

# CAMPAIGN FINANCE REFORM: ATTEMPTING THE FIRST AMENDMENT IN A MARKETPLACE OF IDEAS

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Christian wisdom holds that “money is the root of all . . . evil.”<sup>1</sup> Campaign finance reform proposals, then, have historically attempted to protect the political system from the corrupting influence of so-called “special interest” money.<sup>2</sup> Specifically, most regulatory approaches attempt to limit the political impact of the wealth that accumulates in corporate treasuries.<sup>3</sup> Regulatory efforts assume that a well-funded “special interest” holds the potential to undermine the legitimacy of political outcomes.<sup>4</sup> Indeed, ongoing fundraising

scandals threaten to overwhelm the nation’s highest elected officials.<sup>5</sup> As a result, the mass media have focused on the role of money in politics,<sup>6</sup> a fact which has appeared to erode public confidence in elected officials.<sup>7</sup> If so, the current regulatory regime governing campaign finance bears closer examination.<sup>8</sup>

Although most efforts to reform the system have focused on closing so-called “loopholes” in the regulatory regime,<sup>9</sup> any changes must preserve First Amendment protection of political de-

<sup>1</sup> 1 Timothy 6:10 (St. Paul’s First Letter to Timothy states, “Love of money is the root of all kinds of evil”).

<sup>2</sup> See David Segal, *Main Street America Has Advocates Aplenty: On the Hill, Lobbyists for All*, WASH. POST, July 10, 1995, at A1, for a report regarding the inclusion of every American in a “special interest.” For a deeper examination into the goals of would-be regulatory reformers, see David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141 (1995).

<sup>3</sup> Common Cause is the quintessential proponent of regulatory proposals for political reform. For a perspective on its long-time president, see Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126 (1994). For an examination of Common Cause, which is a nonprofit corporation, see Robert V. Pambianco, *Common Cause’s Uncommon Agenda*, CAPITAL RESEARCH CENTER (1993). For a historical overview of American political finance scandals, see Gil Troy, *Money and Politics: The Oldest Connection*, WILSON QUARTERLY, 1997, at 14-32.

<sup>4</sup> See, e.g., James A. Gardner, *Protecting The Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892 (1984) (arguing that government’s interest in ‘rational’ outcomes supersedes the citizenry’s interest in free speech). For more on the paternalist perspective guiding the Court’s campaign finance jurisprudence, see Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. REV. 1 (1995). Professor Ortiz argues that a regulatory approach necessarily presupposes that Americans are (and always will be) unwilling or unable to meet the requirements of democratic government absent the Court’s careful guidance. See *id.* at 26-29. Contrast Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996). Professor Smith argues that those who advocate equalizing political power represent a more genuine threat to democracy than does corruption. See *id.* at 1050.

<sup>5</sup> For an overview of Attorney General Janet Reno’s consideration of whether to appoint an Independent Counsel to address President Bill Clinton’s alleged campaign misconduct, see David Johnston, *Attorney General Extending Inquiry on Clinton’s Calls*, N.Y. TIMES, Oct. 15, 1997, at A1; Mark Helprin, *Impeach*, WALL ST. J., Oct. 10, 1997, at A22; Micah Morrison, *What Did the President Know When?*, WALL ST. J., July 7, 1997, at A13. Regarding accusations against Vice President Al Gore; Bob Woodward, *Gore Donors’ Funds Used as ‘Hard Money,’* WASH. POST, Sept. 3, 1997, at A1.

<sup>6</sup> Newspaper columnists representing a range of political ideologies have harshly criticized the President’s fundraising activities. See, e.g., William Raspberry, *Too Crass for Comfort*, WASH. POST, Feb. 27, 1997, at A21 (announcing that he is ‘bailing out’ of support for the Administration).

<sup>7</sup> See, e.g., Richard Morin and Dan Balz, *President’s Ratings Register a Setback: Fund-raising Controversy Erodes Public Confidence*, WASH. POST, Mar. 11, 1997, at A1. See also John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377 (1985). Professor Shockley argues that the proliferation of referenda movements represents the citizens’ distrust of government. See *id.* at 379-80.

<sup>8</sup> This Comment critiques current jurisprudence as well as many proposals for campaign reform. For a wider range of perspectives, see the transcript from a May 3, 1996, panel discussion sponsored by the American Bar Association Section on Administrative Law and Regulatory Practice, Election Law Committee, 13 J. L. & POLITICS 163 (Winter, 1997) (Trevor Potter, former Commissioner of the Federal Election Commission, moderated the discussion among University of Virginia Law Professor Lillian R. BeVier, Common Cause General Counsel Donald Simon, National Association of Business PACs Executive Vice President Steven Stockmeyer, and House Oversight Committee Chairman William Thomas (R-CA)).

<sup>9</sup> See Bradley A. Smith, *Why Campaign Finance Reform Never*

bate.<sup>10</sup> This Comment explores the First Amendment implications of regulatory efforts to limit the political expression rights of incorporated "special interests." Part I reviews existing law governing campaign finance. Part II surveys pending proposals to "reform" the system. Part III reveals flaws in the regulatory approach and points to a new jurisprudence model. The Comment concludes by proposing a deregulatory approach to reform that would target actual abuses without limiting the First Amendment rights of all Americans. The proposed jurisprudence model would protect and foster vigorous political discourse in the marketplace of ideas.

### I. BACKGROUND: PERCEIVED CORRUPTION AND THE POLITICAL PROCESS

The proponents of regulatory campaign finance "reform" argue that corporate treasuries pose a risk of corrupting political markets. This Comment momentarily accepts that arguable premise and surveys the legal theory supporting regulation of corporate expression.

The Supreme Court has extended "commercial" (or economic) speech protection to corporations, distinguishing it from political (or editorial) expression that presumably receives greater protection.<sup>11</sup> The Court has recognized a "societal right" to receive information that would otherwise be difficult to obtain.<sup>12</sup> In such cases, the Court has emphasized that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."<sup>13</sup> Recently, a dissenting opinion by Justice Clarence Thomas argued that regulation should not pass muster when government asserts an interest in keeping consumers ignorant.<sup>14</sup> In

fact, the Court has explicitly recognized a societal interest in commercial information.<sup>15</sup> Thus, the Court has identified a societal "right" to information as its basis for extending First Amendment protection to corporate economic expression.

However, the Court extends protection to commercial speech only if it determines that the expression relates to a legal activity.<sup>16</sup> Furthermore, government may legitimately regulate commercial expression if doing so directly advances a substantial state interest through a means "not more extensive than is necessary to serve that interest."<sup>17</sup> The Court has clarified the last component of this test by noting that it requires only a reasonable, as opposed to a perfect, fit between the state's substantial interest and the means utilized to directly advance it.<sup>18</sup> Importantly, then, legitimate regulation to prevent corporate corruption of economic markets requires a reasonable effort that directly advances a substantial state interest. This standard for upholding limits on societal-based rights falls somewhat short of the requirement to uphold government-imposed limits on individual rights. Nonetheless, if this test for preventing corruption in economic markets must serve as the bare minimum for regulating corporate political expression, at what point might the state's interest in preventing "corruption" of the political process justify campaign finance regulation?

The Court's antitrust jurisprudence suggests one possible answer. Antitrust cases provide a useful context for analyzing modern campaign finance cases since the Court has prioritized the basic integrity of and access to the political system in both kinds of jurisprudence. The Court has refused to find a violation for attempting to influence legislation, even if such efforts would use the political process to create an *economic* monopoly.<sup>19</sup> Focusing its concern on the establishment of *polit-*

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Works, WALL ST. J., Mar. 19, 1997, at A19. Professor Smith calls the regulatory proposals "an incumbent's protection racket" and notes that "some of today's biggest loopholes were yesterday's reforms." *Id.* See also Stephen G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193 (1996). Professor Gey describes and derides efforts by "a new generation of censors." *Id.* at 295.

<sup>10</sup> See generally Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258 (1994). For Professor BeVier's initial defense of the Court's authority to strike down legislative incursions on the First Amendment, see Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045 (1985).

<sup>11</sup> See *N.Y. TIMES CO. v. SULLIVAN*, 376 U.S. 254, 264

(1964).

<sup>12</sup> See *Bigelow v. Virginia*, 421 U.S. 809 (1975).

<sup>13</sup> *Id.* at 825-826.

<sup>14</sup> See *44 Liquormart Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996).

<sup>15</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 764 (1976).

<sup>16</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

<sup>17</sup> *Id.*

<sup>18</sup> *Bd. of Trustees, S.U.N.Y. v. Fox*, 492 U.S. 469, 479 (1989).

<sup>19</sup> See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961).

ical monopoly, the Court has refused to limit corporate political expression rights merely because the exercise of those rights includes lobbying for the corporation's own "special interest" promotion of economic monopoly.<sup>20</sup> The Court has held that an antitrust violation, or political corruption, occurs when excessive corporate influence amounts to usurpation of the political process and essentially denies all access to competitors.<sup>21</sup> Antitrust jurisprudence, then, provides a touchstone answer to that question common in corporate political expression cases: at what point does the threat of corruption become an interest so compelling that it surpasses political speech rights?<sup>22</sup> The Court's antitrust cases suggest that government may legitimately regulate corporate political expression only if the special interest had so corrupted the political system as to create a political monopoly that completely shut out all competing interests.

In its campaign finance cases, the Court directly examines government regulation of corporate political participation, but it has frequently failed to reach results consistent with the standard suggested in the antitrust cases. In *U.S. v. Harriss*,<sup>23</sup> the Court upheld the Federal Regulation of Lobbying Act (ROLA) only by narrowly construing its disclosure requirements.<sup>24</sup> The Act would have compelled solicitors, collectors, or recipients to disclose any monetary or otherwise valuable aid contributed in attempts to influence legislative outcomes.<sup>25</sup> The Court, however, construed the

language as unconstitutionally vague unless interpreted to define lobbying "in its commonly accepted sense."<sup>26</sup> Thus, the Court limited the Act's scope to include only activity which as its "principle" purpose seeks direct communication with a member of Congress regarding the passage or defeat of pending or proposed legislation.<sup>27</sup>

In *Buckley v. Valeo*,<sup>28</sup> the Court examined the Federal Election Campaign Act of 1971, as amended in 1974 (FECA), which placed monetary limits on political contributions and expenditures by candidates for federal elective office.<sup>29</sup> The Court concluded that regulation of money does, in fact, regulate speech.<sup>30</sup> The Court upheld contribution limits, reasoning that they "marginally" interfere with political expression.<sup>31</sup> However, the Court struck down limits on expenditures, concluding that they "impose significantly more severe restrictions on protected freedom of political expression."<sup>32</sup>

The Court has struck down contribution limits when applied to committees formed to influence referenda.<sup>33</sup> Yet, the Court has held that the association interests of individual contributors to a nonprofit corporation are "overborne" by a Congressional effort to prevent corruption or the appearance of corruption in the political system.<sup>34</sup> This false distinction between limiting contributions and limiting expenditures continues to haunt Congressional debate regarding proposals to further regulate campaign fundraising.<sup>35</sup>

In the aftermath of *Buckley*, surviving FECA pro-

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supersedes the societal interest in allowing corporate expression. Presumably, the societal rights theory is more open to regulation by legislation.

<sup>20</sup> See generally Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905 (1990). Professor Minda argues that the 'Noerr-Pennington doctrine' is flawed because it assumes pluralistic notions, such as the fact that interest groups promote social welfare, and because it affords First Amendment protection to petitioning interest groups. See *id.* at 1027.

<sup>21</sup> See *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972). But see, Robert H. Bork, *THE ANTI-TRUST PARADOX* (1978). Judge Bork has articulated the Court's antitrust approach as focused on identifying predation through governmental processes. *Id.* at 347. He also argues that, as a means to combat political corruption, antitrust law provides a test involving five prominent factors:

(1) the intent of the parties, (2) the means employed, (3) the character of the governmental processes involved, (4) the character of the decision to be made; and (5) the degree to which the process focuses upon the formulation of general rules or upon the specific rights or liabilities of particular parties.

*Id.* at 357.

<sup>22</sup> Under a societal-based rights theory, the pivotal question is whether the societal interest in preventing corruption

<sup>23</sup> See generally 347 U.S. 612 (1954).

<sup>24</sup> See *id.* at 620-21.

<sup>25</sup> See 2 U.S.C. §§ 261-64, 266-67 & 269 (1988).

<sup>26</sup> *Harriss*, 347 U.S. at 620.

<sup>27</sup> See *id.* at 622.

<sup>28</sup> See generally 424 U.S. 1 (1976).

<sup>29</sup> *Id.* See also 2 U.S.C. §§ 431-41 (1988).

<sup>30</sup> *Buckley*, 424 U.S. at 19.

<sup>31</sup> *Id.* at 23.

<sup>32</sup> *Id.*

<sup>33</sup> *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 300 (1981). The Court recognized that such contribution limits, at least in this limited context, unconstitutionally infringe on the right of association. See *id.* For a proposal to allow limited corporate spending in referenda, see Allen K. Easley, *Buying Back the First Amendment: Regulation of Disproportionate Corporate Spending in Ballot Issue Campaigns*, 17 GA. L. REV. 675 (1983).

<sup>34</sup> *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207 (1982).

<sup>35</sup> See Jonathan Rauch, *Vote Against McCain, Wait, Can I*

visions force corporations to make political expenditures from a fund segregated for that exclusive purpose. Nonprofit corporations may solicit only "members" for contributions to these segregated funds, and each for-profit corporation may solicit only its "restricted class" for contributions to the to its segregated fund.<sup>36</sup> The Court has held that Congress may require political expenditures to be made from a fund segregated from a corporation's general treasury where the money for such expenditures had been derived from so-called "direct fund-raising."<sup>37</sup> The Court concluded that the mass mail solicitation of persons lacking either capital stock or a similarly significant role in the political committee's accumulation of wealth does not produce revenues representing a "relatively enduring and independently significant financial or organizational. . . member" analogous to a shareholder in a for-profit corporation.<sup>38</sup>

The Court has, however, struck down limits on expenditures by a similar nonprofit "independent political committee" precisely because the expenditures were, in fact, contributions to a candidate for elective office.<sup>39</sup> In that case, the Presidential Election Campaign Fund Act had imposed criminal penalties on independent political committees that exceeded a limit on contributions to candidates who had accepted public financing.<sup>40</sup> The Court struck down the penalties as applied to a nonprofit ideological corporation, reasoning that the sanctions unconstitutionally limited expenditures unrelated to corruption of the political system.<sup>41</sup>

In each of the cases involving regulation of political expression by for-profit corporations, the Court relied on the privileges enjoyed by shareholders to legitimize legislative efforts to protect the "integrity" of the political process. Because society has permitted shareholders to engage in potentially lucrative investments, the theory holds, society may regulate expression to limit al-

leged distortions in the electoral process. Yet, in *First National Bank of Boston v. Bellotti*,<sup>42</sup> the Court struck down a Massachusetts effort to ban corporate political expenditures in referenda not clearly in the business interest of the specific corporation.<sup>43</sup> The Court held that in such cases, the corporation's First Amendment right was not limited to issues within its business interests.<sup>44</sup> At least once, then, the Court has disallowed regulation that would merely limit corporate management's discretion to exceed the mandate of its shareholders.

If for-profit corporations enjoy protections beyond even their strict business interests, nonprofit corporations must enjoy at least such levels of protection. As the Court has examined the First Amendment political expression rights of nonprofits, it has recognized that the business purpose of such corporations is indeed ideological rather than economic. In *FEC v. Massachusetts Citizens for Life, Inc.*,<sup>45</sup> the Court struck down the Federal Election Campaign Act mandate that corporations make political expenditures from a segregated fund where the corporation, a nonprofit ideological association with no for-profit members or contributors, could not use its incorporated status to accumulate wealth and manipulate the political process beyond any reflection of actual public support.<sup>46</sup> Here again, the Court found room for further distinctions and maneuvering.

In *Austin v. Michigan State Chamber of Commerce*,<sup>47</sup> restrictions on a nonprofit corporation's political expression survived scrutiny as a means of limiting the political influence of its "for-profit corporate members."<sup>48</sup> The Court upheld a "segregated fund" requirement as narrowly tailored to a compelling state interest in preventing the corruption at the hands of "huge corporate treasuries" amassed with the aid of favorable state laws.<sup>49</sup> Even under strict scrutiny, the Court upheld the inapplicability of a statute regarding unincorpo-

*Say That?*, WALL ST. J., Oct. 1, 1997, at A22.

<sup>36</sup> See 2 U.S.C. §§ 441b(a), 441(b)(4)(A) and 441(b)(4)(C) (1994).

<sup>37</sup> *Right to Work Comm.*, 459 U.S. at 204.

<sup>38</sup> *Id.*

<sup>39</sup> *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985).

<sup>40</sup> See 26 U.S.C. § 9012(f) (1994).

<sup>41</sup> See *Nat'l Conservative Political Action Comm.*, 470 U.S. at 497.

<sup>42</sup> See generally 435 U.S. 765, 777 (1978).

<sup>43</sup> See *id.*

<sup>44</sup> *Id.*

<sup>45</sup> 479 U.S. 238 (1986).

<sup>46</sup> *Id.* at 259.

<sup>47</sup> 494 U.S. 652 (1990).

<sup>48</sup> *Id.* at 657-660. See, e.g., Gerald G. Ashdown, *Controlling Campaign Spending and the 'New Corruption': Waiting for the Court*, 44 VAND. L. REV. 767 (1991) (examining the Court's apparent focus on limiting this 'new corruption').

<sup>49</sup> See *Austin*, 494 U.S. at 668, 669.

rated labor unions, relying upon *Beck*<sup>50</sup> to note that union members were entitled to refrain from contributing to funds used for political purposes.<sup>51</sup> The Court distinguished this case from *FEC v. Massachusetts Citizens for Life, Inc.*, reasoning that the Chamber's non-political, non-business activities created a disincentive for for-profit corporations to end their affiliation (and the provision of dues) even if they disagreed with the Chamber's political advocacy.<sup>52</sup> The Chamber's potential for influence by for-profit corporations seemed significant to the Court.<sup>53</sup> In a scathing dissent, Justice Scalia argued that the constitution does not entrust to majoritarian government decisions as to who may, in fairness, speak and who may not.<sup>54</sup> Scalia noted that corporations are, in fact, voluntary associations;<sup>55</sup> that no amount of special treatment under the law should deprive an individual or association of constitutional protection;<sup>56</sup> and that the majority has restricted corporate expression in ways that would not pass constitutional muster if applied to individuals.<sup>57</sup>

Finally, many of the current proposals for campaign finance reform must consider the existing jurisprudence governing disclosure rules. As in *Harriss*, the *Buckley* Court upheld disclosure and record keeping provisions.<sup>58</sup> Still, the Court has struck down such requirements, with respect to both contributions and expenditures, as applied to a minor political party that had been historically harassed.<sup>59</sup> Thus, the Court has demonstrated at least a distaste for mandatory disclosure.

Importantly, the Court has struck down regulation that would compel political expression by unwilling participants. The Court has also held that a state may not mandate the display of an ideolog-

ical theme on its citizens' automobile license plates<sup>60</sup> and that it may not require a corporation to carry political opponents' messages on "extra space" on billing statements.<sup>61</sup> Although the Court has implied a right of public access to private property, (in essence, compelling the property owner to sponsor the expression) where the property owner had opened the property to the public and could easily disclaim sponsorship of the particular viewpoint,<sup>62</sup> the Court has also insisted that this "does not undercut the proposition that forced associations that burden protected speech are impermissible."<sup>63</sup> For example, the Court has upheld the right of parade organizers to exclude proponents of political views with which they disagree, even though the parade took place not only in a public forum, as in *Pruneyard Shopping Center v. Robins*, but on public property.<sup>64</sup> In *Communication Workers v. Beck*, the Court limited the ability of labor union managers to unilaterally use members' dues in pursuit of a political agenda (or for any purpose beyond the authority to conduct collective bargaining).<sup>65</sup>

## II. RECENT DEVELOPMENTS: CRACKS IN THE COURTS CONSENSUS, EFFORTS TO FURTHER REGULATE, AND A PROPOSAL TO UNDO THE DAMAGE

The Court has yet to reject the *Buckley* model, provoking dissatisfaction and eroding public confidence in elected officials. But most recently, the Court lost a majority of support behind any particular analytical model.<sup>66</sup> Justice Thomas actually rejected the current jurisprudence and called for the application of strict scrutiny to all campaign

<sup>50</sup> See *Communication Workers v. Beck*, 487 U.S. 735 (1988).

<sup>51</sup> See *Austin*, 494 U.S. at 665. For an extensive treatment of underinclusiveness as an argument against regulatory proposals which restrain for-profit corporations, as opposed to the relatively unrestrained political activities of labor unions, see William E. Lee, *The First Amendment Doctrine of Underbreadth*, 71 WASH. U. L.Q. 637 (1993).

<sup>52</sup> See *Austin*, 494 U.S. at 662-63.

<sup>53</sup> See *id.*

<sup>54</sup> See *id.* at 680.

<sup>55</sup> See *id.*

<sup>56</sup> See *id.* at 681.

<sup>57</sup> See *id.* at 685. For an extensive critique of *Austin* in light of the Court's previous decisions governing corporate political expression, see Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587 (1991).

<sup>58</sup> See *Buckley*, 424 U.S. at 84.

<sup>59</sup> See *Brown v. Socialist Workers*, 459 U.S. 87, 101 (1982).

<sup>60</sup> See *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

<sup>61</sup> *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 20-21 (1986).

<sup>62</sup> See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87-88 (1980).

<sup>63</sup> *Pacific Gas*, 475 U.S. at 12.

<sup>64</sup> See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

<sup>65</sup> *Beck*, 487 U.S. at 762-63 (1988).

<sup>66</sup> See *Colorado Republican Federal Election Campaign Committee v. FEC*, 116 S. Ct. 2309 (1996). For more on the ramifications of this case, see Richard Briffault, *Campaign Finance, the Parties and the Court: A Comment on Colorado Republican Federal Election Campaign Committee v. Federal Election Commission*, 14 CONST. COMMENTARY 91 (1997).

finance regulation. In light of the Court's lack of consensus, this Comment proposes an alternative jurisprudence and some limits on corporate political expression that would survive even Justice Thomas' test.

This Comment, then, explores the legislative reforms proposed during the last year. Ironically, even amid efforts to *deregulate* communications media, proposals for political reform—which involve the substance of a healthy democracy's communications—continue to adopt *regulatory* approaches to campaign fundraising reform. Congressional efforts have focused on a bill sponsored by Senators John McCain (R-AZ) and Russell Feingold (D-WI).<sup>67</sup> As originally introduced, the McCain-Feingold bill would have limited financial contributions to political parties and compelled the broadcast networks to grant “free time” to federal candidates for elective office.<sup>68</sup> The current version of McCain-Feingold dropped these most controversial provisions and retained the core of the bill, a ban on so-called “soft money” contributions to political parties.<sup>69</sup> Senate Majority Leader Trent Lott (R-MI) has attempted to add a labor-oriented amendment to this bill that would make McCain-Feingold subject to a filibuster by Democrats.<sup>70</sup> His amendment would go beyond the codification of *Beck* to limit the unions' ability to spend members' dues without the prior express permission of the members.<sup>71</sup> The bill would require said permission to be expressly provided by union members each year.<sup>72</sup> The primary opponent to McCain-Feingold remains Senator Mitch McConnell (R-KY), who argues that each of these measures would violate the First Amendment.<sup>73</sup>

Constitutional concerns have only served as a speed bump for would-be speech regulators on the road to “reform”. House Minority Leader

Richard Gephardt (D-MO) and three other Congressmen introduced measures to amend the Constitution to allow restrictions on campaign fundraising.<sup>74</sup> Gephardt's Amendment would have carved an exception in the First Amendment to allow “reasonable regulations” on campaign finance reform.<sup>75</sup> A variation on Gephardt's resolution was introduced in the upper house by Senator Fritz Hollings (D-SC).<sup>76</sup> After a spirited debate over several days, the measure failed by a surprisingly close margin: 38 in favor and 61 opposed.<sup>77</sup>

These renewed efforts to change the current rules regarding campaign fundraising follow a period of intense scrutiny regarding recent scandals involving the 1996 elections. Soon after they acquired control of Congress in January of 1995, Republicans had issued not-so-veiled threats to for-profit corporations' nonprofit Political Action Committees that had heretofore funded both parties: cut off the other side, or your donations buy you nothing.<sup>78</sup>

Democrats have also alleged that Republicans used nonprofit corporations to circumvent campaign finance regulations. First, they charged that House Speaker Newt Gingrich (R-GA) had improperly used a nonfederal political committee to fuel his political agenda and to seize control of the House.<sup>79</sup> More recently, critics claimed that former Republican National Committee Chairman Haley Barbour had used a nonprofit corporation, the National Policy Forum, to funnel money into Republican candidates' operations.

Recently, however, Democrats have endured numerous scandals regarding various efforts to peddle presidential access to for-profit corporations.<sup>80</sup> Initial outrage focused on an underlying fundraising purpose to the Clinton Administra-

<sup>67</sup> See CONG. REC. S9994 (daily ed. Sept. 26, 1997) (statement of Sen. Lott).

<sup>68</sup> S. 25, 105th Cong. (1997).

<sup>69</sup> John Harwood, *How McCain-Feingold Would Alter Campaign Finance*, WALL ST. J., Sept. 29, 1997, at A24.

<sup>70</sup> See David Rogers, *Senate GOP Impedes Campaign Bill By Demanding Vote on Union Dues Plan*, WALL ST. J., Sept. 30, 1997, at A24.

<sup>71</sup> See *id.* See also, e.g., S. 9, 105th Cong. (1997).

<sup>72</sup> See Rogers, *supra* note 70, at A24.

<sup>73</sup> CONG. REC. S10010 (daily ed. Sept. 26, 1997) (statement of Sen. McConnell).

<sup>74</sup> Gephardt introduced H.R. 47, 105th Cong. (1997). Congressmen John Dingell (D-MI), Eliot Engel (D-N.Y.), and Marcy Kaptur (D-OH), respectively, introduced H.R. 9, 105th

Cong. (1997); H.R. 14, 105th Cong. (1997); and H.R. 17, 105th Cong. (1997).

<sup>75</sup> H.R. 47, 105th Cong. (1997).

<sup>76</sup> See S. 18, 105th Cong. (1997).

<sup>77</sup> See CONG. REC. S2397 (daily ed. Mar. 18, 1997) (roll call vote).

<sup>78</sup> See Ken Auletta, *Pay Per Views*, NEW YORKER, June 5, 1995, at 52-56. See also Thomas B. Edsall, *Capital Drama: As the PACs Turn*, WASH. POST, July 23, 1995, at A8. See also Helene Cooper, *GOP to Rebuke Companies for Bipartisan Donations*, WALL ST. J., Jan. 9, 1997, at A14.

<sup>79</sup> See Leslie Lenkowsky, *New Tax Violation Hard to Find*, WALL ST. J., Jan. 3, 1997, at A8.

<sup>80</sup> See Phil Kuntz, *Hearings Unveil Reckless Pursuit of Specials Interests*, WALL ST. J., July 28, 1997, at A20.

tion's White House "coffees" with the president<sup>81</sup> and overnight stays in the Lincoln bedroom.<sup>82</sup> Congressional hearings uncovered evidence of coordination between Democratic National Committee and White House operations to bring "soft money" into the 1996 Clinton campaign,<sup>83</sup> as well as testimony indicating that Administration policy was influenced by contributors, irrespective of character.<sup>84</sup> Evidence also suggests that the Teamsters and their parent labor union, the AFL-CIO, conspired with the Democratic National Committee in a White House-coordinated effort to funnel labor union PAC contributions, as well as government money intended to monitor the Teamster's internal elections, into the 1996 presidential and congressional campaigns.<sup>85</sup> Most recently, videotapes have revealed the President at ease interacting with potential contributors at the White House.<sup>86</sup> Along with a general failure by

the Clinton Administration to be forthcoming,<sup>87</sup> these types of scandals have inspired the introduction of two separate bills in the House of Representatives; each would make fundraising on federal property expressly illegal.<sup>88</sup> Coupled with allegations that the Vice President conducted "hard money" fundraising on federal property,<sup>89</sup> Congressional Republicans asked the Attorney General to begin an Independent Counsel investigation.<sup>90</sup> Her reluctance to do so has provoked the introduction of legislation to compel her to act.<sup>91</sup>

Most seriously in the eyes of the public,<sup>92</sup> FBI investigators uncovered illegal foreign contributions<sup>93</sup> of so-called "soft money" to the Democratic National Committee.<sup>94</sup> This prompted the introduction of three additional bills from Congress proposing to make such contributions expressly illegal.<sup>95</sup>

<sup>81</sup> Charles Babcock, *Clinton White House Was Host to 58 More Political Functions: Number of Events for Supporters Much Greater Than First Disclosed*, WASH. POST, Mar. 16, 1997, at A21.

<sup>82</sup> See Kenneth T. Walsh, *Bedtime Stories*, U.S. NEWS & WORLD REP., Mar. 10, 1997, at 24-26. For a list of the White House overnight guests, see *White House Guests*, WALL ST. J., Feb. 25, 1997, Interactive Ed. <<http://www.wsj.com>>. See also *The Lincoln Bedroom Caper*, WEEKLY STANDARD, Mar. 10, 1997, at 11. See generally Glenn R. Simpson and Michael K. Frisby, *White House Files Depict Fund Raising*, WALL ST. J., Feb. 26, 1997, at A18; Phil Kuntz, *'Working the Room' Takes On New Meaning for Fund-Raisers Greeting White House Visitors*, WALL ST. J., Feb. 27, 1997, at 18.

<sup>83</sup> See Roberto Suro, *Clinton Campaign Directed 'Soft Money'*, Panetta Says, WASH. POST, Mar. 10, 1997, at A4. But see Geoffrey M. Wardle, *Time to Develop a Post-Buckley Approach to Regulating the Contributions and Expenditures of Political Parties: Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 46 CASE W. RES. L. REV. 603 (1996).

<sup>84</sup> See Michael K. Frisby and David Rogers, *Businessman's Access to White House Leads to a Security Inquiry*, WALL ST. J., Mar. 17, 1997, at A1; *CIA Memos Detail DNC Chief's Contacts on Behalf of Executive*, WALL ST. J., Sept. 10, 1997, Interactive Ed. <<http://www.wsj.com>>; See generally David S. Broder, *The Price of 'Access'*, WASH. POST, Mar. 2, 1997, at C7.

<sup>85</sup> See Glenn Simpson, *Union Probe Studies Ties to Clinton*, WALL ST. J., Sept. 11, 1997, at A16. See also Frank Swoboda and Sharon Walsh, *U.S. Says Carey Aides Used DNC, AFL-CIO*, WASH. POST, Sept. 19, 1997, at A1; Marianne Lavelle, *When Do-Gooders Get Into Bad Trouble: The Teamster Connection at Citizen Action*, U.S. NEWS & WORLD REP., Oct. 13, 1997, at 33; E.J. Dionne, Jr., *The Teamster Mess*, WASH. POST, Oct. 21, 1997, at A19; and Sharon Walsh, *Teamster Race Became a Dealmaker's Undoing*, WASH. POST, Oct. 22, 1997, at A1.

<sup>86</sup> See generally Giovanna Rossi, *Tribes Deal Themselves In: Indian Gaming Money and Political Influence*, POLICY.COM, (visited Nov. 1997), <<http://www.policy.com>> (regarding an alleged 'shakedown' of American Indians resulting in a serious form of 'corruption'—coercion). See generally David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369 (1994) (arguing that coercion repre-

sents the *only* corruption that government may legitimately act to prevent).

<sup>87</sup> See William Clinger, *A Pattern of Stonewalling*, WALL ST. J., May 1, 1997, Interactive Ed., <<http://www.wsi.com>>. See also David E. Rosenbaum, *Witness Says Clinton Aide Asked Him to Shred a Fax*, N.Y. TIMES, Sept. 20, 1997, at A8; John Solomon, *White House Admits Discovering False Testimony Two Years Ago*, WALL ST. J., Mar. 2, 1997, Interactive Ed. <<http://www.wsj.com>>; Richard Cohen, *Was that Hush Money?*, WASH. POST, Apr. 8, 1997, at A15.

<sup>88</sup> See H.R. 636, 105th Cong. (1997); H.R. 2073, 105th Cong. (1997).

<sup>89</sup> Larry Margasak, *Gore Made 44 Fund-Raising Calls From Office: Memos Show Aides Tried to Block Out Time for Vice President's Efforts*, WASH. POST, Aug. 6, 1997, at A4; *Transcript of Vice President Gore's News Conference on Campaign Fund-Raising*, WASH. POST, Mar. 4, 1997, at A9.

<sup>90</sup> Byron York, *Unequal Justice*, WEEKLY STANDARD, Oct. 13, 1997, at 27. See also *The Disgrace of Janet Reno*, WEEKLY STANDARD, Oct. 20, 1997, at 11; *Bankruptcy of Justice*, WALL ST. J., Sept. 4, 1997, at A10; *Troubled Justice*, WALL ST. J., July 31, 1997, at A18.

<sup>91</sup> See S. 1065, 105th Cong. (1997); S. 22, 105th Cong. (1997).

<sup>92</sup> See Morin and Balz, *supra* note 7, at 101.

<sup>93</sup> See Brian Duffy and Bob Woodward, *Senate Panel Is Briefed on China Probe Figure*, WASH. POST, Sept. 12, 1997, at A1. See generally Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 YALE L. & POL'Y REV. 503 (1997) (for an overview of the regulations governing foreign influence).

<sup>94</sup> Hilary Stout and John Harwood, *Foreign Political Donations Worry Public, Poll Finds*, WALL ST. J., Mar. 12, 1997, Interactive Ed. <<http://www.wsj.com>>. See also Barbara Vobejda, *Freeh Discloses Significant Expansion of Campaign Finance Investigation*, WASH. POST, May 5, 1997, at A2; Lena Sun, *Tracing Lippo Empire's Campaign Links*, WASH. POST, May 7, 1997, WashingtonPost.com, <<http://www.washingtonpost.com>>.

<sup>95</sup> See H.R. 34, 105th Cong. (1997); H.R. 354, 105th Cong. (1997); S. 1190, 105th Cong. (1997). Some proposals would even restrict contributions from all sources *outside of*

Some bills proposed in Congress during 1997 attempt to ban or otherwise restrict contributions by PACs<sup>96</sup> and/or "soft money" contributions to political parties.<sup>97</sup> Many of the bills attempt to restrict expenditures, either via the mandates outlawed by *Buckley* or through public financing entitlements.<sup>98</sup> Other proposals would strengthen disclosure rules<sup>99</sup> or set up commissions to further study the issue.<sup>100</sup>

While Congressional enactment of any legislation affecting campaign fundraising remains unlikely,<sup>101</sup> would-be speech regulators have succeeded in forcing an agreement to allow floor amendments and a vote on the McCain-Feingold bill by March.<sup>102</sup>

Opponents of further campaign finance restrictions reportedly plan to introduce an alternative bill that might eliminate limits and require disclosure.<sup>103</sup> Congressman John Doolittle (R-CA) has already offered a novel plan to eliminate contribution limits entirely and to replace the complex regulatory scheme with a simple "full and immediate disclosure" requirement.<sup>104</sup> This approach would take full advantage of online technology and rely on press attention and public scrutiny to police the "corrosive" influence of money in politics. As the ensuing analysis will reveal, the Doolittle approach and a First Amendment jurisprudence that recognizes corporations as associated individuals offers much promise for robust political discourse.

### III. ANALYSIS: FLAWS IN THE OLD REGIME AND IN PENDING PROPOSALS

This Comment has surveyed the sometimes inspired but frequently flawed law that governs corporate political expression. A Comment traditionally analyzes the *most recent developments* in a given field of law, and this Comment has surveyed reform proposals offered in the last year. But this

particular Comment is motivated by the relative *inaction* in this field in the face of eroding public confidence in elected officials. In short, this Comment argues that the precedent is just inspired enough to prevent the kinds of reform being sought yet flawed enough to prevent any other, more targeted reform, as well. Given the Court's lack of consensus behind its current analytical framework, this Comment proposes a new jurisprudence to govern corporate political expression.

This Comment, then, critiques the current law and reform proposals in the context of a proposed replacement model for corporate First Amendment jurisprudence. The proposed model will simultaneously preserve vital first amendment freedoms and promote public confidence in the integrity of the political system. First, this analysis will ascertain whether First Amendment political expression rights reside in individuals or in society. Second, it will explore the nature of a corporation to determine whether it is a voluntary association of individuals or a socially-endowed legal fiction. Third, this critique will ascertain whether the law distinguishes between legitimate expression on behalf of an incorporated association and political expression beyond the scope of management's authority. Finally, this analysis will examine the degrees to which for-profit and non-profit corporations may legitimately engage in protected political expression. The analysis will conclude that the federal government holds no authority with which to regulate political markets. Accordingly, the Comment will propose a new campaign finance jurisprudence that would permit only the targeted reforms within the limited scope of state and federal authority.

#### A. Individual Rights and Societal Interests

A proper analysis of the First Amendment's ap-

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the member's district. See, e.g., H.R. 2573, 105th Cong. (1997).

<sup>96</sup> See, e.g., H.R. 243, 105th Cong. (1997).

<sup>97</sup> See, e.g., H.R. 2183, 105th Cong. (1997). See generally Clarisa Long, *Shouting Down the Voice of the People: Political Parties, Powerful PACs, and Concerns About Corruption*, 46 STAN. L. REV. 1161 (1994); Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 FORDHAM L. REV. 53 (1987).

<sup>98</sup> See, e.g., H.R. 600, 105th Cong. (1997); H.R. 243, 105th Cong. (1997). See also Daniel Hays Lowenstein, *Frameworks of Analysis and Proposals for Reform: A Symposium on Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*,

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18 HOFSTRA L. REV. 301 (1989) (for an argument favoring public financing as an answer to political corruption).

<sup>99</sup> See, e.g., H.R. 2074, 105th Cong. (1997).

<sup>100</sup> See, e.g., H.R. 1614, 105th Cong. (1997).

<sup>101</sup> See *Evans-Novak Political Report*, Oct. 28, 1997, at 1.

<sup>102</sup> See *Senate Leaders Come to an Agreement on Reform Impasse*, CONG. DAILY, Oct. 30, 1997, at 1; Helen Dewar, *March Deadline Set for Senate Campaign Finance Bill*, WASH. POST, Oct. 31, 1997, at A4.

<sup>103</sup> See *Paxon and Shaw Work on GOP Campaign Finance Reform Bill*, THE WHITE HOUSE BULL., Oct. 30, 1997, at 4.

<sup>104</sup> See, e.g., H.R. 965, 105th Cong. (1997).



plicability to corporations must begin by examining the nature of First Amendment freedoms. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>105</sup> Thus, the rights to peaceful assembly and to petition are expressly reserved to "the people," and the clear language of the text prohibits Congress from limiting "freedom of speech."<sup>106</sup> But were the framers of our social compact referring to people as mere individuals or as components of something greater?<sup>107</sup>

The framers of the constitution were heavily influenced by natural law theory, born of the Judeau-Christian theological tradition, in which humans are freely and rationally created in the image of a free and rational Creator.<sup>108</sup> Jefferson declared as "self-evident" the idea that "all men are created equal and endowed by their Creator with inalienable rights."<sup>109</sup> Separately, Jefferson argued that "the God who gave us life gave us liberty at the same time."<sup>110</sup> Thus, those who fought for independence from England did so to preserve the inalienable rights that were the birth-right of not only all British Americans, but of all persons. History records no evidence to suggest that any person ever died for the independence and rights of a corporation. Those first Americans achieved independence and framed a social contract to protect the *individual* rights of their descendants.

Among these rights "inalienable" from the individual, the rights to voluntary assembly, petition, and political speech are presumably at the top of the hierarchy.<sup>111</sup> As Thomas Paine argued, "Speech is, in the first place, one of the natural rights of man always retained."<sup>112</sup> Paine further

elaborated that "the unrestrained communication of thoughts and opinions being one of the most precious rights of man, every citizen may speak, write, and publish freely, provided he is responsible for the abuse of this liberty in cases determined by the law."<sup>113</sup> Traditional understanding, then, holds that the first amendment applies only to individuals.<sup>114</sup> Jefferson even more plainly described his own "Summary View of the Rights of British America" as "laid out before his majesty, with that freedom of language and sentiment which becomes a free people *claiming their rights, as derived from the laws of nature, and not as the gift from their chief magistrate*".<sup>115</sup> Thus, the framers explicitly rejected notions of rights as held by groups or society, and they rejected in particular the idea of the state as a source of rights.

As this Comment has demonstrated, the commercial speech doctrine was the initial basis for recognizing First Amendment rights held by corporations, but this jurisprudence model began by attributing corporate economic expression rights to the societal interest in obtaining information.<sup>116</sup> The Court has opened the door to unlimited restrictions on corporate expression by identifying societal interest as the authority protecting the "marketplace of ideas" from government regulation.<sup>117</sup> *Central Hudson*, after all, recognized a societal interest as the source of authority to regulate this same "marketplace of ideas".<sup>118</sup> Thus, by establishing a societal interest as authority for both regulation of and freedom from restrictions on expression, current precedent regarding corporate expression places all of the power in majoritarian hands. A legislature receives much more latitude to regulate expression borne of a "societal interest" than it does when an "individ-

<sup>105</sup> U.S. Const. amend. I.

<sup>106</sup> *Id.*

<sup>107</sup> See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, 37-41, PRINCETON UNIV. PRESS (1997) (Amy Gutmann, ed.) (arguing the importance of an 'original understanding' of the First Amendment); "To guarantee that the freedom of speech will be no less than it is today is to guarantee something permanent; to guarantee that it will be no less than the aspirations of the future is to guarantee nothing in particular at all." *Id.* at 135-36.

<sup>108</sup> See *Genesis* 1:27.

<sup>109</sup> DECLARATION OF INDEPENDENCE, Preamble (U.S. 1776).

<sup>110</sup> Thomas Jefferson, *Summary View of the Rights of British*

*America*, WRITINGS 122.

<sup>111</sup> T. Barton Carter, Juliet Lushbough Dee, Martin J. Gaynes, and Harvey L. Zuckman, MASS COMMUNICATIONS LAW IN A NUTSHELL 5-7 (1994).

<sup>112</sup> Thomas Paine, *Rights of Man: Declaration of the Rights of Man and of Citizens*, COLLECTED WRITINGS 486 (Library of America, New York, N.Y., 1995).

<sup>113</sup> *Id.* at 507.

<sup>114</sup> See Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159 (Winter, 1997).

<sup>115</sup> Thomas Jefferson, WRITINGS at 120-21 (emphasis added).

<sup>116</sup> See *supra* note 12 and accompanying text.

<sup>117</sup> *Cent. Hudson*, 447 U.S. 557.

<sup>118</sup> *Id.*

ual right" draws lines that government may cross only under the strictest of scrutiny.

*Sullivan* distinguished commercial speech and afforded greater protection to political expression, but the Court's societal-based rights theory in its commercial speech cases opened the door to restrictions on political expression intolerable in the commercial sphere. No laws restrict the amount of money spent on *Super Bowl* advertising via restrictions on contributions to companies. For example, consumers finance economic advertising via their purchases of products. But the Court has upheld limits on *political* advertising via limits on contributions to candidates. Thus individuals (including those assembled in a corporation) are limited in the degree to which they may "purchase" political ideas. The societal-based notion of rights produced this legacy. Rights derived from society ultimately empower society's representative in the political world, government, at the expense of individuals. In each of the primary precedents regarding campaign finance, the Supreme Court fails to reconcile the conflict between First Amendment theories that invest rights in individuals and those that attribute rights to society. Resolution of this first question is intrinsically important as it relates to ramifications of the answer to the second fundamental question: what is a corporation?

#### B. Incorporated Associations or Fictional Entities?

An analysis of the first amendment political expression rights of corporations must next determine whether corporations exist as associations of individuals with rights or as mere state-sanctioned legal fictitious which enjoy only revocable privileges.

The English Common Law and American tradition has long assigned the phrase "legal fiction" to the corporation.<sup>119</sup> As merely a government-sponsored fictitious entity, the corporation's existence is subject to both government restraint and whatever affirmative "public interest" obliga-

tions that society chooses to impose. The corporation continues to enjoy limited liability and other privileges, due to state-sponsorship, and society benefits from the resulting economic growth and accumulation of capital. To the degree that the accumulation of capital begins to threaten the appearance of corruption or undue influence, this theory allows for unlimited regulation.<sup>120</sup> The courts, however, have chosen to selectively award the corporation with certain "rights" under the constitution.<sup>121</sup>

Massachusetts' ban on expenditures in *Bellotti* is consistent with the most noble parts of *Buckley* since the limits only applied where the political issue exceeded the scope of management's fiduciary duty. However, the narrow holding of *Bellotti* ignores the fact that rights and the nature of corporations are vested in individuals, not managers representing a "legal fiction" and not in society's "right" to hear all views. Massachusetts had merely attempted to subject corporate management to limits on discretion over the money of others (shareholders and members). Whereas the *Bellotti* court relied upon the *intent* of the framers of the First Amendment, the proposed jurisprudence model would rely upon the textual *meaning* of the First Amendment.<sup>122</sup> The *Bellotti* court failed to recognize that the Constitution protects an individual's right to express an opinion rather than society's right to hear it. It further failed to distinguish between the narrow limits on management's *discretion* that Massachusetts had sought to enact and the broader *Buckley*-type limits on *political expression*.

As the previous analysis concluded by noting that rights are properly attributed to individuals, this analysis arrives at a similar conclusion regarding the nature of corporations. The "legal fiction" theory assigns rights to an actor that, by definition, cannot act except through its agents and employees. The corporation does not speak; its managers purchase commercial time and authorize a message to convince individuals to purchase the products that the individuals who invested in the corporation believed could be sold. "Being

<sup>119</sup> See generally Henry Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. 99, 100-123 (1989).

<sup>120</sup> See generally David R. Lagasse, *Undue Influence: Corporate Political Speech, Power and the Initiative Process*, 61 BROOK. L. REV. 1347 (1995).

<sup>121</sup> *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284-85 (1989) (O'Connor, J., concurring

in art and dissenting part). See also Carl J. Mayer, *PERSONALIZING THE IMPERSONAL: CORPORATIONS AND THE BILL OF RIGHTS*, 41 HASTINGS L.J. 577 (1990) (for an argument that the recognition of Bill of Rights protections for corporations represents a return to substantive due process as a shield to regulation).

<sup>122</sup> *Bellotti*, 435 U.S. at 776.

the mere creature of law, [the corporation] possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence."<sup>123</sup> Any intervention in the activities of a "legal fiction" might be justified by sufficient state interest. The question then becomes whether an alternative legal theory views corporations as voluntary associations of individuals?

The "Law and Economics" school of thought defines the corporation as a "nexus of contracts".<sup>124</sup> Under this theory, investors (shareholders) contract with professional managers (officers), and the corporation contracts with the state via the corporate charter. According to this view, the corporate legal status is an incentive for the pooling of capital because shareholders are subject to limited liability. This, in turn, produces economic growth through increased investment, production, and employment. Management serves at the discretion of the owners and must honor a contractual fiduciary duty to represent their interests. By this view, individuals are the actors, the corporation is a vehicle for investment and profit, and the first amendment political expression rights of managers are derived solely from those of the shareholders. The shareholders are the individuals whose rights the Constitution was written to protect. If corporations exist as a nexus of contracts between individual investors, between the associated investors and managers, and between the associated investor/managers and the state, traditional theories protect these contractual relationships, civil liability extends to limit their first amendment conduct, and the constitution continues to limit the ability of government to restrain first amendment expression.

Thus, in *Bellotti*, Massachusetts had only sought to do by statute what the courts have generally failed to mandate through traditional breach of fiduciary duty derivative actions. By the language of the Massachusetts statute and under the model jurisprudence outlined throughout this analysis, the corporation's managers should be required to justify their expenditures under the authority granted them under contract. If a corporation is

a nexus of contracts, the corporation has contracted with the state and is subject to those terms, as well as the fiduciary interest terms implicated by the contract between managers and shareholders. If those interests are primarily economic, as is the case in for-profit corporations, the corporation's managers should be required to offer a reasonable valid for-profit goal furthered by the expenditure or suffer a breach of fiduciary duty verdict. Nonprofit ideological corporations would afford managers much more latitude under this model, since the primary purpose of such a corporation is not to make money. Under this scheme, then, a for-profit corporation would be limited to expenditures reasonably justifiable regarding the commercial purpose of the association. This would undoubtedly make valid the expression of nearly all commercial speech, as well as any political speech that could be reasonably justified in the context of *Noerr*-type advocacy. Of course, *Trucking Unlimited*-antitrust liability would continue to protect the integrity of the political process from excessive participation in the (or usurpation of the) political process.

In *Massachusetts Citizens for Life* and in Justice Scalia's dissent in *Austin v. Chamber of Commerce*, corporations are treated as voluntary associations of individuals. This view logically produces first amendment political expression rights for the corporation, either as a conduit for the "free speech" of individual shareholders or as a peaceful assembly or petitioning group of the same. If corporate political expression rights are a product of the corporation's nature as a voluntary association of individuals, then "society's interest" in limiting corporate participation in political debate is subject to limits.<sup>125</sup> The Courts would hold legislatures to a "least restrictive means" test, a standard which would defeat most broad regulatory mandates.

### C. Corporate Executives and the Abuse of Discretion

This analysis has attributed to individuals the nature of both "rights" and "corporations"; only

<sup>123</sup> Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819).

<sup>124</sup> ROBERT W. HAMILTON, CORPORATIONS 12-13 (1994).

<sup>125</sup> See, e.g., Adam P. Hall, *Regulating Corporate 'Speech' in Public Elections*, 39 CASE W. RES. L. REV. 1313 (1989). Hall

argues that viewing the corporation as an association necessarily alters the First Amendment analysis of campaign finance regulation, although certain current regulatory approaches would survive if the corporation in question had insufficiently acted to amplify members' views. *Id.* at 1339-40.

individuals enjoy rights, and corporations only exist as voluntary associations of individuals. Therefore, the true distinction between corporate and individual expression lies in the need for an actor on behalf of the corporation. Corporations do not "do" anything; they require managers and employees. Shareholders elect a leadership to represent the interests of the corporation, a voluntarily associated group of individuals who share a purpose, either profitable or nonprofit. Corporate managers, then, represent their shareholders (if for-profit) or members (if nonprofit). This is their fiduciary duty, enforceable via civil derivative action.<sup>126</sup>

However, the courts have afforded corporate officers increasingly wide latitude under the Business Judgment Rule.<sup>127</sup> As funding sources for "politically correct" causes,<sup>128</sup> corporation managers are encouraged to "invest" shareholders' money in "socially responsible" ways.<sup>129</sup> It is ironic that this politically biased vision has produced a theory under which the right of for-profit corporations has been curtailed to prevent political corruption while nonprofit charitable corporations, ostensibly formed to perform services for individuals in need, have been encouraged to enter into the political process.<sup>130</sup> The political arena has witnessed a proliferation of such nonprofit politically ideological corporations.<sup>131</sup> To the extent that more and more nonprofits have focused on pushing a political agenda, less money is available to the traditional charities that provide services directly to those in need. In practice, then, corpo-

rate contributions to both political action committees and to nonprofit public interest organizations fund highly politicized agendas.<sup>132</sup> Paradoxically, the same for-profit corporations that have been increasingly excluded from an *overt* political presence have been encouraged to develop a *covert* presence through the funding of politically active nonprofit corporations.

The agenda of these nonprofit corporations often has little justification under a theory of fiduciary trust. If, for example, a corporation contributes to a controversial organization such as Planned Parenthood, management may invite a consumer boycott of its products by those who oppose Planned Parenthood's agenda. This boycott squanders resources that have no apparent bearing on the corporation's economic mandate.<sup>133</sup> Almost any use of corporate money may be supported by some assertion of shareholder interest in public relations, community involvement, or simply societal improvement. Milton Friedman has criticized this social engineering as an abuse of corporate management's discretion.<sup>134</sup> Friedman has argued that, consistent with the classical liberal ideals that informed the framers of the U.S. Constitution, the workings of the market act as an "invisible hand" producing good (or supply) where there is need (or demand).<sup>135</sup> Corporate contributions to such nonprofit ideological corporations ought to be judged, at a minimum, by the same standard of fiduciary trust that this analysis proposes regarding contributions to candidates.

<sup>126</sup> See Edward D. Rogers, *Striking the Wrong Balance: Constituency Statutes and Corporate Governance*, 21 PEPP. L. REV. 777 (1994). Professor Rogers discusses corporate executives' efforts to win more discretionary power via so-called "constituency statutes," and concludes that such efforts decrease accountability and increase management's power, thereby making a bad situation worse for shareholders. *Id.* at 811.

<sup>127</sup> See *Hamilton*, *supra* note 124, at 735-821.

<sup>128</sup> See generally Alexis de Tocqueville, *DEMOCRACY IN AMERICA* (Richard D. Heffner, ed., 1956). Tocqueville's description of "tyranny of the majority" feared the development of a stifling consensus in which public opinion chilled controversial expression, but even Tocqueville did not predict that the consensus could be imposed by an elite minority. *Id.* at 117-19.

<sup>129</sup> *Hamilton*, *supra* note 124, at 587-94.

<sup>130</sup> See generally Richard E. Wagner, *Corporate Social Responsibility: 'Progressive' Philanthropy vs. Traditional Charity*, in *ALTERNATIVES IN PHILANTHROPY* 1-4 (1993). See also Thomas J. DiLorenzo, *The Corporate Responsibility Agenda*, in *ALTERNATIVES IN PHILANTHROPY* 4-5 (1993).

<sup>131</sup> See Jonathan Rauch, *The Hyperpluralism Trap*, THE

NEW REPUBLIC, June 6, 1994, at 22-25. See also *Demosclerosis*, NAT'L J., Sept. 5, 1992, at 1998-2003.

<sup>132</sup> See generally Stuart Nolan, *Patterns of Corporate Philanthropy: Public Affairs Giving and the Forbes 250*, CAPITAL RESEARCH CENTER (1994).

<sup>133</sup> See Douglas Scott, *Bad Choices: A Look Inside Planned Parenthood*, LEGACY COMMUNICATIONS, 1992, at 233-48. Surveys list Planned Parenthood, the nation's largest performer of abortions, among organizations that donors most often direct the United Way to refrain from funding with their particular contribution. See Vince Stehle, *The Charities Americans Like Most - and Least*, CHRON. OF PHILANTHROPY, Dec. 13, 1994, at 1, 12-14.

<sup>134</sup> See Milton Friedman, *Freedom and Philanthropy: An Interview with Milton Friedman*, ALTERNATIVES IN PHILANTHROPY, March, 1989, at 1-6. "I don't believe [corporations] should be contributing at all, unless it's in their immediate, direct pecuniary interest, except insofar as they're doing it at the behest of their shareholders." *Id.* at 3-4.

<sup>135</sup> See generally Jerry Z. Muller, *ADAM SMITH IN HIS TIME AND OURS: DESIGNING THE DECENT SOCIETY* 86 (1993).

#### D. Compelling Questions: Types of Corporations and Exceeding the Fiduciary Mandate

As this Comment has argued, First Amendment rights apply to corporations as assemblies of individuals, and fiduciary duty should determine the extent to which managers may engage in political expression. Thus, the distinctions between for-profit and nonprofit corporations bear closer examination.<sup>136</sup> If it follows that civil derivative actions should limit corporate political expression beyond management's authority to speak on behalf of shareholders, how should the Court determine whether management of a nonprofit corporation has exceeded the scope of its authority with respect to political expression?<sup>137</sup>

Under both commercial speech doctrine and the model jurisprudence proposed by this analysis, ideological expression should receive stronger protection than mere commercial speech. When the corporations are nonprofits formed explicitly to pursue a political agenda, the purpose is all the more important.<sup>138</sup> Nonetheless, if for-profit corporations must answer to shareholders, so must the nonprofit, even if the shareholders are now called members or donors. In either case, the corporation exists as a voluntary association to further the common purpose of individuals.

This analysis has now identified the nature of rights as invested in individuals, the nature of corporations as associations of individuals with first amendment protection, the nature of fiduciary trust as a limit on the authority of management to "speak" on behalf of shareholders or members, and the nature of nonprofit corporations as associations organized expressly for political advocacy. But whereas the rationale under the proposed model jurisprudence justifies political expression by for-profits only to the extent that the expression is reasonably linked to the commercial purpose, nonprofit managers have no such check on their authority. Regulation of non-

profits via derivative action for breach of fiduciary trust would probably prove impractical, but nonprofit corporations remain subject to tax code regulations. Thus, questions regarding nonprofit political expression necessarily involve the debate regarding taxpayer-subsidized political expression. If corporations are vehicles for the expression of individual rights and if fiduciary duty limits the authority under which managers function with consent, then the Court's rulings concerning "compelled speech" are dispositive.

The Court's "compelled speech" precedent explores First Amendment issues implicated by corporate management's breach of fiduciary duty since such a breach constitutes speech beyond the authority and consent in a contractual mandate. The proponents of increased regulation embrace campaign finance regulation to promote "equal access" to the marketplace of ideas. Yet, as this Comment has noted, the Court's antitrust cases suggest that corporate expression that "corrupts" by merely denying "equal" access has not met the required threshold for triggering a substantial state interest. Actual corruption, rather than the perception of such that fuels calls for campaign finance regulation, occurs when the electoral process is illegitimately impacted. Compelled speech, such as that which occurs when corporate management's political agenda is unknown to or contrary to the wishes of that corporation's shareholders, is a true corruption of political markets.

In the relativist world envisioned by would-be speech regulators, everyone—statesman and crackpot alike—is equally entitled to be heard at the same muffled volume. But the First Amendment protects *individuals'* right to speak (as well as that of assemblies of individuals), not *society's* right to hear. The regulatory approach implicitly equates each idea and each candidate with any other. Such mandates fail to recognize varying individual merit and desire. Simply put, some ideas are better than others, and some candidates are

<sup>136</sup> See Charles N. Eberhardt, INTEGRATING THE RIGHT OF ASSOCIATION WITH THE BELLOTTI RIGHT TO HEAR: FEDERAL ELECTION COMMISSION V. MASSACHUSETTS CITIZENS FOR LIFE, INC., 72 CORNELL L. REV. 159 (1986) (for distinctions between regulation of commercial speech derived from the right to hear, and the First Amendment protection afforded ideological corporations derived from the right to association).

<sup>137</sup> See generally, Alan J. Meese, *Limitations on Corporate Speech: Protection for Shareholders or Abridgment of Expression?*, 2

WM. & MARY BILL OF RTS. J. 305 (1993) (arguing that sweeping restrictions on corporate political expression violate shareholders' rights).

<sup>138</sup> See generally Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL OF RTS. J. 1 (1995). Professor Brudney distinguishes between the protection afforded multi-purpose vs. exclusively expressive associations. See *id.* at 88. Expression rights of the latter are "presumptively entitled" to at least as much protection as that extended to individuals. See *id.* at 79.

better than others as vehicles for those ideas. The need to raise money and to win the support of volunteers helps identify the candidates who can articulate a coherent message that will resonate with the public.

#### E. Deregulating the Marketplace of Ideas

In short, the marketplace of ideas is not so different from the marketplace for material goods and services. However, the government's authority to regulate the latter in no way endows it with authority to restrict the former. Ironically, the Cold War's aftermath has witnessed an America increasingly skeptical of the federal government's authority to regulate economic markets yet increasingly willing to entertain regulation of political markets. As consumers, Americans accept the use of money as a valid measurement of supply and demand in the distribution of material goods and services. As citizens, however, Americans distrust the role of money as a similar measure of support for political candidates and platforms. Yet, although the Commerce Clause permits federal intervention in interstate economics, the First Amendment specifically limits government's authority to regulate electoral markets. Even without the First Amendment, however, the federalists argued that the enumerated nature of the federal government's powers inherently limited its reach.<sup>139</sup> In fact, they considered a specific list of limits on the government's authority an unnecessary and potentially dangerous measure.<sup>140</sup>

Even if government had the sweeping authority it claims to regulate political markets, it would remain an ill-advised policy. Regulating the marketplace of ideas produces equality for some only by limiting the freedom of others. Under the most basic theories of comparative advantage and pluralism, society is served best when each individual chooses to participate and contribute in the manner for which he or she is well-suited relative to the demand for that particular form of participation. All persons do not run for office or even fol-

low politics particularly closely. Some run for office, some build products, and others offer services. Financial contributions by citizens who do not have the time or inclination to become full-time champions of ideas must necessarily be channeled to those who have both. Such contributions intrinsically communicate political support.

The case law recognizes that an individual may choose to "speak" either by running for office or by contributing money to a candidate. Thus, the Court has expressly forbid spending limits on individuals who run for office. However, the Court has also attempted to distinguish candidate spending from individual and corporate contributions. Congress may limit monetary contributions to a campaign, but it may only offer "public financing" subsidies to "encourage" candidates to accept "voluntary" limits on spending. As a result, the independently wealthy may run for office without devoting substantial periods of time to fundraising, but other candidates must constantly identify ever-increasing numbers of contributors to raise the money necessary to get their message out. Contribution limits, then, produce a perverse effect by requiring candidates to spend more time raising money.<sup>141</sup> Every contribution becomes critical, and every contributor exerts disproportionate influence.

In the end, the *Buckley* court failed to reconcile its defense of expression via money spent with expression via money contributed to another more equipped or more willing to directly communicate the idea in question. The First Amendment, as interpreted by the *Buckley* court, would only protect the expression rights of individuals who run for elective office, a meaning that it simply will not bear. As implied by *Citizens Against Rent Control* and *C-PAC*, the recognition of expenditure limits as unconstitutional is the best evidence that contributions limits must also be struck down by the Court or repealed by Congress. True reform must recognize the truth denied in *Buckley*.<sup>142</sup> A contribution to one is the expenditure of an-

<sup>139</sup> See JACK N. RAKOVE, ORIGINAL MEANINGS 325-338 (1997).

<sup>140</sup> See *id.* The federalists warned that a Bill of Rights which specified limits could serve instead as a mere rhetorical hurdle if the perception developed that these limits were the only exceptions to government power. See *id.*

<sup>141</sup> See Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the*

*First Amendment After All*, 94 COLUM. L. REV. 1281 (1994). Vincent Professor Blasi defends regulation as a means to limit the ways candidates spend their time. See *id.* at 1282.

<sup>142</sup> See *Buckley*, 424 U.S. at 59, 60. The Court distinguished between contributions limits (which it upheld) and limits on independent expenditures, overall spending by the candidate, and the use of personal and family funds (which it struck down). See *id.*

other. The Supreme Court's distinction between contributions and expenditures is invalid, and deregulation would eliminate that distinction.

Deregulation would introduce more competition and reintroduce accountability to political discourse.<sup>143</sup> Deregulatory reform should eliminate contribution limits, making it easier for candidates to replace any single contributor with another.<sup>144</sup> This is the only reform that will truly diminish the *role* of money, even if the actual *amount* of spending increases. Unrestricted political debate, after all, informs the citizenry and empowers the voters.<sup>145</sup> Free of excessive and unauthorized regulation, the citizenry will support their favored candidates with their money, their time, and their votes.

#### F. Empowering Shareholders: Limited Disclosure Requirements, Contract Enforcement, and Competition by the States

Finally, this Comment explores limited disclosure requirements, contract enforcement, and state competition for business incorporation as legitimate means for empowering shareholders and protecting political markets from the actual corruption that compelled speech produces. Disclosure requirements may be appropriate under specific circumstances. Any disclosure requirement, however, should be linked to a fiduciary duty. The valid purpose of the requirement (prevention of compelled speech) does not extend to the public at large, and as the Court has suggested, widespread disclosure produces a chilling effect.

The *Harriss* Court went too far by construing the First Amendment to allow broad public disclosure requirements. The Court based its decision on fear that "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal".<sup>146</sup>

Instead of preserving integrity in the political process, however, the *Harriss* court encouraged lawyers and lobbyists to develop more sophisticated forms with which to engage in pressure politics.<sup>147</sup>

True reform should recognize management's fiduciary duty and promote accountability by compelling executives to disclose to members or shareholders the identity of each recipient and the amount of every contribution to political candidates, parties, or nonprofit advocacy groups. As individuals with a right to know how their money is being invested, shareholders and members would be free to publicize inappropriate support. Limited disclosure requirements would only "chill" expression to the extent that corporate management feels restrained by its contractual mandate and fiduciary duty. State-initiated requirements would make corporate management more responsive to shareholders or members, and information could filter to the wider public through disgruntled shareholders if corporate management's political agenda overreached. State regulation of the corporate form (via charter) may even offer varying degrees of shareholder protection, fostering competition for the incorporation of businesses.

#### IV. CONCLUSION

Alexis de Tocqueville noted that America derived great strength from the rights of voluntary association, petition, and political speech,<sup>148</sup> but those who honor the heritage of a free people must view with alarm recent developments in the debate over "campaign finance reform," as well as the failings of the current jurisprudence governing political debate. Ultimately, any resolution in the campaign finance debate must reconcile legitimate political expression under the First Amendment and the undue influence that has undermined public confidence in the political sys-

ernment. *Id.*

<sup>147</sup> These include ideological "think tanks", political action committees, nonpartisan "grass-roots" education and advocacy groups, endowed foundations, and eventually, the "public interest" litigation groups, all taking the nonprofit corporate form. See generally Laura Chis olm, *Sinking the Think Tanks Upstream: The Use and Misuse of Tax Exemption Law to Address the Use and Misuse of Tax-Exempt Organizations by Politicians*, 51 U. PITT. L. REV. 577 (1990).

<sup>148</sup> See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 96 (Richard D. Heffner, ed. 1956).

<sup>143</sup> See generally Peter H. Schuck, *Against (And For) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL'Y REV. 553 (1997).

<sup>144</sup> See Wilbur C. Leatherberry, *Rethinking Regulation of Independent Expenditures by PACs*, 35 CASE W. RES. L. REV. 13 (1985).

<sup>145</sup> See Robert S. Peck, *Free Speech and Political Reform*, 21 OKLA. CITY U. L. REV. 53 (1996).

<sup>146</sup> *Harriss*, 347 U.S. at 625. The Court failed to explain the distinction (undoubtedly because there is none) between a "special interest group" and a voluntary association of individuals with the right to "free speech" and to petition the gov-

tem through the incompetence, corruption, or overreach of corporate managers. The proposed model for First Amendment jurisprudence addresses crucial distinctions between the individual and the corporation as a source of rights, as well as between the for-profit and nonprofit corporation as a source of management's responsibility and as a potential for compelled speech. This Comment, then, concludes that a model corporate political expression jurisprudence must recognize that:

- distinctions between contributions and expenditures are invalid;
- the federal government has no authority to regulate political markets and is specifically banned from "infringing" on political expression by private actors under the First Amendment;
- corporations are associations of individuals peacefully assembled for distinct purposes, as set out in their charters;
- management's corporate political expression on shareholders' behalf should be limited only by management's fiduciary duty;
- government's proper authority in the enforcement of contracts remains sufficient to guard

against compelled speech, a true corruption of the political process; and

- although disclosure requirements may build public confidence in the integrity of the political system and are vastly preferable to the current system of prior restraint (via contribution and expenditure regulation), limitations on federal regulatory authority and the potential "chilling" effects of such disclosure requirements mean that such rules should be devised by the states and that disclosure should be directed only to the party to whom a fiduciary duty is owed.

This analysis has examined the legal and policy issues connected to the recent scandals in light of Supreme Court precedent and attempts at campaign finance "reform" and has proposed a corporate political expression jurisprudence model consistent with those traditional American values encompassed in the phrase "free speech". A legal theory that recognizes corporations as catalysts for individuals' collective expression while penalizing managers who exceed their contractual mandate will best preserve our First Amendment freedoms and simultaneously promote public confidence in the integrity of the political system.