of campaign money would assure opposition in all districts. Small public grants to major party candidates did not prevent seats in the Minnesota Legislature from being filled without competition. MINN. ETHICAL PRACTICES-BD., PUBLIC FINANCING REPORT 17-20 (1980).

29. V.O. KEY, *THE RESPONSIBLE ELECTORATE* (1966).

30. Boyd, *Popular Control of Public Policy: A Normal Vote Analysis of the 1968 Election*, 66 AM. POL. SCI. REV. 429 *passim* (1972).

31. G. POMPER, *VOTERS' CHOICE* 166-85 (1975).

32. N. NIE, S. VERBA & J. PETROCIK, *THE CHANGING AMERICAN VOTER* chs. 9-10 (1976).

33. T. MANN, *UNSAFE AT ANY MARGIN* 49-99 (1978).

34. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 AM. POL. SCI. REV. 469 *passim* (1978).

standing institutional balances in society. One balance involves political parties. It has been asserted, for instance, that recent changes in campaign finance laws have seriously weakened political parties.³⁵ Limits on contributions prevent parties from raising funds from traditional sources.³⁶ And public financing of candidates' campaigns severs the mutual reliance of candidates and parties on one another, reducing party cohesion and fragmenting politics.³⁷

A second sensitive balance involves the separation of powers. If money runs too heavily to candidates for executive offices, their visibility rises and they become vehicles for the competitive alternatives voters need. Elected without vigorous competition and in less visible campaigns, legislators are neither as responsive to the public nor as able to rally public support. It has also been argued that public funding of presidential campaigns will weaken Congress by diverting special interest money to congressional campaigns, thereby enhancing special interest influence in Congress and tainting it with the stigma of that money.³⁸ Moreover, a chief executive, freed from fundraising for his own campaign, might well extend his influence over the coordinate branch by bending his efforts to fundraising for his legislative allies.

Recognizing the special character of campaign funds and the special concerns that their accumulation, distribution, and use may raise for democratic government, it is important to examine contemporary political financing practices, to assess them against democratic needs, and then to describe the manner in which the rise of PAC's improves or worsens the fit between democratic needs and contemporary financing practices.

35. But why should anyone care about the decline of parties? The answer is that traditional party activities also served important societal purposes. See J. KIRKPATRICK, *DISMANTLING THE PARTIES: REFLECTIONS ON PARTY REFORM AND DECOMPOSITION* 14, 28-29 (1978). Parties recruited candidates, thus assuring competition. And they attracted the campaign workers and the funds necessary to wage competitive campaigns. Parties also mobilized voters through their campaign activities, registration drives, and get-out-the-vote efforts.

Parties historically engaged in consensus-building and interest-aggregating activities. Seeking support from virtually all segments of society, parties tended to recruit and nominate candidates whose political positions were moderate and who were, in addition, committed to fashioning political compromises that satisfied at least some of the needs of most groups.

But despite their tendency toward compromise and moderation, parties did structure the vote. Democrats were generally liberal, favoring governmental social welfare programs and hospitable to society's have-nots. Republicans were generally conservative, supported by more established sectors of society. Such generalized differences allowed voters intelligently to choose candidates compatible with their own preferences. Once elected, officials of the same party had some bases for cooperation in policymaking.

36. Ranney, *supra* note 14, at 242-43.

37. AMERICAN ENTERPRISE INSTITUTE, *PUBLIC FINANCING OF CONGRESSIONAL CAMPAIGNS* 26 (1978) [hereinafter cited as *PUBLIC FINANCING*]; J. KIRKPATRICK, *supra* note 35, at 14, 28-29.

38. D. ADAMANY & G. AGREE, *supra* note 9, at 176-77; *PUBLIC FINANCING*, *supra* note 37, at 27; Jacobson, *supra* note 28, at 2-37 to 2-39; see Sorauf, *Political Parties and Political Action Committees: Two Life Cycles*, 22 ARIZ. L. REV. 445, 462 (1980).

PATTERNS OF POLITICAL FINANCE

Campaign Expenditures

The Cost of Politics. Herbert Alexander has estimated that expenditures to nominate and elect federal, state, and local officials in 1976 were \$540 million—a 285% increase from the \$140 million spent in 1952 and a 27% increase over the \$425 million spent in 1972.³⁹

Campaigns for particular offices showed similar increases.⁴⁰ In California, Republicans spent \$916,000 in the 1958 general election to support their gubernatorial candidate; by 1978, the cost was \$2,275,000.⁴¹ The Democratic candidates spent \$790,000 and \$3,435,000 in those years.⁴² Median general election expenditures for state senators in California rose from \$7,100 in 1958 to \$51,600 in 1978.⁴³ Even in state assembly races, median general election outlays jumped from \$3,253 in 1958 to \$42,861 in 1978.⁴⁴

Why Costs Rise. Spiraling campaign costs are a function of demographics, economics, technology, and increased competition. The size of the eligible electorate has risen steadily. Although turnout percentages have ebbed in recent years, politicians must generally pay to reach all eligible voters, especially as they purchase media coverage. Political spending per eligible voter was \$1.40 in 1952, \$3.04 in 1972,⁴⁵ and \$3.62 in 1976. This twenty-four-year increase of 159% per eligible voter is far less than the total dollar increase of 258% during the same period.

Inflation is another major factor in campaign costs. Herbert Alexander has pointed out that the thirty-three percent increase in the Consumer Price Index between 1972 and 1976 outdistanced the twenty-seven percent increase in campaign costs.⁴⁶ One study has shown that while average total campaign contributions to major party candidates for the House of Representatives have recently risen approximately 115

39. H. ALEXANDER, *FINANCING THE 1976 ELECTION* 166 (1979). Total political expenditures may have risen even more rapidly in some of the nation's political subsystems. Wisconsin campaign costs were estimated at \$1,073,000 in 1950. D. ADAMANY, *supra* note 11, at 46. By 1970, spending had reached \$5.5 million. [1974] WISCONSIN GOV. STUDY COMM'N ON POL. FINANCE, FINAL REP. 2 [hereinafter cited as WIS. GOV. COMM'N]. The author's calculations, based on reports of the Wisconsin State Elections Board, suggest that 1978 outlays reached \$9.3 million. [1979] 2 WISCONSIN STATE ELECTIONS BD. BIENNIAL REP.: CAMPAIGN STATISTICS REP. 4-12 [hereinafter cited as 1979 WIS. REP.].

40. D. ADAMANY, *supra* note 5, at 42-45; H. ALEXANDER, *supra* note 39, at 168; J. OWENS, *TRENDS IN CAMPAIGN SPENDING IN CALIFORNIA, 1958-1970* 55-69 (1973).

41. CAL. FAIR POL. PRACTICES COMM'N, *CAMPAIGN COSTS* 4 (1980) [hereinafter cited as CAL. CAMPAIGN COSTS].

42. *Id.*

43. *Id.* at 6.

44. *Id.*

45. D. ADAMANY & G. AGREE, *supra* note 9, at 19.

46. H. ALEXANDER, *supra* note 39, at 165.

percent, from \$51,752 in 1972 to \$111,232 in 1978, the increase in real dollars was only thirty-four percent.⁴⁷

The third major factor in rising campaign costs is changing technology. Candidates are shifting from traditional means of campaigning—such as newspaper advertising and door-to-door canvassing—to much more sophisticated techniques, which involve public opinion polling, personalized campaign mailings, and professional staff. The California Fair Political Practices Commission has shown that the percentage of spending for traditional campaigning has remained constant or declined, while expenditures for polling, computerized personal mailings, and the like have risen sharply.⁴⁸ These increases have been especially notable in state legislative races, which previously had been largely insulated from changes in campaign technology.⁴⁹

There is also evidence that campaign costs have risen in response to the spread of competition into formerly one-party districts, the replacement of party caucus and convention nominations by primaries (which require a second appeal to the electorate), and the decline of party organizations which formerly provided manpower to conduct door-to-door canvasses and to engage in other less costly traditional campaign methods.⁵⁰

Disparities in Spending. At least as late as 1970 it was possible to say with some confidence that Republicans outspent Democrats and their labor allies, except in the most unusual circumstances.⁵¹ Since World War II, Democratic national and presidential committees have made greater general election outlays than their Republican opponents only in 1960.⁵² This disparity, however, appears to be lessening. In 1976, for example, Carter and Ford were limited in the general election to \$21,800,000 by their acceptance of public funds under the Federal Election Campaign Act.⁵³ In the struggle for the presidential nominations, twenty Democratic candidates (thirteen qualified for public

47. Jacobson, *supra* note 28, at 2-3 to 2-5.

48. CAL. CAMPAIGN COSTS, *supra* note 41, at 39-48, 51-62.

49. *Id.*

50. On the variables contributing to the level of political expenditures, see D. ADAMANY, *supra* note 5, at 51-83; A. HEARD, *supra* note 3, at 380-87; J. OWENS, *supra* note 40, at 70-80.

51. D. ADAMANY, *supra* note 5, at 166-71; A. HEARD, *supra* note 3, at 16-24; J. OWENS, *supra* note 40, at 48-54; Adamany, *supra* note 10, at 27-28.

52. H. ALEXANDER, *supra* note 39, at 167; A. HEARD, *supra* note 3, at 16-24.

53. 2 U.S.C. § 441a(b)(1)(B) (1976) sets the general election expenditure limit for presidential candidates receiving public funds at \$20,000,000. *Id.* Section 441a(c) provides an adjustment of that limit which increases it by the same percentage as the increase in the consumer price index from 1974 (the "base period") to the calendar year preceding the presidential election. This adjustment set the 1976 public subsidy and expenditure limit at \$21,800,000. An exclusion from the expenditure limit allows a national political party committee to spend on behalf of its presidential candidate an amount equal to two cents multiplied by the voting-age population. *Id.* § 441a(d)(2). This limit is also adjusted for changes in the consumer price index. *Id.* § 441a(c). In 1976, the allowable expenditure by a national party committee under this provision was \$3,200,000.

matching grants) spent almost twice as much (\$46.3 million) as was spent in the two-way Republican contest (\$26.7 million).⁵⁴

In campaigns for Congress, there was a virtual draw in spending between general election candidates and congressional party committees of the two parties. Democratic outlays in senate races were \$19.2 million, while Republican spending was \$20 million.⁵⁵ Democratic spending for the House was \$33 million, compared to Republican outlays of \$34.9 million.⁵⁶ If primary losers were included, Democratic expenditures would probably easily outrun Republican spending because of Democratic primaries in the South.

A second spending division appears to continue in good health: Outlays are substantially higher in competitive than in noncompetitive races.⁵⁷ In the 1976 races for the House of Representatives, incumbents in marginal districts (decided by fifty-five percent or less of the vote in the previous election) raised an average of \$135,852, while incumbents in all House contests raised an average of \$94,645.⁵⁸ Challengers in marginal districts built campaign warchests of \$131,309, while those in safe districts raised only \$51,479. In open seats, candidates in districts decided by close margins raised \$170,462, while those in districts decided by lopsided margins raised \$121,285. Similar patterns were found in 1972 and 1974.⁵⁹

The most prominent disparity in spending is between incumbents and challengers. In 1976, Democratic incumbents in marginal districts raised an average of \$132,501, while their Republican opponents garnered \$126,741. Republican incumbents led their Democratic challengers by a wider margin, \$124,722 to \$70,301. Where incumbency was combined with a decisive vote margin, financial disparities were much higher. In districts decided by more than sixty percent of the vote in the previous election, incumbent Democrats raised an average of \$70,286, while their Republican challengers received only \$22,720. Safe district Republican incumbents amassed \$88,340, compared to \$29,371 for Democratic challengers.⁶⁰

Finally, political spending had tended to be greater in races for

54. H. ALEXANDER, *supra* note 39, at 171-72.

55. *Id.* at 180.

56. *Id.*

57. D. ADAMANY, *supra* note 5, at 74-86; D. ADAMANY & G. AGREE, *supra* note 9, at 24-26, J. OWENS, *supra* note 40, at 76-80.

58. Jacobson, *supra* note 28, at 2-38.

59. *Id.*

60. *Id.* at 2-36. Even in small state legislative districts these patterns recur. Hence, in 1978 races for the Minnesota House of Representatives, Democratic-Farmer-Labor [DFL] incumbents in marginal districts (decided by less than 60% of the vote) outspent their Independent-Republican [IR] challengers by an average of \$8,156 to \$7,594. IR incumbents in marginal districts outspent DFL challengers by \$7,633 to \$6,525. In safe districts the incumbents' advantages rose. DFL incumbents outspent IR challengers by \$7,590 to \$4,743, while IR incumbents outspent DFL chal-

executive offices than in all legislative races. Despite relatively low spending limits in the 1976 presidential contest, contenders for that office and national party committees spent \$160 million, compared to \$141 million spent by congressional candidates and committees, who were not subject to expenditure ceilings.⁶¹ The disparity was even greater in 1972.⁶²

Costs in Perspective. Americans do not bear a high cost for nominating and electing officials. The \$3.62 per eligible voter spent in 1976 was less than one hour's wages for an average production worker in the United States.⁶³ Citizens in many other democracies pay a higher price for politics.⁶⁴

Total 1976 expenditures of \$540 million were well under .05% of personal income, from which campaign costs must be paid. All political expenditures to operate America's democratic system of elections are less than Sears and Roebuck spends in one year to advertise its commercial products.⁶⁵ And, in California, total costs were about half the amount spent to operate its prisons.⁶⁶

Increasing campaign costs are also not worrisome. Inflation, an expanding electorate, and changing technology are the major causes; if increased spending reflects more intense political competition that heightens voter choice, the additional outlays should be applauded.

From the perspective of candidates, however, political costs seem very high indeed. How does a candidate raise one million dollars, which was the average treasury amassed by United States Senate candidates in 1978, or \$110,000, the amount raised by the average House candidate? Such funds are primarily available from big contributors, ideological sectors of the population, and organized interests.⁶⁷

From the perspective of democratic politics, the problem is not that campaign spending is too high, but rather that it is neither high enough nor distributed properly to assure the vigorous competition in

lengers by \$7,684 to \$5,037. These calculations were derived from MINN. ETHICAL PRACTICES Bd., *supra* note 28, at appx.

61. H. ALEXANDER, *supra* note 39, at 180.

62. D. ADAMANY & G. AGREE, *supra* note 9, at 24.

63. The average hourly wage of an American production worker in 1976 was \$5.19. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 424 (1978). Earlier studies using average hourly wages of production workers for comparisons of campaign costs between states and between nations as well as for measures of campaign costs compared to personal wealth can be found in D. ADAMANY, *supra* note 11, at 54-57; J. OWENS, *supra* note 40, at 34-35; Heidenheimer, *Comparative Party Finance: Notes on Practices and Toward-a Theory*, 25 J. POL. 796-801 (1963).

64. D. ADAMANY, *supra* note 5, at 33; J. OWENS, *supra* note 40, at 34-35.

65. CAL. CAMPAIGN COSTS, *supra* note 41, at 29.

66. *Id.*

67. See text & notes 70-78, 83-87 *infra*.

all races for all offices that is essential for effective popular control of those who govern.

Campaign Contributions

The Active Minority. Only nine percent of Americans (about twelve million persons) made political contributions in 1976. This was less than the eleven percent who gave in 1960 and 1964 or the ten percent who participated in 1956 and 1972. It exceeded only the 1952 participation rate of four percent.⁶⁸

Survey data show that twenty-five to thirty percent of persons with incomes exceeding \$20,000 contribute to politics, while only three to four percent of those with incomes under \$5,000 do so.⁶⁹ Similarly, between nineteen and twenty-eight percent of college graduates give, but only five to six percent of those with high school education do so.⁷⁰ Thus, not only is the base of contributors small, it has a distinctive class bias.

The Big Givers. From 1952 to 1964, givers of \$10,000 or more numbered no more than 130 in any presidential year; their contributions totalled between \$1.6 million and \$2.3 million. The 1968 campaign marked a departure from the past: 424 persons gave \$10,000 or more and their gifts totalled \$12.2 million.⁷¹ By 1972, 1,254 individuals were giving amounts of \$10,000 or more, equalling \$51.3 million. More than \$18 million of that sum was given by 343 contributors who split their gifts between candidates of different parties.⁷²

The Federal Election Campaign Act [FECA]⁷³ marked the end of giving on this scale: It limits a donor's contributions to any candidate to \$1,000 per election (primary, run-off, and general)⁷⁴ and to all federal candidates to \$25,000 annually.⁷⁵ Disproportionate giving nonetheless continues. More than 53,000 donors give \$500 or more to presidential, Senate, and House campaigns and to national party committees in 1975-76.⁷⁶ Their total gifts were \$17.8 million, or twenty-seven percent of all funds received from individuals. Small by earlier

68. H. ALEXANDER, *supra* note 39, at 525.

69. Adamany, *supra* note 10, at 20. "In 1972 the Center for Political Studies reports that 8 percent of the population claimed an income of more than \$20,000; the corresponding figure for presidential contributors of more than \$100 is 88 percent, with 27 percent reporting an income of more than \$100,000." Brown, Hedges & Powell, *Belief Structure in a Political Elite: Contributors to the 1972 Presidential Candidates*, in POLITY (forthcoming 1980).

70. Adamany, *supra* note 10, at 20; Brown, Hedges & Powell, *supra* note 20, at table 5.

71. H. ALEXANDER, FINANCING THE 1968 ELECTION 167-68 (1971).

72. H. ALEXANDER, *supra* note 17, at 372-73.

73. 2 U.S.C. §§ 431-455 (1976 & Supp. III 1979).

74. *Id.* § 441a(a)(1)(A) (1976).

75. *Id.* § 441a(a)(3).

76. The author has calculated these figures from data in H. ALEXANDER, *supra* note 39, at 824-25.

standards, these contributions are still well beyond the means of most citizens.

Ideological Money. Modern experience demonstrates that large sums can be raised in small amounts by ideological appeals. The presidential campaigns of Barry Goldwater, Eugene McCarthy, George McGovern, and George Wallace were predominantly funded by numerous small gifts.⁷⁷ It would be a mistake to regard these as genuinely "grass-roots" or "mass financed" campaigns, however. None garnered financial support from as much as one percent of the voting age population. What did tie the financing of these campaigns together were their stark, uncompromising appeals on highly charged emotional and ideological issues—the Vietnam War, race relations, street crime—that galvanized campaign workers and contributors.

Recent evidence suggests, for example, that right-wing groups raise funds by ideological appeals on issues. Richard Viguerie has raised substantial amounts in small contributions by making hard-line mail appeals on such issues as gun control, abortion, the Panama Canal treaty, homosexual rights, the equal rights amendment, and school room prayer. Criticized for misrepresentation and for exorbitant fees, he has nonetheless demonstrated the fundraising potential of provocative mail appeals selectively addressed to emotion-charged issues and to right-wing ideologues.⁷⁸

Small Contributors. A great deal of money continues to be raised in small sums. Fifty-seven percent (\$91.3 million) of individual contributions to presidential and congressional candidates and to national and congressional party committees in 1976 were \$100 or less.⁷⁹ These small gifts were, however, only about thirty percent of the \$300 million spent by those candidates and committees.⁸⁰ Jacobson estimates that in congressional races, contributions of \$100 or less averaged from thirty-four percent of receipts in the campaigns of challengers, to forty-five percent in the campaigns of Republican incumbents.⁸¹

Small gifts continue to be raised, for the most part, by traditional fundraising methods. Beginning in 1962, however, the Republican

77. H. ALEXANDER, FINANCING THE 1964 ELECTION 18, 71 (1966); H. ALEXANDER, *supra* note 71, at 8, 72, 406.

78. H. ALEXANDER, *supra* note 39, at 717-21; Conlon, *Commentary*, in INTEREST GROUPS, *supra* note 1, at 185, 189-90; Jessup, *Can Political Influence Be Democratized? A Labor Perspective*, in INTEREST GROUPS, *supra* note 1, at 26, 37-39.

79. These figures are calculated from data reported in H. ALEXANDER, *supra* note 39, at 824-25.

80. *Id.* at 166-67.

81. Jacobson, *supra* note 28, at 2-16.

In 1978, gifts of \$100 or less covered 28.5% of the \$3.3 million spent by statewide candidates in Wisconsin, 36% of the \$2.1 million spent in legislative races, and almost 50% of the \$2.8 million spent by political party committees. 1979 WIS. REP., *supra* note 39, at 4-12 to 4-13.

Party has had notable success with direct mail appeals for contributions between \$15 and \$100 to support the Republican National Sustaining Fund. In 1975 the Fund raised \$6 million, in 1976 \$10.1 million, and in 1977 about \$7 million.⁸² While small contributors are important, there is no evidence that they will give sufficient money to sustain American politics, and there is reason to believe that such givers are more susceptible to Republican than to Democratic appeals.⁸³

Republican and Democratic Givers. After almost half a century, the New Deal continues to divide American politics. Among survey respondents who made political contributions in 1972, those who identified themselves as liberals overwhelmingly were Democrats (84.7%) and thus probably gave to that party or its candidates. Among conservative-identifying contributors, 81.9% were Republicans.⁸⁴

Since the New Deal, Democrats have been strongly and continuously supported by union labor.⁸⁵ Republicans, by contrast, have had their base of support among manufacturers, bankers, and other segments of the business community.⁸⁶ That support has persisted to the present day.

Self-Financing Candidates. The wealthy increasingly have privileged status in seeking office. The Rockefeller family spent more than

82. H. ALEXANDER, *supra* note 39, at 711-12.

While one commentator has taken these successes and the successful mail appeals of ideological groups as evidence that mail techniques might be used also to build a stronger national Democratic party, Kayden, *The Nationalization of the Party System*, in INTEREST GROUPS, *supra* note 1, at 257, 265-77, this analysis falls short. The Republicans are a middle-class party; it is well known that the well educated and the well off are more inclined and able to make political contributions. Moreover, the Republican party is, on the whole, moderately conservative. The class and ideological homogeneity of the Republican party merge to make mail appeals effective. The Democrats share none of these characteristics. A coalition party, their numerous supporters among lower-income groups have neither the commitment to politics nor the means to contribute, while their following among middle-class liberals tends to focus on candidates and issues rather than on the party. Adamany, *Commentary*, in INTEREST GROUPS, *supra* note 1, at 314, 316-17.

83. See note 82 *supra*.

84. Adamany, *supra* note 10, at 24. A recent survey of 1972 presidential campaign contributors of more than \$100 shows that they tended to fix themselves at more extreme positions on a liberal/conservative scale than did voters, that they tended to have more ideologically consistent beliefs on such issues as national health insurance, government aid to minorities, and government job programs, but that they were not more extreme on these specific issues than were voters generally. Brown, Hedges & Powell, *supra* note 69, at .

85. H. ALEXANDER, *supra* note 19, at 105-07; H. ALEXANDER, *supra* note 39, at 448-51; Budde, *Business Political Action Committees*, in INTEREST GROUPS, *supra* note 1, at 9, 16 (Democratic candidates received 95% of labor's 1978 contributions to congressional campaigns); A. HEARD, *supra* note 3, at 178-87.

86. A. HEARD, *supra* note 3, at 120-29. Alexander's studies of contributors from 1956 through 1972 show that Republicans received overwhelming financial support from members of leading business and professional groups, from members of the Business Council, the American Petroleum Institute, and 12 leading families associated with major banking, transportation, financial, and manufacturing interests, from officers and directors of the largest defense contractors and industrial corporations, and from *Fortune Magazine's* listed centimillionaires. H. ALEXANDER, *supra* note 71, at 181-88; H. ALEXANDER, *supra* note 17, at 385-99; H. ALEXANDER, *supra* note 19, at 139-40; Adamany, *supra* note 10, at 25. The commitment of business to the Republicans in state politics has been documented in D. ADAMANY, *supra* note 11, at 203-21.

\$20 million in two decades on the campaigns and other political activities of Nelson, Winthrop, and Jay Rockefeller.⁸⁷ Three Kennedys, Milton Shapp, Richard Ottinger, Norton Simon, Howard Metzenbaum, and Pierre DuPont IV come readily to mind as candidates with special access to politics because of personal wealth.⁸⁸ In 1976, nine House candidates spent more than \$100,000 on their own campaigns; three Senate candidates spent more than half a million dollars, with John Heinz III devoting more than \$2.6 million to his successful race.⁸⁹

The average House candidate's personal spending rose from insignificance in 1972, to \$3,500 in 1974, and then to \$10,300 in 1978.⁹⁰ This personal giving was especially prominent among challengers; self-financing has apparently become essential for candidates, even those of modest means, who do not have the fundraising advantages of incumbency.⁹¹

Giving in Perspective. Much political giving is consistent with the basic New Deal divide in American politics: liberals and labor give to Democrats, conservatives and business interests to Republicans. But there is recently a heightened tendency for extreme ideological sectors of society to give heavily to candidates.

Only a small percentage of Americans make contributions, and these gifts are drawn in striking disproportion from among the well off and the well educated.

Less than half of the funds contributed are in small sums. Most contributions are in large amounts, and they come from wealthy individuals and powerful organizations. Increasingly, wealthy candidates finance their own campaigns, and even aspirants of modest means must pay a high price for admission to the electoral arena.

The sources of funds are, overall, grossly unrepresentative of the electorate at large. Contributions tend to be large and interested, furthering the access of givers to the electoral process and to public officials. As Senator Hart argued, "when a politician's success depends on a combination of dollars and votes, the Nation is clearly less democratic than it would be if victory depended on votes alone."⁹²

87. H. ALEXANDER, *supra* note 20, at 147; H. ALEXANDER, *supra* note 17, at 396-98.

88. Adamany, *supra* note 10, at 22.

89. Buchanan, *Candidates Again Spending Personal Money*, 36 CONG. Q. WEEKLY REP., 1244 (1978).

90. Jacobson, *supra* note 28, at 2-3.

91. *Id.* at 2-13 to 2-17, 2-28.

92. D. ADAMANY & G. AGREE, *supra* note 9, at 221 (quoting Senator Hart).

THE CHANGING ROLE OF PAC'S

The PAC's at Law

In 1907 Congress declared it illegal for corporations to contribute money to campaigns for federal office.⁹³ This basic prohibition continues in federal law⁹⁴ and is emulated completely or partially in twenty-seven states.⁹⁵ Federal law also prohibits the contribution of union dues money to federal offices campaigns,⁹⁶ and it has been followed in eight states.⁹⁷ Federal law extends its prohibition to corporate and labor union expenditures on behalf of or in opposition to candidates,⁹⁸ and at least some states follow this rule.

Under this traditional scheme of regulation, labor unions nonetheless played an active role in political campaigns. They raised substantial voluntary contributions from members, and contributed this "free" money to labor-endorsed candidates.⁹⁹ Corporations made only a modest effort to follow this pattern of raising voluntary contributions and disbursing them through committees identified with particular firms.¹⁰⁰ Corporate executives did, however, make extensive direct personal contributions, often following systematic solicitation from leading executives in the corporation or prominent members of the business community.¹⁰¹ There were also some trade associations that sought funds from executives throughout an industry and then contributed those funds to sympathetic candidates.¹⁰² But both company and trade association political funding activities were modest by comparison with labor's efforts.¹⁰³

The current surge of activity by political action committees can, therefore, be traced to recent statutory changes.¹⁰⁴ FECA¹⁰⁵ allows corporations and labor unions to use their own funds (1) to communicate on any subject, including partisan politics and campaigns, with

93. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864 (1907).

94. 2 U.S.C. § 441b(a) (1976).

95. FEDERAL ELECTION COMMISSION, CAMPAIGN FINANCE LAW 1978 287-303, chart C (1977).

96. 2 U.S.C. § 441b(a) (1976).

97. FEDERAL ELECTION COMMISSION, *supra* note 95, at 287-303, chart C.

98. 2 U.S.C. § 441b(a) (1976).

99. H. ALEXANDER, *supra* note 71, at 191-99; H. ALEXANDER, *supra* note 17, at 500-06; H. ALEXANDER, *supra* note 39, at 542; A. HEARD, *supra* note 3, at 178-96.

100. H. ALEXANDER, *supra* note 17, at 462-63.

101. See text & note 86 *supra*.

102. H. ALEXANDER, *supra* note 17, at 461-64.

103. Epstein, *supra* note 2, at 110-11.

104. For changes in the law affecting PAC activity, see generally Epstein, *Corporations and Labor Unions in Electoral Politics*, in 425 ANNALS 107 (1976).

105. 2 U.S.C. §§ 431-455 (1976 & Supp. III 1979) (as amended by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475; and Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339).

stockholders and executive and administrative officers (for corporations) and with members (for unions) and with their families,¹⁰⁶ (2) to conduct nonpartisan registration and get-out-the-vote drives among these same groups,¹⁰⁷ and (3) to establish and administer a "separate segregated fund" to be used for political purposes, including making campaign contributions or expenditures.¹⁰⁸ The FECA Amendments of 1974¹⁰⁹ clarified a doubtful area by providing that statutory provisions prohibiting contributions by federal contractors did not extend to the activities made legal for corporations and unions by the 1971 Act.¹¹⁰

Significant questions about corporate and union political involvement remain open. The most important is whether direct expenditures of corporate or union funds to support candidates are constitutionally protected. Although the Supreme Court has twice declined to decide the issue directly,¹¹¹ the present prohibition in federal law¹¹² has been cast in doubt by two Supreme Court decisions.

In *Buckley v. Valeo*¹¹³ the Supreme Court held that expenditures to advocate the election or defeat of a political candidate were protected by the first amendment.¹¹⁴ It therefore struck down limits on expenditures by a candidate's campaign committee,¹¹⁵ by the candidate from personal or family funds,¹¹⁶ and by individuals and groups.¹¹⁷ The Court did not face the question of direct expenditures by labor unions or corporations. But in *First National Bank v. Bellotti*,¹¹⁸ the Court struck down a state statute making it a criminal act for any business corporation to "directly or indirectly give, pay, expend or contribute" money to influence voters on a referendum question, except if the question was one "materially affecting any of the property, business or assets of the corporation."¹¹⁹

The *Bellotti* Court held that "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating *the subjects about which persons may speak* and *the speakers who may address a*

106. 2 U.S.C. § 441b(b)(2)(B) (1976).

107. *Id.*

108. *Id.* § 441(b)(2)(C).

109. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (amending 2 U.S.C. §§ 431-455 (1970)).

110. 2 U.S.C. § 441c(b) (1976).

111. *See* *United States v. UAW*, 352 U.S. 567 (1957); *United States v. CIO*, 335 U.S. 106 (1948).

112. 2 U.S.C. § 441b (1976 & Supp. III 1979).

113. 424 U.S. 1 (1976).

114. *Id.* at 14-19.

115. *Id.* at 55-59.

116. *Id.* at 51-55.

117. *Id.* at 39-51.

118. 435 U.S. 765 (1978).

119. MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1980-81).

public issue.”¹²⁰ The first italicized passage addresses the statutory rule limiting speech to issues “materially affecting” the corporation, reflecting the longstanding constitutional rule that the regulation of speech may not be predicated on its content, as long as the content falls within first amendment protections.

The second italicized passage, however, has sweeping new implications for the regulation of political finance. The Court made it clear that first amendment protections run to all corporations, not just media corporations which can claim protection under the free press clause.¹²¹ Furthermore, the Court emphasized that the first amendment serves not only the purpose of individual self-expression—a purpose not served by corporate speech—but also the purpose of “affording the public access to discussion, debate, and the dissemination of information and ideas.”¹²² The right of the public to have access to information, even to purely commercial expression,¹²³ brings corporate expenditures to support or oppose a referendum proposition within the first amendment.¹²⁴

Buckley and *Bellotti* seem to extend first amendment protection to all expenditures on political subjects, whoever the speaker. The dissent in *Bellotti*¹²⁵ and a number of student writers¹²⁶ conclude that corporate expenditures on behalf of political candidates would therefore be constitutionally protected. A similar analysis would presumably apply to union spending on behalf of candidates.

The more difficult question is whether corporate and union contributions, as contrasted with direct expenditures,¹²⁷ also warrant constitutional protection. In *Buckley*, the Supreme Court held that

120. 435 U.S. at 784-85 (emphasis added).

121. *Id.* at 778-84. The Supreme Court has recently reaffirmed the extension of first amendment rights to nonmedia corporations in *Consolidated Edison Co. v. Public Serv. Comm'n*, 48 U.S.L.W. 4776 (1980) (public utility's inclusion of commentary on public issues in customer billings is constitutionally protected expression).

122. *Id.* at 783.

123. *See* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762-65 (1976). The Supreme Court has recently affirmed that the Constitution affords protection to corporate commercial speech, albeit “a lesser protection . . . than to other constitutionally guaranteed expression.” *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 48 U.S.L.W. 4783, 4784 (1980) (utility corporation's promotional advertising of its electric service is protected by the first amendment).

124. 435 U.S. at 783-84.

125. *Id.* at 803 (White, J., dissenting).

126. Note, *First National Bank of Boston v. Bellotti: The Reopening of the Corporate Mouth—The Corporation's Right to Free Speech*, 21 ARIZ. L. REV. 841, 865-68 (1979); Note, *First National Bank of Boston v. Bellotti—Money Talks: Constitutional Protection of Corporate Political Speech*, 8 CAP. UNIV. L. REV. 575, 588-89, 592-93 (1979) [hereinafter cited as *Money Talks*]; Note, *First National Bank of Boston v. Bellotti: The Constitutionality of Government Restrictions on Political Spending by Corporations*, 16 HOUS. L. REV. 195, 203-07 (1978) [hereinafter cited as *Spending Restrictions*]; Comment, *Prohibition of Corporate Political Expenditures: The Effects of First National Bank v. Bellotti*, 1979 UTAH L. REV. 95, 105-06 [hereinafter cited as *Bellotti Effects*]; Case Comment, 1979 HAMLINE L. REV. 119, 136-37.

127. See text & notes 113-29 *supra*.

contributing money is a form of protected first amendment expression, but the size of a contribution has only a marginal first amendment element, because a contribution serves as a general expression of support and does not communicate its underlying basis.¹²⁸ Contributing also gains protection because it is an exercise of the first amendment freedom to associate,¹²⁹ but, again, the amount contributed is not essential to that purpose. Despite some degree of first amendment protection, contributions can also be limited to further the substantial governmental interest in "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."¹³⁰

The plain implication of *Buckley* and *Bellotti*, taken together, is that corporations have first amendment standing and therefore have some right to make contributions, which are a form of protected expression and a means for engaging in protected association.¹³¹ But the size of such contributions may be restricted, because their amount is not essential for their generalized speech and associational purposes and because limits may serve the important governmental interest of curbing the actuality or appearance of corruption.

In *Bellotti*, the Supreme Court noted: "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."¹³² But in *Buckley*, the Court said that where a disbursement is genuinely independent of the candidate, the value to him is undermined and the danger of *quid pro quo* is alleviated.¹³³ And expenditures that are not genuinely independent can be regulated as contributions.¹³⁴ It is difficult, therefore, to see a basis on which independent expenditures by corporations or unions on behalf of candidates could be restricted.¹³⁵

128. 424 U.S. at 20-21.

129. *Id.* at 22.

130. *Id.* at 25.

131. *Money Talks*, *supra* note 126, at 592; *Spending Restrictions*, *supra* note 126, at 207; *Bellotti Effects*, *supra* note 126, at 160-61.

132. 435 U.S. at 788 n.26.

133. 424 U.S. at 47.

134. *Id.* at 46-47.

135. The Court's logic here seems to confuse its own rationale. If the danger of *quid pro quo* is required to justify contribution limits, then the absence of a full congressional record of such corruption should constitute a want of evidence of a substantial governmental interest sufficient to override the acknowledged first amendment speech and association interests involved in contributing. If it is the appearance of corruption that constitutes such an interest, independent expenditures will be taken by a large segment of the public as evidence of liaison between officeholders and spenders, who will be assumed to have acquired some influence over public policy as a consequence of their outlays.

If only influence, and not *quid pro quo*, is required to justify regulation, it would be folly to believe that Democratic candidates, for instance, are not fully aware of such union activities as

Other asserted governmental interests have also been swept aside by the Court. Attempts to equalize citizen influence in the political process by imposing expenditure limits on candidates were regarded as "wholly foreign to the First Amendment" and its interest in promoting the widest dissemination and the unfettered exchange of ideas.¹³⁶ This rationale also prevents the imposition of limits on independent expenditures.

Finally, attempts to restrict either expenditures or contributions to protect dissenting union members or corporate shareholders have been rejected.¹³⁷ Where membership dues or service payments are required—as in union or agency shop arrangements—the Court has said that the remedy lies in refunding to the dissenting member a share of his payments proportionate to the percentage of the treasury spent for political purposes.¹³⁸ Corporate stock ownership is, by contrast, voluntary. The Court said in *Bellotti* that the dissenting shareholder's remedies lie in "the procedures of corporate democracy,"¹³⁹ in derivative suits to challenge corporate disbursements made for allegedly improper purposes,¹⁴⁰ or in a shareholder's withdrawal of his investment which, unlike the payment of union membership or service fees, is a decision solely within his discretion.¹⁴¹

If *Bellotti* and *Buckley* mean what they say, it is safe to conclude that both PAC's and their parent institutions have a constitutional right to make unlimited independent expenditures to support or oppose candidates. And they have a further constitutional right to make contributions, but such contributions may be legislatively limited in amount, although not entirely prohibited, to avoid the actuality or appearance of corruption or undue influence over officials or government itself. Any discussion of PAC's, which directly spend and contribute funds

endorsements, sample ballot distributions, labor newspaper news and editorial coverage, and registration and get-out-the-vote drives. For the scope of these activities, see text & note 231 *infra*. Unions obtain access and influence at least as much by these activities as by direct contributions. And as others embark upon such activities, they shall similarly obtain access and influence. For a discussion of such expenditures by ideological and corporate PAC's, see text & notes 232-37 *infra*.

For other objections to the Court's logic regarding independent expenditures, see Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 Wis. L. Rev. 323, 340-46.

136. 424 U.S. at 48-49. For a generally critical comment on the Court's refusal to consider the equalization of access and impact a sufficient governmental interest to support regulation of campaign expenditures, see Nicholson, *supra* note 135, at 237-40.

137. See Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 ARIZ. L. REV. 373, 402-11 (1980).

138. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-42 (1977).

139. 435 U.S. at 794.

140. *Id.* at 794-95. But such remedies are generally not available under corporate articles, which include political activity as an appropriate function of management. Comment, *Corporate Contributions to Ballot-Measure Campaigns*, 6 U. MICH. J.L. REF. 781, 781 n.3 (1973); Comment, *The Constitutionality of Limitation on Corporate Contributions to Ballot Measure Campaigns*, U.S.F. L. REV. 145, 173 (1978).

141. 435 U.S. at 794 n.34.

that are voluntarily given by their constituents, must occur in the context of apparently broader constitutional rights of corporations and unions to spend and perhaps contribute treasury funds for political purposes.

The PAC Explosion

Although there are somewhat different estimates of the growth of PAC's in the wake of recent statutory changes,¹⁴² there is universal agreement that both their numbers and their total dollar volume have increased enormously. The most careful tracing shows that 608 PAC's filed year-end reports in 1974 and 1,633 did so in 1978.¹⁴³ Even these figures may understate PAC activity: 1,938 PAC's engaged in some activity during 1978 as compared to the 1,633 still registered at the end of that year.¹⁴⁴ In the two-year period from 1976 to 1978, total PAC expenditures rose from an estimated \$36.9 million to \$77.8 million. Their contributions to candidates went from \$20.5 million to \$35.1 million.¹⁴⁵

There is at least some evidence that the growth of PAC's at the national level is being matched by similar activity in state politics. The Wisconsin State Elections Board reported 1974 disbursements by non-party committees of \$917,890; by 1976 the amount had risen to \$2.6 million. PAC contributions to candidates rose from \$362,946 to \$1,165,273 during the same four-year period.¹⁴⁶

The growth of PAC's has not occurred evenly in all economic and interest sectors.¹⁴⁷ Labor, which has long had PAC's, had 201 committees file year-end reports in 1974 and 218 in 1978. New political activity by business corporations has, by contrast, increased markedly. Only 89 corporate PAC's filed in 1974; 784 did so in 1978. All other PAC's—including trade associations, cooperatives, and ideological groups—went from 318 to 631 during the four-year period.¹⁴⁸

The same pattern appears in PAC disbursements and contributions.¹⁴⁹ Corporate PAC's spent \$5.8 million in 1976 and \$15.3 million in 1978. By contrast, labor PAC's grew only slightly, from \$17.5 million to \$18.9 million.

Edwin Epstein has made the "very conservative estimate" that

142. H. ALEXANDER, *supra* note 39, at 544-66; Epstein, *supra* note 2, at 115-24; Malbin, *Campaign Financing and the "Special Interests,"* 56 PUB. INTEREST 21, 24-26 (1979).

143. Epstein, *supra* note 2, at 116. Alexander has reported that there were 520 PAC's in 1972. H. ALEXANDER, *supra* note 39, at 544.

144. Epstein, *supra* note 2, at 117.

145. *Id.*

146. 1979 WIS. REP., *supra* note 39, at 4-12; 2 WIS. STATE ELECTIONS BD., BIENNIAL REP.: SUPP. DATA TABLES 203 (1975) [hereinafter cited as 1975 WIS. REP.].

147. Epstein, *supra* note 2, at 116.

148. *Id.*

149. *Id.* at 117.

one-half of the PAC's outside the union and corporate categories were business-related (*e.g.*, trade and professional associations).¹⁵⁰ Combining these PAC's with their corporate counterparts would set the number of business-related committees at 248 (forty-one percent of all PAC's) in 1974 and at 1,100 (seventy-six percent) in 1978.¹⁵¹ Total disbursements by business-related PAC's rose from \$12.6 million (thirty-five percent of all PAC outlays) in 1976 to \$37.1 million (47.7%) in 1978.¹⁵²

The potential for still further PAC expansion in the business sector remains enormous. Epstein points out that in 1978 only forty percent of the firms in the top 500 and only twenty-four percent in the second 500 of *Fortune's* list of industrials had PAC's. Among *Fortune's* list of 300 leading nonindustrial firms, only twenty-eight percent had PAC's in 1978.¹⁵³ Epstein's analysis of the top twenty firms in each of twenty-one categories of nonfinancial industries showed that, while the number of PAC's grew from 106 in 1976 to 196 in 1978, there were still forty-nine percent of the firms that had not formed PAC's.¹⁵⁴ He concludes that "PAC operations in 1976 and 1978 reveal only the tip of a possible iceberg."¹⁵⁵

The growth of that iceberg has been stimulated by changes in the law and by political practices since 1974. First, "PACs allow corporations and business-related associations to organize and *institutionalize* their electoral activities in a highly efficient way."¹⁵⁶ Second, changes in law and the success of newly formed corporate PAC's have "legitimated [business political] activity both within firms and in the greater community,"¹⁵⁷ thus allowing companies "to undertake political activity with a heightened sense of rectitude and purpose."¹⁵⁸

The PAC's in Practice

Total PAC Spending. One effect of PAC's, largely ignored by their detractors, is to substantially increase the money available for politics. In a nation whose politics chronically suffer financial malnutrition,¹⁵⁹ this is no small accomplishment. PAC contributions to major party House candidates rose from \$5.3 million in 1972 to \$23 million in

150. *Id.* at 118.

151. *Id.* at 117-18.

152. *Id.*

153. *Id.* at 128.

154. *Id.* at 135.

155. *Id.* at 143.

156. *Id.* at 146 (emphasis in original).

157. *Id.*

158. *Id.*

159. See text & notes 64-66 *supra*. See also D. ADAMANY & G. AGREE, *supra* note 9, at 18-27.

1978.¹⁶⁰ They accounted for \$2.8 million in 1972 Senate campaigns and \$8.6 million in 1978.¹⁶¹ Total receipts by major party candidates for both houses went from \$62.2 million in 1972 to \$158.2 million in 1978, an increase of \$96 million.¹⁶² Of this increase, \$23.5 million was contributed by PAC's.¹⁶³

PAC Fundraising. Another largely unnoticed aspect of PAC activity has been the marshalling of small contributors.¹⁶⁴ An examination of all 1976 PAC's with receipts of more than \$100,000 shows that eighty-seven percent of their total receipts of \$35.5 million were in sums of \$100 or less.¹⁶⁵ Labor PAC's skew this pattern somewhat: ninety-six percent of their \$13.5 million was in small contributions. Membership, trade association, and other PAC's got 82.5% of their \$20.8 million in contributions of \$100 or less. Even corporate PAC's received sixty-six percent of their \$1.1 million in these small gifts; another twenty-five percent was received in sums of \$101 to \$499.¹⁶⁶

PAC Contribution Patterns. In the distribution of their funds, unlike the amassing of them, PAC's reinforce disparities that already trouble campaign financing. They plainly favor incumbents over chal-

160. Malbin, *Of Mountains and Molehills: PACs, Campaigns, and Public Policy*, in INTEREST GROUPS, *supra* note 1, at 152, 154.

161. *Id.* at 155.

162. *Id.* at 154-55.

163. More persuasive evidence is found by recalculating political finance data from Wisconsin. In 1970, total campaign costs, excluding campaigns for federal office but including party and PAC activity, were about \$4.5 million. By 1978 that amount had risen to about \$9.6 million. PAC contributions and direct spending accounted for no more than \$240,000 (9%) of these outlays in 1970; in 1978 PAC activity was \$2.6 million (27%). Hence, political spending in Wisconsin increased about \$5.1 million, and \$2.2 million (43%) of that increase can be credited to PAC outlays. These figures are especially useful because they combine PAC contributions to candidates with PAC direct spending and because they portray the role of PAC's in the state's whole "political system."

The 1970 figures are based on recalculations from Wis. Gov. COMM'N, *supra* note 39, at 2, 29-30 and from the original working papers for that study. The 1978 estimates are calculated from 1979 Wis. REP., *supra* note 39, at 4-12 to 4-14.

164. Commentators have differed on the extent of small contributions to business-related and corporate PAC's. Compare MacGregor, *Commentary*, in INTEREST GROUPS, *supra* note 1, at 206, 207-08 (small contributions to corporate PAC's outnumber large gifts) with Manier, *Discussion*, in INTEREST GROUPS, *supra* note 1, at 219, 226 (average contribution to corporate PAC's was \$200).

165. These calculations are made from data reported in H. ALEXANDER, *supra* note 39, at 824-25.

166. In 1978, Wisconsin labor, education (primarily teacher organizations and unions), and business-related PAC's raised \$2.8 million, of which \$2.2 million (79%) was in sums of \$100 or less. The author has made these calculations from 1979 Wis. REP., *supra* note 39, at 4-12 to 4-13, 4-20 to 4-23. Union and education PAC's got 95% of their funds in these small contributions. Business PAC's were also primarily reliant on small gifts: they received 61% of their funds in sums of \$100 or less and another 30% in medium-sized donations of \$101 to \$500. The prominence of small gifts to PAC's in some businesses long associated with large donations is surprising. In Wisconsin, PAC's in several business categories and the percentage of their funds in sums of \$100 or less can be calculated for 1978 as follows: manufacturing (44%), finance (58%), insurance (80%), health-related (89%), mercantile (48%), transportation (31%), utilities (77%), realtors (71%), other businesses (60%). More startling is the insignificant reliance of business PAC's on gifts over \$500; while manufacturing and realtors' PAC's raised respectively 25% (\$31,165) and 6.66% (\$7,800) of their funds in such gifts, no other business-related group raised as much as five percent in large donations. The author has calculated these figures from *id.* at 5-264 to 5-335.

lengers. In 1978, Democratic House incumbents received an average of \$39,657 from PAC's; Republican incumbents got \$34,164. Challengers, by contrast, got much less—Democrats received \$11,010 and Republicans \$14,420. A similar pattern prevailed in 1976.¹⁶⁷ Common Cause reported that seventy-five percent of PAC funds went to incumbents in 1976. Overall, PAC's favored incumbents over challengers in 1976 by a ratio of 3.14 to 1, with agricultural groups favoring incumbents by a margin of 7.29 to 1.¹⁶⁸ Favorable treatment of incumbents also occurs at the state level.¹⁶⁹

The disadvantage to challengers is especially acute in races decided by large margins. Malbin's analysis makes clear that in 1978 very small percentages of PAC money—from labor, business, trade associations, or ideological groups—found their way to challengers in those noncompetitive districts where incumbents won by sixty percent or more of the vote. Safe incumbents, on the other hand, received disproportionate percentages of both business and labor PAC contributions.¹⁷⁰ PAC contributing strategies do not, therefore, hold promise of revitalizing competition and thus accountability in electorally noncompetitive districts where political opposition already suffers severe financial privation.

PAC contributions bear adversely on challengers in another way. They become available toward the end of the campaign rather than during the crucial start-up period when a challenger must establish the presence, organization, and momentum that give his campaign credibility and allow him to generate the resources necessary to sustain his canvas through election day. Fifty-three percent of 1978 congressional candidates reported receiving most union contributions in the last month of the campaign and sixty-three percent got most corporate and special interest PAC money in that period.¹⁷¹ Moreover, incumbents tended to receive PAC funds early, while challengers received them late.¹⁷²

In one respect, PAC's do fuel vigorous competition. In districts where no incumbent is on the ballot (open seats), PAC's gave generously: Democratic candidates in 1978 received an average of \$38,900 and Republicans obtained \$44,000.¹⁷³ Moreover, PAC contributions

167. Jacobson, *supra* note 28, at 2-14 to 2-15.

168. Common Cause figures are reported in H. ALEXANDER, *supra* note 39, at 545-46.

169. See text & note 60 *supra*.

170. Malbin, *supra* note 160, at 158-61; Orren, *The Impact of the Federal Election Campaign Act: The View from the Campaigns*, in CAMPAIGN FINANCE STUDY GROUP REP., *supra* note 1, at 3-1, 3-13 to 3-14.

171. Orren, *supra* note 170, at 3-14 to 3-15.

172. *Id.*

173. Jacobson, *supra* note 28, at 2-16.

tended to be higher in closely contested open-seat districts.¹⁷⁴ Malbin's analysis shows that PAC contributions in closely competitive open-seat districts is both party and issue oriented: Corporate and conservative PAC's give heavily to Republicans, labor and liberal PAC's to Democrats.¹⁷⁵

The behavior of PAC's in open-seat districts suggests their potential impact on the relative financial strength of the two parties. Labor unions contribute heavily to Democratic incumbents, challengers, and open-seat aspirants; they give sparingly to Republicans.¹⁷⁶ Liberal PAC's give disproportionately to Democrats, conservative PAC's to Republicans.¹⁷⁷ Both reserve their funds for candidates—incumbents, challengers, open-seat contenders—in closely contested races.

Business and professional PAC's preferred incumbents to challengers, and they gave the average Republican incumbent about twice as much as the average Democratic incumbent.¹⁷⁸ They preferred Republican challengers to Democratic challengers by even wider margins.¹⁷⁹ Epstein has noted, in addition, that in 1978 corporate PAC's gave to both Democratic and Republican incumbents early in the campaign, but in the last month they contributed much more heavily to Republicans, especially to GOP challengers.¹⁸⁰

The apparently equal PAC support for Democrats and Republicans masks complex patterns which are probably temporary and which, moreover, promise quickly to restore the Republican hegemony in campaign funds that existed until 1976.¹⁸¹ The present balance is due largely to the tendency of trade association and corporate PAC's to support Democratic incumbents. Trade associations may continue that pattern; they give heavy weight to a candidate's incumbency and committee assignments as well as his industry-specific stances.¹⁸² Corporate PAC's, on the other hand, are more concerned about the candidate's overall pro-business voting record and his industry-specific stances than about incumbency and committee assignments.¹⁸³ Epstein has suggested that the late surge of corporate money to Republicans in 1978 reflects a future trend of greater issue orientation by those

174. *Id.* at 2-34.

175. Malbin, *supra* note 160, at 160-61.

176. Jacobson, *supra* note 28, at 2-13 to 2-16; Malbin, *supra* note 160, at 160-61.

177. Malbin, *supra* note 160, at 160-61.

178. Jacobson, *supra* note 28, at 2-14 to 2-15.

179. *Id.*

180. Epstein, *supra* note 2, at 123.

181. See text & notes 51-54 *supra*.

182. These patterns were discovered in a 1976 survey by the United States Chamber of Commerce, reported in H. ALEXANDER, *supra* note 39, at 553.

183. *Id.*

groups.¹⁸⁴

Corporate PAC's are the largest growing group of PAC's in both numbers and dollars. Conservative PAC's have recently greatly outdistanced liberal PAC's in fundraising.¹⁸⁵ If corporate PAC's become more issue-oriented and shift heavily to the support of Republicans, the combination of conservative and corporate PAC contributions to the GOP will swamp labor and liberal support for Democrats.

PAC's and Parties. There is much lament among scholars about the decline of political parties.¹⁸⁶ But PAC's should take little of the rap for this.¹⁸⁷ The forces ravaging American parties were set in motion long before the recent emergence of PAC's.¹⁸⁸ A media-oriented middle-class electorate is becoming more interested in issues and candidates and less interested in parties,¹⁸⁹ and party affiliation has declined precipitously.¹⁹⁰ The traditional incentives for activists and citizens to support parties have declined.

Campaign money has not, as some commentators suggest,¹⁹¹ been a glue which binds candidates to the party organizations. Because of their issue posture and class base, Republican party organizations have long been more successful than their Democratic rivals in raising funds.¹⁹² But Heard's classic analysis of political finance reveals that even a quarter-century ago, party support of candidates varied widely among locales and various levels of party organization.¹⁹³ Party contributions provided a maximum of eleven percent of funds to House campaigns from 1972 to 1976.¹⁹⁴ Contributions from parties to Senate and House candidates are plainly in decline.¹⁹⁵ Parties have provided

184. Epstein, *supra* note 2, at 123.

185. Malbin reports contributions to House and Senate general election candidates by the 15 most visible conservative PAC's at \$1.9 million; the seven most visible liberal PAC's gave \$305,000. Malbin, *supra* note 142, at 160-62. These contribution figures are preferable to expenditure figures because the latter are swollen in the case of conservative PAC's by very high fundraising costs for mass mailing. On the other hand, the increased tendency of ideological PAC's to provide services rather than money makes these contribution figures too small to reflect full PAC activity.

186. J. KIRKPATRICK, *supra* note 35; Ranney, *supra* note 14. See generally A. RANNEY, *CURING THE MISCHIEFS OF FACTION* (1975).

187. See Sorauf, *supra* note 38, at .

188. L. EPSTEIN, *POLITICAL PARTIES IN WESTERN DEMOCRACIES* 233-60 (1967); F. SORAU, *PARTY POLITICS IN AMERICA* 72-77, 82-85, 163-66, ch. 17 (3d ed. 1976).

189. N. NIE, S. VERBA & J. PETROCIK, *supra* note 32, at chs. 10, 17-18.

190. Ranney, *supra* note 14, at 220.

191. See commentators cited notes 36-37 *supra*.

192. See text & notes 51-54, 82 *supra*.

193. A. HEARD, *supra* note 3, at ch. 11. Studies of Connecticut and Wisconsin show that in the 1960's Republican candidates received as much as 77% and as little as 15% of their funds from party organizations, while Democratic aspirants only obtained between one and 23% of their funds from party treasuries. D. ADAMANY, *supra* note 11, at 221-29 (Wisconsin); D. ADAMANY, *CAMPAIGN FUNDS AS AN INTRAPARTY POLITICAL RESOURCE: CONNECTICUT 1966-1968* 22-25 (1972).

194. McDevitt, *supra* note 4, at 144.

195. Jacobson, *supra* note 28, at 2-8.

funds only inadequately, fitfully, and unevenly in the whole of the post-war period. The continuing decline of party financing is surely not due to the rise of PAC's, although the converse may be true.

The Two-Constituency Issue. The most important issue raised by PAC contributions is their effect upon officeholders' responsiveness to and representation of their electoral constituencies. It has been said that "PAC money is *interested* money"¹⁹⁶ and that PAC contributions are generally "contributions with a legislative purpose."¹⁹⁷ But most support for candidates is, at bottom, intended to advance some policy, cause, or program, and these are all "interests." The most pressing public concern, however, is whether campaign contributions produce tangible economic benefits for givers. For PAC's, the answer is not straightforward.

Ideological PAC's¹⁹⁸ present the most qualified case. They plainly have legislative programs. And they contribute their money to facilitate passage of their programs: They support ideologically compatible candidates in marginal races.¹⁹⁹ Their legislative programs, however, are not designed to produce tangible economic benefits for the PAC's or, at least directly, for their members.

Ideological PAC's do, however, tend to give ideological candidates advantages over centrist candidates. They distort the sources of campaign money by drawing large sums from relatively small and extreme sectors of the population. They heighten existing financial disparities, because conservative PAC's raise far more money than liberal groups.²⁰⁰

Labor PAC's also pose special analytical problems. On the one hand, they promote specific programs intended economically to advantage unions and their members—for example, common-site picketing, union- and agency-shop authorizations, wage-and-hour legislation, and subsidies for Chrysler Corporation and the merchant marine. On the other hand, they have had comprehensive programs extending to civil rights, foreign policy, and other national issues only indirectly related to economic unionism.

Unions reserve their support primarily for liberals, and usually for liberal Democrats. They do not follow two practices that mark groups with more narrowly conceived interests: (1) giving to incumbents, regardless of party,²⁰¹ and (2) "targeting" funds to officeholders on key

196. CAMPAIGN FINANCE STUDY GROUP REP., *supra* note 1, at 1-8 (emphasis in original).

197. Wertheimer, *Commentary*, in INTEREST GROUPS, *supra* note 1, at 193.

198. See Malbin, *supra* note 160, at 159 (providing examples).

199. See text & notes 175-77 *supra*.

200. See note 185 *supra*.

201. Unions contribute disproportionately to Democrats, regardless of incumbency, while

legislative committees, regardless of party or ideology.²⁰² Moreover, unions engage in an unusually wide array of political activities—drafting platforms, lobbying, recruiting candidates, mobilizing voters, and participating in national party conventions.²⁰³ Because of the breadth of their programs and political activities, unions have been characterized as political parties, rather than as interest groups.²⁰⁴

Business and trade association PAC's follow more traditional strategies, although corporate PAC's may become more issue and party oriented.²⁰⁵ In 1978 business PAC's gave disproportionately to House incumbents of both parties;²⁰⁶ from 1972 to 1976, the average incumbent, Democratic and Republican, received more from business PAC's than did the average challenger.²⁰⁷ Compilations by Common Cause show that business PAC's "target" funds to members of key committees.²⁰⁸ While Republicans on those committees tend to receive larger business contributions, northern Democrats also receive funds from business PAC's whose parent firms fall within their committees' juris-

largely ignoring both incumbent and nonincumbent Republicans, especially in campaigns for the House of Representatives. Malbin, *supra* note 160, at 160-63.

202. Such targeting by unions was alleged in COMMON CAUSE, *HOW MONEY TALKS IN CONGRESS* 16-18, 40-43, 52 (1979). Close examination of the Common Cause data does not support its conclusions, however. Unions contributed \$597,156 or an average of \$16,000 to members of the House Committee on Education and Labor from January, 1975 to July, 1978. Taking only significant contributions of \$5000 or more, unions supported all 22 northern Democrats, neither of the 2 southern Democrats, and only 2 of 12 Republicans. *Id.* at 52.

An analysis of maritime union contributions to members of the House Merchant Marine and Fisheries Committee in 1977-78 produces similar results. Total contributions were \$102,763 or an average of \$2600. Assuming that \$1000 is a substantial contribution, such union support went to 16 of 20 northern Democrats, 4 of 7 southern Democrats, and 2 of 13 Republicans. *Id.* at 40. What emerges is a picture of strong union preference for northern, liberal Democrats, rather than indiscriminate contributing to members of powerful committees affecting labor's interests.

203. Jessup, *supra* note 78, at 53.

204. *Id.* at 53.

205. Epstein, *supra* note 2, at 123. Epstein has suggested that the shift of corporate PAC contributions to Republican candidates in the last month of the 1978 campaign signals the transition from a "risk averting" strategy of giving to incumbents of both parties, to a "risk taking" strategy in which corporate PAC's support Republicans, challengers as well as incumbents, because of a preference for their business-oriented policies. *Id.*

Kayden also raises the possibility that the professional staffs of corporate PAC's may be in transition from a nonpartisan self-image to a more explicit preference for Republicans, partly due to intensive lobbying of business PAC's by Republican party and conservative ideological PAC operatives. Kayden, *The Impact of the Federal Election Campaign Act upon Political Action Committees*, in CAMPAIGN FINANCE STUDY GROUP REP., *supra* note 1, at 5-1, 5-3.

A more benign explanation for the large surge of Republican money by corporate PAC's is that late primaries, late release of BIPAC's (Business-Industry Political Action Committee) list of endorsed candidates, and late contributions to the PAC's triggered the heavy last minute PAC financial support of candidates. Budde, *supra* note 85, at 23-24. This explanation, however, would not ameliorate the argument that corporate PAC giving, early or late, is beginning to go more heavily to Republicans than it did in prior years.

206. Malbin, *supra* note 160, at 160-61.

207. Jacobson, *supra* note 28, at 2-15. It should be noted, however, that within the category of incumbents, business PAC's gave more generously to Republican incumbents than to Democratic officeholders. A similar preference for Republicans occurred within the category of challengers. *Id.*

208. COMMON CAUSE, *supra* note 202, at 16-18, 39-58.

dictions.²⁰⁹

Even when PAC's do not focus mainly on obtaining direct economic benefits, they create a problem for representative government. Because money is readily transferable, PAC's nationalize funding sources. They collect ample treasuries in small individual gifts from many locales, centralize those funds in the hands of institutional officers, and then make large contributions in strategically important races anywhere in the country. The real or effective financial constituency in these circumstances is the PAC and its leadership, not the small givers to PAC campaign war chests. The candidate knows the programs and objectives of the PAC, and it is to the PAC officers that preferred access is given. These nationally centralized institutions thus compete with local constituents, including those who supply political resources, for the attention of public officials. In this competition nationally centralized institutions are increasingly at an advantage because the money they proffer is readily convertible into technologies that are ever more effective in modern campaigns.

PAC's in Perspective

Statutory changes and perhaps emerging constitutional doctrines have licensed sweeping new PAC activity. The response has been an explosion in the numbers and the dollar volume of PAC's, but persuasive evidence suggests that recent increases are only the first stage in a much larger phenomenon. Moreover, the growth of PAC's is occurring unevenly: slowly and unimportantly among liberal and labor groups, dramatically among conservatives and corporations.

The PAC explosion has brought much more money into politics, and it has promoted participation by raising most of that money in small sums from many givers. But in the distribution of this new money, PAC's have heightened already serious distortions in American politics. Incumbents and, to some extent, candidates in marginal districts are the beneficiaries; electoral accountability in "safe" districts has received no additional nutriment. Business interests, conservatives, and Republicans are helped, while competing groups are disadvantaged. In addition, PAC money magnifies the role of particularized interests by concentrating money in relatively few hands, locating it in

209. *Id.* Common Cause shows, for example, that all members of the House Subcommittee on Financial Institutions received contributions from individuals and PAC's affiliated with financial institutions. Looking only at significant contributions of \$5000 or more, these individuals and PAC's supported seven of eleven northern Democrats, both southern Democrats, and five of six Republicans on the Subcommittee. Other examples advanced by Common Cause show similar bipartisan giving by business to key committee members, although in some cases the support for Republicans is stronger than for Democrats.

Washington, and often targeting it to afford favored access on matters involving direct economic benefits to the givers.

While important constitutional values involving speech and association and the civic virtue of greater individual participation may be promoted by the growth of PAC's, it is difficult to be sanguine about their adverse effects on political competition and accountability, on economic, ideological, and partisan balances, and on the policymaking process. More than a minor threat to democratic politics has accompanied whatever happy consequences have flowed from the emergence of PAC's.

WHAT TO DO ABOUT PAC's

American policies toward political finance embody four different approaches: (1) Disclosure of the sources and uses of money; (2) the restriction of campaign expenditures; (3) the limitation of campaign contributions; and (4) the public financing of campaigns. It is within these confines that public policy toward PAC's must be discussed.

Longstanding prohibitions on the contribution or expenditure of union and corporate treasury funds to support or oppose political candidates give rise to PAC's, which use "voluntary" funds—albeit raised and administered with treasury dollars—for these purposes. Recent Supreme Court decisions have thrown doubt on the constitutionality of the prohibitions that restrict the parent institutions.²¹⁰ Expenditure prohibitions now appear indefensible.²¹¹ Contributions may be limited, but probably not banned altogether.²¹² Judicial decisions have, therefore, not only narrowed the scope of regulatory policies that might be applied to PAC's, they may also have freed the parent institutions from much existing regulation.

There seems little dispute that PAC's ought to be subject to rigorous disclosure requirements. The purposes of such disclosure are, however, hotly argued. The traditional reform position was that disclosure would alert voters to the sources and uses of campaign funds, that most politicians would avoid big or interested contributions and excessive expenditures in anticipation of adverse voter reaction at the polls, and that voters would indeed punish candidates and parties that did not rebuke evil practice in campaign financing.²¹³

210. See text & notes 111-24 *supra*.

211. See text & notes 125-26 *supra*.

212. See text & notes 125-31 *supra*.

213. H. ALEXANDER, *MONEY, POLITICS AND PUBLIC REPORTING* 7 (1960); L. OVERACKER, *MONEY IN ELECTIONS* 202 (1932); PRESIDENT'S COMMISSION ON CAMPAIGN COSTS, *FINANCING PRESIDENTIAL CAMPAIGNS* 17-18 (1962); TWENTIETH CENTURY FUND TASK FORCE ON FINANCING CONGRESSIONAL CAMPAIGNS, *ELECTING CONGRESS* 15 (1970).

That position has recently been viewed with skepticism.²¹⁴ Disclosure laws generate more information than can be mastered by the media, the politicians, or the voters—at least in the short run of a campaign. Media may show little interest in political financing practices, and their partisan or editorial positions may color their coverage of such practices by competing candidates. Voters, too, are likely to evaluate such information through a “perceptual screen” that is colored by their own partisan allegiances and candidate preferences. Even if voters obtained, mastered, and wished to use the information, the calculus of voting would make it difficult for them to forswear a candidate they preferred on great issues of the national economy, foreign and defense policy, or civil liberties and civil rights in order to punish him for dubious campaign finance practices.

The uses of disclosure are, therefore, quite limited. They may occasionally have an impact on campaigns.²¹⁵ But their more important uses are to aid in the enforcement of other aspects of the law, such as contribution limits, and to develop a body of information useful for evaluating and developing political finance policies. In a handful of instances, disclosures may play on the legislative process by throwing light on potential connections between contributions and official actions.²¹⁶

The FECA prohibits multicandidate committees, which includes PAC's, from contributing more than \$5,000 per election to any candidate and \$15,000 per year to any national political party committee.²¹⁷ There is no aggregate limit on the total contributions a multicandidate committee can make,²¹⁸ although there is a stringent antiproliferation clause which counts all contributions by all PAC's of the same international union or company within the \$5,000 limit.²¹⁹

An amended version of the Obey-Railsback bill, adopted by the House of Representatives,²²⁰ would impose new contribution limits on

214. D. ADAMANY & G. AGREE, *supra* note 9, at 103-15.

215. A Federal Election Commission survey of 1976 congressional candidates showed that 7% believed their fund sources had been a major campaign issue and 11% thought them a minor issue. H. ALEXANDER, *supra* note 39, at 46-48.

216. At least one congressman has given Common Cause credit for defeating cargo preference legislation by widely publicizing the contributions of maritime unions and industry representatives to members of the House, including members of the Merchant Marine and Fisheries Committee. COMMON CAUSE, *supra* note 202, at 11-12.

217. 2 U.S.C. § 441a(a)(2) (1976).

218. By contrast, individuals are prohibited from making contributions aggregating more than \$25,000 in any calendar year. *Id.* § 441a(a)(3) (1976). Wisconsin has adopted a somewhat different approach, limiting any PAC to aggregate contributions in a biennium of \$50,000 to all statewide candidates and \$30,000 to all legislative and local candidates. WIS. STAT. § 11.26(5), (6) (1977).

219. 2 U.S.C. § 441a(a)(5) (1976).

220. The modified Obey-Railsback provisions have been added by the House as an amendment to an FEC appropriations bill. S. 832, 96th Cong., 1st Sess., 125 CONG. REC. H9261-9305 (1979) (text at H9289-90). At this writing, however, passage by the Senate is uncertain.

PAC's. A candidate involved in a primary and a general election could receive no more than \$6,000 from any PAC and not more than \$5,000 in either of those elections. A candidate participating in primary, run-off, and general elections could receive \$9,000 from a PAC, but not more than \$5,000 in any one of those elections. In addition, the aggregate amount that a candidate could receive from all PAC's would be \$70,000, but that limit would be increased to \$85,000 for a candidate participating in a primary, a run-off, and a general election.²²¹

A strong case can be made for limits on contributions from PAC's both individually and in the aggregate. First, such contributions are often an exaggerated case of multiple voting,²²² frequently intended to promote specific economic interests and to obtain disproportionate access to officeholders.²²³ Contribution limits diminish the disparity in influence between voters and small contributors, on the one hand, and major institutions, on the other.

The aggregate limit serves this purpose, but goes beyond, by restricting the influence obtained by many PAC's acting in concert. Edwin Epstein has suggested that "one of the greatest challenges to the integrity of American electoral politics could arise from excessive harmony between powerful business and powerful labor."²²⁴ Although he concluded that "such a coalition has not yet come about,"²²⁵ Fred Wertheimer of Common Cause has aptly pointed out that "in recent years we find cases of business and labor lobbying together on such issues as defense spending, environmental regulation, maritime legislation, trucking legislation, and nuclear power."²²⁶ If business and labor have not yet found it convenient to marry, they sleep together often enough to threaten public (though not private) morality. The aggregate limit on PAC contributions that may be received by a candidate is prophylactic on those occasions.²²⁷

Buchanan, *Obey-Railsback Plan Stalled in the Senate By Threat of Filibuster*, 38 CONG. Q. WEEKLY REP. 33 (1980).

221. See Alexander, *The Obey-Railsback Bill: Its Genesis and Early History*, 22 ARIZ. L. REV. 653, 660 (1980). A variant is Wisconsin's rule limiting PAC contributions to 45% of a statutory guideline, which also constitutes the expenditure ceiling for candidates receiving public funding, and restricts PAC and party contributions together to 65% of that amount. WIS. STAT. § 11.26(a) (1977). Under this arrangement the allowable aggregate contribution limit for PAC's and parties rises as the expenditure limit is adjusted for inflation and the size of the electorate.

222. See text & note 11 *supra*.

223. See text & notes 20-30 *supra*.

224. Epstein, *supra* note 2, at 149.

225. *Id.* at 150.

226. Wertheimer, *supra* note 197, at 200.

227. The strongest constitutional challenge to such an aggregate limit is that those specific PAC's attempting to make contributions after the limit is reached will be denied the speech and associational rights that the Supreme Court has found inherent in campaign contributions. See text & notes 128-29 *supra*. On the other hand, contributions may be limited to avoid the actuality or appearance of corruption. See text & note 130 *supra*. The coalition of many PAC's on a single issue, as suggested in text & notes 224-26 *supra*, would pose such a danger and might constitute a

Reduced limits on PAC contributions and an aggregate limit on total PAC donations should not stand alone. These measures remove money from politics for good reason, but they weaken politics by reducing the funds available to discuss issues and run campaigns. Hence, limits on PAC contributions, like limits on individual contributions, ought to be enacted in conjunction with ample public financing.²²⁸ While the details of an appropriate public financing measure are not at issue in this Article,²²⁹ public financing can assure ample funds to support vigorous campaigns in all races and to draw those funds from sources neither specially interested nor unrepresentative of the electorate. Some public financing plans—such as those triggering substantial grants when a candidate qualifies by receiving a modest threshold of primary votes, vouchers, small contributions, or some combination of them—provide struggling candidates with the “early” or “start-up” funds that are among the purported advantages of participation by PAC’s and large individual contributors.²³⁰

The salutary effects of contribution limits plus public financing, however, will not fully curb the influence of PAC’s. They will have the

sufficient governmental interest to sustain an aggregate limit on PAC contributions. The case for sustaining such a limit is strengthened because PAC speech is not cut off by such a ceiling: a PAC which could not contribute within the limit could still make its views known through direct independent expenditures.

228. Expenditure limits, which are a common feature of public financing schemes, should be avoided. First, it is difficult to devise an expenditure limit that takes into account campaign costs dictated by widely disparate conditions in various constituencies—*e.g.*, geographical size, population density, congruence of media with district lines, strength of party organization. D. ADAMANY & G. AGREE, *supra* note 9, at 212-13; D. ADAMANY, *supra* note 5, at 224. Second, the persuasive evidence that campaign spending aids challengers, but perhaps not incumbents, by giving them visibility, should be a warning that spending limits are likely to favor incumbents, to diminish the electoral prospects of challengers, and thus to reduce accountability. See text & notes 29-34 *supra*. Third, expenditure limits may discourage candidates from accepting the public funding to which limits are tied. In the uncertain circumstances of campaigns, few candidates—especially those in highly competitive races—dare to shackle themselves to spending limits. MINN. ETHICAL PRACTICES BD., *supra* note 28, at 17 (“campaign expenditure limits in 1978 were sufficiently restrictive to be one of the major causes for a decline in candidate participation in the public financing program”). Finally, contribution limits tend to reduce the undue influence that arises from private campaign giving, and it is difficult to see how expenditure limits further advance this desirable public purpose. N.J. ELECTION LAW ENFORCEMENT COMM’N, PUBLIC FINANCING IN NEW JERSEY: THE 1977 GENERAL ELECTION FOR GOVERNOR 33-34 (1978).

It is significant that two of the state commissions with the most experience in administering public financing programs have recently urged the abolition of the expenditure limits tied to those subsidies. MINN. ETHICAL PRACTICES BD., *supra* note 28, at 1, 16-17, 25-26; N.J. ELECTION LAW ENFORCEMENT COMM’N, *supra*, at 33-35.

229. For a review of the main features in recent public financing bills and the merits of those various arrangements, see PUBLIC FINANCING, *supra* note 37. The author’s recommendations can be found in D. ADAMANY & G. AGREE, *supra* note 9, at chs. 1, 10-11.

230. CAMPAIGN FINANCE STUDY GROUP REP., *supra* note 1, at 1-13; Malbin, *supra* note 142, at 41. Although the amount of money raised in congressional campaigns in sums of \$500 or more has increased more rapidly than has the amount obtained in small gifts, see Wertheimer, *supra* note 197, at 203, it is doubtful whether the existing contribution limit of \$1,000 per election actually restrains very many individual givers. Conlon, *supra* note 78, at 191. Moreover, it seems clear that PAC contributions tend to be made late rather than early, especially to challengers. Orren, *supra* note 170, at 3-15. Hence, the “start-up” money argument for generous individual or PAC contribution limits may be more rhetorical than real.

option of spending their funds directly for political education, for endorsement of candidates among their employees, stockholders, or members, and for registration and get-out-the-vote drives. Labor already allocates far more money to these activities than it contributes directly to candidates,²³¹ and its direct political action efforts are regarded as especially effective. Corporate PAC's have not yet developed extensive programs of this kind. But they have large constituencies for such appeals—stockholders and their families as well as administrative and executive employees—and one commentator has suggested that they will develop more vigorous direct political action programs in the near future.²³²

Recent Supreme Court decisions suggest, in addition, that unlimited direct expenditures from PAC and/or treasury funds are constitutionally protected.²³³ Limits on PAC contributions might well provoke an onslaught of direct expenditures supporting or opposing candidates.²³⁴ To date, such expenditures have been modest.²³⁵ And making such expenditures effectively is a complicated undertaking.²³⁶ Nonetheless, one effect of the rapid expansion of PAC's is the creation of additional political expertise, especially in the business community. The new professional staffs in PAC's and trade associations should not have much difficulty calculating from the candidate's own campaign strategy which kinds of independent expenditures would be most helpful to and appreciated by him.²³⁷

An open question about direct expenditures is the permissible extent of disclosure requirements. If PAC's can develop unrevealing names (*e.g.*, Citizens for Good Government), independent expenditures may become a relatively attractive campaign device. Voters will not be likely to learn the sources of these efforts, but the candidates whom PAC's wish to influence certainly will.

Campaign laws might, however, be written to require explicit mention of the PAC's parent—for example, the ABC corporation or

231. H. ALEXANDER, *supra* note 39, at 548-51, 566-70; H. ALEXANDER, *supra* note 17, at 505-06. The author's calculations show that labor unions in Wisconsin spent 67% of their total expenditures in both 1974 (\$657,802) and 1978 (\$1,206,531) for direct political activity and only 33% for contributions to candidates. 1975 WIS. REP., *supra* note 146, at 6-24; 1979 WIS. REP., *supra* note 39, at 5-292 to 5-303.

232. Epstein, *supra* note 2, at 144.

233. See text & notes 111-26 *supra*.

234. Malbin, *supra* note 160, at 181-83.

235. H. ALEXANDER, *supra* note 39, at 363-65, 407-08, 524; Kayden, *supra* note 205, at 5-23 to 5-24.

236. Conlon, *supra* note 78, at 190-91.

237. Evidence of greater direct expenditures by PAC's, even without new statutory limits on their contributions, may be found in the \$1 million campaign by a group of conservative PAC's to defeat five liberal United States Senators. Weinraub, *Million-Dollar Drive Aims to Oust 5 Liberal Senators*, N.Y. Times, March 24, 1980, § B (Metropolitan Report), at 6.

XYZ trade association—in the media announcements, printed appeals, and other campaign materials purchased by independent outlays. Where PAC's have diverse fund sources, such regulations might require identification of those contributing more than a specified percentage (*e.g.*, twenty percent) of the independently expended funds. Independent expenditures would be less attractive to spending institutions, less helpful to candidates, and less persuasive to voters if funding sources were explicitly identified in campaign appeals.

Limitations on PAC contributions might also cause them to redirect their funds into lobbying and other direct attempts to influence legislation or executive and administrative decisions. A recent successful lobbying effort—including sweeping grassroots activity—to block labor law revision, cost business organizations and PAC's about \$5 million.²³⁸ This expenditure on a single issue equaled one-seventh of total PAC contributions made to congressional candidates in 1978.

Although there are alternative channels for PAC involvement in politics, contribution limits are useful because they diminish the direct flow of money from PAC's and their parent institutions to candidates. This may mute the influence and access that contributors gain with officeholders. It dilutes, but plainly does not eliminate, the multiple voting effects implicit in large institutional contributions to candidates.

CONCLUSION

Whatever are the advantages for democratic politics that may be posited for large PAC contributions can be gained and exceeded by carefully conceived public financing programs that supply ample funds to support vigorous political activity, distribute that money to assure competition in all races, and ameliorate disproportionate representation of, or access for, monied individuals, groups, or institutions. Low limits on individual and PAC contributions would, when combined with such a public funding program, allow desirable individual and institutional participation in politics, while avoiding excessive multiple voting by any participant and without starving the polity or any of its parts of the money essential for vibrant politics.

238. Malbin, *supra* note 160, at 179.