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UNDERSTANDING *MCCONNELL V. FEC* AND ITS IMPLICATIONS FOR THE CONSTITUTIONAL PROTECTION OF CORPORATE SPEECH

Thomas R. McCoy*

INTRODUCTION

In order to understand the constitutional issues presented to the Supreme Court in *McConnell v. Federal Election Commission*¹ and to appreciate fully the doctrinal implications of the Court's results in that case, one must first understand the Court's pre-*McConnell* campaign finance jurisprudence.² The primary opinion for the majority in *McConnell* reasons from and expands the application of various "rules" abstracted from pre-*McConnell* cases without any explicit reliance on or reference to the underlying constitutional methodology that produced the results from which the rules were abstracted. On the central question regarding the appropriate level of constitutional protection for the speech of corporate entities, the majority invoked and expanded on one authoritative thread of pre-*McConnell* jurisprudence³ that was demonstrably inconsistent with a second thread of pre-*McConnell* jurisprudence,⁴ which appeared to many to be equally authoritative. Unfortunately for doctrinal clarity, the majority articulated and implemented its choice between these two inconsistent doctrinal threads with no explicit rejection or even acknowledgement of the opposite thread. Thus, to fully understand and evaluate either the primary majority opinion or any of the dissenting opinions in *McConnell*, one must understand the analytical methodology of the pre-*McConnell* cases, the rules produced by that methodology on the facts of those pre-*McConnell* cases, the apparent inconsistency in the Court's pre-*McConnell* jurisprudence, and the unacknowledged doctrinal step

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1. 540 U.S. 93 (2003).

2. The conflict between campaign finance regulations and the Constitution stems from the First Amendment, which provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

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

4. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

taken by the majority in *McConnell* on the question of constitutional protection for corporate speech.

This Article seeks to accomplish two closely related objectives. First, this Article presents a comprehensible picture of the Court's pre-*McConnell* jurisprudence with a specific focus on the underlying analytical methodology that produced the pre-*McConnell* rules. In the course of this careful review of the pre-*McConnell* jurisprudence, this Article dispels the commonly held notion that the seminal decision in *Buckley v. Valeo*⁵ contains internal inconsistencies and relies on unsound and unworkable conceptual distinctions. This review of the pre-*McConnell* jurisprudence also isolates and precisely identifies the single post-*Buckley* doctrinal inconsistency that was responsible for confusing legislators, courts, and other participants throughout the debate about the constitutionality of campaign finance restrictions.⁶ Second, this Article traces the *McConnell* majority's treatment of corporate political advocacy to its analytical foundation in pre-*McConnell* jurisprudence, thereby allowing for an evaluation of this most significant doctrinal step in *McConnell* through a manageable two-step process. The first step is a conscious and explicit evaluation of the soundness of the pre-*McConnell* doctrinal construct relied upon. The second step is an evaluation of the soundness of the application of the pre-*McConnell* doctrine to the greatly expanded regulatory program at issue in *McConnell*.

5. 424 U.S. 1 (1976). The *Buckley* opinion is the doctrinal fountainhead of the Court's campaign finance jurisprudence. Most of the basic constitutional "rules" governing the regulation of campaign finance were articulated by the Court in *Buckley* or are readily deducible from *Buckley*. See generally *id.*

6. Even a conscientious reviewer of the Supreme Court's pre-*McConnell* campaign finance cases might well have concluded the following: (1) It was difficult to extract any doctrinal framework from the cases; (2) any resulting doctrinal framework was hopelessly complex and relied on hyper-technical distinctions that were impossible to administer consistently in the real world; and (3) creative legal technicians could structure transactions to invoke constitutional protection and evade regulation by exploiting the technical distinctions on which the Court's doctrinal framework was based. A widespread perception of incoherence invited those with a regulatory agenda to view all aspects of the Court's jurisprudence in this area as up-for-grabs and invited the advancement of regulation on all fronts in the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002) (amending the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. § 431 et seq. (2000)), in order to probe the apparently unsettled doctrinal limits. This Article's careful review of the Supreme Court's pre-*McConnell* decisions concludes that a single doctrinal inconsistency produced the widespread impression that the Court's decisions could not be abstracted into a coherent doctrinal framework.

II. THE PRE-McCONNELL JURISPRUDENCE

A. Analytical Background

It is axiomatic that regulations intended to suppress political speech because of hostility to its content are per se violations of the Free Speech Clause of the First Amendment.⁷ But regulations that are aimed at evils unrelated to the content or persuasive effect of the speech, and that only incidentally impact speech, are subjected to some sort of balancing. Such regulations are referred to most commonly as “time, place, or manner” regulations.⁸ Classic examples are noise regulations applied to all loud speakers no matter what message is being broadcast⁹ or restrictions on all billboards no matter what message is being displayed on a particular billboard.¹⁰ In some contexts, such regulations are classified as regulations of “symbolic speech.”¹¹

Whatever label one attaches to such regulations, those cases call for a balancing of the state’s non-speech regulatory interests in the activity against the extent of the “accidental” regulatory impact on the speaker’s ability to communicate his or her message.¹² Evaluating the importance of the state’s non-speech regulatory interest requires an assessment of the alternative regulatory means available to the state to accomplish its non-speech regulatory objectives with less of an accidental impact on the ability of the speaker to communicate his or her message.¹³ Similarly, evaluation of the extent of the accidental impact on the communication requires an assessment of the alternative means available to the speaker to communicate the same message to

7. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (stating that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *accord* *United States v. Eichman*, 496 U.S. 310, 317 (1990); *see also* *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (declaring that “[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment” (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984))).

8. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Court stated:

[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”

Id. (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

9. *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949).

10. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981).

11. *E.g.*, *Clark*, 468 U.S. at 294.

12. *Id.*

13. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

the same audience with less of an impairment of the state's non-speech regulatory interests.¹⁴ Where a time-place-manner regulation's impact on speech is minimal because alternative means of communicating the message are readily available, a modest non-speech regulatory interest will be sufficient to justify the minimal incidental impact on the speech.¹⁵ Where the regulatory impact on speech is great, however, the balancing test will take the form of "strict" or "exacting" scrutiny that may require a "compelling governmental interest" to justify the impact on speech.¹⁶

To illustrate this time-place-manner balancing calculus, consider the application of the murder laws to the assassination of a political candidate. Even the quiet assassination of a political candidate could communicate a message of disapproval of that candidate to those who know the details of the murder. A deliberately public assassination of a political candidate could also be intended to communicate a political message to a broad audience. But the state has an obvious regulatory interest in the activity completely aside from whether it communicates anything. In its simplest form, the time-place-manner balancing calculus yields the conclusion that the state has a very strong regulatory interest in preventing murder, completely independent of any communicative intent or effect associated with a particular murder. And the state has no readily available alternative regulatory approach that would accomplish the objectives of the murder law with less of an accidental impact on the communicative aspects of assassinating a candidate. On the other side of the balance, the communicative value of assassinating a political candidate is not that high in view of the many alternative means available to the assassin to communicate his or her political message. And even where the communicative value of the assassination must be assessed as high, the state's "compelling interest" in protecting individuals from murder is sufficient to justify the substantial accidental interference with the communicative aspects of assassinating the candidate. By implementing these general principles in the context of campaign finance, the case of *Buckley v. Valeo*¹⁷ es-

14. In *Perry Education Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983), a school teachers' union sued the school district for allowing a rival union exclusive access to teachers' mailboxes. After engaging in the balancing discussed earlier, the Court concluded that because the union had alternative means of communicating with the teachers, the First Amendment was not violated. *Id.* at 53-54; see also *Pell v. Procunier*, 417 U.S. 817, 827-28 (1974).

15. See *Perry*, 460 U.S. at 54.

16. See, e.g., *O'Brien*, 391 U.S. at 377.

17. 424 U.S. 1 (1976).

established the basic pre-*McConnell* framework for assessing the constitutionality of any measures regulating campaign finance.¹⁸

B. Buckley and MCFL

1. First Principle: Advocacy Expenditures by Individuals

The first and most fundamental question the *Buckley* Court confronted was presented by the argument that restrictions on the amount of an individual's independent expenditures supporting his or her own advocacy efforts or on the amount of a candidate's advertising expenditures coming out of his or her own personal funds should be treated as time-place-manner regulations that only incidentally impact speech and thus are subject to the balancing methodology.¹⁹ This argument relies on the assumption that expenditures to publish a message are separable from the message itself in the same way that the size and shape of a billboard are separable from any particular message that might be displayed thereon. From this premise, it would follow that the state may assert a regulatory interest in restricting the expenditure, completely independent of any regulatory interest in suppressing the speech itself. Although this argument is sound as an abstract construct, the Court clearly and correctly rejected its application to the regulation in *Buckley*.²⁰

There were two serious problems with the state's attempt to apply time-place-manner analysis in *Buckley*. First, the regulation in question restricted the use of expenditures only when the subject of the communication was political.²¹ Identical expenditures in support of advocacy on a different subject were not restricted.²² This content discrimination ran afoul of the Court's oft-repeated principle that time-place-manner regulations must be content neutral.²³ Content based time-place-manner regulations are treated as content regulations that are per se unconstitutional.²⁴ Second, and more fundamental, the two reasons offered by the state to justify the purported time-place-manner restrictions on campaign expenditures revealed that the state's regulatory interest actually was in limiting the effect of the political

18. See generally *id.*

19. *Id.* at 39–59.

20. *Id.* at 58–59.

21. *Id.* at 12–13.

22. *Id.*

23. *Buckley*, 424 U.S. at 44–45, 49–51; see also cases cited *supra* note 7 and accompanying text.

24. See, e.g., *Eichman*, 496 U.S. 310; *Johnson*, 491 U.S. 397. See generally cases cited *supra* note 7 and accompanying text.

speech itself, not in regulating some non-speech aspect of the communication expenditure.²⁵

The state initially argued that the restriction on expenditures was justified by a regulatory interest in reducing the effectiveness of wealthy speakers, whatever their message, in order to level the playing field in the marketplace of ideas for less wealthy speakers.²⁶ In making this argument, the state admitted that its conscious, deliberate purpose was the restriction of core political speech, not the pursuit of some non-speech time-place-manner objective with an incidental effect on speech.²⁷ Not surprisingly, the *Buckley* Court responded emphatically that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."²⁸

The state's second argument was not so obviously defective. The state argued that its restriction on an individual's expenditures used to advance his or her advocacy efforts on behalf of a candidate was designed to reduce the risk of real or perceived quid pro quo corruption.²⁹ The state argued that once the candidate was elected, he or she would bestow favors on the advocate as a reward for the advocate's financial efforts on the candidate's behalf.³⁰ This argument appears to fit the classic time-place-manner formulation more closely because the asserted regulatory interest is in preventing corruption, not in suppressing or restraining the communication. But closer inspection reveals that it is the amount and effectiveness of the advocacy that presents the risk that the candidate will reward the advocate. And the method chosen by the state to reduce that risk is a direct restriction on the amount and effectiveness of the advocacy itself. The ultimate regulatory objective may be to eliminate the risk of real or perceived corruption, but the deliberate, immediate objective of the regulation in question is the restriction of core political speech, not the restriction of some non-speech aspect of the communicative activity.³¹

25. *Buckley*, 424 U.S. at 45-51, 53-58.

26. *Id.* at 48, 54, 56.

27. *Id.* at 57.

28. *Id.* at 48-49.

29. *Id.* at 45, 53.

30. *Id.*

31. In one line of cases, the Court does seem to have allowed a similar, direct regulation of protected speech because of its content or message when the ultimate regulatory objective was to eliminate some undesirable "secondary effects" of the speech. In *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50 (1976), the Court developed this secondary effects doctrine to sustain the constitutionality of zoning laws restricting adult theaters because of their non-obscene (and thus protected) sexual content, while not restricting similar theaters showing other content. According to the Court, in these secondary effects cases, direct content-discriminatory regulation of

A restriction on expenditures that applies only to expenditures for speech is a restriction on the speech itself. It is inconceivable that the state would have a time-place-manner regulatory interest in suppressing expenditures only for speech but not expenditures for any other purpose. It is further inconceivable that the regulatory interest would be entirely independent of any interest in suppressing or restricting the speech itself. A true time-place-manner restriction on expenditures for speech would be a restriction on all expenditures for any purpose, including speech, in order to further a regulatory interest in the expenditures themselves without reference to their purpose. In such a case, the impact of the expenditure restriction on speech would be accidental. An example of such a legitimate time-place-manner restriction on advocacy expenditures would be a child support decree that prevented a candidate from spending the money on any purpose other than child support, thus preventing the candidate from spending the money to finance his or her campaign advocacy. In that case, the regulatory purpose would not be the restriction of speech, so the effect of reducing the amount and effectiveness of the candidate's speech would be accidental rather than deliberate, and the restriction on speech would be analyzed using the time-place-manner methodology.

Thus, the first principle from *Buckley* can be stated as follows: Regulatory restrictions on an individual's expenditures for his or her own political advocacy (while other individual expenditures for other purposes are not regulated) are per se violations of the Free Speech Clause.³² It is this fundamental holding that many regulation advo-

otherwise protected speech was permissible under a corrupted form of time-place-manner analysis because the state's ultimate regulatory objective was to eliminate the gathering of undesirable patrons and the resulting decline in neighboring property values. *Id.* at 63-73. According to the Court, the state was not restricting the speech because of a regulatory interest in suppressing the message. *Id.* In fact, however, the state was deliberately suppressing the message in order to accomplish its ultimate regulatory objective of eliminating the undesirables who would be attracted by that message and not by other messages. *Id.* It is difficult to perceive any limit on the applicability of this secondary effects doctrine since the government's ultimate regulatory objective in every case of suppressing core political speech is the prevention of some undesirable effect of the message. Direct suppression of the speech in and of itself is never the ultimate regulatory objective. The ultimate regulatory objective is always the prevention of some effect that is expected to result from the message if left unrestricted. Thus, it appears that the secondary effects doctrine, if taken seriously and applied broadly, would effectively negate all First Amendment protection for all disfavored advocacy. Fortunately, the Court seems to have confined this doctrine to cases involving sexual content, an area in which the Court's doctrinal inconsistency is notorious. For an effective analysis and critique of the secondary effects doctrine, see David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms"*, 37 WASHBURN L.J. 55 (1997).

32. See generally *Buckley*, 424 U.S. 1.

cates attacked directly in their persistent calls to re-examine *Buckley*. And it is this fundamental holding that many regulation advocates and regulation drafters have sought to evade by exploiting perceived ambiguities in the Court's post-*Buckley* doctrinal pronouncements.

2. *Second Principle: Campaign Contributions*

Having established the fundamental principle that restricting the use of an individual's money in advancing his or her own advocacy is indistinguishable, for First Amendment purposes, from restricting the speech itself, the *Buckley* Court also addressed the constitutionality of restrictions on campaign contributions—the contribution of one's money to a political candidate to advance that candidate's advocacy.³³ Here the time-place-manner methodology applied perfectly. The act of contributing money to a political candidate rarely is intended to *communicate* (i.e., “speak”) one's support for that candidate to a broad audience.³⁴ It is of course true that those who happen to know of one's contribution to a political candidate will understand that action to be an endorsement of the candidate. And in rare circumstances, a deliberately public contribution to a candidate can be intended to communicate to a broad audience an endorsement of the candidate. The time-place-manner balancing analysis is applicable here, however, because the state in restricting contributions is not seeking to limit the communicative effect of the act of contributing.³⁵ Rather, the state is restricting the act of transferring money to the candidate because that action creates a substantial risk of real or perceived quid pro quo corruption, whether or not the action communicates anything to the marketplace of ideas.³⁶

In the case of campaign contributions, the state has an interest in preventing individuals from purchasing political favors from future office holders (i.e., bribery), whether the contribution is intended to communicate endorsement to a broader audience and whether it has such a communicative effect. Although the state has the same ultimate regulatory objective as in restricting individual advocacy expenditures to promote a candidate, the state has no proximate objective in restricting the amount or effectiveness of an individual's political advocacy. In contrast, the immediate regulatory objective of the state in restricting individual advocacy expenditures is to reduce or disable the *communicative* effect of the expenditure in advancing the speech.

33. *Id.* at 23–38.

34. *Id.* at 20–22.

35. *Id.* at 21.

36. *Id.* at 26–29.

Applying the general time-place-manner balancing framework, the *Buckley* Court concluded that regulating campaign contributions to candidates passed constitutional review because the state's non-speech regulatory interest was significant while the impact on the contributor's "speech" was minimal.³⁷ The key to this result in *Buckley* was the Court's conclusion that usually very little speech (in the sense of addressing the marketplace of ideas) is involved in the act of making a campaign contribution to a candidate.³⁸ Further, contributors seeking to communicate their endorsements of a candidate have numerous equally effective alternative means of communicating their views on the candidate.³⁹ Since the Court's analysis is a straightforward application of classic time-place-manner methodology, the result is entirely sound. This result can be summarized as the second principle in *Buckley*: Campaign contributions to candidates are not protected by the Free Speech Clause.

3. *Third Principle: Coordinated Expenditures*

The *Buckley* Court then confronted the argument that constitutionally permissible restrictions on campaign contributions to candidates could be circumvented easily by having the would-be contributor directly fund campaign ads according to explicit directions from the candidate or the candidate's staff.⁴⁰ As a response to this practical reality, the Court is generally understood to have concluded that such "coordinated expenditures" should be treated, for constitutional purposes, as unprotected contributions rather than as protected "independent expenditures."⁴¹ Described this way, the Court's holding that an individual's coordinated expenditures can be regulated appears inconsistent with its first holding in *Buckley* that regulating individual political advocacy expenditures is a per se violation of the Free Speech

37. *Id.* at 28–29.

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

39. *Id.* at 20–21. The Court explained:

A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Id. (footnote omitted).

40. *Id.* at 46–47.

41. *Id.* at 46.

Clause. But this apparent inconsistency is resolved by a more careful analysis and description of the Court's holding. The first holding in *Buckley* is that the state cannot address the problem of quid pro quo corruption (an ultimate non-speech goal) by restricting the amount of an individual's expenditures for his or her own advocacy in favor of a candidate (a proximate speech-suppressing goal).⁴² Thus, a restriction on coordinated expenditures by an individual must be understood not as a restriction on the expenditures, but rather as a restriction on the action of "coordinating" the speech with the candidate or the candidate's staff by meeting with the candidate or staff to obtain instructions on how and where to make the advocacy expenditure.

The difference is not mere formalism. The state may not pursue its ultimate regulatory objective of reducing quid pro quo corruption by pursuing the intermediate objective of restricting the amount or effectiveness of an individual's political speech. But the state can pursue its ultimate non-speech regulatory objective by restricting the non-speech elements of the individual's actions (the coordinating activities) that give rise to a risk of quid pro quo corruption beyond that presented by the amount of the advocacy itself. Regulating the contact with the candidate or the candidate's staff to "coordinate" the expenditure may have the effect of reducing the overall impact of the individual's speech on behalf of the candidate. But reducing the effectiveness of the speech is neither the ultimate nor the intermediate goal of a regulation restricting coordination. Thus, the constitutionality of the accidental impact on the individual's speech is appropriately judged by the time-place-manner balancing methodology.

Viewed through the time-place-manner analytical lens, the *Buckley* Court's holding on coordinated expenditures was a holding regarding the constitutionality of regulating coordination, not regulating expenditures or speech. The Court held that the significant regulatory interest in preventing actual and perceived quid pro quo corruption outweighed the relatively slight impact on the individual's speech on behalf of a candidate, which would result from the individual's inability to consult with the candidate on when, where, and how to speak.⁴³ In time-place-manner terms, the alternative available to the speaker was to engage in the same speech with the same expenditure of resources but without contact with the candidate or staff.⁴⁴ Because this alternative method was not much less effective than the "coordinated" method, the state's regulatory interest in preventing the actual and

42. *Id.* at 19, 20, 45-48.

43. *Buckley*, 424 U.S. at 46-47.

44. *Id.*

apparent corruption attendant on the activity of coordinating was sufficient to justify the regulation of that activity under a classic time-place-manner analysis.

Misreading *Buckley* as a holding that some individual expenditures for speech are speech and cannot be regulated while other individual expenditures that are identical in scope and impact can be regulated (i.e., those that are “coordinated”) introduces a logical inconsistency into *Buckley* itself. More importantly, misconstruing the *Buckley* opinion as holding that the expenditures can be regulated if they are coordinated, rather than a holding that coordination activities can be regulated, would allow regulatory advocates to assert that expenditures advancing one’s own advocacy in support of a candidate can be considered coordinated, and thus regulatable, even without any contact between the speaker and representatives of the candidate. Relying on an expansive, commonsense, out-of-context meaning of the term “coordinated,” one could argue that any effort by an individual to maximize the impact of his or her own expenditures and speech by choosing to use media or to address audiences not reached by the candidate’s own efforts constitutes a form of “coordination,” as the term is commonly understood. In other words, conscious choices by an individual to assure that his or her advocacy efforts compliment the candidate’s own efforts, rather than wastefully duplicating the candidate’s efforts, could be considered “coordinated” and subject to regulation even without any contact between the individual and the candidate’s campaign organization. Such an expansive, out-of-context use of the term “coordinated” appears to underlie the Bipartisan Campaign Finance Reform Act’s instruction to the Federal Election Commission (FEC) to draft new rules expanding the regulatory definition of “coordinated” to ban individual expenditures even when there is no contact at all between the individual and campaign personnel.⁴⁵ Anyone contemplating a large expenditure to advance his or her advocacy on behalf of a candidate will judiciously invest in advocacy that maximizes its impact by complimenting rather than duplicating the candidate’s campaign efforts. As a result, all large independent expenditures

45. The relevant section of the BCRA stated: “The Federal Election Commission shall promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees. The regulations shall not require agreement or formal collaboration to establish coordination.” BCRA, Pub. L. No. 107-155, tit. II, § 214(c), 116 Stat. 81 (2002). Despite this broad directive, the Federal Election Commission (FEC) implemented the following limited definition of coordination: “*Coordinated* means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party committee or its agents.” 11 C.F.R. § 109.20(a) (2004).

would effectively qualify as coordinated and thus be subject to regulation under this expansive notion of coordination.⁴⁶ This result is avoided, however, if *Buckley* is understood as holding that the activity of contact with the candidate or staff, rather than the expenditures, can be regulated.

It is true, of course, that a candidate unavoidably will be aware of large expenditures for advocacy on the candidate's behalf made by individuals acting entirely on their own. And there will be a consequent inclination to "reward" such efforts through the use of political favors or access that appear to be (or actually are) quid pro quo corruption, even though no "deal" was struck in advance. In other words, the state can assert exactly the same regulatory interest in exactly the same amount to justify both the regulation of coordinated expenditures and the regulation of independent expenditures. Thus, some commentators have concluded that *Buckley* is internally inconsistent in allowing the regulation of coordinated expenditures and not the regulation of independent expenditures. That conclusion, however, overlooks the critical fact that in an independent expenditure case it is the speech itself being regulated, while in a coordinated expenditure case it is the coordinating activity that is being regulated.⁴⁷ The core holding in *Buckley* is that this regulatory interest, and implicitly any other regulatory interest, cannot justify the direct and deliberate suppression of an individual's "independent" political advocacy in

46. For example, any individuals or organizations contemplating the purchase of television time to promote their preferred candidate naturally would inquire of the local stations about the time slots already scheduled for coverage by the candidate's own advertising and would then direct their expenditures to underserved time slots. Under the commonsense expansive notion of "coordination" apparently contemplated in the BCRA, such independent expenditures could then be regulated.

47. See, e.g., David Schultz, *Revisiting Buckley v. Valeo: Eviscerating the Line Between Candidate Contributions and Independent Expenditures*, 14 J.L. & POL. 33, 48-50 (1998). Professor Schultz argues that the compelling interest in reducing corruption and the appearance of corruption applies with equal force to cases of independent expenditures and cases of coordinated expenditures:

"Let us suppose that each of two brothers spends \$1 million on TV spot announcements that he has individually prepared and in which he appears, urging the election for the same named candidate in identical words. One brother has sought and obtained the approval of the candidate; the other has not. The former may validly be prosecuted under § 608(e) [of the FECA]; under the Court's view, the latter may not, even though the candidate could scarcely help knowing about and appreciating the expensive favor. For constitutional purposes it is difficult to see the difference between the two situations."

Id. at 49 (quoting Justice Byron White in *Buckley*, 424 U.S. at 261). In the hypothetical cited by Professor Schultz, and originally posited by Justice Byron White, the reason that one brother may be prosecuted while the other may not is that the first brother has engaged in an activity that can constitutionally be regulated: coordination. *Id.* at 50-51. The other engaged in pure speech. *Id.*

support of a candidate.⁴⁸ But under time-place-manner analysis, that same regulatory interest can easily justify restrictions on coordinating activities where the restrictions have minimal impact on the advocacy itself.⁴⁹ Thus, the third principle from *Buckley* should be understood as: While restrictions on an individual's expenditures to advance that individual's own advocacy on behalf of a candidate are per se violations of the Free Speech Clause, the individual can be prohibited from contacting the candidate or staff to coordinate the individual's advocacy and expenditures with the desires of the candidate.

4. *Fourth Principle: Advocacy Expenditures by Political Advocacy Groups*

Conceptually (as distinguished from chronologically) the Court's next step after *Buckley* was *Federal Election Commission v. Massachusetts Citizens for Life (MCFL)*,⁵⁰ in which the Court concluded that the principles announced in *Buckley* for the constitutional protection of an individual's advocacy expenditures apply with equal force to protect advocacy expenditures by nonprofit corporations formed for the purpose of political advocacy.⁵¹ If this case had followed *Buckley* immediately in chronological sequence, the result would have been so entirely predictable as to be nearly unremarkable. In a venerable line of cases commonly (and inaccurately) referred to as "freedom of association" cases,⁵² the Court established that group political speech is constitutionally protected in the same way and to the same degree that individual political speech is protected. When the Court in *Buckley* decided that individual expenditures for political advocacy are constitutionally indistinguishable from the speech itself, simple logic dictated that this principle would apply to expenditures by political associations for political advocacy. Thus, if one ignores the cases that

48. *Buckley*, 424 U.S. at 45–51.

49. *Id.* at 46–47.

50. 479 U.S. 238 (1986).

51. *See generally id.*

52. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). In subsequent cases, the Court explained that there is no First Amendment freedom simply to "associate." According to these later cases, the early freedom of association cases should be understood as affording First Amendment protection for a freedom to associate for purposes of political advocacy—such as a freedom of "group speech" that is entitled to the same level of protection as individual speech. Merely associating for purposes other than speech is entitled to no more constitutional protection than all other non-fundamental individual liberties. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

intervened in the chronological sequence between *Buckley* and *MCFL*, *MCFL* was a simple next logical step, producing the fourth operative principle of pre-*McConnell* jurisprudence: Advocacy expenditures by incorporated political advocacy groups are covered by the same constitutional principles that protect the advocacy expenditures of individuals.⁵³

5. *Fifth Principle: Individual Contributions to Political Advocacy Groups*

Similarly, simple logic suggests that individual contributions of money to associations formed for purposes of political advocacy are inherently part of the individual's protected participation in the association's speech. Thus, the fifth operative principle of pre-*McConnell* jurisprudence is a logical implication of *MCFL* and the "freedom of association" cases: Individual contributions to incorporated political advocacy groups for the purposes of political advocacy are protected to the same extent as individual expenditures for the individual's own direct political advocacy.

C. *The Bellotti Holding*

In actual chronological order, the Supreme Court's next pivotal campaign finance case after *Buckley* was not *MCFL* but *First National Bank of Boston v. Bellotti*.⁵⁴ If one anticipates the decision in the *MCFL* case, the broad issue in *Bellotti* can be neatly stated: To what extent should the principles protecting the political advocacy expenditures of individuals and incorporated political advocacy associations be applicable to the political advocacy expenditures of for-profit business corporations?⁵⁵ Writing for the majority, Justice Lewis Powell unequivocally asserted that the speech of for-profit corporations was entitled to exactly the same protection that the First Amendment provides for the speech of individuals.⁵⁶

53. See generally *MCFL*, 479 U.S. 238.

54. 435 U.S. 765 (1978).

55. See generally *id.*

56. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.* at 777. For a vigorous and thorough attack on the basic premise of *Bellotti*, see Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995 (1998). For an equally spirited defense of *Bellotti*, see Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998), or Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1 (2001).

This reading of Justice Powell's opinion for the Court in *Bellotti* is confirmed by his explicit rejection of the dissenters' arguments that a for-profit corporation is a legal abstraction constructed by the state to serve certain economic purposes, and that, as a creation of government, a for-profit corporation should be subject to any limitations imposed by government, including limitations on its ability to engage in the political process (through advocacy or expenditures to advance its advocacy).⁵⁷ Justice Powell's reasoning reinforced the point even further. He asserted that it is the speech itself, and not the speaker, that is protected by the Free Speech Clause.⁵⁸ Therefore, the nature of the speaker (whether an individual, an incorporated political advocacy association, or a for-profit business corporation) has no bearing on the level of constitutional protection accorded to any particular speech.⁵⁹ Thus, *Bellotti* appears to announce the sixth operative principle of pre-*McConnell* jurisprudence: The rules of *Buckley* and *MCFL* apply with equal force to the advocacy expenditures and contributions of for-profit corporations.⁶⁰

Had Justice Powell simply stopped at that point, *Bellotti* would not have been inconsistent in any respect with *Buckley*, and no element of incoherence would have been introduced into the Court's campaign finance jurisprudence. Applying the "rules" of *Buckley* (and *MCFL*) to the expenditures of for-profit corporations would have been a simple and straightforward proposition. Unfortunately, Justice Powell proceeded to offer two observations about the appropriate level of protection for for-profit corporations.⁶¹ Those "suggestions" either were inconsistent with his broad holding that the speech and advocacy expenditures of for-profit corporations received the same level of protection as the advocacy expenditures of individuals or were inconsistent with *Buckley*'s clear instructions about the level of protection to be accorded to the expenditures of individuals. These suggestions are the fountainhead of all the true incoherence in the Court's pre-*McConnell* jurisprudence. When these suggestions were picked up by regulation advocates and implemented in subsequent cases, a fundamental inconsistency became firmly embedded in the Court's campaign finance jurisprudence. Regulation advocates were encouraged to view the most basic *Buckley* principles as open for re-examination, and the drafters of the Bipartisan Campaign Finance Reform Act

57. *Bellotti*, 435 U.S. at 791 n.30.

58. *Id.* at 776–77.

59. *Id.* at 776–86.

60. See generally *id.*

61. See *infra* Part II.D.

(BCRA) were encouraged to exploit the confusion by including restrictions that stretch both the spirit and the letter of *Buckley*.

D. The Bellotti "Suggestions"

1. Regulation of Corporate Candidate Advocacy Justified by the Risk of Corruption

The "narrow," "technical," or "actual" holding in *Bellotti* is only that advocacy expenditures of for-profit corporations in an issue election (as opposed to a candidate election) are protected by the First Amendment because only issue ads were in question in *Bellotti*.⁶² But Justice Powell's opinion in *Bellotti* was written, and is widely understood, as a grand, sweeping, and absolutely unequivocal pronouncement that the speech of for-profit corporations (hereinafter simply corporate speech) is protected in every context to the same extent as the speech of individuals (and by implication, the speech of incorporated political advocacy associations). Thus, it is startling to find buried in footnote 26 of the opinion the clear suggestion that a restriction on independent corporate speech addressing a *candidate* election might be found constitutional because: "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."⁶³ In making this assertion, Justice Powell seemed oblivious to the fact that the Court in *Buckley* had clearly held that the First Amendment protected independent expenditures by individuals to advance their own advocacy of a candidate because the expenditures are inseparable from the advocacy.⁶⁴ The *Buckley* Court explicitly rejected the risk of real or apparent corruption (and argua-

62. *Bellotti*, 435 U.S. at 788-92.

63. *Id.* at 788 n.26. The text of the critical language in footnote 26 is as follows:

The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. See *United States v. Automobile Workers*, [352 U.S. 567,] 570-575 [(1967)]; *Schwartz v. Romnes*, [495 F.2d 844,] 849-851 [(2d Cir. 1974)]. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of 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. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections. Cf. *Buckley v. Valeo*, [424 U.S.] at 46; Comment, *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies*, 126 U. Pa. L. Rev. 386, 408-10 (1977).

Id.

64. See generally *Buckley*, 424 U.S. 1.

bly any other possible reason) as a justification for restricting an individual's core political speech.⁶⁵

If one combines Justice Powell's suggestion in footnote 26 with the broad holding in *Bellotti*, that corporate speech is the constitutional equivalent of individual speech, then the *Buckley* holding, that an individual's independent expenditures for either issue advocacy or candidate advocacy are protected, must be wrong. If one combines the apparent broad *Bellotti* holding, that corporate speech is the constitutional equivalent of individual speech, with the holding in *Buckley*, that expenditures for an individual's candidate advocacy are protected in spite of any risk of real or apparent corruption, then the suggestion in footnote 26 must be wrong. Or if one accepts both *Buckley* and the suggestion in footnote 26 of *Bellotti*, then the apparent broad holding in *Bellotti*, that corporate speech is the constitutional equivalent of individual speech, must be wrong. To re-establish doctrinal coherence and consistency after *Bellotti*, the Court could have either: (a) overruled *Buckley*'s holding that independent individual expenditures for candidate advocacy are protected; (b) overruled *Bellotti*'s broad holding that corporate speech (and thus the inseparable expenditures for political advocacy) is protected in exactly the same way as individual speech (and inseparable individual expenditures for political advocacy); or (c) rejected Justice Powell's suggestion in footnote 26 (which, after all, is only dicta).

One might argue that the suggestion in footnote 26 concerning real or apparent corruption as a justification for the regulation of corporate candidate advocacy can be distinguished from the *Buckley* holding protecting an individual's candidate advocacy because corporate candidate advocacy presents a higher risk of real or apparent corruption. However, the risk of real or apparent corruption does not depend on whether the advocate is an individual, an individual's corporate alter ego, or a full scale national corporate entity. The risk of real or apparent corruption depends on the amount of money expended to advance the advocacy and on the ability of the candidate, once elected, to assist the economic interests of the advocate. In other words, a regulatory interest in preventing real or apparent corruption does not support treating corporate candidate advocacy expenditures different from an equal candidate advocacy expenditure by an individual with financial resources equal to or exceeding those of many corporations. Stated still another way, nothing about the regulatory interest in preventing real or apparent corruption confines the sugges-

65. See generally *id.*

tion in footnote 26 to corporate rather than individual advocacy expenditures of an equal amount. Nothing about the corporate form of a business organization (as distinct from the amount of financial resources commanded by some corporations and by some individuals or the ability of the candidate to advance the economic interests of some corporations and some individuals) gives rise to a greater risk of real or apparent corruption from corporate expenditures. If corporate advocacy expenditures are regulatable to avoid corruption, and individual advocacy expenditures in an equal amount with an identical risk of corruption are not regulatable, it must be because the regulation of corporate speech can be justified by a regulatory interest of a certain magnitude while regulation of individual speech cannot be justified by that same regulatory interest. In other words, corporate speech must not receive the same level of constitutional protection as individual speech, and the apparent core holding in *Bellotti* must be wrong.

2. *Regulation Justified by the "Undue" Impact of Wealthy Advocates*

Justice Powell's second disorienting suggestion came in response to arguments by the state that regulation of corporate expenditures for either issue advocacy or candidate advocacy was constitutionally justified because large amounts of wealth invested in either issue advocacy or candidate advocacy "would exert an undue influence on the outcome of a . . . vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government."⁶⁶ Justice Powell opined in response: "If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration."⁶⁷ If, as Justice Powell asserted in *Bellotti*, corporate political advocacy is protected to the same extent as individual political advocacy, then Justice Powell's observation (that state arguments about disabling wealthy advocates in order to level the playing field for less wealthy advocates "would merit our consideration")⁶⁸ was flatly contrary to the Court's explicit and unequivocal rejection of any such notion in *Buckley* with respect to individual advocates.

Again the inconsistency is not just technical nor merely rhetorical. In terms of its impact on the marketplace of ideas, there is no discern-

66. *Bellotti*, 435 U.S. at 789.

67. *Id.*

68. *Id.*

able difference between the impact of the expenditure of a certain sum on political advocacy by a corporate entity and the identical impact of the expenditure of an identical sum on identical advocacy by an individual.⁶⁹ If the impact of wealth on public political debate is a constitutionally sufficient justification for the regulation of a corporate advocacy expenditure, but not for the regulation of an individual expenditure of an identical amount for identical political advocacy with identical impact, then the reason for the distinction must not lie in the impact of the expenditure. The reason for the distinction must lie in the difference between wealth acquired and held in the corporate form on the one hand, and an identical amount of wealth acquired and held by an individual on the other hand. In other words, political speech by corporations, which includes the inseparable expenditures to advance that speech, must not be constitutionally protected to the same extent that the Constitution protects an individual's political speech and the inseparable expenditures to advance that advocacy.

Justice Powell's suggestion that reducing the impact of wealth on public political debate justifies restricting the advocacy of wealthy corporations combined with the broad holding in *Bellotti* that corporate speech is the constitutional equivalent of individual speech would mean that *Buckley* must have been wrong in holding that the state may not, by regulation, restrict the impact of wealthy individual advocates. The broad *Bellotti* holding, that corporate speech is the constitutional equivalent of individual speech, combined with the holding in *Buckley* that expenditures for individual candidate advocacy are protected in spite of any risk of an "undue" impact of wealthy advocates, would mean that Justice Powell must have been wrong in suggesting that the "undue" impact of wealthy corporations would justify regulation. Or *Buckley* combined with Justice Powell's suggestion in *Bellotti*, that the state can regulate advocacy expenditures by wealthy corporations, would mean that the apparent broad holding in *Bellotti*, that corporate speech is the constitutional equivalent of individual speech, must have been wrong. To re-establish doctrinal coherence and consistency after *Bellotti*, the Court could have either: (a) overruled *Buckley*'s holding that independent expenditures by wealthy individuals for candidate advocacy are protected; (b) overruled *Bellotti*'s broad holding that corporate speech (and thus the inseparable expenditures for political advocacy) are protected in exactly the same

69. See Susan W. Dana, *Restrictions on Corporate Spending on State Ballot Measure Campaigns: A Re-Evaluation of Austin v. Michigan Chamber of Commerce*, 27 HASTINGS CONST. L.Q. 309, 350 (2000).

way as individual speech (and inseparable individual expenditures for political advocacy); or (c) rejected Justice Powell's suggestion that reducing the "undue" impact of wealthy corporate advocacy in public political debate might be an acceptable constitutional justification for restrictions on corporate advocacy expenditures (which is, like his other suggestion, only dicta).

E. *Austin v. Michigan State Chamber of Commerce*

The seeds of doctrinal inconsistency planted by Justice Powell's broad holding in *Bellotti* and his two suggestions in *Bellotti* bore fruit in Justice Thurgood Marshall's majority opinion in *Austin v. Michigan State Chamber of Commerce*.⁷⁰ In *Austin*, the Court found constitutional a restriction on independent corporate expenditures for political advocacy in a candidate election.⁷¹ This result effectively adopted and implemented Justice Powell's first *Bellotti* suggestion. Thus, this result either overruled the broad *Bellotti* holding that corporate speech was protected to the same extent as individual speech or overruled the *Buckley* holding that all individual expenditures for political advocacy, including candidate advocacy, were protected.

The Court's reasoning in *Austin* suggests that the Court intuitively viewed its holding as consistent with *Buckley* because it did not view the wealthy corporate political advocacy at issue in *Austin* as constitutionally equivalent to the advocacy of an equally wealthy individual.⁷² The key elements of the Court's reasoning in *Austin* are the arguments that corporate advocacy expenditures are distinguishable from individual advocacy expenditures of identical amounts because of constitutionally determinative differences between corporations and individuals.⁷³ Thus, *Austin* suggests that the apparent broad holding of *Bellotti*, equating corporate speech with individual speech, must be wrong. In fact, the *Austin* Court's justifications for restrictions on corporate candidate advocacy are virtually identical to the *Bellotti* dissent arguments that as a general matter corporate speech should not be entitled to the same level of constitutional protection that is accorded by the First Amendment to individual speech.⁷⁴

The *Austin* Court was well aware that individuals can accumulate and invest in political advocacy "immense aggregations of wealth"⁷⁵

70. 494 U.S. 652 (1990).

71. See generally *id.*

72. *Id.* at 660.

73. *Id.* at 659-60.

74. See *Bellotti*, 435 U.S. at 804-12 (White, J., dissenting).

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

that are indistinguishable from corporate political advocacy expenditures in terms of their “corrosive and distorting effects”⁷⁶ on public political debate. And the Court was aware that individual political advocacy expenditures were absolutely protected as core political speech under *Buckley*.⁷⁷ Thus, the Court in *Austin* explained its holding very carefully: “We emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification . . . rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent [corporate] expenditures.”⁷⁸ The Court expanded on this key point as follows:

State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments. These state-created advantages not only allow corporations to play a dominant role in the Nation’s economy, but also permit them to use “resources amassed in the economic marketplace” to obtain “an unfair advantage in the political marketplace.” As the Court explained in *MCFL*, the political advantage of corporations is unfair because “[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation’s political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.”⁷⁹

Thus, it seems clear that *Austin* effectively overruled the broad holding in *Bellotti*. And because the broad holding in *Bellotti* was the only available reasoning to support the actual or narrow holding in *Bellotti* protecting corporate issue advocacy, it seems clear on reflection that *Austin* effectively overruled *Bellotti*’s narrow holding by removing its underlying rationale. Nothing in the *Austin* reasoning quoted above confines that reasoning only to candidate elections rather than the corporate issue advocacy protected by *Bellotti*.⁸⁰ From the point of view of doctrinal coherence, however, two separate but closely related things went wrong in *Austin*.

First, Justice Marshall in *Austin* never explicitly overruled the broad *Bellotti* holding nor even acknowledged the inconsistency between his

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 658–59 (quoting *MCFL*, 479 U.S. at 257–58).

80. *See* Dana, *supra* note 69, at 336–37.

holding that corporate candidate advocacy was not protected and the broad *Bellotti* principle that corporate speech and individual speech were equivalent for constitutional purposes. The narrow holding in *Austin* was that corporate candidate advocacy is not protected while the real (or narrow) holding in *Bellotti* was merely that corporate issue advocacy is protected. Thus, one can make the argument that Justice Marshall could not technically “overrule” *Bellotti* in *Austin*. While this argument is technically correct, it overlooks the fact that *Bellotti* was, and still is viewed and cited as, an authoritative holding that corporate speech is entitled to the same constitutional protection as individual speech in all contexts. Justice Marshall could not have been oblivious to this fact, and thus his failure to acknowledge the inconsistency between his holding in *Austin* and the common understanding of the holding in *Bellotti* was conspicuous to any informed observer. That failure allowed pro-regulation advocates to ignore the *Austin* reasoning, which suggested that *Bellotti* was overruled, and to insist instead that *Bellotti* remained good law. And if the *Bellotti* equivalency principle remained good law, then the *Austin* holding that corporate candidate advocacy was not protected must then also apply to individual candidate advocacy. In other words, it could be argued that *Austin*, through *Bellotti*’s equivalency principle, overruled *Buckley*. Thus, if one ignores the *Austin* reasoning, the *Austin* holding left the most fundamental *Buckley* principles open to re-examination and rejection in the drafting of the BCRA.

The second problem for doctrinal coherence in *Austin* was that Justice Marshall did not (and technically could not) overrule the narrow holding in *Bellotti* that corporate issue advocacy was protected. Because *Austin* involved only corporate candidate advocacy, Justice Marshall could only “hold” that corporate candidate advocacy was unprotected. He could not hold that corporate issue advocacy also was unprotected, thus overruling *Bellotti*’s narrow holding. All of Justice Marshall’s reasoning in *Austin* leading to the holding of “unprotected,” however, applied equally well to both corporate candidate advocacy (*Austin*) and corporate issue advocacy (*Bellotti*). Stated another way, all of the reasoning in *Bellotti*, which formed the broad holding, was equally applicable to both corporate issue advocacy (*Bellotti*) and corporate candidate advocacy (*Austin*). When that reasoning (the broad holding in *Bellotti*) was explicitly rejected in *Austin*, the narrow holding in *Bellotti* of protection for corporate issue advocacy was left with no comprehensible rationale. Nonetheless, Justice Marshall’s opinion in *Austin* conspicuously failed to acknowledge that it had removed all of the underlying rationale for the narrow *Bellotti*

holding protecting corporate issue advocacy. This conspicuous failure allowed pro-protection advocates to assert that *Bellotti's* holding protecting corporate issue advocacy was technically consistent with *Austin's* holding of no protection for corporate candidate advocacy.

This argument then made the distinction between issue ads and candidate ads the constitutionally determinative factor in whether a particular instance of corporate political advocacy expenditure was protected. This distinction spawned a thoroughly disreputable body of debate and judicial decisions attempting to distinguish between protected "issue" ads that merely endorse a specific viewpoint on a specific public issue (even if a particular candidate is advancing that same view on that same issue in a current campaign) and unprotected "express" ads that endorse the campaign of a particular candidate because of the candidate's stand on the public issue of interest to the corporation.⁸¹ The result of *Austin* then seemed to introduce a seventh principle that was fundamentally inconsistent with the sixth principle and which furthermore relied on an unworkable and theoretically unsupported distinction between issue ads and candidate ads: Corporate expenditures for issue advocacy are protected by the *Buckley-MCFL* rules but corporate expenditures for candidate advocacy are not protected.

F. Anticipating McConnell

In *McConnell*, the Court confronted a regulatory restriction on both corporate issue advocacy (which was protected according to *Bellotti*) and corporate candidate advocacy (which was not protected according to *Austin*). The foregoing compilation of the Court's pre-*McConnell* jurisprudence suggests that before attempting to reason from pre-*McConnell* principles, any opinion in *McConnell* at a minimum would be forced to resolve the two issues presented by the seventh principle from *Austin*. First, one would need to decide whether to preserve or reject as unworkable and unprincipled the abstract distinction between corporate issue ads and corporate candidate ads. Because there was no discernable distinction and because the Court's reasoning in

81. See *Landell v. Vermont*, 300 F.3d 129 (2d Cir. 2002); *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997). But see *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). The drafters of the BCRA assumed or hoped that the Court would eliminate the indefensible (after *Austin*) distinction between corporate issue advocacy and express advocacy by holding that corporate expenditures for either form of election advocacy are unprotected. All of the BCRA's restrictions on corporate expenditures for electioneering activity would then pass constitutional muster. The decision in *McConnell* proved this hope or assumption to be well-founded.

Austin applied equally to both, one might have predicted that most members of the Court would reject the distinction and apply the same level of protection (if any) to both corporate issue advocacy and corporate candidate advocacy.

That prediction, of course, would then focus attention squarely on the question presented by the fundamental conflict between *Austin* and *Bellotti*. Thus, it seemed unavoidable that each of the opinions in *McConnell* would be forced either to accept the obvious implications of *Austin* and explicitly overrule *Bellotti* or to overrule *Austin* in favor of the broad *Bellotti* holding that corporate political advocacy is protected to the same extent as individual political advocacy. Neither of the two other options (overruling *Buckley* or maintaining the distinction between issue ads and candidate ads) seemed very likely at this point in the development of the Court's jurisprudence. In other words, in *McConnell*, either *Bellotti* would be expressly overruled or *Austin* would be expressly overruled as an unavoidable first step in assessing the constitutionality of the BCRA's direct restrictions on all forms of corporate political advocacy.

III. *McCONNELL V. FEC*⁸²

As one might have predicted, the five-vote majority in *McConnell* easily rejected the discredited distinction between corporate issue advocacy and corporate candidate advocacy.⁸³ The evidence was overwhelming that no discernable difference between the two existed in the real world of corporate political advocacy.⁸⁴ Drawing the distinction on the basis of the presence or absence of certain "magic words" was patently arbitrary to the point of absurdity.⁸⁵ And it was clear

82. 540 U.S. 93.

83. *Id.* at 126-29.

84. *Id.*

85. The Court in *McConnell* condemned the unworkable distinction in great detail:

While the distinction between "issue" and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words. Little difference existed, for example, between an ad that urged viewers to "vote against Jane Doe" and one that condemned Jane Doe's record on a particular issue before exhorting viewers to "call Jane Doe and tell her what you think." Indeed, campaign professionals testified that the most effective campaign ads, like the most effective commercials for products such as Coca-Cola, should, and did, avoid the use of the magic words. Moreover, the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election. Corporations and unions spent hundreds of millions of dollars of their general funds to pay for these ads, and those expenditures, like soft-money donations to the political parties, were unregulated under FECA. Indeed, the ads were

that even the most explicit ad urging the election or defeat of a candidate could easily be recast as an issue ad that focused on the issues that were central to a particular candidate's record or platform.⁸⁶ Finally, it was established that the professionals who designed candidate election advertising preferred the "issue" format over the "candidate" format as a more effective form of candidate advertising even if the "candidate" form had been constitutionally protected.⁸⁷

A. *Reduced Protection for Corporate Election Advocacy*

The quick rejection of the distinction between corporate issue advocacy and corporate candidate advocacy then focused attention on the key question of the level of protection provided by the First Amendment for all corporate political advocacy.⁸⁸ The majority answered this central question simply by relying on *Austin*'s core holding (now without the residual distinction between issue ads and candidate ads) that corporate political advocacy is not protected from regulatory restrictions that would be unconstitutional under *Buckley* if applied to an individual's advocacy.⁸⁹ The majority simply reasoned from *Austin* as its starting point, without the residual distinction between *Austin* and *Bellotti*.⁹⁰ Unfortunately, it did not expressly overrule, or even acknowledge the existence of, *Bellotti*.

Once the majority adopted the implicit holding of *Austin*, that corporate speech is not fully protected by the First Amendment, it followed quickly that all of the BCRA's restrictions on both corporate advocacy expenditures and corporate political contributions would be found constitutional. Remember, contributions to candidates and coordination of expenditures (by either corporations or individuals) already were unprotected under *Buckley* because regulating them involved very little incidental restriction on speech.⁹¹ Now direct cor-

attractive to organizations and candidates precisely because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money.

Id. at 126–28 (footnotes omitted).

86. *Id.*

87. *Id.* at 127 n.18. The Court cited exhibits and briefs showing that during the 1998 election cycle only four percent of candidate advertisements actually used words that appeared in the famed "footnote 52" of *Buckley*. *McConnell*, 540 U.S. at 127 n.18; see *Buckley*, 424 U.S. at 44 n.52. In 2000, a Presidential election year, the number rose to only five percent. *McConnell*, 540 U.S. at 127 n.18.

88. *McConnell*, 540 U.S. at 203–09.

89. *Id.* at 205.

90. *Id.*

91. See generally *Buckley*, 424 U.S. 1.

porate speech, whether through independent advocacy expenditures or through contributions to *MCFL* political advocacy groups, was unprotected.⁹² In other words, it no longer mattered whether a particular corporate expenditure was treated as a contribution (direct candidate contributions and coordinated expenditures) or as speech (independent advocacy expenditures and contributions to political advocacy groups). All corporate political activity, whether it qualified as speech or not, was subject to regulation.⁹³ The regulatory interest in reducing the real or apparent corruption that continues to inhere in large advocacy expenditures by individuals or corporations directed at candidate elections was more than adequate to justify regulation of corporate speech in candidate elections.⁹⁴ The regulatory interest in leveling the playing field by reducing the effect of wealth was also adequate to justify the restrictions on corporate advocacy expenditures in the context of either candidate or issue elections.⁹⁵ Those two reasons remained inadequate, however, to justify restrictions on political advocacy expenditures by individuals (and by *MCFL* not-for-profit political advocacy corporations) because those expenditures remained absolutely protected as core political speech under *Buckley*.

B. *Reduced Protection for General Corporate Speech*

On the fundamental question of the level of protection to be afforded corporate speech, the majority opinion is unsatisfactory in three important respects. First, the majority did not explain clearly that it was effectively overruling *Bellotti* or at least was recognizing that *Austin* had effectively overruled *Bellotti*. It is true that the reasoning offered in *Austin* for not protecting the one class of corporate advocacy (i.e., the state-created nature of a corporate entity) applied with equal force to the other class of corporate advocacy that had been protected by *Bellotti*. Thus, *Austin* clearly suggested that when the unsound distinction was rejected, neither class of corporate advocacy would be protected. But this approach effectively overruled *Bellotti* without making that overruling explicit in either *Austin* or *McConnell*. While such an implied overruling is not unheard of in the Court's history, it is particularly problematic here. By simply reasoning from *Austin* after removing the distinction, the majority was able to sustain all of the BCRA restrictions on corporate political advocacy (as within the authority of *Austin*) without ever exploring what level

92. See generally *McConnell*, 540 U.S. 93.

93. *Id.*

94. *Id.* at 205.

95. *Id.*

of constitutional protection might be appropriate for corporate speech after *Bellotti's* sweeping absolutes are rejected. This shortcoming is particularly problematic because *Bellotti* is the fountainhead of constitutional protection for corporate speech in all contexts, not just election advocacy. The implications of *McConnell* for the constitutional protection of corporate speech in non-election contexts escaped any exploration as a result of the majority's failure to explicitly acknowledge overruling *Bellotti* somewhere between *Austin* and *McConnell*.

Note that this is not a criticism of the majority's overruling of *Bellotti* or the result in *McConnell* that corporate political advocacy is not protected from regulatory restrictions that would be unconstitutional if applied to individuals. The reasoning in *Austin* on which the majority apparently relies tracks the reasoning of the dissents in *Bellotti* and establishes that corporate speech is not entitled to constitutional protection as a general proposition.⁹⁶ But if that is what the majority in *McConnell* meant, then they should have said so and not left us to guess about the implications of *McConnell* for corporate speech generally. Of course, ideally *Austin* itself would have overruled *Bellotti*. Since *Austin* preserved some vestige of arguable consistency with *Bellotti*, and since the majority in *McConnell* stripped away that last vestige of consistency, however, the majority in *McConnell* should have explicitly acknowledged the overruling of *Bellotti* and given some general sense of what standard of protection was to take its place.⁹⁷

The second problem with the Court's treatment of corporate political speech in *McConnell* is that what little the Court did say on the subject is not consistent with well-established free speech analytical methodology.⁹⁸ The majority in *McConnell* purported to simply adopt

96. Even if corporate speech is not entitled to constitutional protection as such, it seems likely that a viewpoint discriminatory regulation of corporate speech would still be found unconstitutional. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), seems to hold that classes of speech that are excluded from First Amendment protection are nonetheless entitled to protection from viewpoint discriminatory regulations. *But see* *Virginia v. Black*, 538 U.S. 343, 343-44 (2003) (in which the majority apparently rejected the dissenters' *RAV*-based argument that unprotected "true threats" may not be restricted when they communicate disfavored political viewpoints while other true threats remain unregulated).

97. The level of constitutional protection that corporate speech generally merits after *Bellotti-Austin-McConnell* undoubtedly will be the subject of extended scholarly and judicial exploration in the near future. At this point, it is clear only that *McConnell* must be understood as holding that corporate political advocacy (and by implication, all corporate speech on subjects farther from the core of the First Amendment) is not entitled to the same protection as that afforded to individual speech. *See generally* *McConnell*, 540 U.S. 93.

98. At a minimum, this makes it difficult to use existing doctrine to reason out the implications of *McConnell* for corporate speech in other contexts. At worst, the Court's casual rhetoric in *McConnell* will send future doctrinal development off in incoherent directions.

and implement the holding and reasoning in *Austin*.⁹⁹ As outlined earlier in this Article's discussion of *Austin*, the *Austin* reasoning tracks the arguments of the dissent in *Bellotti*. That reasoning leads to the conclusion that because a corporation is a creature of the state, created for limited purposes, its speech generally should not qualify for First Amendment protection. Thus, one would have expected the Court in *McConnell* to have concluded from the *Austin* reasoning that corporate speech was indistinguishable from all other corporate activities that constitutionally can be regulated by the state on a showing of a mere rational basis. And then one would have expected the Court to conclude that the regulatory interests in reducing corruption and reducing the "distorting" effects of wealthy advocates in public debate easily met the deferential rational basis standard.¹⁰⁰ This line of reasoning then would have allowed one to deduce that corporate speech in all other (non-election) contexts was similarly unprotected and regulatable with a rational basis. But that is not what the Court in *McConnell* said.

Citing *Austin* as its controlling authority, the Court in *McConnell* articulated a time-place-manner analysis to conclude that the absolute ban on corporate election advocacy did not prohibit, but merely burdened corporate speech, and that the burden was justified by a compelling governmental interest.¹⁰¹ The key to this mischaracterization of the regulatory restrictions was the Court's assertion that because a corporation could facilitate the organization of a free standing, financially independent political action committee (PAC) that could then fund election advocacy, the regulatory restrictions on corporate speech were not a "complete ban" on a corporation's political speech.¹⁰² The Court then "examine[d] the degree to which BCRA burdens First Amendment expression."¹⁰³ Apparently concluding implicitly that the burden was substantial, the Court proceeded to "evaluate whether a compelling governmental interest justify[d] that burden" and "easily answered" that question in the affirmative.¹⁰⁴ The compelling interest served by the regulation was the interest in reducing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate

99. *McConnell*, 540 U.S. at 204–05.

100. *Id.* at 205.

101. *Id.*

102. *Id.* at 204.

103. *Id.* at 205.

104. *Id.*

form.”¹⁰⁵ Finally, the Court concluded that the regulation passed the last step in a time-place-manner analysis because it was not “overbroad”—that is, it did not burden more speech than necessary to accomplish its purpose.¹⁰⁶

The most charitable thing one could say about the Court’s misrepresentation of the regulation in *McConnell* and its invocation of the time-place-manner analysis is that it is confused, but “dishonest” probably would be a more accurate description. Although the Court asserted that characterizing the regulation as a “complete ban” was “simply wrong,”¹⁰⁷ the restriction was in fact a complete ban on corporate election advocacy. The Court’s assertion to the contrary is itself “simply wrong.” The fact that a separate financial entity, a PAC, could be created and funded by some *individuals* associated with the corporation does not make the ban on speech by the corporation any less absolute. No corporate resources can be transferred to the separate PAC, so the speech of the PAC can in no way be characterized as the speech of the corporation. Furthermore, the express purpose of the ban was precisely to prohibit speech by the corporate entity with corporate resources. The Court’s casual assertion that the PAC’s speech was simply an alternative form of speech by the corporation itself is not just “simply wrong,” it is astonishing.

Even if the complete ban on corporate election advocacy could somehow accurately be described as a time-place-manner regulation that left adequate alternative opportunities for the corporation to engage in election advocacy, it still would not have passed an honest time-place-manner analysis. Any apparent regulation of time-place-manner with an actual purpose to impede or suppress the speech is not treated as a time-place-manner regulation, but rather as a direct or deliberate restriction on the speech. In a case involving core political speech, such a regulation is a per se violation of the First Amendment. Thus, the BCRA’s explicit purpose to reduce the persuasive impact of corporate speech in public debate surrounding an election prevents the application of any honest time-place-manner analysis.

It is extremely difficult to figure out where this blatant misrepresentation and misuse of the time-place-manner analysis by the Court in *McConnell* leaves us with the question of constitutional protection for corporate speech generally. If one accepts the Court’s use of time-place-manner analysis at face value, it implies that corporate speech

105. *McConnell*, 540 U.S. at 205 (quoting *Austin*, 494 U.S. at 660) (internal quotation marks omitted).

106. *Id.* at 207.

107. *Id.* at 204.

remains fully protected under *Bellotti*. If *Bellotti* were not still good law protecting corporate speech, the Court would not have needed to invoke time-place-manner analysis to sustain the regulation. In other words, the Court's invocation of time-place-manner analysis to sustain the regulation in *McConnell* implies that *Austin* did not overrule *Bellotti*'s broad holding that corporate speech is protected to the same extent as individual speech. On the other hand, the reasoning behind the holding in *Austin*, which the Court cited as controlling authority in *McConnell*, suggests that *Bellotti* has been overruled. And the Court's reliance on time-place-manner analysis in *McConnell* to avoid explicitly overruling *Bellotti* is transparently defective, suggesting that corporate speech in principle is not protected and *Bellotti* effectively is overruled. This seems to leave the standard of constitutional protection for corporate speech in some sort of incoherent doctrinal limbo. To say that further doctrinal clarification is required understates the case quite seriously.

The necessity of doctrinal clarification will be forced on the Court by subsequent cases involving direct state restrictions on corporate speech concerning public issues in non-election contexts.¹⁰⁸ It is certain that the government in those cases will now cite *Austin* and *McConnell* for the fundamental principle that *Bellotti* has been overruled and that corporate speech is not protected by the First Amendment. It would follow then that corporate speech can be constitutionally regulated like all other corporate activities by a showing of a mere rational basis. If the Court rejects that extreme but logical inference from *Austin* and *McConnell*, then it will be forced to describe a level of constitutional protection for corporate political speech somewhere between no protection at all and the absolute protection afforded individual political speech.¹⁰⁹

As one possible course of future action, the Court could accept the doctrinal result of *McConnell* without the flagrantly defective time-place-manner rationale. The net result of *McConnell* is that a direct, deliberate, total regulatory restriction on corporate political speech

108. See, e.g., *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

109. In a line of cases that began with *Central Hudson Gas*, the Court has held that commercial speech (i.e., advertising) is entitled to a sort of mid-level First Amendment protection if it is not misleading and concerns legal activity. See *Cent. Hudson Gas*, 447 U.S. 557; see also 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995). Virtually all commercial speech cases involve commercial speech by business corporations. If *McConnell* means that corporate speech as such can be regulated on the basis of some standard less than that applied to the speech of individuals, then a regulation of the commercial speech of a corporation will be constitutional if the regulation meets *either* the standard for commercial speech or the as-yet-undetermined standard for corporate speech.

was subjected to the compelling interest test where similar speech by an individual would have been absolutely protected from such a direct regulatory restriction. Thus, if one ignores the *McConnell* time-place-manner reasoning, then *McConnell* stands for the principle that, unlike individual speech, corporate speech is protected only by the compelling interest test from direct regulatory restrictions designed to suppress the speech. This approach would preserve and combine pieces of *Bellotti*, *Austin*, and *McConnell*. *Bellotti* is preserved to the extent that corporate speech is entitled to some constitutional protection, essentially for the reasons outlined in *Bellotti*. *Austin* is preserved to the extent that its reasoning (and the reasoning of the dissent in *Bellotti*) explains why the protection for corporate political speech is not as high as the absolute protection from direct restrictions that is afforded to individual speech. Finally, *McConnell* is preserved to the extent that it actually applied the compelling interest test to a direct restriction on corporate political speech. This approach would leave largely intact the results in virtually all of the non-election corporate speech cases that have relied on *Bellotti* over the years, but it would be necessary to recharacterize them as cases in which the state failed to justify the regulation with a compelling interest.

If this is the doctrinal consequence of *McConnell*, the landscape of constitutional protection for corporate political speech still will have changed radically. All cases involving state regulation of corporate speech on public issues will begin with the state's argument that *McConnell* stands for the principle that corporate speech can be directly suppressed if the state can show a compelling interest to justify the restriction. The state will then invoke as its compelling interest for restricting corporate speech on the particular issue the compelling interest accepted by the Court in *McConnell*: “[T]he 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.”¹¹⁰ It is difficult to imagine why this same compelling interest would not justify any state restriction on corporate advocacy on any public issue. If the compelling interest test will be met in every case by the same compelling interest that applies to all corporate advocacy on every public issue, then the “protection” is only nominal. The net effect would be that corporate speech is not actually protected from state regulation, with the possible exception of viewpoint-discrimina-

110. *McConnell*, 540 U.S. at 205 (quoting *Austin*, 494 U.S. at 660) (internal quotation marks omitted).

tory regulations.¹¹¹ We are then essentially back to the original implication of *Austin*: Corporate speech is not protected by the First Amendment.

The third problem with the majority's unarticulated holding that corporate speech is not entitled to the same level of constitutional protection as individual political speech is that it depends on the practical workability of a theoretical distinction between traditional corporations (either for-profit or not-for-profit), whose speech is unprotected under *McConnell*, and traditional incorporated political advocacy associations, whose speech is protected under *MCFL*. A further distinction seems to be required between non-*MCFL* media corporations, whose speech presumably remains protected by the speech and press clauses of the First Amendment,¹¹² and all other non-*MCFL* corporations whose speech is not protected under *McConnell*. Distinguishing both *MCFL* corporations and media corporations from all other corporations may be sound in theory, but it is likely to be devilishly difficult for the courts in practice.

At the outset, it is far from clear why the National Rifle Association (NRA) does not fall immediately into the constitutionally protected category of *MCFL* political advocacy corporations rather than into the unprotected all-other-corporations category. While the NRA's corporate activities include a wide variety of services for gun enthusiasts, it can be argued persuasively that the NRA's central purpose has become the political campaign to preserve the legal right of individual gun ownership. All of the NRA's other corporate activities depend on the success of this central political mission, and even these other activities can be characterized as a kind of "speech" advocating a lifestyle of gun ownership and recreational use.

And if the NRA seems easy to categorize as a regulatable non-*MCFL* corporation, what about the National Association for the Advancement of Colored People (NAACP)? It seems well established that the speech of the incorporated NAACP is protected as the speech

111. See cases cited *supra* note 96 and accompanying text. But note that the viewpoint of corporations on most public issues is entirely predictable and probably would be the real reason that corporate speech on a particular public issue would be restricted. See Redish & Wasserman, *supra* note 56, at 238.

112. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). In contrast, see Justice Scalia's *Austin* dissent, which argued that the majority's reasons for denying First Amendment protection to corporate political speech applied most forcefully to the political speech of economically powerful media corporations. *Austin*, 494 U.S. at 691 (Scalia, J., dissenting). For a similar suggestion, see Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 *TEX. L. REV.* 1627, 1653-54 (1999).

of a political advocacy association.¹¹³ Thus, the NAACP must qualify after *McConnell* for *MCFL* corporation status. Yet the difference between the NAACP and the NRA in terms of the centrality of the political advocacy mission is extremely difficult to discern, much less to define with precision. Though it seems inconceivable, *McConnell*'s narrow definition of the protected *MCFL* category¹¹⁴ seems to raise a question about the continued protection of the NAACP's political advocacy. At a minimum, the majority in *McConnell* has seriously underestimated the difficulty of administering a critical distinction on which its holding depends for legitimacy, and at worst the majority has failed to provide constitutional protection for the core political speech of incorporated associations of like-minded individuals joined in conscious and deliberate advocacy of their common political objectives. The majority's definition of a protected *MCFL* corporation seems far too narrow to protect core political speech and association, and in any event, it will prove extremely difficult to administer.

If the distinction between an *MCFL* corporation and all other corporations such as the NRA is not problematic enough, then where exactly is the line between media corporations and all other non-*MCFL* corporations? If the speech of media corporations remains protected by the speech and press clauses in spite of their corporate form and wealth,¹¹⁵ then the Court will be forced to develop some definitional criteria analogous to those that identify an *MCFL* corporation. And here the definitional task seems truly daunting. Starting from one end of a spectrum that is composed of infinite factual variations, how many radio stations would the NRA need to acquire in

113. See generally *Button*, 371 U.S. 415; *Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

114. The Court described the characteristics of a "MCFL organization" as follows:

"First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities. This ensures that political resources reflect political support. Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity. Third, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace."

McConnell, 540 U.S. at 210–11 (quoting *MCFL*, 479 U.S. at 264).

115. See, e.g., *The N.Y. Times Co., Our Company*, at <http://www.nytimes.com/company.html> (last visited Mar. 18, 2005). The New York Times Company had 3.3 billion dollars of revenue in 2004. *Id.* It owns nineteen newspapers, including the *New York Times*, the *Boston Globe*, and the *International Herald Tribune*. *Id.* The company also owns eight network affiliated television stations, two major New York area radio stations, and more than forty websites, and its stock is regularly traded on the New York Stock Exchange. *Id.*

order to qualify its speech for constitutional protection as the editorializing of a media corporation? Or how large would the NRA's newsletters and other publications need to become before the NRA qualified for constitutional protection as "the press?" Starting from the other end of the factual spectrum, how many subsidiary non-press businesses (e.g., sale of T-shirts and coffee mugs, real estate holdings, and rentals) could the New York Times Company pursue before it moved from a protected media corporation into the unprotected "all-other-corporations" category? And near the middle of the spectrum, is a public relations firm or advertising agency an unprotected corporation or a protected media corporation? The definitional problem seems insurmountable when one considers the modern reality of corporate conglomerates and multiple levels of holding companies that control both media and non-media subsidiaries. For example, is the political speech of the Disney Corporation, in its many forms, protected?¹¹⁶

IV. CONCLUSION

Somewhere between *Austin* and *McConnell*, the Supreme Court has rejected what is commonly cited as the "holding" in *Bellotti* that corporate speech is entitled to the same level of protection as individual speech. The *McConnell* holding contradicts *Bellotti's* fundamental premise. Yet the Court has failed to acknowledge, much less explain, the consequences of that implicit overruling for corporate speech in the wide variety of non-election contexts. Further compounding the confusion, the Court purported to explain the lack of protection for corporate speech in *McConnell* by mischaracterizing the regulation and invoking time-place-manner analysis to sustain the restriction. Although the Court has succeeded, at least since *Austin*, in evading its responsibility to produce a coherent doctrinal structure for the lower courts and for the public, future cases involving state restrictions on corporate speech in non-election contexts will force substantial doctrinal clarification. Whatever form that clarification ultimately takes, it seems certain that corporate speech will no longer enjoy a level of constitutional protection equivalent to the protection afforded to the speech of individuals. The sweeping absolutes of *Bellotti* clearly are no longer good law.

116. For some preliminary thoughts on how the distinction might be defined and defended, see Greenwood, *supra* note 56, at 1060.