
Citizens United and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?

Matthew A. Melone

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Matthew A. Melone, *Citizens United and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?*, 60 DePaul L. Rev. 29 (2010)

Available at: <https://via.library.depaul.edu/law-review/vol60/iss1/3>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

CITIZENS UNITED AND CORPORATE POLITICAL SPEECH: DID THE SUPREME COURT ENHANCE POLITICAL DISCOURSE OR INVITE CORRUPTION?

*Matthew A. Melone**

Electoral reform is a graveyard of well-intentioned plans gone awry. It doesn't take an Einstein to discern a First Law of Political Thermodynamics—the desire for political power cannot be destroyed, but at most, channeled into different forms—nor a Newton to identify a Third Law of Political Motion—every reform effort to constrain political actors produces a corresponding series of reactions by those with the power to hold onto it.

Samuel Issacharoff & Pamela S. Karlan¹

INTRODUCTION

It is not often that a decision by the Supreme Court prompts the President of the United States to pointedly express his displeasure with the Court during the State of the Union Address.² Despite the fact that President Obama may be eminently qualified to debate the merits of the Court's reasoning in constitutional matters, his public rebuke of the Court in that particular venue was surprising—and perhaps lacking in decorum.³ That brief episode, however, effectively captured the visceral feelings engendered by the Court's decision in *Citizens United v. FEC*.⁴ To its supporters, *Citizens United* represents the vindication of First Amendment liberties. To its detractors, the case represents the surrender to corporate domination of the electoral

* Professor of Law, Lehigh University, Bethlehem, Pennsylvania.

1. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1705 (1999).

2. See President Barack Obama, Remarks by the President in the State of the Union Address (Jan. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

3. It appears that some members of the Court took exception to the President's remarks. See Adam Liptak, *A Justice Responds to Criticism from Obama*, N.Y. TIMES, Feb. 4, 2010, at A17 (reporting that Justice Thomas defended the Court in a talk at Stetson University College of Law). Chief Justice Roberts also believed that the President's remarks were inappropriate. See Jeff Shesol, Editorial, *Justices Will Prevail*, N.Y. TIMES, Mar. 14, 2010, at 10. He did not take exception to the fact that the President disagreed with the Court's decision but rather that his criticism was aired during the State of the Union Address. *Id.*

4. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

process—and the concomitant loss of confidence in the political system that such domination will engender.

Campaign finance reform has a long and checkered history. Serious efforts at reform began in the 1970s and culminated in a major legislative initiative in 2002.⁵ The courts, particularly the Supreme Court, have had a major influence in shaping the legal landscape of campaign finance and, consequently, the actual strategies and practices employed by campaign operatives.

Restrictions on campaign activities implicate First Amendment issues. Like all First Amendment questions, competing interests are at stake and quite often the Court, in its bitterly divided opinions, reflects societal rifts regarding the desirability, necessity, and legality of campaign finance restrictions. *Citizens United* freed corporations to engage in express political advocacy and disturbed what many believed was a well-settled principle supported by a century of precedent. However, *Citizens United* should not have come as a surprise. Several members of the Court had made their antipathy towards campaign restrictions quite clear for a number of years. Once those members were in the majority, *Citizens United* became inevitable.

Part II of this Article discusses campaign finance reform measures up to the time of the 1970s-era legislation that formed the foundation of present campaign finance rules.⁶ Early reform efforts were, for the most part, toothless and ineffective. Part III analyzes the reform legislation of the 1970s, the judicial decisions concerning that legislation, and the effects that the legislation and Court decisions had on campaign practices.⁷ This period saw the institution of contribution limitations, various expenditure limitations, the rise of so-called soft money, and the creation of an enforcement mechanism, the Federal Election Commission. It also was a period in which the tension between the reform efforts and the First Amendment came to the forefront and the Court's decisions established constitutional parameters that survive to this day.

Part IV focuses on the landmark campaign finance legislation enacted in 2002.⁸ It analyzes the legislation, several Supreme Court cases concerning the First Amendment implications of that legislation, and the changes in campaign finance practices that occurred in the succeeding years. This period was characterized by the end of soft money, the increased importance of independent advocacy groups,

5. See *infra* notes 59–279 and accompanying text.

6. See *infra* notes 11–58 and accompanying text.

7. See *infra* notes 59–180 and accompanying text.

8. See *infra* notes 181–279 and accompanying text.

and the heightened focus on small-donor funding accelerated by technological developments. Moreover, it was also a period in which members of the Supreme Court who had long believed that many campaign finance restrictions were the antithesis of First Amendment principles came into the majority.

Part V provides a detailed analysis of *Citizens United*, including the Court's disposition of various as applied challenges to the 2002 legislation.⁹ Particular emphasis is placed on the Court's reasoning with respect to the facial validity of the statute. Part VI is a critique of the *Citizens United* decision and examines whether corporate liberties should be treated as co-equal to individual rights and, if not, whether corporate political speech restrictions should withstand First Amendment attack.¹⁰ That Part concludes that restrictions on corporate speech liberties can be more easily justified than similar restrictions on individual freedom of expression. However, the asserted justifications for the restrictions imposed on corporate political speech are not persuasive and, accordingly, the Court's strong First Amendment leanings were warranted.

II. EARLY REFORM EFFORTS

Money has played a role in political campaigns since colonial times. From our vantage point more than two centuries later, some early campaign activities, such as George Washington's provision of food and drink to eligible voters, appear quaint and relatively harmless.¹¹ The formation of political parties and their attendant ideological differences—coupled with an expanding electorate due in part to immigration—created the demand for vehicles that could broadly disseminate political messages.¹² Newspapers, often subsidized by political parties or prominent individuals, became effective mouthpieces for candidates or parties.¹³ Martin Van Buren introduced mass

9. See *infra* notes 280–363 and accompanying text.

10. See *infra* notes 364–448 and accompanying text.

11. See Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOV'T L. REV. 1, 2–3 (2008) (discussing George Washington's campaign for a seat in the Virginia House of Burgesses in 1757). As a campaign tool, liquor was vital. James Madison lost his race for reelection to the Virginia legislature in 1777 due, in large part, to his refusal to provide liquor at his campaign rallies. *Id.* at 3 n.13.

12. See *id.* at 4–5.

13. *Id.* Daniel Webster became personally indebted to the Second Bank of the United States as a result of the bank's lending to the Whig Party newspaper. The bank's funding was motivated by its desire to encourage opposition to Andrew Jackson's plan to revoke its charter. Newspaper costs were the most significant campaign costs throughout the early 1800s. See Benjamin S. Feuer, Comment, *Between Political Speech and Cold, Hard Cash: Evaluating the FEC's New Regulations for 527 Groups*, 100 Nw. U. L. REV. 925, 932 (2006).

campaigning on behalf of Andrew Jackson, and by 1840, the nation was treated to campaign pictures, buttons, parades, and conventions.¹⁴ As a consequence, the cost of campaigns swelled and the practice of candidates self-financing their campaigns grew as small donor support gave way to the hunt for large donor participation.¹⁵ Corporate contributions began in earnest during Andrew Jackson's 1832 campaign, motivated in large part by desire to prevent President Jackson from making good on his pledge to revoke the charter of the Bank of the United States.¹⁶ Due to the proliferation of government contracts, corporate giving expanded during the Civil War. Post-war reconstruction, the growth of the railroads, and the rapid industrialization of the economy kept the money flowing from the corporate spigot.¹⁷

The Pendleton Civil Service Reform Act, which created the civil service system, removed a significant source of party funds by eliminating assessments on holders of patronage jobs.¹⁸ Although civil service reform may have professionalized the government bureaucracy, it also eliminated a vast pool of small donors from which parties could obtain funds, heightening the relative importance of large donors.¹⁹ The increasing relevance of government action to a rapidly industrializing private sector eventually led to the predominance of corporate funding of political campaigns.²⁰

By the end of nineteenth century, some states had begun to regulate campaign finance practices, and corporate contributions were the target of particular opprobrium. Initially, restrictions or outright bans on

14. Urofsky, *supra* note 11, at 5-6.

15. *Id.* at 6-7.

16. *Id.* at 7-8. See also *supra* note 13 and accompanying text.

17. Urofsky, *supra* note 11, at 8.

18. Among his achievements, Andrew Jackson introduced the "spoils system" to American politics. Grateful office holders kicked back a percentage of their salaries to the party. By 1878, approximately 90% of the Republican Party's congressional campaign committee income was derived from such kickbacks. The Pendleton Civil Service Reform Act, enacted in the wake of President Garfield's assassination, created the federal civil service system and thus eliminated the ability of parties to extract funds from patronage employees. See *id.* at 8-9.

19. See *id.* at 9-10.

20. Mark Hanna, the legendary chairman of the Republican Party, raised \$250,000 each from Standard Oil and J.P. Morgan and \$400,000 from Chicago meatpacking houses during William McKinley's 1892 presidential campaign. *Id.* at 11. Theodore Roosevelt raised almost three quarters of his campaign funds from corporation interests in 1904. *Id.* at 12. The Democrats were equally adept at corporate fundraising, including the progressive standard bearer, William Jennings Bryan, who raised significant funds in 1896 from silver mining interests. *Id.* Not all corporate funding flowed from the expectation of *ex post* favors from those who benefited from the corporate largesse. Boies Penrose practiced corporate extortion by introducing legislation that was unfavorable to corporate interests and then demanding contributions as the price to kill the bills in committee. See Feuer, *supra* note 13, at 933 (describing the practices of Penrose, the Pennsylvania Republican Party chairman).

corporate contributions were prompted more by efforts at political payback than by bipartisan principles aimed at good governance.²¹ However, a growing reform movement was incubating across the political spectrum. Conservative attorney Elihu Root urged New York to prohibit corporate campaign contributions and echoed sentiments that resonate to this day:

The idea . . . is to prevent the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth, from using their corporate funds, directly or indirectly, to send members of the legislature to these halls, in order to vote for their protection and the advancement of their interests as against those of the public.

It strikes . . . at a constantly growing evil . . . which has . . . done more to shake the confidence of the plain people of small means in our political institutions, than any other practice which has ever obtained since the foundation of our government. And I believe that the time has come when something ought to be done to put a check upon the giving of \$50,000 or \$100,000 by great corporation toward political purposes, upon the understanding that a debt is created from a political party to it.²²

An investigation into the practices of corporate officers of certain large insurance companies brought to light the extent of corporate support for the Republican Party and provided a tailwind for supporters of reform.²³ In 1907, Congress enacted the Tillman Act, making it unlawful for any national bank or federally chartered corporation to contribute money “in connection with any election to any political office.”²⁴ Moreover, the Act prohibited any corporation from contributing money in connection with any U.S. presidential or congressional election.²⁵ The Tillman Act proved ineffective. The Act’s prohibi-

21. For example, Nebraska, Missouri, Tennessee, and Florida prohibited corporate campaign contributions in 1897. Urofsky, *supra* note 11, at 13. These states were carried by William Jennings Bryan in the 1896 presidential election, and bans on corporate contributions were seen as retaliation against the overwhelming corporate support for William McKinley. *Id.*

22. *Id.* at 13–14 (quoting ELIHU ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP 143–44 (1916) (alterations in original)).

23. *Id.* at 14–15.

24. Tillman Act of 1907, ch. 420, 34 Stat. 864, 864. Limited campaign finance reform measures were enacted previously. The Navy Appropriations Bill of 1867 prohibited the solicitation of funds from workers at U.S. Naval yards. Robert E. Mutch, *Three Centuries of Campaign Finance Law, in A USER’S GUIDE TO CAMPAIGN FINANCE REFORM* 1, 12 (Gerald C. Lubenow ed., 2001) The Enforcement Act of 1870 prohibited certain practices during federal election campaigns. Ch. XI, 16 Stat. 63. In 1877 President Rutherford B. Hayes issued an Executive Order prohibiting assessments on federal employees for political purposes. Urofsky, *supra* note 11, at 12. See also Jon Simon Stefanuca, *The Fall of the Federal Election Campaign Act of 1971: A Public Choice Explanation*, 19 U. FLA. J.L. & PUB. POL’Y 237, 239 (2008) (discussing the history of federal election reform legislation).

25. Tillman Act of 1907, ch. 420, 34 Stat. at 864–65.

tions were limited to donations of money and corporations soon shifted to in-kind contributions of property, travel accommodations, and labor.²⁶ Moreover, the Act provided no enforcement mechanism.²⁷

The Publicity of Political Contributions Act (the Contributions Act) was enacted in 1910, and it required post-election disclosure of donations to candidates for the House of Representatives.²⁸ Amendments were soon made to the Contributions Act that extended the disclosure rules to elections for the Senate and put in place spending caps on House of Representatives and Senate races.²⁹ Like the Tillman Act, this legislation also proved ineffective. The Contributions Act did not provide an enforcement mechanism and applied only to donations in election years.³⁰ Moreover, it covered only donations to national party committees and the candidates themselves, doing little to rein in state party committees and newly created independent committees.³¹ In 1918, the Supreme Court held that the Contributions Act was unconstitutional in its application to primaries and Senate races.³² The inapplicability of the disclosure rules to primaries was particularly eviscerating because, in the South, the Democratic primaries were where the election was won for all practical purposes.³³ Although the Court did not invalidate the legislation in its entirety, the Wilson Administration took the position that the entire Act was invalidated and that the disclosure requirements were no longer in effect.³⁴

Foreshadowing the effects of Watergate several decades later, a major political scandal prompted the next wave of campaign finance reform. Investigations of the Harding Administration in connection with the Teapot Dome scandal revealed large contributions by oil interests to the Republican Party and led to the passage of the Federal

26. See Urofsky, *supra* note 11, at 17.

27. Tillman Act of 1907, 34 Stat. at 864-65. See also Urofsky, *supra* note 11, at 17.

28. Contributions Act, ch. 392, 36 Stat. 822, 822-24 (1910).

29. Publicity of Political Contributions Act, ch. 33, 37 Stat. 25, 25-29 (1911). See also Urofsky, *supra* note 11, at 18.

30. Contributions Act, 36 Stat. at 822-24. The legislation did provide for fines or imprisonment. § 10, 36 Stat. at 824.

31. § 1, 36 Stat. at 822-23 (defining political committees to include national committees and committees that operated in two or more states).

32. See *Newberry v. United States*, 256 U.S. 232, 258 (1921). Chief Justice White believed that the ratification of the Seventeenth Amendment would allow the legislation to pass constitutional muster insofar as it applied to Senate races. *Id.* at 261 (White, C.J., dissenting). Note that the Supreme Court later reversed course with respect to congressional regulation of primaries and held that Congress did indeed have the authority to regulate primary elections. See *United States v. Classic*, 313 U.S. 299, 317 (1941).

33. Urofsky, *supra* note 11, at 18.

34. See *id.* at 19.

Corrupt Practices Act of 1925 (the Corrupt Practices Act).³⁵ This legislation extended the Tillman Act's corporate-donation prohibition to in-kind contributions,³⁶ improved upon the 1910 disclosure rules by requiring the disclosure of contributions regardless of when they were made,³⁷ and raised the spending ceilings applicable to Senate races.³⁸ Again, Congress failed to provide enforcement mechanisms and the Corrupt Practices Act's provisions were riddled with loopholes that proved easy to exploit.³⁹

The ascension of President Franklin D. Roosevelt to the White House ushered in a new player in the campaign finance arena: labor unions. Organized labor, as evidenced by various pieces of labor-friendly New Deal legislation, had an ally in the White House and rewarded Democrats with cash and sweat in the form of volunteers.⁴⁰ Various public works programs, such as the Tennessee Valley Authority and the Public Works Administration, employed millions of workers outside the strictures of the Pendleton Act.⁴¹ A coalition of Republican and conservative Democrats, concerned that President Roosevelt was using the New Deal programs to build a political base, was able to enact the Hatch Political Activity Act (the Hatch Act) in 1939.⁴² The Hatch Act banned contributions and participation in campaigns by all government employees, not solely those employed in civil service under the Pendleton Act.⁴³ The Hatch Act was quickly amended to extend the contribution ban to federal contractors and employees of state agencies that were recipients of federal funding, and the amendments capped contributions to national committees and

35. Corrupt Practices Act of 1925, 43 Stat. 1070, 1070.

36. § 301(d), 43 Stat. at 1071.

37. §§ 303–308, 43 Stat. at 1071–73.

38. § 309, 43 Stat. at 1073. See also Urofsky, *supra* note 11, at 20.

39. Urofsky, *supra* note 11, at 21. The Act was repealed by the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 405, 86 Stat. 3, 20 (1972). See *infra* notes 59–70 and accompanying text for a discussion of the Federal Election Campaign Act of 1971.

40. For example, the National Industrial Recovery Act of 1933, ch. 90, 48 Stat. 195, 195, 199, assured labor of the right to collective bargaining and required industrial codes to adopt minimum wage and maximum hour provisions. After the Supreme Court held the Act unconstitutional in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935), the National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 was enacted and the right of labor to collective bargaining was reaffirmed and policed by the newly established National Labor Relations Board. The Fair Labor Standards Act, ch. 676, 52 Stat. 1060 (1938), provided for minimum wages, maximum hours, and safety measures for workers engaged in interstate commerce. See 52 Stat. at 1062–63.

41. Urofsky, *supra* note 11, at 25. See also *supra* notes 18–19 and accompanying text for a discussion of the Pendleton Act.

42. Hatch Act, ch. 410, 53 Stat. 1147 (1939).

43. 53 Stat. at 1147. See also Urofsky, *supra* note 11, at 25.

placed a spending limit on such committees.⁴⁴ Like the previous reforms, the restrictions imposed by the Hatch Act were relatively easy to avoid and accomplished little actual reform.⁴⁵

The bitter public reaction over the United Mine Workers strike during World War II made the enactment of the War Labor Disputes Act possible over President Roosevelt's veto.⁴⁶ This legislation prohibited labor union campaign contributions for the duration of the war.⁴⁷ Although narrow in scope, it had a lasting effect because labor unions avoided its prohibition by forming political action committees (PACs), whose presence on the campaign scene proved to be long-lasting.⁴⁸ The Republican takeover of Congress in 1946 led to the passage—again, over a Presidential veto—of the Taft–Hartley Act, which made permanent the War Labor Disputes Act's ban on union campaign contributions.⁴⁹ Moreover, the Taft–Hartley Act prohibited all corporate and union political expenditures, including internal union communications with members.⁵⁰ The legislation was quickly challenged and the Supreme Court held that it did not operate to ban internal union communication.⁵¹ Subsequently, the ban on external political expenditures was challenged on First Amendment grounds, but the Supreme Court remanded the case to the district court on procedural grounds where the union was eventually acquitted.⁵² Thus, the restrictions placed on corporate and union political speech were first challenged in the organized labor context, leading to tension between reform efforts and First Amendment liberties.

By this time, television had begun to dramatically alter the political landscape. Campaign costs increased significantly and the emerging medium began to erode the role of political parties and shifted the

44. Urofsky, *supra* note 11, at 25. Title II of the Federal Election Campaign Act of 1971 repealed the Hatch Act's limitation on individual contributions to national committees and the spending limits imposed on such committees but imposed spending limitations on the candidates directly. The statute prohibited a candidate from making expenditures from his personal funds or the personal funds of his immediate family in excess of \$50,000 for presidential or vice-presidential candidates, and \$35,000 and \$25,000 for Senate and House of Representatives candidates, respectively. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 202, 86 Stat. 3, 9 (1972).

45. See Urofsky, *supra* note 11, at 25–26.

46. War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943).

47. §9, 57 Stat. at 167–68.

48. Corporations, at this point in time, did not make extensive use of PACs because there was some doubt as to their legality and, due to lack of enforcement of existing laws, corporations felt no compelling need to funnel funds through PACs. See Urofsky, *supra* note 11, at 28–29.

49. Taft–Hartley Act, ch. 120, § 304, 61 Stat. 136, 159–60 (1947).

50. *Id.* See also Urofsky, *supra* note 11, at 27 (citing H.R. Rep. No. 79-2739, at 40 (1946)).

51. See *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 123–24 (1948).

52. See *United States v. Int'l UAW*, 352 U.S. 567, 592–93 (1957); Urofsky, *supra* note 11, at 28.

focus of campaign financing more squarely on the candidates.⁵³ Rapidly escalating costs resulted in permanent, year-round fundraising in contrast to what had been a more cyclical process.⁵⁴ Moreover, the candidates began to directly engage in solicitation activities and often had little use for the national party committee apparatus.⁵⁵ These developments led to increasing concern over the corruptive influence of corporate funding and the concomitant erosion of public confidence in the entire political system.⁵⁶ Despite these concerns, reform attempts stalled throughout the 1950s and 60s.⁵⁷ Finally, in 1971, major changes were enacted. The Watergate scandal prompted more dramatic reforms later that decade and provided the motivation to enforce these reforms.⁵⁸

III. THE FEDERAL ELECTION CAMPAIGN ACT OF 1971

The Federal Election Campaign Act of 1971⁵⁹ (the Campaign Act) was a comprehensive effort to impede the rapidly rising costs of presidential and congressional elections and provide candidates with greater access to media to enable them to better explain their positions on issues.⁶⁰ The legislation also sought to equalize the playing

53. Television placed a premium on the ability to deliver effective sound bites and increased the importance of the personal characteristics of the candidates, such as physical appearance. See Urofsky, *supra* note 11, at 31. Previously, such characteristics were not particularly relevant to electoral success. *Id.* The Kennedy–Nixon debates in 1960 probably did more than any other event to focus attention on the power of television as a campaign tool. *Id.*

54. Combined Democratic and Republican spending on presidential elections grew from approximately \$5 million for the 1948 election to almost \$37 million for the 1968 election. *Id.* at 41. The Nixon–McGovern election in 1972 cost approximately \$91 million. *Id.* The costs associated with Senate and House campaigns also experienced exponential increases. *Id.* at 42.

55. Most famously, President Nixon formed his own reelection committee, the Committee to Re-Elect the President. This committee, often referred to as CREEP, played a central role in the Watergate scandal as did many of its officers, including former U.S. Attorney General John Mitchell. The comings and goings of CREEP were compellingly told in a best-selling book. See generally CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974) (chronicling the Washington Post's investigation of the Watergate break-in and subsequent cover-up by the Nixon Administration).

56. See Urofsky, *supra* note 11, at 44–45.

57. *Id.* at 39–40.

58. See *supra* notes 71–86 and accompanying text.

59. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 47 U.S.C. § 315 (2006)).

60. S. REP. NO. 92-229 (1972), *reprinted in* 1972 U.S.C.C.A.N. 1821, 1822. The Revenue Act of 1971 was also enacted; it put into place public funding of presidential campaigns through voluntary taxpayer contributions. See Revenue Act of 1971, Pub. L. No. 92-178, §§ 801–802, 85 Stat. 497, 562–74. A similar provision was enacted in 1966 but was not implemented. In fact, this provision of the Revenue Act of 1971 was not to be implemented until the 1976 election. See Urofsky, *supra* note 11, at 49. The Revenue Act of 1971 also provided a modest individual tax credit or, in the alternative, a deduction for political contributions, both of which were later repealed. §§ 701(a), 702(a), 85 Stat. at 560–62; Tax Reform Act of 1986, Pub. L. No. 99-514,

field by eliminating the advantages enjoyed by wealthy candidates and shifting focus away from limiting individual contributions to enhanced disclosure of those contributions. Title I of the Campaign Act provided express limitations on the amount that broadcast and non-broadcast media could charge political candidates.⁶¹ Moreover, Title I of the Campaign Act imposed spending limitations on candidates with respect to media purchases.⁶² Title II of the Campaign Act expanded the definition of political contributions and expenditures, liberalized the rules to allow bona fide loans to political candidates, and defined the term "political committee" very broadly.⁶³ Title II repealed the Hatch Act's limitation on individual contributions to national committees and the spending limits imposed on such committees but imposed spending limitations on the candidates directly.⁶⁴ The statute prohibited a candidate from making expenditures from his personal funds or the personal funds of his immediate family in excess of \$50,000 for presidential or vice-presidential candidates, and \$35,000 and \$25,000

§ 112(a), 100 Stat. 2108. Current law certainly does not subsidize political expenditures. It prohibits any deduction for amounts paid or incurred in influencing legislation, participating or intervening in any political campaign, attempting to influence the general public, or segments thereof, with respect to elections, legislative matters, or referendums, and communicating directly with certain executive branch officials. See I.R.C. § 162(e)(1) (2006). Moreover, dues paid to tax-exempt organizations, such as trade associations, that are allocable to such activities are similarly non-deductible. § 162(e)(3). Deductions for certain indirect contributions to political parties, such as advertising in convention programs and other publications and admission costs to dinners and inaugural events are also not deductible. § 276(a). See also § 271 (prohibiting bad deductions or losses from worthless debts owed by political parties for all taxpayers except banks).

61. Federal Election Campaign Act of 1971, § 103, 86 Stat. at 4. Broadcast stations were prohibited from charging legally qualified candidates an amount in excess of the "lowest unit charge" for air time of the same class and time during a forty-five day period preceding the date of a primary election or a sixty day period preceding the date of a general election. *Id.* Print media could not impose charges in excess of charges made for comparable use of space for other purposes. *Id.*

62. A legally qualified candidate was prohibited from spending for the use of communication media in excess of an amount based on the voting age population of the geographic area in which the election for office was held or \$50,000, whichever was greater. § 104, 86 Stat. at 5. Spending on broadcast media was limited to sixty percent of the total spending limit on communication media. *Id.*

63. The statute defined the term "contribution" as
a gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office

§ 201, 86 Stat. at 8. Expenditures were similarly defined. *Id.* A political committee was defined as "any individual, committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding \$1,000." *Id.*

64. *Id.*

for Senate and House of Representatives candidates, respectively.⁶⁵ The long-standing prohibitions on corporate and union contributions were undisturbed by the legislation.

Title III of the Campaign Act established detailed disclosure requirements for political committees⁶⁶ that were administered by the U.S. Comptroller General.⁶⁷ Among the reporting requirements was the disclosure of all donors who contributed \$100 or more to a political committee.⁶⁸

The Campaign Act was decidedly pro-incumbent—one commentator opined that Congress behaved “like an oil cartel” in passing the legislation.⁶⁹ The spending limitations on both broadcast and non-broadcast media tended to favor incumbents because such limitations impeded the ability of challengers to overcome the publicity inherent to incumbency. Moreover, incumbents tend to be better financed and are therefore in a better position to secure the bank financing that the legislation allowed. Like prior legislative efforts, the Campaign Act failed to provide an effective enforcement mechanism, thereby failing to diminish any proclivity a candidate had to skirt the spending limits imposed by the legislation. The Campaign Act also failed to regulate some expenditures that could aid in the conduct of a campaign.⁷⁰ The Watergate scandal and the attendant shenanigans of the Nixon Administration—often funded by money received by the Committee to Re-elect the President—ensured that the system set in place by this legislation would be short-lived.

A. *The 1974 Amendments*

The Federal Election Campaign Act Amendments of 1974⁷¹ (the 1974 Amendments) did significantly more than shore up the perceived shortcomings of the 1971 legislation. Indeed, they dramatically altered the legal landscape of campaign finance. Repudiating the notion that detailed disclosure rules vitiated the need for contribution and spending limits, the 1974 Amendments imposed a \$1,000 limit on the amount any person could contribute to any candidate with respect

65. § 202, 86 Stat. at 9–10.

66. § 302, 86 Stat. at 11–19.

67. § 307, 86 Stat. at 17.

68. § 301, 86 Stat. at 15.

69. Stefanuca, *supra* note 24, at 253.

70. *Id.* at 266.

71. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 [hereinafter 1974 Amendments].

to any election for federal office.⁷² In addition, political committees other than a candidate's principal campaign committee could not contribute more than \$5,000 to any candidate with respect to any election for federal office.⁷³ Aggregate individual contributions during a calendar year were capped at \$25,000.⁷⁴ Further amendments in 1976 placed a \$20,000 limitation on contributions to national political party committees and a \$5,000 limitation on contributions to other political committees.⁷⁵

In addition to the contribution limits, the 1974 Amendments imposed spending caps on candidates, committees authorized to make expenditures by the candidate, national and state committees of political parties, and certain persons authorized to make expenditures by the candidate or authorized committees.⁷⁶ The limits, adjusted for in-

72. § 101, 88 Stat. at 1263. “[C]ontributions to a named candidate made to any political committee authorized by such candidate . . . to accept contributions on his behalf” were considered contributions to the candidate. *Id.* (codified at 18 U.S.C. § 608(b)(4) (2006)). In the aftermath of the Supreme Court’s decision in *Buckley v. Valeo*, discussed *infra* at notes 88–109 and accompanying text, the statute was amended again to include within the definition of contributions “expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents” Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112, 90 Stat. 475, 488 (codified at 2 U.S.C. § 441a(a)(7) (2006)) [hereinafter 1976 Amendments].

73. 1974 Amendments, § 101(b)(2), 88 Stat. at 1264. The contribution limit did apply to a candidate’s principal campaign committee to the extent such committee contributed to the campaign of other candidates. *Id.* The 1974 Amendments also prevented the use of intermediaries or conduits to skirt the contribution limitations. § 101, 88 Stat. at 1264. In response to disclosures of large cash contributions to the Nixon reelection campaign, cash contributions were limited to \$100. § 101, 88 Stat. at 1268.

74. Contributions made during a calendar year preceding the election year were deemed made during the election year. § 101, 88 Stat. at 1263.

75. Limitations were also placed on multicandidate committees. *See* 1976 Amendments, § 320, 90 Stat. at 487 (codified at 2 U.S.C. § 441a). The limitations on contributions to political committees that engage in independent advocacy were, as a result of the Supreme Court’s decision in *Citizens United v. FEC*, struck down by the Court of Appeals for the District of Columbia Circuit. *See infra* notes 364–65 and accompanying text.

76. 1974 Amendments, § 101, 88 Stat. at 1264. Spending limits on national and state party committees were much more liberal than the expenditure limits placed on other persons. In general, these committees were entitled to spend amounts that were determined by the voting age population of the United States for presidential elections, §101(f)(2), 88 Stat. at 1265, and by the voting age population of a state for both senatorial and congressional elections in a single district state. §101(c)(1)(D), 88 Stat. at 1264. The spending cap for other House of Representatives elections was \$10,000. § 101(f)(3)(B), 88 Stat. at 1266. The Supreme Court struck down these restrictions with respect to independent party expenditures but upheld them in the case of coordinated expenditures. *Colo. Republican Fed. Campaign Comm. v. FEC* (Colo. I), 518 U.S. 604, 614–15, 618, 622–23 (1996); *FEC v. Colo. Republican Fed. Campaign Comm.* (Colo. II), 533 U.S. 431, 447, 456 (2001). *See also infra* notes 152–59 and accompanying text. The higher contribution limits for donations to political parties combined with the ability of national and state parties to spend significantly more funds than others led to a heightened role for the parties in campaign fundraising. *See infra* notes 85, 164–65 and accompanying text. The Bipartisan Campaign Reform Act of 2002 (McCain–Feingold Act) increased the contribution limits for dona-

flation, were set at \$10,000,000 for presidential primaries and \$20,000,000 for presidential elections.⁷⁷ Lower limits were imposed for Senate and House of Representatives elections.⁷⁸ The spending limits imposed on the use of a candidate's own funds and the funds of his immediate family by the 1971 legislation were left in place, although loans that were evidenced by a written instrument were permitted.⁷⁹ The 1974 Amendments also placed a \$1,000 limit on independent political expenditures.⁸⁰ Although labor unions had established PACs as early as 1943, the 1974 Amendments clarified their legal status.⁸¹

In contrast to previously enacted reform legislation, the 1974 Amendments did include an effective enforcement mechanism. Section 208 of the 1974 Amendments established the Federal Election Commission (the FEC).⁸² It provided the FEC with formidable enforcement powers, rule-making authority, and the authority to issue advisory opinions.⁸³

tions and indexed them for inflation. McCain–Feingold Act, § 307, 116 Stat. 81, 102 (codified at 2 U.S.C. § 441a(a)(1)).

77. 1974 Amendments, § 101(c)(1), 88 Stat. at 1264.

78. § 101, 88 Stat. at 1265–66. Special limitations were provided for the national committee and state committees of political parties. § 101, 88 Stat. at 1265–66.

79. § 101, 88 Stat. at 1266.

80. The Act prohibited any expenditure “relative to a clearly identified candidate . . . which, when added to all other expenditures . . . advocating the election or defeat of such candidate” made during the calendar year exceeded \$1,000. § 101, 88 Stat. at 1265.

81. The 1971 legislation did exclude, for purposes of 18 U.S.C. § 610, “the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization” from the definition of contribution or expenditure. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 205, 86 Stat. 3, 10 (1972) (codified at 18 U.S.C. § 610). The 1974 Amendments clarified the legitimacy of PACs. See 1974 Amendments, § 103, 88 Stat. at 1272 (codified at 18 U.S.C. § 611). This provision codified the Supreme Court’s decision in *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972), which held that the 1971 legislation permitted union officials to administer PACs. *Id.* at 416–20. PAC funding received a boost after the FEC issued an advisory opinion in 1975 that allowed Sun Oil to spend corporate funds in order to solicit contributions to its PAC from stockholders and employees. See FEC Advisory Op. 1975-23, 40 Fed. Reg. 31,879 (July 29, 1975).

82. 1974 Amendments, § 310(a)(1), 88 Stat. at 1280 (codified at 2 U.S.C. § 437c(a)(1) (2006)). The FEC is comprised of six voting members, no more than three of which can be affiliated with the same political party, and two non-voting ex-officio members. § 310(a)(1), 88 Stat. at 1280–81. Legislation enacted in 1976 provided that the voting members of the FEC were to be appointed by the President. See 1976 Amendments, Pub. L. No. 94-283, § 101(a)(1), 90 Stat. 475, 475 (codified at 2 U.S.C. § 437c(a)(1)). Legislation enacted in 1997 limited commissioners to one six-year term. See Treasury and General Government Appropriations Act of 1998, Pub. L. No. 105-61, § 512(a), 111 Stat. 1272, 1305 (1997) (codified at 2 U.S.C. § 437c(a)(2)(A)).

83. 1974 Amendments, §§ 311–315, 88 Stat. at 1282–85 (codified at 2 U.S.C. § 437d).

Despite these improvements, the law did have its flaws. The legislation made no distinction between “hard” and “soft” money.⁸⁴ However, amendments enacted in 1979 allowed donors to contribute an unlimited amount of funds to political parties for certain party-building activities.⁸⁵ These soft money activities would prove to be a significant source of consternation for reformers and would ultimately serve as the impetus for later reforms.⁸⁶ The legislative efforts of the 1970s established a campaign finance regime with contribution and spending limitations, elaborate disclosure rules, a commission with enforcement powers, and a continued ban on corporate and union contributions and expenditures. These efforts also assured prominent roles for PACs and political parties in the funding of political campaigns. However, the courts would shake this system to its foundations, and campaign finance practices over the next two decades would usher in another set of major reforms.

B. Judicial Developments

I. Buckley v. Valeo

Political speech and political association have long held an exalted position in First Amendment jurisprudence.⁸⁷ Consequently, little time passed before the constitutionality of the 1971 Act and its 1974 amendments were tested. In 1976, the Supreme Court decided *Buckley v. Valeo*.⁸⁸ It is difficult to overestimate *Buckley's* effect on campaign finance activity because, in addition to undoing many of the reform provisions, it set into motion practices that would dominate campaign finance for over two decades. At issue were various contribution and expenditure limits imposed by the 1974 Amendments and the disclosure rules of the Campaign Act as amended.

84. “Hard money” refers to contributions subject to statutory contribution limitations. “Soft money” refers to contributions not subject to such restrictions.

85. See Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339, 1340 (1980) (codified at 2 U.S.C. § 431(8)(B)); FEC Advisory Op. 1978-10 (Nov. 21, 1978), available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=2392> (reporting the inability of the FEC to obtain the necessary four votes to require that the costs of certain activities be allocated to federal election activities and subjected to the contribution and spending limits). See also Urofsky, *supra* note 11, at 61–62.

86. See *infra* notes 181–218 and accompanying text.

87. “Indeed, the First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). See also *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *Roth v. United States*, 354 U.S. 476, 488 (1957).

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

The Court distinguished the contribution and expenditure limitations from permissible time, place, and manner restrictions.⁸⁹ The Court stated that it “has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.”⁹⁰ Moreover, the Court took notice of the effect of mass communication on campaign finance and recognized the strong link between money and the ability to amplify and effectively disseminate political messages to the electorate.⁹¹ The Court found that the contribution and expenditure limitations passed muster under strict scrutiny.⁹²

According to the Court, political contributions and political expenditures are not entitled to the same degree of First Amendment protection. The Court held that reasonable limitations may be placed on political contributions because the “actuality and appearance of corruption resulting from large individual financial contributions” was a sufficiently compelling interest to justify infringements on an otherwise protected First Amendment liberty interest.⁹³ The Court wrote that such contribution limits “do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.”⁹⁴ Insofar as the contribution limitations focused “precisely on the problem of large campaign contributions,” they were narrowly tailored to meet the government’s compelling interest of preventing actual or perceived corruption.⁹⁵ Consequently, the 1974 Amendments’ restrictions on campaign donations to candidates and political committees passed constitutional muster.⁹⁶

89. *Id.* at 17–19.

90. *Id.* at 16. Some scholars and commentators believe that the Court has not examined restrictions on campaign contributions with the same level of strict scrutiny applied in other First Amendment contexts. They assert that the direct and imminent causal link between speech restrictions and the compelling government interest sought to be achieved, required by the landmark case of *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), has been relaxed in the campaign finance setting. See, e.g., Patrick M. Garry, *Where Speech Loses Its Luster: Campaign Finance Laws and the Constitutional Downgrading of Political Speech*, 12 NEXUS 83, 89 (2007); Rachel Gage, Note, *Randall v. Sorrell: Campaign-Finance Regulation and the First Amendment as a Facilitator of Democracy*, 5 FIRST AMENDMENT L. REV. 341, 342–43 (2007).

91. *Buckley*, 424 U.S. at 19.

92. *Id.* at 44–45.

93. *Id.* at 26.

94. *Id.* at 29.

95. *Id.* at 28.

96. *Id.* at 29, 35–36, 38. The Court rejected the argument that the \$1,000 contribution limitation was unreasonably low. *Id.* at 30. Having determined that some limitation was justified, the

In contrast, the Court held that the \$1,000 limitation on independent expenditures, the limitation on expenditures by candidates from personal or family resources, and the limitation on overall campaign expenditures all violated the First Amendment.⁹⁷ The Court held that the primary effect of these provisions was “to restrict the quantity of campaign speech by individuals, groups, and candidates.”⁹⁸ Unlike political contributions, the risk of quid pro quo corruption was not implicated by political expenditures.⁹⁹ The government’s anticorruption interest in limiting expenditures was not sufficient to justify the limitations.¹⁰⁰ Also, in striking down the expenditure limitations, the Court expressly denied that the government’s ancillary interest in equalizing the relative ability of individuals to influence the outcome of elections—or equalizing the relative financial resources of competing candidates—was sufficiently compelling to warrant the infringement such restrictions imposed on First Amendment liberties.¹⁰¹

Although the Court invalidated the expenditure limitations on First Amendment grounds, it first analyzed whether the independent expenditure limitation was unconstitutionally vague. This analysis proved to be one of the more enduring features of the decision. The 1974 Amendments limited independent expenditures to \$1,000 per year and defined such expenditures as “any expenditure . . . relative to a clearly identified candidate . . . advocating the election or defeat of such candidate.”¹⁰² The Court found that this language was impermis-

Court believed that it was outside its purview to tinker with matters of degree. *See id.* The Court also rejected the assertion that contribution limitations were a form of invidious discrimination by incumbents against would be challengers. *Id.* at 30–32.

97. *Id.* at 51, 54, 58. Although the independent expenditure ban imposed by the statute, discussed *supra* at note 80 and accompanying text, also applied to corporations and labor unions, the Court did not reach the issue of whether a specific corporate and union expenditure prohibition was permissible. In fact, the corporate and union expenditure ban was recodified not long after the *Buckley* decision. *See* 1976 Amendments, Pub. L. No. 94-283, § 321, 90 Stat. 475, 490 (codified at 2 U.S.C. § 441b (2006)).

98. *Buckley*, 424 U.S. at 39.

99. With respect to the independent expenditure limitation the Court held that such limitation was unconstitutional even if it was assumed that such expenditures posed the same dangers of quid pro quo corruption as contributions. *Id.* at 45. The Court’s reasoning was predicated on its interpretation of the statute in order to avoid unconstitutional vagueness. *Id.* *See also infra* notes 102–05 and accompanying text.

100. *Buckley*, 424 U.S. at 55. The Court’s insistence on quid pro quo corruption as the justification necessary to support infringement on First Amendment liberties has been subject to criticism. For example, one commentator has criticized *Buckley* for not recognizing the anticorruption principles embodied in various clauses of the U.S. Constitution and for its too narrow conception of corruption. *See generally* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

101. *See Buckley*, 424 U.S. at 17.

102. 1974 Amendments, Pub. L. No. 93-443, § 101, 88 Stat. 1263, 1265. *See also supra* note 80 and accompanying text.

sibly vague because the distinction between the mere discussion of issues and candidates, on the one hand, and advocacy on the other hand “may often dissolve in practical application.”¹⁰³

In order to preserve the statutory provision, the Court held that the provision must be interpreted to cover only “expenditures for communications that in express terms advocate the election or defeat” of a candidate.¹⁰⁴ In a footnote, the Court provided examples of such express advocacy: the so-called magic words.¹⁰⁵ Thus, although the Court struck down the statute in part, its interpretation of this particular provision opened the door for unregulated issue advocacy and the explosion of soft money to fund such advocacy.¹⁰⁶ The fact that *Buckley* was interpreted to stand for the proposition that issue advocacy was beyond regulation may be criticized. The Court, by limiting the reach of the statute to the “magic words,” merely prevented the statute from being unconstitutionally vague. On its face, *Buckley* did not appear to provide speech including the magic words automatic First Amendment protection. Nothing in the Court’s opinion suggested that clear, unambiguous statutory language prescribing more than the magic words would necessarily violate the First Amendment. The status of the magic words would resurface with the passage of the Bipartisan Campaign Reform Act of 2002 (the McCain–Feingold Act).¹⁰⁷

103. *Buckley*, 424 U.S. at 42.

104. *Id.* at 44.

105. The Court defined express advocacy to include words or phrases such as “vote for,” “elect,” “support,” “defeat,” and “reject.” *Id.* at 44 n.52. The Court then used this interpretation of the statute in refusing to uphold it under an actual or apparent quid pro quo corruption rationale reasoning that preventing express advocacy expenditures would fail to sufficiently eliminate the dangers of such expenditures because the statute could be easily circumvented. *See id.* at 45.

106. The Court, in dismissing the assertion that independent expenditures could easily be used to circumvent contribution limitations by simply coordinating such expenditures with the candidate, held that such coordinated expenditures would be captured under the contribution limitation provisions. *Id.* at 46. At the time, the statute’s definition of contributions did not make this result so apparent and the statute was amended shortly after the Court rendered its decision to expressly include coordinated expenditures within its ambit. *See supra* note 72 and accompanying text. The McCain–Feingold Act required that expenditures coordinated with a political party committee be treated as contributions to such party committee, limited the ability of parties to make coordinated expenditures once a nominee for election was selected, and charged the FEC with the issuance of new regulations governing coordinated expenditures. *See infra* notes 202–03 and accompanying text. The FEC has had a devilish time in attempting to define just what constitutes coordination. *See* Meredith A. Johnston, Note, *Stopping “Winks and Nods”: Limits on Coordination as a Means of Regulating 527 Organizations*, 81 N.Y.U. L. REV. 1166, 1176–79 (2006). *See also infra* note 203 and accompanying text.

107. *See infra* note 192 and accompanying text.

Finally, the Court upheld the disclosure requirements of the Campaign Act and the 1974 Amendments.¹⁰⁸ The Court found that the government's interest in providing more information to both the electorate and enforcement authorities, thereby deterring corruption through increased exposure, was sufficient to overcome the burdens imposed on individuals' rights to association. However, the Court made clear that as applied challenges were not precluded by its holding in the event that disclosure requirements exposed members or supporters of historically suspect organizations to reprisal.¹⁰⁹

Of course, *Buckley* would not be the last word on campaign finance restrictions, but it did provide the overarching framework by which campaign finance restrictions would be measured. In general, contribution limitations and disclosure requirements were valid, campaign expenditure limitations were unconstitutional, and independent issue-advocacy expenditures were outside the purview of the regulators. The long-standing ban on corporate and union contributions remained intact. Post-*Buckley* cases, often involving state law restrictions, dashed any hope for doctrinal consistency from the courts. Moreover, changes in the composition of the Supreme Court would call into question the continued vitality of *Buckley* itself.

108. *Buckley*, 424 U.S. at 84. The Court also upheld the constitutionality of the system of voluntary presidential election expenditure limitations tied to public financing via voluntary income tax return check-offs. *See id.* at 90–92.

109. The Court was well aware of this possibility. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958). In *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 88 (1982), the Court struck down an Ohio law requiring that every political party report the names and addresses of campaign contributors and recipients of campaign contributions. The Court held that the exposure of corruption made possible by disclosure rules had little relevance to minor parties given their low likelihood of success at the polls. *Id.* at 95. The history of harassment against the Socialist Workers Party convinced the Court that the potential misuse of the required information outweighed the government's interest in obtaining the information. *Id.* at 100–01. The disclosure rules have occasionally been criticized on broader grounds. For instance, a former Federal Election Commissioner stated,

Campaign finance disclosure rules have encouraged harassment of donors and coarsened public debate. . . .

. . . .

But it's far from clear that the forced disclosure of political contributions has benefited society. Disclosure has resulted in government-enabled invasions of privacy—and sometime outright harassment—and it has added to a political climate in which candidates are judged by their funders rather than their ideas.

Notable & Quotable, WALL ST. J., Mar. 10, 2010, at A23 (quoting former Federal Election Commissioner Bradley A. Smith's remarks in the Winter 2010 City Journal). However, in a recent case, the Court rejected a facial challenge to Washington's Public Records Act under which the names and addresses of individuals that signed a petition to initiate a referendum that would overturn a recently enacted domestic partnership statute would be disclosed. The Court held that disclosure of referendum petitions does not, as a general matter, violate the First Amendment although as applied challenges to such laws could, in appropriate circumstances, succeed. *See Doe v. Reed*, No. 09-559, Slip Op. at 2 (9th Cir. June 24, 2010).

2. *Post-Buckley Decisions*

The Court had several opportunities to apply *Buckley*'s holding that reasonable restrictions on political contributions were justified on anticorruption grounds. Two years after *Buckley*, the Court, in *First National Bank of Boston v. Bellotti*, held that a Massachusetts prohibition on contributions and expenditures by certain business corporations for the purposes of influencing or affecting the vote on referendums was unconstitutional.¹¹⁰ The Court did not base its decision on the grounds that the statute engaged in viewpoint discrimination and instead rested its decision on the principle that corporations are entitled to First Amendment liberties.¹¹¹ Despite the federal prohibition on corporate contributions dating back to the Tillman Act of 1907, the Court focused on the quid pro quo anticorruption rationale set forth in *Buckley* and dismissed rationales based on shareholder rights and the corruptive aggregations of corporate wealth.¹¹²

The Court found that restrictions involving referendums did not have a close enough nexus to the regulation of quid pro quo corruption. The Court left open the possibility that a restriction on independent corporate expenditures in support of an electoral candidate (as opposed to referendum) could pass constitutional muster.¹¹³ Justice White pointedly argued that corporations, as artificial entities created by law to further economic goals, were not entitled to protections afforded to individuals—a position that would echo loudly over thirty years later in *Citizens United*.¹¹⁴

Three years later, the Court invalidated a Berkeley, California, ordinance that restricted contributions to committees formed to support or oppose ballot measures submitted to popular vote.¹¹⁵ Again, the Court failed to recognize the anticorruption justification for such restrictions, particularly because contributions of this sort were not made to candidates.¹¹⁶

110. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 795 (1978).

111. *Id.* at 784.

112. *Id.* at 789.

113. "[A] corporation's right to speak on issues of general public interest *implies no comparable right* in the quite different context of participation in a political campaign for election to public office." *Id.* at 788 n.26 (emphasis added). However, the Court, in *Citizens United*, dispelled the notion that expenditures in an electoral context could be treated any differently from the expenditures at issue in this case. See *infra* notes 280–363 and accompanying text.

114. See *Bellotti*, 435 U.S. at 809–10 (White, J., dissenting). See *infra* notes 280–363 and accompanying text for a discussion of *Citizens United*.

115. See generally *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

116. *Id.* at 298–99.

The Court did uphold the contribution limitations imposed on donors to PACs in *California Medical Ass'n v. FEC*.¹¹⁷ The Court held, as it did in *Buckley*, that contribution limitations do not directly impinge on the ability of contributors to air their political views.¹¹⁸ Because the PAC contribution limitation was necessary to prevent donors from easily circumventing the limits on contributions to candidates, it passed muster under *Buckley*'s anticorruption rationale.¹¹⁹ Likewise, in *Nixon v. Shrink Missouri Government PAC*, the Court upheld a Missouri law that limited contributions to candidates for state office to amounts ranging from \$275 to \$1,075, depending on the state office or the size of the constituency.¹²⁰ However, between the time that *Buckley* and *Nixon* were decided, the composition of the Court had changed markedly and dissenting voices questioned the continued validity of *Buckley*'s anticorruption rationale.¹²¹ In 2006, these voices struck down a Vermont law imposing contribution limitations ranging from \$200 to \$400, depending on the office in question, on the ground that the limits were too restrictive.¹²² Justice Thomas, joined by Justice Scalia in his concurring opinion, stated his desire to overturn *Buckley*,¹²³ and Justice Kennedy appeared almost as eager to do the same.¹²⁴

Although the Court upheld the right of corporate contributions in *Bellotti*, it did so in the context of a referendum.¹²⁵ In *FEC v. Beaumont*, the Court considered the issue of whether the ban on direct corporate contributions was unconstitutional as applied to a nonprofit advocacy corporation.¹²⁶ Despite existing precedent that provided special treatment for advocacy corporations with respect to expendi-

117. *Cal. Med. Ass'n v. FEC*, 453 U.S. 182 (1981).

118. *See id.* at 196.

119. *Id.* at 198.

120. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 397–98 (2000).

121. Justice Kennedy's dissenting opinion called for the reversal of *Buckley*. *Id.* at 409–10 (Kennedy, J., dissenting). Justices Scalia and Thomas would regularly question the validity of *Buckley*. *See infra* notes 123, 232 and accompanying text.

122. *Randall v. Sorrell*, 548 U.S. 230, 248 (2006). The Court found several problems with the statute's contribution limits, including the fact that it applied to both primaries and general elections and limited contributions from both individuals and political parties. *Id.* at 249. However, the Court was most troubled by the extremely low contribution limit, which was not indexed for inflation. *Id.* at 250. The low contribution limits, coupled with the infringement on political association rights imposed by the limit on party contributions, proved fatal. Vermont failed to show that its interest in preventing corruption was more urgent than similar interests of other states. *Id.* at 251–53.

123. *Id.* at 265–66 (Thomas, J., concurring).

124. *See id.* at 264–65 (Kennedy, J., concurring).

125. *See supra* notes 110–14 and accompanying text.

126. *FEC v. Beaumont*, 539 U.S. 146, 149–52 (2003).

tures, the Court upheld the restrictions pursuant to *Buckley*'s contribution–expenditure dichotomy.¹²⁷

With respect to restrictions on political expenditures, the Court's decisions were inconsistent and reflected the tension growing within the Court about the *Buckley* contribution–expenditure dichotomy. The Court provided conflicting guidance regarding limitations on direct independent expenditures by corporations. In *Bellotti*, the Court struck down restrictions on corporate expenditures intended to influence the outcome of a state referendum.¹²⁸ In *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*,¹²⁹ the Court decided whether the ban on corporate political expenditures for express advocacy was unconstitutional as applied to a small, nonprofit and nonstock corporation.¹³⁰ The corporation published and distributed a newsletter that detailed the pro-life positions of every candidate for state or federal office in Massachusetts.¹³¹ The publication and distribution of the newsletter were paid for with corporate funds.¹³²

The Court held that the publication and distribution of the newsletter constituted expenditures that met the express advocacy standard set forth in *Buckley* and were therefore subject to statutory and FEC regulation.¹³³ Distinguishing between small, nonprofit corporations and other corporations, the Court held that the prohibition on corporate expenditures, as applied to this corporation, was unconstitutional.¹³⁴ In the Court's opinion, the “[r]egulation of corporate political activity” was not “about the use of the corporate form per se . . . but about the potential for unfair deployment of wealth for political purposes.”¹³⁵ Because Massachusetts Citizens for Life did not pose such a threat, the state had no compelling justification for the expenditure restrictions.¹³⁶ The FEC subsequently incorporated this decision in its regulations. The exception for so-called *MCFL* corporations applied to corporations that were formed to promote po-

127. *Id.* at 162–63. See also *infra* notes 129–37 and accompanying text.

128. See *supra* notes 110–14 and accompanying text.

129. *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238 (1986).

130. *Id.* at 241.

131. *Id.* at 243–44.

132. The corporation could have established a PAC to make the expenditures in question. However, the Court believed that the recordkeeping and reporting requirements and the necessity to appoint a treasurer and custodian of the records imposed an administrative burden that many small organizations would be unable to bear and that such requirements probably caused many small entities to refrain from political activity. *Id.* at 254–55.

133. *Id.* at 249–50.

134. *Id.* at 258–59.

135. *Id.* at 259.

136. *Id.*

litical ideas, had no shareholders or other persons with a claim to corporate assets or earnings, and were not established by nor accepted contributions from labor unions or business corporations.¹³⁷

A few years earlier, in *FEC v. National Right to Work Committee*,¹³⁸ the Court noted that restrictions on corporations and labor unions may be justified to combat the large financial “war chests” that these entities may amass.¹³⁹ Moreover, the Court nodded approvingly to the government’s asserted interest in protecting investors and members of an organization from a corporation’s political views that such investors or members might find disagreeable.¹⁴⁰ The Court stated that Congress may create a regulatory scheme that reflects the belief that “the special characteristics of the corporate structure require particularly careful regulation.”¹⁴¹ Although *National Right to Work* did not deal with contributions or expenditures, it did reveal the Court’s position on corporate restrictions.¹⁴² *MCFL* did nothing to dispel this position because it focused on a corporation’s ability to aggregate wealth but concluded that any dangers posed by such a possibility did not exist in that case.¹⁴³

However, in *Austin v. Michigan Chamber of Commerce*, the Court upheld a Michigan law prohibiting the expenditure of general corporate funds in any election to state office as it applied to a nonprofit corporation.¹⁴⁴ The Court distinguished the Michigan Chamber of Commerce from nonprofit advocacy groups such as *MCFL*.¹⁴⁵ Whereas the membership of the latter groups were comprised of like-minded individuals, the former’s members were almost entirely for-profit corporations.¹⁴⁶ The Court relied on *Buckley*’s anticorruption rationale to justify the restriction and denied that the statute was in-

137. See Corporate and Labor Organization Expenditures, 11 C.F.R. § 114.10(c) (2010). The Supreme Court later held that this exception also applied to the ban on electioneering communications put in place by the McCain–Feingold Act. See *infra* note 223 and accompanying text.

138. *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197 (1982).

139. *Id.* at 207.

140. *Id.* at 208.

141. *Id.* at 209–10.

142. This case dealt with the constitutionality of 2 U.S.C. § 441b(b)(4)(C), a provision that restricted union solicitation of PAC contributions to union members. *Nat’l Right to Work Comm.*, 459 U.S. at 198. FEC regulations defined “members” narrowly and the statute and regulations were challenged as unduly burdensome of the union’s First Amendment associational liberties. *Id.* at 203.

143. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259 (1986).

144. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654 (1990).

145. *Id.* at 664. The Court, in that case, created the *MCFL* corporation exception that was later codified in regulations issued by the FEC. *MCFL*, 479 U.S. at 259. See also *supra* note 137 and accompanying text.

146. *Austin*, 494 U.S. at 664.

tended to equalize political voices—a rationale expressly deemed constitutionally inadequate in *Buckley*.¹⁴⁷ According to the Court, the corporate power to aggregate wealth, made possible by advantages granted by the state-created corporate form, had a corruptive effect because corporate aggregation of wealth has “little or no correlation to the public’s support for the corporation’s political ideas.”¹⁴⁸

The Court’s emphasis on the lack of correlation between a corporation’s accumulation of wealth and public support for its political positions is curious because the same objection could be made to independent expenditures by wealthy individuals such as Bill Gates, Warren Buffet, or George Soros. The focus on the corporation as a creature of state law echoed Justice White’s dissent in *Bellotti*.¹⁴⁹ In fact, the Court’s focus on corporate wealth appeared to single out corporations per se for regulation, contrary to its prior statement in *Bellotti*.¹⁵⁰ This case became central to later reform debates and was expressly overturned in *Citizens United*.¹⁵¹

The Court also appeared to extend *Buckley*’s anticorruption rationale by upholding restrictions on coordinated expenditures by political parties in support of party candidates. In *FEC v. Colorado Republican Federal Campaign Committee (Colorado II)*, the Court noted that political parties and candidates invariably work together.¹⁵² The Court also found that coordinated expenditures were the “functional equivalent” of contributions and thus should be evaluated under the same standard of scrutiny as contribution limits in general.¹⁵³ In *Colorado Republican Federal Campaign Committee v. FEC (Colorado I)*, an earlier case involving the same organization, the Court struck down restrictions on independent party expenditures.¹⁵⁴ In that case, the Colorado Republican Party had run radio ads opposing its likely opponent in an upcoming race for the U.S. Senate at a time in which the maximum expenditure allowed by law had already been spent by the party.¹⁵⁵ *Colorado I* centered on the categorization

147. *See id.* at 660. *See also supra* note 101 and accompanying text.

148. *Austin*, 494 U.S. at 660.

149. *See supra* note 114 and accompanying text.

150. The Court distinguished corporations from labor unions by noting that unions “amass large treasuries . . . without the significant state-conferred advantages of the corporate structure.” *Austin*, 494 U.S. at 665. In *Bellotti*, the Court denied a state the ability to regulate corporate speech on the basis of the identity of the speaker. 435 U.S. 765, 784 (1978).

151. *See infra* note 360 and accompanying text.

152. *See FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 451–53 (2001).

153. *Id.* at 447, 456.

154. *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604, 608 (1996).

155. *Id.* at 612.

of expenditures as either independent or coordinated.¹⁵⁶ In *Colorado II*, a facial challenge to party expenditure limits, the government contended that unless political party expenditures were presumed to be coordinated with the candidate, the statutory contribution limits could be easily avoided by funneling contributions to candidates through the political parties.¹⁵⁷ Despite the difficulty in tying party expenditures to corruption, the Court held that such expenditures may be limited “to minimize circumvention of contribution limits”¹⁵⁸ and that the necessity to prevent disguised contributions was “a valid theory of corruption.”¹⁵⁹ *Buckley* and the 1976 amendments to the Federal Election Campaign Act of 1971 made clear that coordinated expenditures could be regulated as contributions.¹⁶⁰ Presumably, the Court’s reliance on the circumvention rationale was a response to the difficulty of establishing a close enough nexus between political party contributions and quid pro quo corruption—probably because it can be assumed that a party’s candidate holds political views closely aligned with that of the party prior to the receipt of any contributions.

C. *Effects of the Federal Election Campaign Act of 1971
and Its Amendments*

The campaign finance statutory regime put into place in the 1970s ensconced political parties in an advantageous position relative to individuals, corporations, labor unions, and PACs. Individuals were limited to \$1,000 contributions to candidates,¹⁶¹ corporations and labor unions could not donate directly to candidates at all,¹⁶² and PACs could donate up to \$5,000 to candidates.¹⁶³ As a result of the 1974 and 1976 amendments to the Campaign Act, the limitations on donations to political parties were more generous.¹⁶⁴ Moreover, although political parties were subject to the same direct contribution limitation as

156. See *id.* at 614–15, 618, 622–23.

157. *Colorado II*, 533 U.S. at 446, 456, 477. Note that *Buckley* expressly provided for the regulation of coordinated expenditures and the 1976 amendments to the Federal Election Campaign Act amended the statute to include coordinated expenditures within the definition of contributions. See *supra* notes 72, 106 and accompanying text.

158. *Colorado II*, 533 U.S. at 465.

159. *Id.* at 456. Justice Thomas believed that the Court created an alternative theory of corruption quite apart from *Buckley*’s quid pro quo corruption and that this alternative theory was not justified. *Id.* at 477 (Thomas, J., dissenting).

160. See *supra* notes 72, 106 and accompanying text.

161. See *supra* note 72 and accompanying text.

162. An exception was created for so-called *MCFL* corporations. See *supra* note 137 and accompanying text.

163. See *supra* note 73 and accompanying text.

164. See *supra* notes 76, 85 and accompanying text.

PACs, they enjoyed the unique ability to undertake coordinated expenditures that were subject to less stringent restrictions.¹⁶⁵

Coordinated expenditures dwarfed direct contributions by the political parties during the 1990s.¹⁶⁶ In addition, state party committees could expend an unlimited amount of funds for certain “grass roots” activities, such as voter registration and “get out the vote” efforts.¹⁶⁷ After the Supreme Court’s 1996 decision in *Colorado I*, political parties could also spend an unlimited amount on independent expenditures.¹⁶⁸ However, despite a surge in independent expenditure activity in the aftermath of the Court’s decision, independent expenditures never became a significant weapon in the parties’ campaign arsenals.¹⁶⁹ They had a better weapon at their disposal: issue advocacy funded by soft money.

Although the limits on political party expenditures were relatively generous—and in the case of independent expenditures, unlimited—expenditures for express advocacy activities had to be funded with contributions raised within the confines of the statutory contribution limitations (so-called hard money). As a result of the 1979 amendments to the Campaign Act and favorable FEC decisions, state and national parties were able to raise funds outside the strictures of the statute to fund administrative costs allocable to non-federal activities, despite the fact that party activities benefiting candidates for state or local office also tend to benefit candidates for federal office.¹⁷⁰

The use of soft money grew during the 1980s but exploded during the 1990s.¹⁷¹ One reason for this explosion was the increasing source of well-heeled donors from which to solicit soft money contributions.¹⁷² Although the booming economy no doubt played a major

165. Coordinated expenditures are deemed contributions to the candidates and, consequently, are subject to the stringent contribution limits. 1976 Amendments, Pub. L. No. 94-283, § 112, 90 Stat. 475, 488 (codified at 2 U.S.C. § 441a(a)(7)(2006)). Therefore, individuals, corporations, labor unions, and PACs are limited from undertaking coordinating activities in any meaningful way. See *supra* note 72 and accompanying text. Political party limitations are much more generous. See *supra* note 76 and accompanying text.

166. Over the three election cycles between 1994 and 1998, direct Republican and Democratic party donations to candidates totaled \$14.7 million while both parties’ combined coordinated expenditures amounted to \$129.4 million. See Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 626 (2000).

167. Coordination between state and national party committees allowed the state committees to benefit from the national committee’s fundraising apparatus. See *id.*

168. See *supra* note 156 and accompanying text.

169. Briffault, *supra* note 166, at 627–28.

170. *Id.* at 629 (citing FEC Advisory Op. 1978-10 (Nov. 21, 1978) and FEC Advisory Op. 1979-17 (July 16, 1979)).

171. Briffault, *supra* note 166, at 629–31.

172. *Id.* at 631.

factor in increasing the supply of wealthy donors, most soft money came from corporate donors.¹⁷³ Perhaps more importantly, the political parties found another use for soft money donations that had its genesis in *Buckley*. As discussed previously, *Buckley* held that independent expenditures could be regulated only if they resulted in express advocacy.¹⁷⁴ The Court then laid down the famous magic words doctrine in defining what type of communication constituted express advocacy.¹⁷⁵ Issue advocacy had been the domain of independent, ideologically driven groups.¹⁷⁶ However, in 1995 the FEC approved the use of soft money for a Republican National Committee advertisement that discussed issues but also criticized President Clinton by name.¹⁷⁷ Both the Republican and Democratic parties undertook multi-million dollar issue advertising campaigns during the 1996 election cycle.¹⁷⁸

The *Buckley* decision opened the floodgates to soft money, and by the mid to late 1990s, the parties exploited the opportunities presented by the use of unregulated issue advocacy to an extent that would soon set in motion major reforms.¹⁷⁹ Although issue advocacy had been unregulated since *Buckley*, independent groups had not been a force in federal campaigns until the 1990s. The contrast between corporate soft money contributions to political parties and independent advocacy groups suggested that corporations—and perhaps well-heeled individuals as well—were more interested in the access that such contributions could provide than in supporting particular ideologies.¹⁸⁰ However, the landscape would change in dramatic fashion in the aftermath of the bitterly contested 2000 presidential election.

The system of campaign finance regulation in place three decades after the passage of the Campaign Act was one that could permissibly regulate contributions, coordinated expenditures, and express advocacy by corporations, labor unions, and political committees. It could

173. *Id.*

174. *See supra* note 104 and accompanying text.

175. *See supra* note 105 and accompanying text.

176. Briffault, *supra* note 166, at 632.

177. *Id.* (citing FEC Advisory Op. 1995-25 (1995)).

178. *See id.*

179. See Laura MacCleery, *Goodbye Soft Money, Hello Grassroots: How Campaign Finance Reform Restructured Campaigns and the Political World*, 58 CATH. U. L. REV. 965, 978–84 (2009), for a discussion of soft money fundraising during the 1990s.

180. A recent Republican National Committee fundraising strategy document indicated that small donors, in general, are motivated by ideology but that large donors seek access. See Ben Smith, *Exclusive: RNC Document Mocks Donors, Plays on 'Fear,'* POLITICO.COM (Mar. 3, 2010), http://www.politico.com/news/stories/0310/33866_Page2.html.

require disclosure of political activity, but generally could not place limitations on independent expenditures by individuals and political committees, nor regulate non-advocacy expenditures. By the time of the 2000 presidential election, the inability of the government to regulate non-advocacy expenditures resulted in an explosion of issue advocacy by the political parties, funded principally by corporations and wealthy individuals. Soft money had become the proverbial camel's nose in the tent of campaign finance reform. To a casual observer of the political scene, there appeared to be little distinction between an issue ad and express advocacy communication. Moreover, despite almost a century since the passage of the Tillman Act, corporate participation in the political arena was extensive.

IV. THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002 (THE MCCAIN-FEINGOLD ACT)

A. *Statutory Provisions*

The extensive use of soft money during the 2000 presidential election, as well as revelations about unsavory campaign fundraising tactics, created a wellspring of support for further reform that was championed by Senators John McCain and Russell Feingold.¹⁸¹ The McCain-Feingold Act¹⁸² represented the most significant legislative change since the 1974 amendments to the Campaign Act.

The legislation banned soft money contributions to, and expenditures by, political parties. Title I of the McCain-Feingold Act, entitled "Reduction of Special Interest Influence," prohibited indirect contributions made through national committees of political parties and prohibited spending any funds that were not subject to hard money statutory restrictions and reporting requirements.¹⁸³ Similar restrictions were placed on state, district, and local party committees with respect to amounts that such committees expended for federal election activities.¹⁸⁴ Moreover, fundraising costs by national, state,

181. See, e.g., Don Van Natta, Jr. & Jill Abramson, *In Justice Inquiry, Clinton Denies Seeking Financial Help for Friend*, N.Y. TIMES, July 25, 2000, at A1 (reporting on allegations that a large campaign contribution was pledged to President Clinton by an Indonesian businessman); Leslie Wayne, *Gore's Calls to Big Donors Number 86, Papers Show*, N.Y. TIMES, Aug. 27, 1997, at A16 (reporting that Vice President Gore made fundraising calls from the White House).

182. McCain-Feingold Act, Pub. L. No. 107-155, 116 Stat. 81 (2002).

183. § 101(a), 116 Stat. at 82 (codified at 2 U.S.C. § 441i (2006)). The prohibition applied to any national committee, officers or agents acting on behalf of such committees, and any entities that were directly established, financed, maintained, or controlled by a national committee. *Id.*

184. *Id.* However, state and local committees of a political party were permitted to receive what are known as "Levin Funds," donations up to \$10,000 per year per donor that may be used for certain purposes such as voter registration drives, voter identification initiatives, and get-out-

district, and local committees were also subjected to the hard money limitations and disclosure rules.¹⁸⁵ Political parties were restricted from engaging in electioneering communications through the broadened coordinated expenditure rules.¹⁸⁶ Title I of the Act also increased the limitation on contributions to state political committees to \$10,000 and required enhanced disclosures from political committees.¹⁸⁷

Title II of the McCain–Feingold Act defined the term electioneering communications as

any broadcast, cable, or satellite communication which—(I) refers to a clearly identified candidate for Federal office; (II) is made within (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.¹⁸⁸

A communication is targeted at the relevant electorate if it can be received by 50,000 or more persons in the congressional district or state of a candidate for the House of Representatives or Senate, respectively.¹⁸⁹ Electioneering communications do not include news stories, commentaries, or editorials distributed through the facilities of a broadcast station not owned or controlled by a political party, candidate, or political committee. Nor do such communications include candidate debates or forums, communication promoting such events, or expenditures governed by the other provisions of the statute.¹⁹⁰ In the event that this statutory definition is held unconstitutional, then the statute would narrow the definition to include only express advocacy communications that are “suggestive of no plausible meaning

the-vote efforts. *Id.* Corporations and labor unions are permitted to donate such Levin Funds. See 11 C.F.R. § 300.31(c) (2010).

185. § 101(a), 116 Stat. at 84 (codified at 2 U.S.C. § 441i(c)).

186. § 202, 116 Stat. at 90–91 (codified at 2 U.S.C. §§ 434, 441a(a)(7)).

187. § 101(a), 116 Stat. at 84. See *infra* notes 188–99 and accompanying text for a discussion of the restrictions on “electioneering communications.” Such committees were also prohibited from soliciting funds for, or directly donating funds to, any I.R.C. § 501(c) organization exempt from tax pursuant to I.R.C. § 501(a) or any I.R.C. § 527 organization that was not a political committee. McCain–Feingold Act, § 101(a), 116 Stat. at 84. See *infra* notes 259–74 and accompanying text for a discussion of I.R.C. § 527 organizations.

188. McCain–Feingold Act, § 201, 116 Stat. at 89 (codified at 2 U.S.C. § 434(f)(3)(A)).

189. § 201, 116 Stat. at 90 (codified at 2 U.S.C. § 434(f)(3)(C)).

190. § 201(f)(3)(B), 116 Stat. at 89–90 (codified at 2 U.S.C. § 434(f)(3)(B)(iii)). Also exempted are communications pursuant to regulations promulgated by the FEC. § 201, 116 Stat. at 90 (codified at 2 U.S.C. § 434(f)(3)(B)(iv)).

other than an exhortation to vote for or against a specific candidate.”¹⁹¹ The statute expressly rejected the necessity of the magic words in order for a communication to fit within this narrower definition.¹⁹²

If a communication is an electioneering communication then the McCain–Feingold Act subjects any person who contributed in excess of \$10,000 for the direct costs of producing and airing that communication to detailed reporting requirements.¹⁹³ The Act also amended the coordinated expenditure rules to treat coordinated electioneering communications as both contributions to the candidate and as expenditures by the candidate or the candidate’s party.¹⁹⁴ Finally, corporations and labor unions were prohibited from making electioneering communications.¹⁹⁵ However, under the so-called Snowe–Jeffords amendment, certain nonprofit civic corporations and IRC § 527 organizations are excluded from the prohibition, provided that the communication in question is paid for exclusively by funds provided directly by citizens, nationals, or permanent residents of the United States.¹⁹⁶ With respect to civic associations that receive corporate or union funding, the exemption only applies if the communication is paid for out of a segregated account to which only the above-described individuals can contribute.¹⁹⁷ The Snowe–Jeffords amendment, however, did not apply to television, radio, or cable communications.¹⁹⁸ The Snowe–Jeffords amendment codified, to a degree, the extension of the *MCFL* corporation exception to electioneering communications.¹⁹⁹

In addition, Title II imposed reporting requirements on independent expenditures made between the twentieth day and the twenty-four hours before an election if such expenditures, in the aggregate, equal \$1,000 or more.²⁰⁰ The statute defined an “independent expen-

191. § 201, 116 Stat. at 89 (codified at 2 U.S.C. § 434(f)(3)(A)(ii)).

192. The statute states, parenthetically, that a communication falls within the statutory definition “regardless of whether the communication expressly advocates a vote for or against a candidate.” § 201, 116 Stat. at 89 (codified at 2 U.S.C. § 434(f)(3)(A)(ii)).

193. § 201(f), 116 Stat. at 88–89 (codified at 2 U.S.C. § 434(f)(1)).

194. § 202, 116 Stat. at 88–89 (codified at 2 U.S.C. § 441a(a)(7)).

195. § 203, 116 Stat. at 91 (codified at 2 U.S.C. § 441b(b)(2)).

196. § 203(c)(2), 116 Stat. at 91 (codified at 2 U.S.C. § 441b(c)(2)).

197. § 203(c)(3)(B), 116 Stat. at 91–92 (codified at 2 U.S.C. § 441b(c)(3)(B)).

198. § 204, 116 Stat. at 92 (codified at 2 U.S.C. § 441b(c)(6)). This provision, the so-called Wellstone Amendment, would substantially water down the *MCFL* corporation exception. See *supra* note 137 and accompanying text for a discussion of the *MCFL* corporation exception. However, the Supreme Court interpreted the Wellstone Amendment so as to retain the *MCFL* corporation exception. See *infra* note 223 and accompanying text.

199. See *supra* note 196 and accompanying text.

200. § 212(g)(1)(A), 116 Stat. at 93 (codified at 2 U.S.C. § 434(g)).

diture” as an expenditure expressly advocating the election or defeat of a clearly identified candidate that was not made in concert or cooperation with, or at the request or suggestion of a candidate, a candidate’s authorized committee, their agents, or a political party or its agents.²⁰¹ Moreover, the McCain–Feingold Act impeded the ability of a political party to make both independent and coordinated expenditures. No independent expenditures by a political party are permitted once a political party has nominated a candidate and has made any coordinated expenditures.²⁰² Additionally, no coordinated expenditures by a political party are permitted after a political party has nominated a candidate if any independent expenditures have been made by the party.²⁰³

Title III of the McCain–Feingold Act placed certain restrictions on candidates’ use of campaign contributions, prohibited fundraising on federal property, strengthened the ban on contributions and expenditures by foreign nationals, and banned contributions by minors.²⁰⁴ The legislation also amended the “lowest unit charge” requirement imposed on broadcast stations, eliminating this requirement for certain attack ads.²⁰⁵ Title III also increased the limitations for contributions to candidates from \$1,000 to \$2,000 and to national party

201. § 211, 116 Stat. at 92–93 (codified at 2 U.S.C. § 431).

202. § 213, 116 Stat. at 94 (codified at 2 U.S.C. § 441a(d)(4)).

203. *Id.* The McCain–Feingold Act deems the expenditure of funds in coordination with a political party committee as a contribution to such committee. § 214, 116 Stat. at 94 (codified at 2 U.S.C. § 441a(a)(7)(B)(ii)). It also repealed the existing FEC regulations concerning coordinated expenditures and charged the FEC with promulgating new regulations that address specific criteria. § 214(b), 116 Stat. at 94–95 (codified at 2 U.S.C. § 441a). The FEC has struggled with the coordinated expenditure issue. In response to the district court decision in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999), that specified when an expressive communication is coordinated, the FEC issued regulations on coordinated expenditures. See *Coordinated General Public Political Communications*, 11 C.F.R. § 100.23 (2001) (repealed 2002). It was these regulations that were repealed by the statute. New regulations, pursuant to the statute, were issued in 2002 but a portion of the regulations was held invalid in *Shays v. FEC*, 337 F. Supp. 2d 28, 30 (D.D.C. 2004), *aff’d* 414 F.3d 76, 79 (D.C. Cir. 2005). Regulations issued in 2006 were also invalidated. See *Shays v. FEC*, 508 F. Supp. 2d 10 (D.D.C. 2007), *aff’d* 528 F.3d 914 (D.C. Cir. 2008). One of the more contentious issues with respect to the FEC’s efforts was its restrained approach to internet communications. See generally Daniel W. Butrymowicz, *Loophole.com: How the FEC’s Failure to Fully Regulate the Internet Undermines Campaign Finance Law*, 109 COLUM. L. REV. 1708 (2009). The FEC has recently issued proposed regulations on coordinated expenditures. See generally *Coordinated Communications*, 74 Fed. Reg. 53,893 (Oct. 21, 2009). Under the proposed regulations, whether an expenditure is coordinated depends on both the content of the message and the speaker’s conduct in connection with such message. *Id.*

204. McCain–Feingold Act, §§ 301–303, 318, 116 Stat. at 95–96, 109 (codified at 2 U.S.C. §§ 439a, 441e, 441k; 18 U.S.C. § 607).

205. § 305, 116 Stat. at 100–02 (codified at 47 U.S.C. § 315(b)).

committees from \$20,000 to \$25,000.²⁰⁶ Moreover, the limit was set at \$37,500 for contributions to candidates and their authorized committees and at \$57,500 for overall contributions, provided no more than \$37,500 in contributions were made to political committees other than national party committees.²⁰⁷ These limitations were also indexed for inflation.²⁰⁸ Finally, the McCain–Feingold Act required clear identification of the sponsors of election-related advertising, including the now familiar phrase, “I approve of this ad,” in radio and television advertisements.²⁰⁹

Perhaps the most controversial provision of Title III was the so-called millionaires’ amendment. *Buckley* precluded restricting a candidate from using personal or family funds in financing her campaign.²¹⁰ Congress believed that the inherent advantage enjoyed by wealthy candidates would be exacerbated by the ban on soft money imposed by the McCain–Feingold Act, and provisions were therefore enacted to mitigate a wealthy candidate’s funding advantages.²¹¹ The millionaires’ amendment is a complex provision, supported by detailed rules relaxing contribution limits to a candidate depending on the level of self-funding by the candidate’s opponent.²¹² With respect to Senate elections, for example, if the opposition expends personal funds by an amount exceeding over twice a threshold amount, then the individual contribution limit to the candidate is tripled.²¹³ If such excess expenditures by the opposition exceed four times a threshold

206. § 307, 116 Stat. at 102 (codified at 2 U.S.C. § 441a(a)(1)).

207. § 307, 116 Stat. at 102–03 (codified at 2 U.S.C. § 441a(a)(3)).

208. § 307, 116 Stat. at 103 (codified at 2 U.S.C. § 441a(c)). The contribution limits for individuals for 2009–2010 are \$2,400 and \$30,400 for contributions to candidates and national party committees, respectively. The aggregate limitations for the same periods are \$45,600 and \$69,900 for contributions to candidates and overall contributions, respectively. See *The FEC and Federal Campaign Finance Law*, FEDERAL ELECTION COMMISSION, http://www.fec.gov/pages/brochures/fecfeca.shtml#Contribution_Limits (last visited Mar. 11, 2010).

209. § 311, 116 Stat. at 105–06 (codified at 2 U.S.C. § 441d). Radio and television advertisements sponsored by persons other than the candidate or person authorized by the candidate must contain a statement indicating who is responsible for the advertisement. § 311, 116 Stat. at 106 (codified at 2 U.S.C. § 441d(d)(2)).

210. See *supra* note 97 and accompanying text.

211. See Michael J. Kesper, *Magic Words and Millionaires: The Supreme Court’s Assault on Campaign Fundraising*, 42 J. MARSHALL L. REV. 1, 16–18 (2008).

212. § 304, 116 Stat. at 97–100 (codified at 2 U.S.C. § 441a).

213. § 304(a), 116 Stat. at 97 (codified at 2 U.S.C. § 441a(i)(1)(c)). In addition, the aggregate contribution limitations are suspended. *Id.* (codified at 2 U.S.C. § 441a(i)(1)(C)). The threshold amount is an amount equal to \$150,000 plus \$.04 multiplied by the voting age population of the state. *Id.* (codified at 2 U.S.C. § 441a(i)(B)). Moreover, expenditures from personal funds are deemed to include a portion of the opposition candidate’s overall fundraising advantage—termed the “gross receipts advantage.” § 316, 116 Stat. at 108–09 (codified at 2 U.S.C. § 441a(i)(E)(ii)).

amount, then the individual contribution limit is increased six-fold.²¹⁴ A similar scheme, though operationally distinguishable from the above-described provisions, was put into place for elections to the House of Representatives.²¹⁵

Titles IV and V of the McCain–Feingold Act provided for the direct appeal to the Supreme Court on an expedited basis of any district court decision concerning declarative or injunctive relief from the McCain–Feingold Act on constitutional grounds.²¹⁶ These titles also gave standing to members of Congress to intervene in a lawsuit²¹⁷ and mandated that reports be made accessible on the Internet.²¹⁸

B. Judicial Developments

I. McConnell v. FEC

Predictably, the McCain–Feingold Act was quickly challenged and the Supreme Court rendered a decision in *McConnell v. FEC* less than two years after the passage of the legislation under the statute’s expedited appeal provision.²¹⁹ A bitterly divided Court upheld the legislation virtually in its entirety.²²⁰ The Court approved the McCain–Feingold Act’s restrictions on soft money. In doing so, it appeared to relax the nexus required by *Buckley* between contributions and corruption or the appearance of corruption. The Court stated, “[T]he Government’s strong interests in preventing corruption, and in particular the appearance of corruption, [were] thus sufficient to jus-

214. § 304, Stat. 116 at 97 (codified at 2 U.S.C. § 441a(i)(C)(ii)). If the expenditures exceed ten times the threshold amount, then, in addition to the six-fold increase in the contribution limitations, the state and national party committee spending limitations do not apply. § 304, 116 Stat. at 98 (codified at 2 U.S.C. § 441a(i)(C)(iii)).

215. For House of Representatives elections the threshold amount is \$350,000. If a party exceeds that amount the contribution limits are tripled for his opponent, and the party committee expenditure limitations do not apply. § 319, 116 Stat. at 109 (codified at 2 U.S.C. § 441a-1).

216. § 403(a), 116 Stat. at 113–114.

217. § 403(b), 116 Stat. at 114.

218. § 501–502, 116 Stat. at 114–15 (codified at 2 U.S.C. § 434(a)(11)(B)).

219. *McConnell v. FEC*, 540 U.S. 93 (2003).

220. Justices Stevens, O’Connor, Souter, Ginsburg, and Breyer formed the majority. *Id.* at 114. Chief Justice Rehnquist, and Justices Scalia, Thomas, and Kennedy all dissented from significant portions of the majority opinion. *Id.* at 247, 264, 286, 350. The constitutionality of the millionaires’ amendment, discussed *supra* at notes 212–15 and accompanying text, was not decided by the Court in *McConnell*. *See id.* at 229–30. Senator Mitch McConnell, the lead plaintiff and an incumbent, did not challenge this provision. *Id.* at 114 n.1 (citing *McConnell v. FEC*, 251 F. Supp. 2d 176, 221–26 (D.D.C. 2003)). It was challenged by a group of other plaintiffs but the Court dismissed their challenge for lack of standing. *Id.* at 229–30.

tify subjecting all donations to national parties” to the statutory limitation and disclosure rules.²²¹ As one scholar noted,

In sustaining the soft money ban, *McConnell* relied principally on several post-*Buckley* cases that had interpreted *Buckley*’s “lesser scrutiny” for contribution limitations to dictate virtually no judicial scrutiny of them at all. If *Buckley* could be thought to have rested on an implicit premise of distrust of legislative judgment regarding restrictions that “operated in an area of the most fundamental First Amendment freedoms,” *McConnell* replaced it with an explicit premise of deference to legislatures. In addition . . . the *McConnell* majority thoroughly repudiated *Buckley*’s narrow definition of corruption as *quid pro quos* between contributors and candidates. . . . Indeed, the Court went so far as to announce that soft-money contributions could be regulated “[e]ven if . . . access did not secure actual influence, [because] it certainly gave the appearance of such influence.”²²²

The Court also upheld the corporate and union ban on electioneering communications. In doing so, the Court found that the statutory definition of such communications was “both easily understood and objectively determinable.”²²³ More importantly, the Court rejected the notion that *Buckley*’s magic words were a constitutional threshold in order for communication restrictions to pass First Amendment scrutiny. In fact, the Court expanded *Buckley*’s definition of express advocacy by stating that “issue ads broadcast during the thirty- and sixty-day periods preceding federal primary and general elections are the functional equivalent of express advocacy.”²²⁴

According to the Court, *Buckley* had not “suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.”²²⁵ The Court, interpreting *Buckley*’s magic words as a corrective measure to deal with vagueness concerns,²²⁶ found that the statutory definition raised no such concerns.²²⁷

221. *Id.* at 156. The restrictions on soft money were subsequently challenged in the wake of the Supreme Court’s decision in *Citizens United* but were upheld by the District Court for the District of Columbia and affirmed, without opinion, by the Supreme Court. See *infra* note 366 and accompanying text.

222. Lillian R. BeVier, *First Amendment Basics Redux: Buckley v. Valeo to FEC v. Wisconsin Right to Life, 2005–07 CATO SUP. CT. REV. 77, 82* (alterations in original) (quoting *McConnell*, 540 U.S. at 153).

223. *McConnell*, 540 U.S. at 194. The Court did interpret the statute to retain the *MCFL* corporation exception despite the language of the Wellstone Amendment, which on its face appeared to negate the *MCFL* corporation exception for television, radio, cable, and satellite television communications. *Id.* at 211. See *supra* note 198 for a discussion of the Wellstone Amendment.

224. *McConnell*, 540 U.S. at 206.

225. *Id.* at 192.

226. *Id.*

Deferring to “the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation,” the Court upheld the statute.²²⁸ In doing so, the Court dismissed the argument that the prohibition on corporate and union electioneering was overbroad and would prohibit bona fide issue ads.²²⁹ According to the Court, the statute did not result in an excessive suppression of speech because corporations and unions remained free to speak outside the thirty- and sixty-day statutory windows or could fund speech through segregated funds.²³⁰

Thus *McConnell* knocked *Buckley*'s magic words doctrine off the constitutional pedestal, loosened the nexus required between contributions and corruption, expanded the definition of express advocacy, exhibited a new deference to the legislature, and adopted the *Austin* Court's amenability to corporate speech regulation.²³¹ Moreover, its deferential approach toward congressional findings belied the application of the strict scrutiny called for in *Buckley*. Justice Scalia's scathing dissent was a harbinger of the future judicial antipathy toward *McConnell* that would find a voice in three subsequent cases, including *Citizens United*:

This is a sad day for freedom of speech. Who could have imagined that the same Court which, within the past four years, has sternly disapproved of restrictions upon such inconsequential forms of expression as virtual child pornography, tobacco advertising, dissemination of illegally intercepted communications, and sexually explicit cable programming, would smile with favor upon a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government.²³²

2. *Post-McConnell Decisions*

The ban on corporate electioneering communications was tested again in *FEC v. Wisconsin Right to Life, Inc.*²³³ However, by this time the composition of the Court had changed with the additions of Chief Justice Roberts and Justice Alito. *Wisconsin Right to Life*, a non-profit advocacy corporation, wanted to run advertisements paid for by general corporate funds that criticized the filibusters by Senate Demo-

227. *Id.* at 194.

228. *Id.* at 192, 205 (quoting *FEC v. Beaumont*, 539 U.S. 146, 155 (2003)).

229. *Id.* at 204–06.

230. *Id.* at 204. See *supra* notes 188–99 and accompanying text for a discussion of electioneering communications.

231. See *supra* notes 144–51 and accompanying text.

232. *McConnell*, 540 U.S. at 248 (Scalia, J., dissenting) (citations omitted).

233. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

crats of some of President George W. Bush's judicial nominees.²³⁴ The ads would have run afoul of the electioneering communications restrictions because they would be aired within thirty days of the 2004 Wisconsin primary and mention Senator Feingold by name.²³⁵ The ads would contain none of the so-called magic words of express advocacy.²³⁶ The district court held on procedural grounds that *McConnell* precluded the corporation's as applied challenge to the statute.²³⁷ The Supreme Court unanimously vacated the judgment and remanded the case to the district court for consideration on the merits, and the district court then sustained the challenge.²³⁸

The Court, now affirming the district court, made clear that the ban on corporate electioneering communications was subject to strict scrutiny, citing *New York Times v. Sullivan* for the proposition that "debate on public issues should be uninhibited, robust, and wide-open."²³⁹ The Court rejected the assertion that *McConnell* established an intent-based standard for testing whether such communications were the functional equivalent of express advocacy because such a standard "would chill core political speech."²⁴⁰ Instead, the Court put forth an objective standard that equated an ad with express advocacy only if the ad was "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."²⁴¹ The Court, in finding that the ad in question did not meet this test, placed significant emphasis on the fact that the ad did not mention an election, candidate, party, or challenger.²⁴² The Court was particularly dismissive of the FEC's position stating that the Commission was, in essence, advocating the "perverse" position that "there can be no such thing as a genuine issue ad during the blackout period."²⁴³

Having determined that the ad in question did not amount to express advocacy, the Court proceeded to determine whether the government had a compelling government interest that would sustain the regulation. The Court firmly rejected the position that the restriction was valid as a means of rooting out "the corrosive and distorting ef-

234. *Id.* at 458–59.

235. *Id.* at 459.

236. *Id.* at 458–59.

237. *Wis. Right to Life, Inc. v. FEC*, No. 04-1260, 2004 U.S. Dist. LEXIS 29036, at *6 (D.D.C. Aug. 17, 2004).

238. *See Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) (per curiam); *Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 210 (D.D.C. 2006).

239. *Wis. Right to Life*, 551 U.S. at 467–68 (citing *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

240. *Id.* at 468.

241. *Id.* at 470.

242. *Id.*

243. *Id.* at 471–72.

fects of immense aggregations of wealth that are accumulated with the help of the corporate form.”²⁴⁴ The Court cited *Bellotti* in refusing to strip corporations of their First Amendment rights.²⁴⁵ Although this case did not present a facial challenge to the statute, its holding called into question the continuing vitality of *McConnell*.²⁴⁶ Unlike in *McConnell*, the *Wisconsin Right to Life* Court showed no deference to the legislative findings. In promulgating an objective test for the functional equivalency of express advocacy, the Court also made clear that the distinction between issue and express advocacy first set forth in *Buckley* remained valid.²⁴⁷ Moreover, the Court’s approving nod to *Bellotti* and its refusal to create an *MCFL* corporation-type exception to the statute spoke volumes about the majority’s predilections regarding per se corporate restrictions on political speech.²⁴⁸

In *McConnell*, the Court dismissed a challenge to the constitutionality of the McCain–Feingold Act’s millionaires’ amendment for lack of standing.²⁴⁹ In 2008, the Court had another occasion to examine this provision in *Davis v. FEC*.²⁵⁰ In another 5–4 decision, the Court invalidated the provision and held that it imposed an unjustifiable burden on First Amendment liberties.²⁵¹ Despite the fact that this provision did not impose the type of expenditure limits that the Court struck down in *Buckley*, the Court believed that the millionaires’ amendment imposed an “unprecedented penalty on any candidate who robustly exercises [his] First Amendment right.”²⁵² By forcing a candidate to choose between “unfettered political speech” and “discriminatory fundraising limitations,” the statute created a “drag” on the speech rights of the candidate.²⁵³ The Court further noted that the anticorruption justification for the provision, required by *Buckley*, did

244. *Id.* at 479–80 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)). See *supra* notes 144–50 and accompanying text for a discussion of *Austin*.

245. *Wis. Right to Life*, 551 U.S. at 478 (citing *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776–77 (1978)). See *supra* notes 110–14 and accompanying text for a discussion of *Bellotti*.

246. Justice Scalia’s concurrence, joined by Justices Kennedy and Thomas, however, made clear that he preferred to overrule *McConnell* and that he did not join the majority opinion for this reason. *Wis. Right to Life*, 551 U.S. at 499–504 (Scalia, J., concurring).

247. *Id.* at 467–70.

248. See *supra* note 137 and accompanying text for a discussion of the *MCFL* corporation exception.

249. See *supra* notes 213–15 and accompanying text for a discussion of the millionaires’ amendment.

250. See *Davis v. FEC*, 128 S. Ct. 2759 (2008).

251. *Id.* at 2772–73. Justice Alito wrote the opinion of the Court and was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. *Id.* at 2764–65.

252. *Id.* at 2771.

253. *Id.* at 2771–72.

not exist.²⁵⁴ In fact, the provision's statutory scheme actually belied an anticorruption rationale, because its remedy for excessive campaign money was to allow more campaign money in the form of greater direct contributions to the opposing candidate—the very form of financing that *Buckley* did allow to be regulated due to its potential for quid pro quo corruption.²⁵⁵

The Court squarely rejected any justification relating to the notion that the provision leveled the playing field for candidates without a great degree of personal wealth. The Court cited *Buckley* for the proposition that “[t]he ancillary interest in equalizing the . . . financial resources of candidates’” cannot justify such restrictions.²⁵⁶ Justice Alito, writing for the majority, made clear the Court's aversion to any restrictions not firmly grounded in an anticorruption rationale and indicated the Court's unwillingness to defer to Congress on this issue:

Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters' choices.²⁵⁷

Davis reinforced the Court's insistence on a close nexus between the government restrictions sought and their contribution to combating quid pro quo corruption. Arguably, the millionaires' amendment did not inhibit the ability of a candidate to speak. A wealthy candidate could spend any amount of personal funds she desired. The fact that her opponent could then take advantage of increased funding limits seems to place minimal burdens on the wealthy candidate. Ironically, allowing the opposing candidate to raise greater funds would appear to encourage more speech. However, the Court was not willing to countenance this type of restriction if its rationale was rooted in an attempt to equalize electoral opportunities. *Davis* also highlighted the continued hostility of the Court's majority toward

254. *Id.* at 2773.

255. *Id.*

256. *Id.* at 2771 (alteration in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 54 (1976)).

257. *Id.* at 2774. The Ninth Circuit recently upheld the constitutionality of a similar matching fund scheme under Arizona law. See *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010). However, the Supreme Court stayed the Ninth Circuit's mandate. See *McComish v. Bennett*, 130 S. Ct. 3408 (2010) (order vacating the stay of the District Court's injunction and staying the mandate of the Ninth Circuit).

campaign finance regulation in general. This hostility, pointedly expressed by Justice Thomas in *McConnell* when he referred to the McCain–Feingold Act as “the most significant abridgment of the freedoms of speech and association since the Civil War,”²⁵⁸ would soon have another outlet for its expression. This time, however, the Court would deal more squarely with *McConnell*.

C. Effects of the McCain–Feingold Act

The success that the McCain–Feingold Act had in rooting out the use of soft money by political parties had several effects on campaign finance practices. Section 527 organizations became increasingly prominent participants in the political process. These tax-exempt organizations, named after the IRC section that defines and regulates them, can be parties, committees, associations, funds, or other incorporated or unincorporated entities that are organized and operated for the purpose of accepting contributions and making expenditures for a statutorily defined exempt function.²⁵⁹ An exempt function is one that influences or attempts to influence “the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors. . . .”²⁶⁰ Section 527 governs the taxation of political organizations and includes within its ambit political parties and other committees that are subject to the statutory campaign finance rules.²⁶¹

258. *McConnell v. FEC*, 540 U.S. 93, 264 (2003) (Thomas, J., concurring in part and dissenting in part).

259. I.R.C. § 527(e)(1) (2006). Other tax-exempt organizations can also engage in political activity to a limited degree. Section 501(c)(3) organizations, which include the prototypical charitable, religious, and educational institutions, risk losing their tax exemption if they engage in substantial electoral or lobbying activities or participate in campaigns. See I.R.C. §§ 501(c)(3), 501(h). Unlike other tax-exempt organizations, donations to these entities are deductible by the donor as a charitable contribution. See I.R.C. § 170(c)(2)(B). Section 501(c)(4) social welfare organizations, Section 501(c)(5) labor unions, and Section 501(c)(6) trade associations have greater latitude to engage in electoral activities, but these activities cannot constitute their primary purpose. See Donald B. Tobin, *Political Advocacy and Taxable Entities: Are They the Next “Loophole?”*, 6 FIRST AMENDMENT L. REV. 41, 52–53 (2007). Section 501(c)(6) trade organizations have been used as a vehicle to fund issue ads favorable to corporate interests. See Shayla Kasel, Note, *Show Us Your Money: Halting the Use of Trade Organizations as Covert Conduits for Corporate Campaign Contributions*, 33 J. CORP. L. 297, 314–17 (2007) (noting that Microsoft contributed over \$250,000 to trade organizations to fund issue ads). See also Jim Rutenberg et al., *Offering Donors Secrecy, and Going on Attack*, N.Y. TIMES, Oct. 12, 2010, at A1. One commentator has discussed the possibility that taxable entities may become the vehicle of choice for conducting campaign activities. See Tobin, *supra*, at 259.

260. I.R.C. § 527(e)(2).

261. § 527(c)(1). In general, political organizations are subject to tax on their taxable income at corporate income tax rates. § 527(b). However, excluded from taxable income is “exempt

The definition of an exempt function for purposes of Section 527 would seem to place such organizations squarely within the definition of a political committee as defined under the campaign finance statutes.²⁶² However, the IRS took an expansive view of activities meant to influence “the selection, nomination, election, or appointment” of any covered individual.²⁶³ Many such activities do not amount to express advocacy and, accordingly, are outside the scope of the campaign finance rules. The tax law “encompasses activities that, directly or indirectly, relate to and support *any aspect* of the *process* of influencing or attempting to influence” the electoral process.²⁶⁴ After *Buckley*, only political organizations that engage in express advocacy or that coordinate their activities with a candidate, candidate’s committee, or political party are subject to FEC regulation.²⁶⁵ Since 2000, all Section 527 organizations have been subject to disclosure requirements administered by the IRS that are similar to those under the campaign finance rules administered by the FEC.²⁶⁶

The ban on soft money imposed by the McCain-Feingold Act resulted in the heightened importance of unregulated Section 527 organizations engaged in issue advocacy. In contrast to political party soft money sources, these organizations are funded primarily by large con-

function income,” which includes contributions, membership dues and fees for political organizations, and fundraising proceeds. § 527(c)(3). No deduction is allowed for political expenditures. See § 162(e)(1). Moreover, dues paid to tax-exempt organizations, such as trade associations, that are allocable to such activities are similarly non-deductible. § 162(e)(3). Deductions for certain indirect contributions to political parties, such as advertising in convention programs and other publications and admission costs to dinners and inaugural events are also not deductible. § 276(a). Section 527 was enacted in 1975 to provide an element of certainty to the taxation of political organizations. Act of Jan. 3, 1975, Pub. L. No. 93-625, §10, 88 Stat. 2018, 2116–19. Prior to the enactment of I.R.C. § 527, the tax treatment of contributions was governed by IRS rulings. See Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 955 (2005).

262. See *supra* note 63 and accompanying text. However, a recent decision by the Court of Appeals for the District of Columbia Circuit struck down the limitations on contributions to political committees that engage in independent advocacy. See *SpeechNow.org v. FEC*, 599 F.3d 686, 695–96 (D.C. Cir. 2010). That case involved a Section 527 organization. See *infra* note 364 and accompanying text.

263. I.R.C. § 527(e)(2). Costs incurred to aid a person in exploring whether to run for office, costs related to issue advocacy, and costs incurred between elections and prior to the existence of a named candidate are examples of exempt function expenditures that would not be governed by the campaign finance rules. See Miriam Galston, *Emerging Constitutional Paradigms and Justifications for Campaign Finance Regulation: The Case of 527 Groups*, 95 GEO. L.J. 1181, 1190–93 (2007).

264. Galston, *supra* note 263, at 1192.

265. See *supra* notes 104–06 and accompanying text. After the passage of the McCain-Feingold Act, political organizations that engage in electioneering communications would also be subject to FEC regulation. See *supra* notes 188–99 and accompanying text.

266. I.R.C. § 527(j). The disclosure rules were added by Act of July 1, 2000, Pub. L. No. 106-230, § 2(a), 114 Stat. 477, 479 (2000).

tributions from individuals.²⁶⁷ Corporations, perhaps uncertain about the legal status of these entities and finding them too remote from the candidates to provide access, generally avoided these organizations.²⁶⁸ Democrats were quicker to utilize Section 527 organizations due to the perceived advantages enjoyed by the Republicans in raising hard money.²⁶⁹ A network of Section 527 organizations developed independent of the national party and with the aid of large contributions from wealthy individuals such as George Soros.²⁷⁰ However, by the 2004 presidential campaign season, Republicans had embraced Section 527 organizations with alacrity.

The 2004 presidential election represented the pinnacle of Section 527 organizations' influence—most likely due to the visceral reaction by liberals to President George W. Bush and conservatives' counter-reaction. Approximately \$233 million was raised by Section 527 groups for federal election activities in 2004, of which approximately \$175 million was related to the presidential election.²⁷¹ Although these groups could not coordinate with the campaigns, a great deal of informal communication developed between the groups and key party operatives, including former President Clinton, the chair of the Republican National Committee, and the director of the Bush campaign.²⁷²

The increasing influence of these organizations led to various legislative and administrative attempts to subject Section 527 groups to regulation. These attempts approached the issue from different angles, including requiring all such groups to register with the FEC, liberalizing political party fundraising ability, and tightening the coordination rules.²⁷³ The reform proposals died.²⁷⁴ However, by the 2008 presidential election, both political parties had reduced their reliance on Section 527 groups and focused their efforts on raising hard money.

267. See Johnston, *supra* note 106, at 1180–81.

268. *Id.* at 1181.

269. *Id.* at 1182.

270. *Id.* at 1183.

271. *Id.* at 1182–83. Two commentators estimated overall 527 organization spending during the 2004 presidential election to be in excess of \$440 million. See Ellen L. Weintraub & Jason K. Levine, *Campaign Finance and the 2008 Elections: How Small Change(s) Can Really Add up*, 24 ST. JOHN'S J. LEGAL COMMENT. 461, 467 (2009) (citing figures provided by OpenSecrets.org).

272. Johnston, *supra* note 106, at 1184–85.

273. See Ronald Hrebenar et al., *The Struggle to Regulate the 527s: Through the FEC, Congress and the Courts*, 12 NEXUS 97, 108–13 (2007).

274. *Id.* See also *supra* note 203 for a discussion of the FEC's struggle to issue coordinated expenditure regulations.

There were several reasons that the political parties discovered a new-found appreciation for hard money. First, the McCain–Feingold Act increased the contribution limitations on donations to campaigns and political parties.²⁷⁵ The candidates and their political parties were able to exploit the increased contribution limits through the adept use of bundlers.²⁷⁶ Second, the elimination of soft money forced the parties to focus on grassroots fundraising activities.²⁷⁷ Third, Howard Dean’s success in utilizing the internet as a tool for raising small, hard money donations during the Democratic primaries caught the attention of party operatives and resulted in the growth of Internet-based fundraising—a tool used to great effect by then-Senator Obama’s campaign in 2008.²⁷⁸ Finally, although attempts at formally regulating Section 527 organizations failed, the FEC aggressively mounted case-by-case challenges to the practices of several Section 527 groups and thereby chilled the enthusiasm for the use of such groups as vehicles for political activity.²⁷⁹

V. *CITIZENS UNITED v. FEC*

In January 2008, Citizens United, a nonprofit corporation with an annual budget of approximately \$12 million, released a film entitled *Hillary: The Movie*.²⁸⁰ The film, a ninety-minute documentary, mentioned then-Senator Hillary Clinton by name and was extremely critical of her.²⁸¹ At that time, Senator Clinton was a candidate in the Democratic Party’s presidential primary elections.²⁸² Citizens United financed its operations primarily with donations from individuals, but it also received a small portion of its funding from for-profit corporations.²⁸³ The film was released in theaters and on DVD, and in December 2007, a cable operator offered to make the film available to its subscribers free of charge on its video-on-demand channel.²⁸⁴ Citi-

275. See *supra* notes 206–08 and accompanying text.

276. Bundlers are individuals who are identified with the campaign that collect individual donations. During the 2008 presidential campaign, then-Senator Obama raised \$750 million from 605 bundlers and Senator McCain raised \$375.5 million from 851 bundlers. MacCleery, *supra* note 179, at 1003–04 (citing the results of an investigation reported by Public Citizen).

277. See *id.* at 970, 994.

278. *Id.* at 995–99. See also Butrymowicz, *supra* note 203, at 1708 n.3.

279. See Weintraub & Levine, *supra* note 271, at 467–68 (noting that, after the 2004 elections, the FEC imposed over \$3 million in fines against a number of Section 527 organizations).

280. *Citizens United v. FEC*, 130 S. Ct. 876, 887 (2010).

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

zens United also prepared three ads that it intended to run on broadcast and cable television to promote the film.²⁸⁵

Due to the fact that the film would, according to its plan, be available through the video-on-demand service within thirty days of the 2008 primary elections, Citizens United feared that it would run afoul of § 441b of the McCain–Feingold Act’s ban on corporate electioneering communications.²⁸⁶ The corporation sought declaratory and injunctive relief against the FEC, arguing that § 441b was unconstitutional as applied to the film and that the disclaimer and disclosure requirements of the 2002 legislation were unconstitutional as applied to the film and the three ads.²⁸⁷ The district court denied injunctive relief and granted the FEC’s motion for summary judgment.²⁸⁸ The court, citing *McConnell*, held that § 441b was constitutional on its face and also as applied to the film.²⁸⁹ The court also upheld the disclaimer and disclosure requirements of the legislation.²⁹⁰

Surprisingly, in June 2009, the Supreme Court directed the parties to file supplemental briefs addressing whether the Court should overrule *Austin*, the part of *McConnell* that upheld the facial validity of § 441b, or both.²⁹¹

A. *As Applied Challenges*

The Court, before proceeding to the continuing validity of *Austin* and the facial constitutionality of the statute, addressed the as applied claims brought by Citizens United. Four such claims were brought, and the Court rejected them all in a 5–4 decision.²⁹²

285. *Id.*

286. See *supra* notes 188–99 and accompanying text for a detailed discussion of the statutory provision in question.

287. *Citizens United*, 130 S. Ct. at 888; *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275–76 (D.D.C. 2008) (*per curiam*).

288. See *id.* at 275.

289. *Id.* at 279.

290. *Id.* at 281.

291. *Citizens United*, 129 S. Ct. at 2893. The Court noted probable jurisdiction under the statute’s provision for a direct appeal of the district court’s decision. See *supra* note 216 and accompanying text.

292. Justice Kennedy wrote the majority opinion. *Citizens United*, 130 S. Ct. at 886. Chief Justice Roberts, joined by Justice Alito, concurred and wrote separately to discuss the issue of *stare decisis*. *Id.* at 917 (Roberts, C.J., concurring). Justice Scalia, joined by Justice Alito and by Justice Thomas in part, concurred and wrote separately to address the dissent’s view of First Amendment rights. *Id.* at 925 (Scalia, J., concurring). Justice Thomas wrote a separate opinion concurring in all of the majority opinion except the part of the opinion that upheld the statute’s disclaimer and disclosure requirements. *Id.* at 979–82 (Thomas, J., concurring in part and dissenting in part). Justice Thomas argued that those requirements were also unconstitutional. *Id.* at 979–80. Justice Stevens, joined by Justices Breyer, Ginsburg, and Sotomayor, dissented to all

First, Citizens United claimed that § 441b was inapplicable to the film because the film did not qualify as an electioneering communication under the statute.²⁹³ The corporation argued that, because video-on-demand transmissions are delivered only to a requesting cable converter box, each transmission could be viewed by only one household, an amount falling far short of the statutorily required 50,000-person audience.²⁹⁴ The Court rejected the corporation's argument, noting that FEC regulations clearly provided that the number of people who can receive a cable transmission is to be determined by the number of cable subscribers in the relevant area—in this case, 34.5 million.²⁹⁵ One amici brief argued, alternatively, that the question of whether the communication reaches 50,000 people should depend on the number of voters who will likely view it.²⁹⁶ The Court also rejected that argument on the grounds that such a statutory interpretation would not cure the constitutional defect, because it would subject the speaker to sanctions as a result of inaccurate estimates and also cause her to incur burdensome expenses in challenging such estimates.²⁹⁷

Second, Citizens United asserted that § 441b could not be applied to the film because, under *Wisconsin Right to Life*, the film was not the functional equivalent of express advocacy.²⁹⁸ *Wisconsin Right to Life* had sustained an as applied challenge to § 441b and defined the functional equivalent of express advocacy as a communication that “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”²⁹⁹ The Court found that the film, highly critical of then-Senator Clinton, was susceptible to no reasonable interpretation other than as an appeal to vote against her.³⁰⁰

Third, Citizens United contended that the corporate ban on electioneering communications should be held invalid as applied to films distributed by video-on-demand services.³⁰¹ The corporation asserted that video-on-demand requires the viewer to take a series of affirmative steps in order to view a program.³⁰² In contrast, television view-

of the majority opinion except the portion of the opinion that upheld the statute's disclaimer and disclosure requirements. See *id.* at 929–79 (Stevens, J., dissenting in part and concurring in part).

293. *Id.* at 888.

294. *Id.* at 888–89.

295. *Id.*

296. *Id.* at 889.

297. *Id.*

298. *Id.*

299. *Id.* at 889–90 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469–70 (2007)). See *supra* notes 233–48 and accompanying text for a discussion of *Wisconsin Right to Life*.

300. *Citizens United*, 130 S. Ct. at 890.

301. *Id.*

302. *Id.*

ers subjected to political ads do not affirmatively choose to watch the political ad in question.³⁰³ The Court rejected this argument stating,

[A]ny effort by the judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to courts' own lawful authority. . . .

. . . .

. . . We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker. . . . The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable.³⁰⁴

Finally, *Citizens United* asked the Court to create an exception to the application of § 441b to a nonprofit corporation that engages in political speech and is funded overwhelmingly by donations from individuals.³⁰⁵ The Court had created the *MCFL* exception for corporate advocacy prior to the enactment of the McCain–Feingold Act.³⁰⁶ The exception applied to nonprofit corporations—formed for the purpose of promoting political ideas—that neither engaged in business activities nor accepted contributions from for-profit corporations or labor unions.³⁰⁷ This exception was incorporated into regulations subsequently issued by the FEC.³⁰⁸ The Snowe–Jeffords Amendment incorporated a version of the *MCFL* exception for electioneering communications into § 441b, but the Wellstone Amendment eviscerated the exception for radio, cable, and satellite television communications.³⁰⁹ Subsequently, *McConnell* interpreted the Wellstone Amendment to retain the *MCFL* exception for electioneering communications.³¹⁰

The Court held that *Citizens United* qualified for neither the *MCFL* exception nor the exception carved out by the Snowe–Jeffords Amendment because both exceptions prohibited any for-profit corporate funding.³¹¹ *Citizens United* did receive a modest amount of such

303. *Id.*

304. *Id.* at 890–91.

305. *Id.* at 891.

306. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259 (1986). *See also supra* note 137 and accompanying text.

307. *MCFL*, 479 U.S. at 259. *See also supra* note 137 and accompanying text.

308. Corporate and Labor Expenditures, 11 C.F.R. § 114.10(c) (2010). *See also supra* note 137 and accompanying text.

309. McCain–Feingold Act, Pub. L. No. 107-155, § 204, 116 Stat. 81, 92 (2002) (codified at 2 U.S.C. § 441b(c)(6) (2006)). *See supra* notes 196–99 and accompanying text for a discussion of these provisions.

310. *See McConnell v. FEC*, 540 U.S. 93, 211 (2003).

311. *Citizens United v. FEC*, 130 S. Ct. 876, 891 (2010).

funding.³¹² Moreover, the Court refused to create a *de minimis* exception to the *MCFL* exception for two reasons. First, any *de minimis* exception that allowed funding from for-profit corporations would allow for-profit corporate general treasury funds to be used for independent express advocacy and, in the Court's opinion, there was no principled basis for doing this "without rewriting *Austin's* holding."³¹³ Second, any *de minimis* standard would require case-by-case determinations to be made and would chill political speech.³¹⁴

B. Facial Validity of Corporate Political Speech Bans

Having rejected all four as applied challenges and, concomitantly, having failed to decide the case on narrow grounds, the Court turned its attention to *Austin* and the facial validity of § 441b.³¹⁵ The Court termed § 441b an "outright ban" on corporate political speech buttressed by criminal sanctions.³¹⁶ The fact that a PAC created by a corporation could speak to political issues did not soften the Court's position.³¹⁷ The Court found that a PAC is a separate and distinct entity from the sponsoring corporation.³¹⁸ Moreover, the Court held that a PAC is burdened by administrative responsibilities and extensive regulatory mandates—facts that, according to the Court, might explain why there are fewer than 2,000 corporate PACs.³¹⁹ In addition, the time required to establish a PAC may preclude a corporation from establishing one in time to make its views known in a current campaign.³²⁰ The Court maintained that political speech has a prominent perch in First Amendment jurisprudence, stating that "[t]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office."³²¹ Accordingly, "[l]aws that burden political speech are 'subject to strict scrutiny,' which re-

312. *Id.* at 887, 891.

313. *Id.* at 891–92.

314. *Id.* at 892.

315. Citizens United stipulated to dismissing the part of its complaint that challenged the facial validity of the statute. *Id.* at 892. The Government argued that by doing so Citizens United waived its challenge to *Austin*. *Id.* The Court responded with a fairly lengthy discussion that explained why the waiver of a facial challenge did not preclude the Court from reconsidering *Austin* or addressing the facial validity of the statute. *See id.* at 892–96.

316. *Id.* at 897.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 898.

321. *Id.* (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)).

quires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”³²²

The Court then turned its attention to whether corporations could be targeted by speech restrictions. Speech restrictions that are aimed at particular speakers are suspect because they not only deprive the speaker of a voice but also “deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”³²³ The Court distinguished the restriction in question from speech restrictions aimed at particular persons that previously had been upheld on the grounds that the permitted restrictions were necessary to the operation of particular government functions.³²⁴ The Court cited numerous cases, including *Bellotti*, that extended First Amendment liberties in general and specifically to corporations in the political context.³²⁵ Justice Stevens’s lengthy dissent disputed, largely on historical grounds, the notion that corporations are entitled to First Amendment protections as great as those afforded to regular persons.³²⁶ Justice Scalia had a radically different view of the historical record.³²⁷

Although corporate expenditure restrictions were put into place in 1947, their constitutional validity remained untested until *Buckley*.³²⁸ In the Court’s opinion, *Buckley* was the earliest precedent that denied the imposition of corporate expenditure restrictions.³²⁹ The Court noted that although *Buckley* invalidated a separate ban on independent expenditures, the provision at issue in that case also applied to corporations.³³⁰ Moreover, *Buckley* in no way suggested that the restriction in question was struck down by the invocation of the overbreadth doctrine—that is, had the restriction applied only to corporations, the constitutional infirmity would still not have been cured.³³¹ Moreover, the Court took a broad view of the *Bellotti* hold-

322. *Id.* (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

323. *Id.* at 899.

324. *Id.* (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (dealing with speech restrictions in public schools); *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 129 (1977) (dealing with speech restrictions in correctional institutions); *Parker v. Levy*, 417 U.S. 733, 759 (1974) (dealing with speech restrictions in the military); *Civil Serv. Comm’n v. Letter Carriers*, 413 U.S. 548, 557 (1973) (dealing with speech restrictions with respect to civil service employees)).

325. *Id.* at 899–900.

326. *See id.* at 948–52 (Stevens, J., dissenting in part and concurring in part).

327. *See id.* at 925–29 (Scalia, J., concurring).

328. *See supra* notes 50–52 and accompanying text.

329. *Citizens United*, 130 S. Ct. at 901–02 (majority opinion).

330. *Id.* at 902.

331. *Id.*

ing. Despite the fact that *Bellotti* struck down corporate expenditure restrictions in the context of a referendum, the Court stated that its holding would have been similar had the law imposed restrictions on electoral activities.³³²

According to the majority, corporations are entitled to the First Amendment protections enjoyed by other persons, and *Buckley* and *Bellotti* had already made clear that corporate expenditure limitations were impermissible. Thus, the Court laid the foundation for revisiting *Austin* and *McConnell*. To the majority, *Austin* represented an aberration and a break from precedent: “Thus the law stood until *Austin*. *Austin* ‘up[held] a direct restriction on the independent expenditure of funds for political speech for the first time in [this Court’s] history.’”³³³

In order to meet its burden under the strict scrutiny test, the government asserted three compelling interests in support of § 441b. First, the government asserted an antidistortion interest that the Court had found adequate in *Austin*. This interest was defined in *Austin* as the prevention of “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”³³⁴ The Court unambiguously rejected this interest as adequate to justify corporate speech restrictions.³³⁵

The Court noted that the government’s reasoning would allow it to ban political books and other expressions of political opinion beyond those at issue in this case.³³⁶ Moreover, *Buckley* had squarely “rejected the premise that the Government has an interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections’”³³⁷ Likewise, *Davis* rejected this rationale when it invali-

332. *Id.* at 902–03.

333. *Id.* at 903 (alterations in original) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 695 (1990) (Kennedy, J., dissenting)).

334. *Id.* (quoting *Austin*, 494 U.S. at 660).

335. The Court stated that any interpretation of footnote twenty-six in *Bellotti* that suggests otherwise is misguided. *Id.* at 909. Footnote twenty-six in *Bellotti* suggested that the right of a corporation to participate in a referendum implies no comparable right in the context of an electoral campaign. *Belloti*, 435 U.S. at 788 n.26. See also *supra* note 113 and accompanying text. The Court also found its holding in *National Right to Work* inapposite. *Citizens United*, 130 S. Ct. at 909. In that case, discussed *supra* at notes 138–43 and accompanying text, the Court upheld restrictions imposed on a labor union with respect to the solicitation of member contributions to a PAC. See *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 207–10 (1982). The Court viewed *National Right to Work* as a case concerning contributions, not expenditures. See *Citizens United*, 130 S. Ct. at 909.

336. *Citizens United*, 130 S. Ct. at 904.

337. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976)).

dated the statute's millionaires' amendment.³³⁸ The Court also rejected the notion that corporations are distinguishable from wealthy individuals on the ground that the former are creatures of state law that are granted special advantages.³³⁹ To the Court, this did not suffice to sustain laws prohibiting speech because "the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights"³⁴⁰

The Court also held that whether a corporation's accumulation of wealth is correlated with the public's support for its political beliefs was of no relevance. According to the Court, "all speakers, including individuals and the media," use funds that they accumulate in the marketplace to fund their speech.³⁴¹ Despite the existing statutory exception for media corporations, the Court held that the government's reasoning would allow it to extend its restrictions to such media corporations.³⁴² Moreover, the mere existence of the media exemption was "all but an admission of the invalidity of the antidistortion rationale."³⁴³ The exemption applies to media owned and controlled by large corporations with interests far removed from the media, yet such corporations are exempt from the restrictions.³⁴⁴ Finally, the Court believed that the antidistortion rationale was further belied by the fact that the vast majority of corporations are small enterprises that do not have immense aggregations of wealth.³⁴⁵ The law would not prevent large corporations from engaging in political activity by lobbying, for example.³⁴⁶ Instead, small corporations unable to engage in alternative forms of political activity would find themselves unable to object to the practices of their more well-funded brethren.³⁴⁷

The second compelling interest asserted in support of § 441b was the prevention of corruption or the appearance of corruption.³⁴⁸ The Court forcefully reaffirmed *Buckley's* holding that this interest was

338. *Id.* (citing *Davis v. FEC*, 128 S. Ct. 2759, 2774 (2008)). See *supra* notes 250–57 and accompanying text for a discussion of the *Davis* decision.

339. *Citizens United*, 130 S. Ct. at 905.

340. *Id.* (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting)).

341. *Id.*

342. *Id.*

343. *Id.* at 906. See *supra* note 190 and accompanying text for a discussion of the media exemption.

344. *Citizens United*, 130 S. Ct. at 906.

345. *Id.* at 907 (citing various statistical sources).

346. *Id.*

347. See *id.* at 908.

348. *Id.*

limited to the prevention of quid pro quo corruption.³⁴⁹ The Court also stressed that the distinction drawn in *Buckley* between restrictions on political contributions and political expenditures was predicated on this limited view of corruption.³⁵⁰ According to the Court, “[r]eliance on a ‘generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.’”³⁵¹ The Court, referring to the extensive *McConnell* record,³⁵² took the lack of direct examples of votes being exchanged for expenditures as confirmation that “independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption.”³⁵³ Even assuming that such expenditures provide access, the government’s rationale could stand because “[i]ngratiation and access, in any event, are not corruption.”³⁵⁴

Finally, the Court rejected the government’s third asserted compelling interest—protecting dissenting shareholders from being compelled to fund corporate political speech.³⁵⁵ To the Court, many of the infirmities that existed in the antidistortion rationale existed here as well. For example, such a rationale would justify political speech restrictions on media corporations.³⁵⁶ Moreover, § 441b was both under- and over-inclusive in meeting this objective. It was under-inclusive because it only restricted certain forms of political speech and only for a very limited time prior to a primary or general election.³⁵⁷ It was over-inclusive because the restrictions apply to all corporations, including those owned by single shareholders.³⁵⁸ The Court believed

349. *Id.*

350. *Id.* at 908–10.

351. *Id.* at 910 (alterations in original) (quoting *McConnell v. FEC*, 540 U.S. 93, 296 (2003) (Kennedy, J., dissenting)).

352. *Id.*

353. *Id.*

354. *Id.* The Court cited to its recent holding in another high profile case, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), as further support for its holding. *Citizens United*, 130 S. Ct. at 910. In that case, the Court held that a judge must recuse himself from a case if a person with an interest in the case had a significant and disproportionate influence, through fundraising or other campaign activity, in placing the judge on the case when the case was pending or imminent. *Caperton*, 129 S. Ct. at 2265. The Court, in *Citizens United*, stated that the remedy in that case was recusal and not the banning of the litigant’s political speech. 130 S. Ct. at 910.

355. *Citizens United*, 130 S. Ct. at 911. The Government also asserted a fourth compelling interest: the prevention of foreign influence in the nation’s political process. *Id.* The Court did not reach this issue because, even if this interest was found to be compelling, § 441b would be defective nonetheless due to its overbreadth in reaching U.S. corporations. *See id.*

356. *Id.*

357. *Id.*

358. *Id.*

that any such abuse could be corrected through other regulatory mechanisms.³⁵⁹

Having rejected all of the government's stated rationales, the Court overruled *Austin*.³⁶⁰ Therefore, the government had no justification for limiting independent corporate expenditures. The Court likewise invalidated the restrictions on corporate electioneering communications imposed by § 441b of the McCain–Feingold Act and overruled that portion of *McConnell* upholding this provision.³⁶¹ In perhaps its most controversial holding, the Court also struck down the statutory restriction on corporate express advocacy expenditures in general.³⁶² The disclaimer and disclosure rules were upheld as applied to the film and the ads promoting the film, based on reasoning similar to that found in *Buckley* and *McConnell*.³⁶³

VI. ANALYSIS & CRITIQUE

The Court's decision in *Citizens United* has generated a significant amount of handwringing from proponents of campaign reform measures. In one fell swoop, the Court—according to its critics—opened the door to corporate domination of the electoral process and disturbed the century-old notion that corporate campaign participation was subject to significant limitation. Predictions about whether the Court's reasoning in *Citizens United* will be extended to strike down other campaign finance limitations are best made with caution. The fact that the Court has been bitterly divided over the permissibility of campaign finance restrictions suggests that the composition of the Court may be determinative of whether *Citizens United* is merely the opening salvo in the dismantling of campaign finance restrictions or is only an aberration.

However, it has not taken long for the effects of the decision to be felt, at least by lower courts. On March 26, 2010, the U.S. Court of Appeals for the D.C. Circuit held that *Citizens United* compelled it to strike down the contribution limitations imposed on a Section 527 organization that fell under the definition of a political committee.³⁶⁴ The court reasoned that the constitutional protection afforded by *Citizens United* to independent political expenditures, including express advocacy expenditures, should naturally extend to contributions to or-

359. *See id.*

360. *Id.* at 913.

361. *Id.*

362. *Id.*

363. *Id.* at 914–16.

364. *See* *SpeechNow.org. v. FEC*, 599 F.3d 686, 695–96 (D.C. Cir. 2010).

ganizations that make such expenditures.³⁶⁵ Also, the Republican National Committee recently challenged the McCain–Feingold Act’s restrictions on soft money donations to political parties. The district court upheld the ban, and its decision was affirmed without opinion by the Supreme Court, although it is unlikely that this case will be the last word on soft money restrictions.³⁶⁶

The following sections assert that corporate speech rights should not stand shoulder-to-shoulder with individual speech rights and may be justifiably restricted in the appropriate circumstances. However, corporate political speech does not present one of those circumstances.

A. Corporate Speech Rights

The controversy generated by *Citizens United* began with the Court’s belief that corporations are entitled to First Amendment liberties commensurate with those liberties enjoyed by natural persons. Whether one ultimately concludes that *Citizens United* was correctly decided depends, in large part, on whether one subscribes to that belief. The First Amendment, on its face, protects speech without regard to the identity of the speaker. Ample precedent exists to prove that the First Amendment confers some protection to corporations.³⁶⁷ *Citizens United* did not break new ground in this regard. However,

365. *Id.* at 694 (“In light of the Court’s holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption.”).

366. See *Republican Nat’l Comm. v. FEC*, No. 08-1953, 2010 U.S. Dist. LEXIS 29163 (D.D.C. 2010), *aff’d.* No. 09-1287, 2010 U.S. LEXIS 5530 (D.C. Cir. June 29, 2010). See *supra* notes 183–86 and accompanying text for a discussion of the restrictions imposed on soft money by the McCain–Feingold Act. The repercussions from *Citizens United* have also extended to Congress. See Op-Ed., *Repealing the First Amendment*, WALL ST. J., Feb. 24, 2010, at A16 (commenting on a bill to be proposed by Senator Charles Schumer and Representative Chris Van Hollen that would regulate the campaign activity of corporations with more than 20% foreign shareholders, recipients of Troubled Asset Relief Program (TARP) funds, and government contractors). The bill was introduced in the Senate on April 30, 2010. See *Disclose Act*, S. 3295, 111th Cong. (2010). The bill has been subject to partisan wrangling and exemptions that have been provided for certain nonprofit entities has proved to be particularly controversial. See Carl Huse, *Loopholes Grow in Bill to Offset Campaign Ruling*, N.Y. TIMES, June 18, 2010, at A1 (reporting on the controversy caused by an exemption that would benefit the National Rifle Association). Movement on the bill has stalled in the Senate where Democratic supporters of the bill have failed to obtain a filibuster proof majority. See Greg Hitt & Brody Mullins, *Campaign-Finance Legislation Dead for Now*, WALL ST. J., July 28, 2010, at A4.

367. Corporate personhood, for purposes of due process and equal protection rights under the Fourteenth Amendment, was established as early as 1886. See *generally* *Santa Clara Cnty. v. S. Pac. R.R.*, 118 U.S. 394 (1886). The Court in *Citizens United* also provided an extensive list of precedents for the existence of corporate rights to free speech. See *supra* note 324 and accompanying text.

should corporate liberties be subject to the same level of protection that is provided to individuals in similar contexts? If not, did the Court necessarily err in its conclusion? With respect to the first question, corporate speech rights could justifiably be subjected to greater restrictions than those that imposed on individual expression for two reasons. First, corporate speech rights emanate from their societal utility. Accordingly, sufficient policy-based reasons for restricting such rights should be respected. Second, support for corporate speech rights derived from the individual right of association is not persuasive.

1. Utilitarian Basis for Corporate Speech Rights

Corporate and individual rights of expression are not identical because the reasons for protecting each differ. Corporate rights can only be justified on utilitarian, or policy-based, grounds. Rights for individuals may be similarly justified, but they also may be justified on a more fundamental level. Moreover, attempts to align institutional speech rights with individual rights by resorting to the right to freely associate are not satisfactory. The derivation of corporate speech rights from individual associational rights reflects a misunderstanding of the nature of the modern corporation.

The right to freedom of speech is a fundamental right, and state-imposed restrictions on such rights are accordingly subject to strict scrutiny. However, identifying a right as fundamental begs the question of why such a right is fundamental. A right may be considered fundamental simply because people believe that the right is essential to human respect and dignity. This Kantian view of fundamental rights seems to apply most clearly to rights such as the right to freedom of religion,³⁶⁸ the right to be free from cruel and unusual punishment,³⁶⁹ and the right to be free from racial discrimination.³⁷⁰ The Framers of the Constitution undoubtedly subscribed to this view, at least in certain respects.³⁷¹

368. U.S. CONST. amend I.

369. U.S. CONST. amend VIII.

370. U.S. CONST. amend XIV. Immanuel Kant's philosophy of rights is often referred to as a philosophy rooted in natural rights and argues that human beings are entitled to certain rights simply by virtue of their status as free and autonomous beings capable of rational thought. A detailed discussion of Kant is well beyond the scope of this work. For an introduction to Kant's philosophy, see IMMANUEL KANT, *BASIC WRITING OF KANT* (Allen W. Wood ed., 2001).

371. The Declaration of Independence speaks of certain inalienable rights that were conferred to individuals by their creator. *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776). Moreover, the Constitution was ratified, in part, in order to "secure the Blessings of Liberty." U.S. CONST. pmb.

It is certainly debatable that the freedom to express oneself has Kantian roots and is essential for individuals to live meaningful lives. In *Whitney v. California*, Justice Brandeis stated that “[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties”³⁷² Freedom of speech may be viewed as a natural extension of freedom of thought, the quintessential human characteristic.³⁷³ To a certain extent, the self-actualization aspect of expression blurs into substantive due process claims to autonomy. For example, in *Griswold v. Connecticut*, the landmark right to privacy case, Justice Douglas asserted that the existence of peripheral rights—the freedom to read, to inquire, to teach, and to associate, for example—emanate from the First Amendment and that the existence of such peripheral rights is necessary to secure more basic rights.³⁷⁴ A similar justification was articulated by Justice Cardozo: freedom of speech and expression are necessary to support other fundamental rights.³⁷⁵

Alternatively, a right may be considered fundamental because the existence of such a right is necessary to the functioning of an ordered society. A right premised on such a rationale is policy-based and is subject to protection because its existence is essential to the well-being of society. Unlike the Kantian view of rights, this view regards these rights as instrumental and rooted in a utilitarian rationale. Therefore, although rights may be deemed fundamental under both rationales, the reason for protecting such rights differs depending on whether they are natural rights or policy-based.

If such rights are natural rights then they are not subject to traditional cost-benefit analysis. If they are policy-based, then they are. Of course, many rights do not lend themselves to neat compartmentalization and can be supported on both grounds. For example, the exclusionary rule and the right to confront adverse witnesses are supportable by the theory that individuals are entitled to procedures that provide fundamental fairness regardless of the utilitarian conse-

372. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

373. Justice Holmes, defending the right of a pacifist to become a naturalized citizen, stated that “if there is any principle of the Constitution that any more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.” *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting).

374. *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965).

375. See *Palko v. Connecticut*, 302 U.S. 319, 326–27 (1937) (stating that freedom of thought and speech is “the indispensable condition, of nearly every other form of freedom”). This view of freedom of speech presupposes a teleology of rights and considers freedom of speech a lower-order-right necessary for the enjoyment of some higher-order-right or rights.

quences of such practices.³⁷⁶ However, such rights can also be premised on utilitarian grounds—for example, such practices foster a healthy respect for law enforcement and the criminal justice system. Free speech rights may be similarly supported by both rationales. Justices Holmes and Brandeis, two giants of First Amendment jurisprudence, resorted to utilitarian rationales to support the right of free expression.³⁷⁷ Whether the right to free speech is premised on natural rights or policy-based considerations matters a great deal. Restrictions imposed on freedoms derived from natural rights would be more difficult to support through compelling government interests because such interests cannot rely on consequential or utilitarian rationales. Policy-based rights, however, can be restricted if the utility of the state restrictions in question are found to be both compelling and narrowly tailored.

Leaving aside the justifications put forth for political speech, in general, a corporation cannot have “natural rights.” Whether such rights emanate from a creator or deity or inherently attach to individuals by virtue of their humanity, these rights cannot attach to a corporation for the simple reason that a corporation is neither spawned by a creator or deity nor entitled to rights by virtue of its humanity. Corporations, according to Sir Edward Coke, “have no soul[].”³⁷⁸

Corporate existence itself is based on utilitarian concepts. General incorporation acts became prevalent in the late nineteenth century.³⁷⁹ The corporate characteristics of unlimited life and limited liability were established to facilitate both long-term business endeavors and

376. The exclusionary rule is a judicially developed doctrine that extends the Fourth Amendment protection against unreasonable searches and seizures by requiring that evidence obtained in such unreasonable searches and seizures be excluded from evidence at trial. *See* U.S. CONST. amend. IV; *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961). *See also* U.S. CONST. amend. VI. A recent Supreme Court case illustrated the Court’s support of rights despite potential utilitarian consequences. In *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the Court held that the accused had the right to confront the affiant whose affidavit regarding the results of forensic testing of a substance found to be cocaine was admitted into evidence. *Id.* at 2532. Despite protestations by the government that such a requirement would create tremendous practical problems for law enforcement authorities, the Court held that the Sixth Amendment’s Confrontation Clause mandated this result. *Id.* at 2540–41.

377. “Those who won our independence . . . valued liberty both as an end and as a means. . . . They believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth” *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Justice Holmes’s famous dissent in *Abrams v. United States* put forth his position that society is best served by “free trade in ideas” and that truth is best tested in the “competition of the market.” 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

378. Liam Séamus O’Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 207 (2006) (quoting *Case of Sutton’s Hosp.*, 77 Eng. Rep. 960, 973 (K.B. 1612)).

379. *See id.* at 218–19.

the deployment of capital to make these endeavors possible.³⁸⁰ To the extent that the state felt compelled to confer legal benefits upon the corporate structure, this compulsion sprang from the perceived public benefits to be derived by successful business enterprises. Nobel Laureate Ronald Coase theorized that the reason firms existed at all was to serve as a mechanism to direct resources in a cost efficient manner.³⁸¹ Early on, the Supreme Court recognized that a corporation's *raison d'être* was utilitarian. In *Trustees of Dartmouth College v. Woodward*, Chief Justice Marshall stated that the life of a corporation allows "a perpetual succession of many persons" to act for the promotion of a particular end, "like one immortal being."³⁸² Similarly, Chief Justice Taney emphasized that corporations exist to benefit the public in the case of *Charles River Bridge v. Warren Bridge*.³⁸³

The corporate social responsibility movement is a modern manifestation of this view of corporations. Proponents of social responsibility reject the shareholder-primacy model of corporate governance in favor of a model that takes into account the interests of a diverse group of stakeholders, including employees, suppliers, and the community at large.³⁸⁴ However, even critics of corporate social responsibility do not deny that the corporation exists to confer benefits to society. For these critics, a corporation acts in a socially responsible manner and benefits society by producing goods and services that satisfy the needs or desires of its customers.³⁸⁵ Shareholder wealth-maximization is therefore not an organization's principal objective but is evidence of the extent to which an organization has had success in achieving its principal purpose.³⁸⁶ The debate over corporate social responsibility is not over whether a corporation exists to serve the public, but rather whether it meets its social obligation. Conse-

380. *See id.* at 232–33.

381. *See* R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 392 (1937).

382. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat) 518, 636 (1819).

383. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837).

384. *See, e.g.*, Edwin M. Epstein, *The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux*, 44 *AM. BUS. L.J.* 207 (2007); David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 *J. CORP. L.* 41 (1999). Traditionally, boards of directors owed a fiduciary duty to shareholders only. *See* Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship*, 29 *CARDOZO L. REV.* 623, 636–37 (2007). However, courts, including the Delaware courts, have sanctioned the consideration by boards and management of outside stakeholder interests. *Id.* at 637. Moreover, a number of states have enacted "other constituency" statutes that permit officers and directors to consider the interests of various stakeholders when making decisions. *Id.* at 638.

385. *See, e.g.*, Peter Koslowski, *The Limits of Shareholder Value*, 27 *J. BUS. ETHICS* 137 (2000).

386. *Id.* at 141.

quently, sufficient policy-based reasons for restricting corporate rights ought to be respected.

2. *Corporate Speech Rights Derived from the Freedom of Association*

In *Citizens United*, Justice Scalia—whose spirited concurrence took the dissent to task for its insistence that the Framers intended freedom of speech to extend only to individuals—supported corporate speech rights on textual grounds.³⁸⁷ He also provided another rationale: freedom of association. Justice Scalia wrote,

The dissent says that when the Framers “constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.” . . . That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears. But the individual person’s right to speak includes the right to speak *in association with other individual persons*.³⁸⁸

Justice Scalia’s reference to the associational rights of individuals appears to shift corporate speech rights toward the fundamental-rights end of the spectrum. Justice Scalia analogized corporate speech to the speech of political parties and wrote that institutional speech is the speech “of many individual Americans, who have associated in a common cause.”³⁸⁹ He did not clarify just who are the individuals that are part of the association. Does it include shareholders only, or does it also include creditors and employees? If the former, does this mean that restrictions on single-shareholder corporations are more tolerable?³⁹⁰ Just what is their common cause?

Unlike members of a political party, the common cause of shareholders is commercial in nature. In *NAACP v. Alabama*, the Court held that the right of association does not turn on whether the beliefs sought to be advanced pertain to political, economic, religious, or cultural matters.³⁹¹ Moreover, this right is protected against state actions that impose indirect impediments to the ability of individuals to associate.³⁹² However, indirect burdens are examined to determine their likelihood of imposing a substantial restraint upon the exercise of

387. See *Citizens United v. FEC*, 130 S. Ct. 876, 925 (2010) (Scalia, J., concurring).

388. *Id.* at 928 (citation omitted).

389. *Id.*

390. Note that the majority opinion in *Citizens United* deemed the statute in question overbroad with respect to the government’s asserted interest in protecting minority shareholders because it would also cover corporations owned by a single shareholder. See *supra* note 358 and accompanying text.

391. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

392. See *id.* at 461.

members' rights to freely associate.³⁹³ Consequently, the nexus between the group's common cause and the speech in question is relevant to whether the state's impediment significantly and meaningfully stifles individuals' ability to associate. Members do not associate in corporate form to advance political beliefs. Restrictions on corporate political speech neither prevent individuals from associating in corporate form, nor do they meaningfully stifle individuals' desire to associate.

The nature of the modern corporation also weakens the claim that corporate restrictions weaken individual associational rights. Justice Scalia makes no distinction between small closely held corporations, large publicly traded corporations, and those that fall between these two extremes. Restrictions imposed on a single shareholder corporation impose no associational burdens. At the other end of the spectrum, a persuasive case may be made that associational rights weaken considerably in a large publicly traded corporation—arguably, the very entities that the legislation had in mind when it sought to limit corporate participation in the electoral process.³⁹⁴

The notion that a corporation with several hundred thousand or more shareholders implicates significant associational liberty appears to grossly exaggerate the rights of association. The law has recognized that rights to freely associate are more likely to give way to other competing goals as the number of members in the association grows larger. Title VII of the Civil Rights Act of 1964 is a case in point.³⁹⁵ The importance of such rights is placed in further doubt by the fact that the identities of the shareholders in a publicly traded corporation change by the minute. Also, given the prevalence of institutional shareholders, how far removed may individuals be from the speaker before the right to speak in association with other individuals becomes too attenuated to be taken seriously?³⁹⁶

To equate the rights of individuals with the rights of an association of individuals manifested in a corporate form would call into question

393. *Id.* at 462.

394. Although the legislation in question covered all corporations, the fear of corporate aggregations of wealth that motivated the statutory restrictions implies that large corporations were the prime target of those restrictions.

395. The freedom to associate with persons of one's choosing is overcome by the state's interest in a workplace free from discrimination on the basis of race, color, gender, religion, and national origin if fifteen or more persons are employed by the company for a statutorily determined period. See 42 U.S.C. §§ 2000e(b), 2000e-2(b) (2006).

396. Individuals are at least two levels removed from the corporation in question to the extent that corporate shares are held by mutual funds, pension plans, hedge funds, and other institutional investors. To the extent that such funds are aggregates of other funds—a fund of funds, for example—individuals are even more remote from the corporation in question.

a host of speech restrictions imposed on corporations under the federal securities laws. Many of the restrictions imposed on corporations under these laws go beyond the traditional justifications for commercial speech restrictions and would not be tolerated if imposed upon an individual. For example, mandatory quiet periods are imposed on issuers of new securities, and regulations dictate to whom speech is to be directed.³⁹⁷

Finally, as discussed above, the majority opinion in *Citizens United* dismissed the government's asserted compelling interest in protecting shareholders from subsidizing speech with which they disagree.³⁹⁸ The Court did not deny that corporate political speech does present such problems but believed that the statutory ban was both over- and under-inclusive and that traditional corporate governance procedures were adequate to address this issue.³⁹⁹ The fact that this issue exists at all belies the notion that corporate political speech is a manifestation of the views of various individuals joined together in a common cause. Unanimity is difficult to find in any organization, and disparities between the views of those in the majority and those in the minority are not unique to corporate governance. However, the extent to which this issue presents itself in the corporate world is unique, and the recent scandals involving executive compensation can cause one to question whether the Court's faith in the policing effects of the corporate governance process is unduly optimistic.⁴⁰⁰ A recent study has indicated that corporate political expenditures are motivated more by the predilections of management than by the furtherance of long-term

397. See Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 871 (2007) (citing 15 U.S.C. § 77e (2006) and 17 C.F.R. § 240.14a-8 (2006)).

398. See *supra* notes 355–59 and accompanying text.

399. See *supra* notes 357–59 and accompanying text.

400. Executive compensation practices have been subject to severe criticism for some time. See, e.g., Lucian Ayre Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751 (2002); William Arthur Wines & Thomas M. Fuhrmann, *An Inquiry into CEO Compensation Practices in the United States and Proposals for Federal Law Reform*, 43 NEW ENG. L. REV. 221 (2008). Such practices have been thought to have contributed to various corporate scandals such as those involving Enron and WorldCom and to the recent economic problems. See generally Matthew A. Melone, *Are Compensatory Stock Options Worth Reforming?*, 38 GONZAGA L. REV. 535, 572–89 (2003). As a result, various legislative attempts to improve these practices have been instituted. For example, the Sarbanes-Oxley Act of 2002 provides for the clawback of compensation in certain circumstances. See Pub. L. No. 107-204, § 304(a), 116 Stat. 745, 778 (2002) (codified at 15 U.S.C. § 7243 (2006)). More recently, legislation that implemented TARP imposed compensation-clawback provisions and limitations on compensation and tax deductions thereon. See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765; American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 7001, 123 Stat. 115.

corporate interests.⁴⁰¹ The current debate over “say on pay” provisions and proxy access provides further evidence of the disconnect between the members of the corporate association.⁴⁰²

401. The study examined the relationship between political donations and firm returns. See Rajesh K. Aggarwal, Felix Meschke & Tracy Wang, *Corporate Political Contributions: Investment or Agency?* (European Finance Ass’n, Meeting Paper, 2009), available at <http://ssrn.com/abstract=972670>. A positive relation between donations and firm returns is expected if such donations are driven by firm objectives—donations the authors term “investments.” *Id.* at 13, 16. In contrast, a negative relation between donations and returns would imply that donations were motivated to a great extent by management’s desire to demonstrate its power and prestige, obtain high-profile cabinet or ambassadorial positions, or other such idiosyncratic reasons. *Id.* The authors found a negative correlation between donations and firm returns. *Id.* at 38–39. The Center for Responsive Politics reported that forty major ambassadorships were granted to large donors to President George W. Bush and the Republican Party between 2000 and 2004 and that thirty-three of such ambassadorships were given to corporate chief executive officers, presidents, founders, or their immediate family members. *Id.* at 13.

402. Shareholders of TARP assistance recipients are entitled to a non-binding vote on executive compensation. See American Recovery and Reinvestment Act of 2009, § 7001, 123 Stat. at 519–20. The Securities and Exchange Commission (SEC) has not provided shareholders of non-TARP recipients with a “say on pay,” although some prominent companies, such as Verizon Communications and Motorola, have provided shareholders with a non-binding vote on executive compensation. See Joann S. Lublin, *A Quiet Response to ‘Say on Pay’ Measures*, WALL ST. J., May 18, 2009, at B6. During the 2009 proxy season, seventy-six shareholder proposals for an advisory vote on executive compensation were submitted and received the support of 45.6% of the votes cast. See *Governance Shareholder Proposals—Executive Pay Issues, 2009 PROXY SEASON SCORECARD*, http://www.riskmetrics.com/knowledge/proxy_season_scorecard_2009 (last visited Mar. 1, 2011). The House of Representatives has passed a bill that would require publicly traded entities to provide shareholders with a non-binding vote on executive compensation and golden parachute arrangements. See Corporate and Financial Institution Compensation Fairness Act of 2009, H.R. 3269, 111th Cong. § 2 (2009). The Dodd–Frank Wall Street Reform and Consumer Protection Act (the Dodd–Frank Act), Pub. L. No. 111-203, § 957, 124 Stat. 1376 (2010), signed into law on July 21, 2010, requires that proxy statements include, at least once every three years, a non-binding resolution to approve executive compensation. Moreover, not less than every six years, the proxy statement must include a separate resolution to determine whether such vote must occur every one, two, or three years. Shareholders of British firms have the ability to cast advisory votes on compensation matters and have increasingly dissented on management proposals—including a remarkable fifty-nine percent vote against the compensation plans of Royal Dutch Shell Group. See *Muck, Brass and Spleen*, ECONOMIST, May 23, 2009, at 70; Guy Chazan & Joann S. Lublin, *Shell Investors Revolt over Executive Pay Plan*, WALL ST. J., May 20, 2009, at B1. With respect to proxy access, current law provides for shareholder nominees to the board of directors to be placed on the corporate proxy ballot only if the corporate charter or bylaws permit such access. Very few corporations permit such access. The alternative is to mount a challenge to management’s slate of directors. See Lisa M. Fairfax, *The Future of Shareholder Democracy*, 84 IND. L.J. 1259, 1263–65 (2009). Current SEC proxy rules require that shareholders seeking to nominate directors in this fashion adhere to the proxy disclosure rules—a very expensive undertaking. See *id.* at 1265. In 2009, the SEC proposed new rules that would grant shareholders meeting certain ownership and holding period requirements access to corporate ballots. See *Facilitating Shareholder Director Nominations*, 74 Fed. Reg. 29,024 (proposed June 18, 2009) (to be codified at 17 C.F.R. pt. 240) (proposing Rule 14a-11, which would allow shareholders meeting certain ownership and holding period requirements to nominate the greater of one director or twenty-five percent of directors being elected provided that state law or the corporate governing document are not violated). Section 971 of the Dodd–Frank Act

The Court's insistence in *Citizens United* that the First Amendment permits no discrimination based on the identity of the speaker is not persuasive. The Court itself noted that several speaker-based restrictions have been upheld.⁴⁰³ The Court did take pains to distinguish those cases from the case it confronted.⁴⁰⁴ Nonetheless, the fact that *Citizens United* was distinguishable from those cases does not mean that the law can *never* distinguish among speakers. As discussed above, the federal securities laws impose speech restrictions on certain types of corporations.⁴⁰⁵ The cases cited by the Court merely illustrated that the asserted government interests in those cases were found to be sufficiently compelling. In contrast, the government's asserted justifications in *Citizens United* were not.

B. Policy-Based Support for Corporate Political Speech

The belief that corporate and individual speech rights should not be entitled to similar protections from state interference does not imply that *Citizens United* was wrongly decided. Instead, corporate speech rights must be firmly grounded in policy-based principles. With respect to political speech, such principles do provide adequate support for limited government interference for four broad reasons. First, the heightened protection afforded to political speech is based on the significant societal utility of such speech. The fact that political speech emanates from a corporate speaker does not diminish its utility. Second, support for provisions that stifle corporate speech is premised on a particularly dispiriting view of elections and the electorate. Third, the preoccupation with wealth that underlies support for corporate speech restrictions is simplistic and grossly exaggerates the effect that corporate participation in electoral debates has on the political process. Finally, the imposition of corporate speech restrictions in the political context is a classic case of treating a symptom of a disease while leaving the underlying cause untreated. Restrictions on corporate electoral participation will do little to ameliorate the problems perceived by would-be reformers because the problems have their genesis in the behavior of elected officials.

provides that the SEC may prescribe rules that permit shareholders to include nominees for election as directors in proxy statements. § 971, 124 Stat. at 1915.

403. See *supra* note 324 and accompanying text.

404. *Id.*

405. See *supra* note 397 and accompanying text.

1. *The Social Utility of Political Speech*

The utility of political speech is derived principally from its propensity to inform and agitate the electorate. Although all speech has the propensity to inform the listener, political speech has achieved its exalted position in First Amendment jurisprudence because its informative tendencies support vital societal objectives. “Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”⁴⁰⁶ Professor Zentner captured the essence of political speech:

[T]he modern state is personified rather than discovered. Because that state is merely a human creation, its legitimacy must be established and maintained. Unlike other kinds of expression and action, political speech precisely concerns this matter. This is the general reason why the Court has traditionally thought that political speech should be the most protected kind of expression, that government regulation of political speech has until recently been very limited, i.e., strictly scrutinized. Indeed, as we shall see, limited government results in citizens that are more, rather than less, politically active. Citizens in the modern world often exhibit their political nature through opposition to the state, not through submission to it.⁴⁰⁷

Professor Zentner’s view of political speech echoes Justice Cardozo’s sentiment that speech rights are protective of higher order rights.⁴⁰⁸ The freedom to express political views may be considered subordinate to other rights but it is nonetheless vital to the continued enjoyment of higher order rights. Note that political speech rights, when viewed in this context, are not based on any fundamental right possessed by the listener, for this would impose on persons a duty to speak. Political speech, in and of itself, has inherent social value, and that social value is diminished neither because it originates from corporate “lips” nor because of the corporation’s motivation for such speech.

Milton Freidman, the patron saint of the shareholder-primacy model of corporate governance, has posited that corporate social responsibility for its own sake is illegitimate. Boards of directors and management that expend corporate funds for purposes other than shareholder wealth maximization are, in effect, imposing a tax upon

406. *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

407. Scot J. Zentner, *Revisiting McConnell: Campaign Finance and the Problem of Democracy*, 23 J.L. & Pol. 475, 496 (2007).

408. See *supra* note 375 and accompanying text.

the shareholders to fund social benefits.⁴⁰⁹ Moreover, corporate management is ill-equipped to decide which of many desirable social objectives should be funded.⁴¹⁰ Freidman, however, does not object to corporate expenditures for social purposes if, in the judgment of management, such expenditures will benefit the shareholders.⁴¹¹ Consequently, corporate expenditures or activities directed toward social ends are acceptable if such expenditures will, for example, increase customer goodwill, improve employee morale, or burnish a corporate brand. In effect, corporate management may undertake socially desirable activities under the cover of the business judgment rule.⁴¹² The shareholder-primacy model of corporate governance would therefore deny that corporate political speech has as its primary purpose anything other than a commercial benefit. The fact that corporate political speech may stimulate debate and edify the public is merely incidental to the corporation's purpose of maximizing its wealth. Otherwise, such expenditures are illegitimate. However, rejection of the stakeholder model of corporate governance in favor of Friedman's view does not suggest that corporate political speech is susceptible to recharacterization as commercial speech. The motivation for speech is irrelevant to its classification.

Commercial speech has enjoyed constitutional protection, albeit at a lesser level than political speech, for almost fifty years.⁴¹³ Restrictions imposed upon commercial speech are not subject to exacting scrutiny but instead are examined under an intermediate standard.⁴¹⁴ In general, truthful communications about a lawful activity are protected.⁴¹⁵ The Court has defined commercial speech as speech that

409. See Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine) at 122.

410. See *id.*

411. *Id.*

412. The business judgment rule is a judicially developed doctrine that insulates corporate directors and officers from claims that they have breached their fiduciary duty of care to shareholders. This rule is operative if the actions taken by such directors or officers were the result of due deliberation after consideration of all material information. See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). In effect, this rule protects directors and officers from second-guessing by shareholders with the benefit of hindsight. See *Orman v. Cullman*, 794 A.2d 5, 20 (Del. Ch. 2002). The business judgment rule manifests the reality that directors and officers manage the corporation, not the shareholders. See *Aronson*, 473 A.2d at 812; *Orman*, 794 A.2d at 19–20. See also Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439 (2004).

413. See, e.g., *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

414. Commercial speech restrictions must be supported by a substantial, as opposed to a compelling, government interest and such restrictions must be proportional to that interest. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980).

415. See *id.*; *Va. Bd. of Pharmacy*, 425 U.S. at 771–72.

does no more than propose a commercial transaction.⁴¹⁶ However, the fact that speech is motivated by the economic interests of the speaker is not relevant to the classification of speech. Instead, the inquiry into the nature of the speech is focused on the content of such speech according to Justice Stevens:

Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward.⁴¹⁷

Moreover, commercial speech that relates to a constitutionally protected activity is afforded traditional First Amendment protection.⁴¹⁸ The content of the speech is what matters, and surely the expression of the political views of a corporation, despite its motivation, does far more than propose a commercial transaction.

2. *Paternalism and the Electorate*

Support for corporate speech restrictions implicates a particularly unflattering view of citizen participation in the electoral process. One view of the electoral process, the “pluralistic-protective,” sees the purpose of politics as a mechanism to aggregate voter preferences to enable such voters to either obtain government benefits or to protect existing benefits or entitlements.⁴¹⁹ Those participants with greater wealth are advantaged due to the fact that their superior resources enable them to more effectively mobilize their supporters.⁴²⁰ The pluralistic-protective model discounts the value of political speech because it views preferences as more or less fixed.⁴²¹ Consequently, political speech is simply a method of making those preferences known.

In contrast, the “republican-communitarian” perspective views the political process as a mechanism to foster debate and, through deliberation, shape preferences and reach collective decisions about the public good.⁴²² Under this approach, political speech does more than merely accumulate preferences—it also helps shape preferences. The

416. See *Cent. Hudson Gas & Elec.*, 447 U.S. at 562; *Va. Bd. of Pharmacy*, 425 U.S. at 760–61; *Bigelow*, 421 U.S. at 822.

417. *Cent. Hudson Gas & Elec.*, 447 U.S. at 579–80 (Stevens, J., concurring).

418. See *Bigelow*, 421 U.S. at 822 (holding that advertisements related to abortion are fully protected under the First Amendment).

419. Issacharoff & Karlan, *supra* note 1, at 1723.

420. *Id.* at 1724.

421. *Id.* at 1723–24.

422. *Id.*

republican-communitarian view attains support from the electoral process in the United States, in which political campaigns are not limited by the narrow time frames applicable to elections in certain parliamentary systems.⁴²³

Campaign reforms that seek to remove the supposed distorting influence of corporate wealth are premised on an unflattering profile of the typical voter. Proponents of reform call into question the civic capabilities of voters—the paradox of campaign finance reform—and suggest that certain bases for voting decisions are inferior to others.⁴²⁴ Professors Issacharoff and Karlan forcefully portrayed reformers' image of voters:

The reformers' agenda is driven by the image of a quite different consumer of political news, sitting in his armchair in front of a quite different screen. Most of the money that they see as having corrupted our political system goes into television spots, particularly emotional attack advertising. The thoughtful citizen can simply disregard these noxious offerings or turn off the TV. Not for nothing was the remote control invented. But the reformers must believe that most voters are *not* thoughtful citizens. Rather, voters are "civic slackers," who devote little time and less real thought to how to vote. Thus, money, in the guise of spending on substantively vacuous mass media advertising, distorts the election process by influencing how these slackers cast their ballots.⁴²⁵

If this jaded view of the electorate is accurate, then it is difficult to discern the benefit of corporate speech restrictions. In effect, this view is an admission that any sort of influence is harmful and that true egalitarian reform will prohibit all mass media advocacy. Moreover, just who is to decide what forms of influence are legitimate and which reasons for casting a ballot in favor of a particular candidate are appropriate? This is dangerous territory, and territory that most reasonable people should avoid. In any event, if the American electorate is genuinely comprised of civic slackers, then the problems with the political system go well beyond inordinate corporate participation.

3. *Is Corporate Wealth Singularly Distorting?*

The obsession with corporate wealth as the principal impediment to the attainment of an egalitarian political system reflects a simplistic view of politics. The demonization of corporate wealth suggests that

423. See Samuel Issacharoff, *The Constitutional Logic of Campaign Finance Regulation*, 36 PEPP. L. REV. 373, 377–79 (2009).

424. See Daniel Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 895, 909–10 (1998).

425. Issacharoff & Karlan, *supra* note 1, at 1727 (citations omitted).

such wealth, as a competitive advantage, is somehow unique and especially corrosive. *Austin* and *McConnell* both accepted the government's contention that the state had a compelling interest in neutralizing the aggregation of corporate wealth made possible by state conferred advantages.⁴²⁶ Admittedly, the state makes possible the very existence of corporations and has created the legal architecture that has allowed many corporations to prosper and grow to sizes unimaginable a mere half-century ago. However, by no means are state-created advantages applicable singularly to corporations. Individual aggregations of wealth are similarly indebted to actions of the state. The laws of inheritance and descent, the exclusivity of intellectual property rights, and the enforcement of contracts are the most obvious examples of state encouragement of the aggregation of wealth—whether by corporations or individuals.

It is supremely ironic that the corporate form itself has, in significant respects, contributed to immense concentrations of wealth by individuals. The liability shield conferred by the corporate form and the establishment of well-functioning public securities markets, for example, have assisted in the amassment of great personal fortunes.⁴²⁷ Moreover, any supposed advantage that is uniquely conferred by a corporate treasury may be eroding without the helping hand of the state. Technological advancements have resulted in an increasing focus on small hard money donations during the last two presidential election cycles—a trend that was exploited vigorously and most effectively by then-Senator Obama in 2008.⁴²⁸ There is no evidence to suggest that this trend will not continue. To the contrary, one would expect that as the political operatives gain expertise in this type of fundraising, its importance will increase in future elections.

As discussed above, a particularly jaded view of the electorate is implied by the belief that wealth is an advantage that should be subject to heightened scrutiny by the state.⁴²⁹ Assuming *arguendo* that such a view of the body politic is warranted, it is difficult to comprehend why wealth is singularly distorting. For example, if wealth is removed as an electoral advantage, are we to believe that some other advantage will not take its place? It is difficult to discern any public

426. See *supra* notes 144–50, 223–32 and accompanying text.

427. The current economic crisis illustrates the role that the limited liability of the corporate form plays in protecting personal fortunes. The great Wall Street investment houses were, at one time, general partnerships. Had they remained in such form it is likely that many individual fortunes would have been wiped out, or at least greatly compromised, by the astounding losses incurred by many of the investment firms.

428. See *supra* notes 277–78 and accompanying text.

429. See *supra* notes 419–25 and accompanying text.

advantage derived from a political system dominated by those with the time to devote to political matters or by those well-situated to bundle contributions, for example.⁴³⁰ Contrary to the beliefs of would-be reformers, wealth can actually have democratizing effects. In a more or less free market, a capitalistic society's wealth is fluid. It tends, over time, to destabilize entrenched interests and to create new centers of power, often with different political views. After all, IBM begat Bill Gates who begat Google. The phrase "what's good for General Motors is good for the country" is a sad reminder of how quickly fortunes can change.⁴³¹ James Madison recognized long ago that commercial interests tended to both create a diverse society and inhibit the installation of a permanent majority.⁴³²

4. *The Exaggerated Consequences of Corporate Political Speech*

The reformers who insist on limiting the political arena of corporate speech greatly exaggerate the effect that such speech has on political outcomes. The notion that corporate spending will overwhelm competing voices and result in inordinate corporate electoral influence is necessarily premised on a monolithic view of corporate interests. Reality intrudes on this view rather rudely. To believe that corporations behave in lockstep on matters of free trade, intellectual property protection, tax policy, energy policy, and other similar issues is naïve. The debate over the recently enacted health care legislation illustrates this point nicely. Differences of opinion between and among insurance companies, large employers, and medical providers surfaced regularly.

In fact, rather than dominate the conversation, corporate political speech will lead to more vigorous debate. Does anyone really doubt that a corporate political advertisement supporting or opposing a particular position or candidate will not generate an immediate response by corporations with competing views? It is not too much to assume, for example, that an advertisement by the cable industry supporting a position favorable to its interest would be met vigorously by a competing advertisement from Verizon Communications, AT&T, or DirecTV. Moreover, *Citizens United* not only freed corporations from

430. Bundling refers to the practice of accumulating hard money donations from numerous individual contributors. See *supra* note 276 and accompanying text. Certain special interests may be particularly well positioned to engage in this practice. See, e.g., James R. Copland, Op-Ed., *How the Plaintiffs Bar Bought the Senate*, WALL ST. J., Feb. 9, 2010, at A17.

431. This phrase has been attributed to Charles Wilson, a former president of General Motors. See *McConnell v. FEC*, 540 U.S. 93, 262–63 (2003) (Scalia, J., dissenting in part and concurring in part).

432. See Zentner, *supra* note 407, at 498–99 (quoting THE FEDERALIST NOS. 10, 51 (James Madison)).

political speech restrictions; it also freed organized labor, the prototypical corporate antagonist, from these restrictions.⁴³³ Interest groups attempt to derive “specific, concentrated benefits from the political system But if you have competing interest groups you don’t end up with a systematic bias toward bad policy.”⁴³⁴

In addition, the fear of corporate hegemony in the political process ignores the existence of internal and external constraints on corporate political activity. Corporations tend to keep a low public profile on contentious political matters. As previously discussed, corporations were large soft money donors but were not deeply engaged with Section 527 groups.⁴³⁵ Soft money donations to political parties provided, at least in the minds of corporate managers, greater opportunities for access to elected officials than contributions to ideologically driven organizations. Moreover, “bet-hedging”—the practice of donating to both major parties—is a common corporate practice and further evidences that access is the principal motivating factor behind most corporate political expenditures.⁴³⁶

Although *Citizens United* may prompt additional corporate spending on issue advocacy, it is unlikely to lead to unfettered spending in direct support or opposition of a candidate. The risk of backing the wrong horse and the concomitant lack of access that may be caused by open opposition to the eventual officeholder is a risk that most corporations will not shoulder. Moreover, corporations will undoubtedly consider the possibility that open advocacy will generate a response from corporate interests that favor the opposing candidate. In addition, corporations are constrained by the potential reaction of customers, employees, shareholders, public interest groups, and non-governmental organizations to open advocacy.⁴³⁷ Unseemly corporate campaigning may result in the loss of customers, employee dissat-

433. In certain respects, *Citizens United* may benefit labor unions more than corporations because the internal and external restraints on labor union political activity may be weaker than similar constraints applicable to corporate activity. See Steven J. Law, *Organized Labor and Citizens United*, WALL ST. J., Mar. 11, 2010, at A15.

434. Peter Robinson, ‘*Basically an Optimist*’ – Still, WALL ST. J., Mar. 27, 2010, at A13 (quoting Nobel Prize winning economist Gary Becker). See also James Taranto, Op-Ed., *The Media and Corporate Free Speech*, WALL ST. J., Jan. 30, 2010, at A13 (interviewing Floyd Abrams, perhaps the preeminent First Amendment practitioner).

435. See *supra* note 268 and accompanying text.

436. See generally Jason Cohen, *The Same Side of Two Coins: The Peculiar Phenomenon of Bet-Hedging in Campaign Finance*, 26 N. ILL. U. L. REV. 271 (2006).

437. See, e.g., Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL ST. J., Aug. 7, 2010, at A2 (reporting on nationwide demonstrations by gay rights activists outside Target stores prompted by Target’s support for a gubernatorial candidate that opposes same-sex marriage). Public interest groups and non-governmental organizations have played an increasingly prominent role in corporate governance matters. See, e.g., Amiram

isfaction, or shareholder agitation in the form of proxy fights.⁴³⁸ Disclosure rules, consistently upheld by the Court, should be adequate to assure that corporations cannot avoid the constraints imposed upon open advocacy. If not, the answer is to strengthen the disclosure rules, not ban the speech.⁴³⁹

Corporations prefer their political activity at the wholesale, not the retail, level. Corporate influence is exercised most effectively through access to political decisionmakers. Access to those decisionmakers is often made available simply by virtue of a corporate officer's reputation or due to the fact that the corporation is a large employer of an elected official's constituents.⁴⁴⁰ Lobbying and the placement of persons sympathetic to corporate points of view in prominent regulatory positions allow the corporations to confer with decisionmakers behind closed doors.⁴⁴¹ Such practices are not necessarily illegitimate. Regulators may not be in a position to fully comprehend the myriad issues attendant to complex corporate matters. Corporate input may actu-

Gill, *Corporate Governance as Social Responsibility: A Research Agenda*, 26 BERKELEY J. INT'L L. 452 (2008).

438. Access to the ballot for shareholder proposals concerning corporate political activity may be challenged by the corporation on the grounds that whether or not such activity is conducted is exclusively a managerial prerogative. See 17 C.F.R. § 240.14a-8(i)(7) (2009); Abbott Laboratories, SEC No-Action Letter, 2009 WL 851564 (Feb. 11, 2009).

439. For example, if corporations attempt to engage in open advocacy through the cover of trade organizations, then disclosure rules should be put in place that will shed light on such practices. See *supra* text accompanying note 259. Advances in communications technology have made disclosure regimes more effective irrespective of the policy goals sought to be advanced by disclosure. See *The Open Society, A Special Report on Managing Information*, ECONOMIST, Feb. 27, 2010, at 11–12 (discussing government use of technology to provide public access to various information). See also L. Gordon Crovitz, *Digital Technology and Cleaner Politics*, WALL ST. J., Feb. 8, 2010, at A19.

440. For an excellent and in-depth discussion of corporate political activity, see Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495 (2005).

441. Lobbying activities and lobbyists are subject to widespread regulation. A discussion of such regulations is beyond the scope of this work. See generally Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J.L. & PUB. POL'Y 1 (2006). Critics of the federal bailout of financial institutions during the current economic crisis are quick to note that many government officials with responsibility for crafting the bailout, including former secretary of the Treasury Henry Paulson, were formerly employed by Goldman Sachs. See, e.g., Gretchen Morgenson & Don Van Natta, Jr., *Paulson's Call to Goldman Tested Ethics During Crisis*, N.Y. TIMES, Aug. 9, 2009, at A1. The financial services industry has lobbied vigorously to shape to its liking any legislation that revises regulation of its industry. See Robert Cyran & James Pethokoukis, *Formidable Lobbyists*, N.Y. TIMES, Mar. 3, 2010, at B2. Corporate-friendly regulators lead to the phenomenon of "regulatory capture." One scholar has asserted that the FEC itself has been captured by incumbent politicians. See generally Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625 (2007). See also Andrew Martin, *Does This Bank Watchdog Have a Bite?*, N.Y. TIMES, Mar. 28, 2010, at BU1 (reporting about the criticism directed at John Dugan, the Comptroller of the Currency, due to his relationships with the banking industry).

ally mitigate the potential for policy mistakes due to informational asymmetries. To the extent that such practices are objectionable, they have nothing to do with the corporate speech made possible by *Citizens United*. In contrast to this stealthy influence, corporate electoral speech is transparent and subject to public scrutiny.

5. *The Root of the Campaign Finance Problem: Politicians*

Finally, as noted by Professors Issacharoff and Karlan, money is like water—it will always find an outlet.⁴⁴² The campaign reformers are aiming at the wrong target. Corporate money has no purchasing power if nothing is for sale. Public choice theory posits that elected officials are not, as a whole, public-regarding models of civic virtue.⁴⁴³ Instead, they seek to further their own selfish ends—usually reelection.⁴⁴⁴ Professor David Mayhew’s seminal study of Congress found that legislators have a singular focus on reelection and influence-gathering.⁴⁴⁵ Favors are granted, earmarks are enacted, and self-perpetuating legislation is proposed and passed.⁴⁴⁶ Campaign finance reform is part of this pattern of behavior. It is decidedly pro-incumbent because it poses obstacles to challengers in overcoming the advantages of incumbency. Incumbents enjoy certain inherent advantages, including broad name recognition and concomitant fundraising advantages,

Because the law itself defines the extent of a democracy, those who create it “have the capacity to shape, manipulate, and distort democratic processes.” Thus Congress, as the body that controls the existing arrangement for campaign finance structure, has the capacity to make the rules and . . . “[h]istorical experience provides convincing reasons to believe that those who currently hold power will deploy that power to try to preserve their control.”⁴⁴⁷

One commentator likened Congress’ behavior in enacting the Campaign Act to the behavior expected from an oil cartel.⁴⁴⁸ Any restrictions imposed on campaign activities increases the relative advantages

442. See *supra* note 1 and accompanying text.

443. See Jill E. Fisch, *The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 *FORDHAM L. REV.* 1593, 1611 (2006).

444. *Id.*

445. See Robert P. Beard, Note, *Whacking the Political Money Mole Without Whacking Speech: Accounting for Congressional Self-Dealing in Campaign Finance Reform After Wisconsin Right to Life*, 2008 *U. ILL. L. REV.* 731, 763 (citing DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 5–7 (1974)).

446. *Id.*

447. *Id.* at 764 (quoting SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 2 (rev. 2d ed. 2002)).

448. See Stefanuca, *supra* note 24, at 262–67.

of incumbency. To believe that corporate advocacy will distort the political process and lead to public lack of confidence in the system is to miss the point that influence will continue to be sought by other means. As long as elected officials offer themselves up for sale there will be buyers. Even if one believes that corporate express advocacy will become a currency for influence peddling, it is less objectionable than other forms of currying political favors: at least corporate advocacy is transparent.

VII. CONCLUSION

Almost four decades of First Amendment jurisprudence dealing with campaign finance has yet to provide anything closely resembling a consensus on the permissible boundaries of campaign finance restrictions. Ultimately, those who believe that money is the overwhelming factor in determining who gets elected will never be convinced that *Citizens United* has any merit. In contrast, those who believe that campaign finance restrictions are manifestations of rent-seeking incumbents and reflect an especially pessimistic view of the electorate praise *Citizens United* for vindicating cherished rights. The bitterly divided Court makes it difficult to predict whether this case will have the long pedigree enjoyed by *Buckley* or the short lifespan of *Austin* and *McConnell*. However, it is unlikely that, in practice, *Citizens United* will usher in a new era of corporate political dominance. Most likely, the public will discern little difference in the conduct of future campaigns.