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Opens the Gate to "Phantom" Political Speakers

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Note

***CITIZENS UNITED v. FEC*: DEPARTURE FROM PRECEDENT OPENS THE GATE TO “PHANTOM” POLITICAL SPEAKERS**

Esther Houseman*

In *Citizens United v. FEC*,¹ the Supreme Court of the United States held that a ban on the use of corporate and union general treasuries to fund speech advocating the election or defeat of a political candidate violated the First Amendment of the United States Constitution.² The majority reached this holding by finding that the Bipartisan Campaign Reform Act’s (“BCRA”)³ ban on the use of general treasury funds to finance independent expenditures constituted an “outright ban” on corporate political speech.⁴ In so holding, the Court failed to recognize the distinct threat that corporations pose to the political process.⁵ That is, corporations are able to use the corporate form to create the appearance of strong political backing for a political position that does not reflect the support of actual individuals, individuals who have provided funds for the purpose of supporting a corporation’s political speech.⁶

Additionally, in reaching its holding, the *Citizens United* Court improperly extrapolated assertions from its decisions in *Buckley v. Valeo*⁷ and *First National Bank of Boston v. Bellotti*.⁸ The Court relied on its assertion in *Buckley* that speech restrictions based on a speaker’s wealth are

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1. 130 S. Ct. 876 (2010).

2. *Id.* at 886–87, 896–97, 913.

3. Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2, 18, 28, 36, and 47 U.S.C. (2006)).

4. *Citizens United*, 130 S. Ct. at 887, 896–97.

5. *See infra* Part IV.A.

6. *See infra* Part IV.A.

7. 424 U.S. 1 (1976) (per curiam).

8. 435 U.S. 765 (1978); *see supra* Part IV.B.

impermissible⁹ and its assertion in *Bellotti* that “the worth of speech ‘does not depend upon the identity of its source’”¹⁰ to erroneously conclude that restrictions on corporate independent political expenditures are unconstitutional.¹¹ Furthermore, the Court mischaracterized the antidistortion rationale it applied in *Austin v. Michigan State Chamber of Commerce*¹² as an outlier in the Court’s corporate expenditure jurisprudence.¹³ To the contrary, *Austin*’s antidistortion rationale was not an anomaly but a natural extension of the exception to corporate expenditure restrictions¹⁴ that the Court crafted in *FEC v. Massachusetts Citizens for Life* (“*MCFL*”).¹⁵

As a consequence of *Citizens United*, political distortion will now manifest in two forms: (1) the political marketplace of ideas, and possibly the composition of representative government itself, will be skewed by the addition of inordinately large sums of corporate money; and (2) it will be impossible to trace money from corporate general treasuries back to actual individuals’ support for the political speech in question.¹⁶ Thus, by allowing corporations to use their general treasuries to make campaign expenditures, the *Citizens United* majority has invited “phantom speakers” to participate in, and distort, American politics via the marketplace of political speech.¹⁷

I. THE CASE

On January 7, 2008, Citizens United, a politically conservative nonprofit membership corporation that is tax-exempt under Internal Revenue Code Section 501(c)(4),¹⁸ notified the United States District Court for the District of Columbia that it had released its highly critical

9. See *Citizens United*, 130 S. Ct. at 904 (“The First Amendment’s protections do not depend on the speaker’s ‘financial ability to engage in public discussion’” (quoting *Buckley*, 424 U.S. at 49)).

10. See *id.* (quoting *Bellotti*, 435 U.S. at 777).

11. See *infra* Part IV.B.

12. 494 U.S. 652 (1990), *overruled by Citizens United*, 130 S. Ct. at 913.

13. See *infra* Part IV.C.

14. See *infra* Part IV.C.

15. 479 U.S. 238 (1986). The *MCFL* exception permits a nonprofit corporation to make campaign expenditures from its general treasury only if the nonprofit corporation meets certain criteria that prove the nonprofit’s shareholders actually support the nonprofit’s political speech. See *id.* at 263–64.

16. See *infra* Part IV.D.

17. See *infra* Part IV.D.

18. 26 U.S.C. § 501(c)(4) (2006) (exempting “[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare” from taxation).

documentary, *Hillary: The Movie*, “for public sale and exhibition.”¹⁹ *Hillary* highlighted then-Senator Hillary Clinton’s White House record during President Bill Clinton’s presidency, her Senate record, and her presidential campaign, and it offered a critical assessment of her fitness for the office of the President of the United States.²⁰ Citizens United scheduled *Hillary* for release via video-on-demand and funded an accompanying advertising campaign that it scheduled to run, if Clinton were to secure the Democratic presidential nomination, within thirty days of the Democratic National Committee Convention and within sixty days of the November 2008 general election.²¹ Citizens United sought to prevent the Federal Election Commission (“FEC”) from banning the movie’s video-on-demand distribution and accompanying advertisements under Sections 203, 201, and 311 of the BCRA.²² Specifically, Citizens United sought injunctive relief declaring that Section 203 of the BCRA unconstitutionally burdened the First Amendment right to freedom of speech—both as applied to *Hillary* and on its face²³—so that it could distribute *Hillary* via video-on-demand without the risk of civil and criminal penalties under the BCRA.²⁴

Section 203 of the BCRA bars corporations and unions from funding electioneering communications²⁵ using general treasury funds,²⁶ and this prohibition applies to all primary elections or political conventions for any federal office.²⁷ BCRA Section 201 lays out extensive disclosure requirements,²⁸ including the disclosure of the names and addresses of

19. Citizens United v. FEC, 530 F. Supp. 2d 274, 275 (D.D.C. 2008) (per curiam) (internal quotation marks omitted). The film’s “release date coincide[d] with the dates when many states [held their] primary elections or party caucuses.” *Id.* For examples of negative commentary about then-Senator Hillary Clinton offered by the film’s narrator, see *id.* at 279 n.12.

20. *Id.*

21. *Id.* at 275–76. Citizens United planned to fund at least three advertisements—one thirty-second advertisement, “Questions,” and two ten-second advertisements, “Wait” and “Pants”—to coincide with the release of *Hillary* to promote the movie. *Id.* In its filings and at oral argument, the FEC conceded that the BCRA § 203 prohibitions against electioneering communications did not apply to the advertisements. *Id.* at 277 n.9.

22. *Id.* at 277.

23. *Id.* at 278.

24. Citizens United v. FEC, 130 S. Ct. 876, 888 (2010).

25. An electioneering communication is “any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office; [and] is made within 60 days before a general, special, or runoff election” or “30 days before a primary or preference election, or a convention or caucus of a political party.” 2 U.S.C. § 434(f)(3)(A)(i)(I)–(II) (2006).

26. Pub. L. No. 107-155, § 203, 116 Stat. 81, 91–92 (2002) (codified at 2 U.S.C. § 441b), declared unconstitutional by Citizens United, 130 S. Ct. 876.

27. 2 U.S.C. § 441b(a).

28. Pub. L. No. 107-155, § 201, 116 Stat. 81, 88–90 (codified at 2 U.S.C. § 434) (requiring political committees and individuals to file various reports with the FEC disclosing, inter alia, the amount of funds contributed to political candidates, the amount of expenditures made, the identity

certain contributors.²⁹ For those electioneering communications that are not banned under the BCRA, Section 311 requires disclaimers that identify the sources of funding for the communication.³⁰

To determine whether a preliminary injunction was warranted, the district court³¹ first assessed whether there was a substantial likelihood that Citizens United would succeed on the merits of its Section 203 claim.³² The court concluded that Citizens United could not possibly prevail in a Section 203 facial challenge, because to do so the court would have to overrule a portion of the Supreme Court's opinion in *McConnell v. FEC*,³³ in which the Court had upheld Section 203.³⁴ The district court then rejected Citizens United's as-applied challenge, finding that because *Hillary* "is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office," the movie is "the functional equivalent" of the kind of express advocacy prohibited by the Supreme Court's ruling in *FEC v. Wisconsin Right to Life* ("WRTL").³⁵ Thus, the district court found that *Hillary* fell within the *McConnell* holding that upheld BCRA

of each person making contributions or expenditures, and identifying information including the principal place of business of persons making expenditures for electioneering communications).

29. 2 U.S.C. § 434(b)(5).

30. Pub. L. No. 107-155, § 311, 116 Stat. 81, 105-06 (codified at 2 U.S.C. § 441d(a)). Electioneering communications that are not authorized by a candidate must include a clear disclaimer that provides the "name and permanent street address, telephone number, or World Wide Web address" of the entity that funded the communication. 2 U.S.C. § 441d(a)(3).

31. The case was heard before a three judge panel in the District Court for the District of Columbia because Citizens United challenged the law using the statute's own judicial review mechanisms. See 2 U.S.C. § 437h (establishing the procedure for judicial review of actions arising under the BCRA).

32. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 278-80 (D.D.C. 2008) (per curiam).

33. 540 U.S. 93 (2003), overruled by *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Citizens United*, 530 F. Supp. 2d at 278 ("Only the Supreme Court may overrule its decisions. The lower courts are bound to follow them.").

34. The Supreme Court in *McConnell* rejected claims that financing "electioneering communications" fall within the protection of the First Amendment. *Citizens United*, 530 F. Supp. 2d at 278 (citing *McConnell*, 540 U.S. at 203-09). The district court further rejected Citizens United's theory that *FEC v. Wisconsin Right to Life, Inc.* ("WRTL"), 551 U.S. 449 (2007), narrowed *McConnell* and left § 203 vulnerable to "facial invalidation." *Citizens United*, 530 F. Supp. 2d at 278. Citizens United's theory was that *WRTL* narrowed *McConnell* by holding that an advertisement is only express advocacy subject to the § 203 prohibition if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Citizens United*, 530 F. Supp. 2d at 278 (quoting *WRTL*, 551 U.S. at 469-70). The court found that adopting Citizens United's theory would require overruling *McConnell* and rejected it on those grounds. *Citizens United*, 530 F. Supp. 2d at 278.

35. *Citizens United*, 530 F. Supp. 2d at 279-80; see also *WRTL*, 551 U.S. at 469-70 ("[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.").

Section 203's corporate expenditures on electioneering communications, leaving no possibility that Citizens United would prevail on the merits.³⁶

The district court also determined that Citizens United could not prevail on its challenge to Section 201's disclosure and Section 311's disclaimer requirements.³⁷ In so finding, the court relied on *McConnell*, which had upheld these provisions "for the 'entire range of electioneering communications,'" noting that "Citizen's advertisements obviously are within that range."³⁸ Upon considering the remaining factors for granting a preliminary injunction,³⁹ the district court determined that an injunction would not further the public interest.⁴⁰ Accordingly, the court denied Citizens United's request for a preliminary injunction with respect to all claims presented.⁴¹

Citizens United filed a jurisdictional statement, appealing the district court's decision directly to the Supreme Court.⁴² The Court dismissed the appeal "for want of jurisdiction,"⁴³ and the case returned to the district court on cross motions for summary judgment filed by Citizens United and the FEC.⁴⁴ The district court granted the FEC's motion for summary

36. *Citizens United*, 530 F. Supp. 2d at 280.

37. *Id.* at 281.

38. *Id.* (quoting *McConnell*, 540 U.S. at 196). Citizens United may have prevailed on its as-applied challenge if it had provided evidence to show that disclosure would lead to reprisals against its members, but Citizens United provided no such evidence. *Id.* (citing *McConnell*, 540 U.S. at 198–99).

39. To secure a preliminary injunction, a movant is required to demonstrate "that it has 1) a substantial likelihood of success on the merits, 2) that it would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction." *Id.* at 277–78 (quoting *Omar v. Harvey*, 479 F.3d 1, 18 (D.C. Cir. 2007)) (internal quotation marks omitted).

40. *Id.* at 282. In finding that the public interest would not be served, the court relied on the Supreme Court's determination in *McConnell* that BCRA's § 203 prohibitions "assist the public in making informed decisions, limit the coercive effect of corporate speech, and assist the FEC in enforcing contribution limits." *Id.* (citing *McConnell*, 540 U.S. at 196, 205, 231). The court did not address two of the four preliminary injunction factors: whether the movant would suffer irreparable injury if the injunction were not granted and whether the injunction would substantially injure another interested party. *See supra* note 39.

41. *Citizens United*, 530 F. Supp. 2d at 282. The court denied as moot the request for a preliminary injunction with respect to the application of § 203 to the advertisement "Questions" because the FEC conceded that the advertisement was exempt from BCRA § 203. *Id.* at 277 n.9, 282.

42. Jurisdictional Statement at 3, *Citizens United v. FEC*, 128 S. Ct. 1471 (2008) (No. 07-953). Citizens United appealed the district court decision directly to the Supreme Court under 28 U.S.C. § 1253 (2006), which provides that "any party may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." *Id.*

43. *Citizens United v. FEC*, 128 S. Ct. 1732 (2008) (mem.).

44. *Citizens United v. FEC*, No. 07-2240, 2008 WL 2788753, at *1 (D.D.C. July 18, 2008), *aff'd in part, rev'd in part, and remanded by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

judgment, basing its decision on the reasoning in its prior opinion that had denied Citizens United's request for declaratory relief and a preliminary injunction.⁴⁵

Citizens United appealed once more to the Supreme Court, and the Court noted probable jurisdiction over the case.⁴⁶ After hearing arguments on Citizens United's facial challenges to BCRA's disclosure provisions, as well as its as-applied challenges,⁴⁷ the Court decided to hear the case reargued.⁴⁸ The Court ordered the parties to supply a supplemental brief discussing whether a ban on the use of corporate and union general treasuries for campaign expenditures was facially unconstitutional, thus setting the stage to overrule either *Austin v. Michigan State Chamber of Commerce*,⁴⁹ in which the Court had articulated its antidistortion rationale, or the part of *McConnell* that upheld BCRA Section 203 on its face—or both.⁵⁰

II. LEGAL BACKGROUND

The First Amendment freedom of speech has its greatest force when applied to political speech.⁵¹ Congress, however, has a long-standing history of treating corporations differently for the purposes of regulating campaign expenditures—money spent by individuals to advocate for the election or defeat of a candidate⁵²—and has traditionally justified separate treatment as necessary to prevent corruption of the democratic political process.⁵³ Through decades of state and federal corporate campaign expenditure regulation,⁵⁴ the Supreme Court has afforded great deference to

45. *Id.*; see also *supra* notes 32–41 (describing the reasoning that led to the district court's original denial of Citizens United's request for declaratory relief and a preliminary injunction).

46. *Citizens United v. FEC*, 129 S. Ct. 594 (2008) (mem.).

47. The Court heard the first round of argument in the case on March 24, 2009. See generally Oral Argument, *Citizens United v. FEC*, 130 S. Ct. 876 (No. 08-205), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf.

48. The Court heard the second round of argument on September 9, 2009. *Citizens United*, 130 S. Ct. at 876. The Supreme Court generally permits reargument “in the most legally complicated, highly salient, and politically contentious cases.” James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 541 (2011) (citing Valerie Hoekstra & Timothy Johnson, *Delaying Justice: The Supreme Court's Decision to Hear Rearguments*, 56 POL. RES. Q. 351, 355–57 (2003)). *Citizens United* is one such case. *Id.*

49. 494 U.S. 652 (1990), overruled by *Citizens United*, 130 S. Ct. at 913.

50. *Citizens United*, 130 S. Ct. at 888.

51. See *infra* Part II.A.

52. See 2 U.S.C. § 431(9)(A)(i) (2006) (defining expenditure as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office”).

53. See *infra* Part II.A.

54. See *infra* text accompanying notes 83–106.

legislatures and has acquiesced to these regulations.⁵⁵ Although the Court previously ruled that the government cannot place caps on campaign expenditures on the basis of a speaker's wealth⁵⁶ or limit corporate speech on referenda to only those issues that affect corporate interests,⁵⁷ the Court did not strike down corporate campaign expenditure regulations specifically.⁵⁸

When squarely confronted with a restriction on corporate campaign expenditures by a nonprofit organization, the Court did not find the restrictions unconstitutional but instead carved out an exception for certain corporate nonprofit organizations whose composition ensured that any expenditures it made reflected actual public support for its political ideas.⁵⁹ Building on this nonprofit exception, the Court created an antidistortion rationale that justified corporate campaign restrictions on the ground that corporate expenditures do not reflect actual public support for a corporation's political ideas and thus distort the political process.⁶⁰

A. One of the Primary Purposes of the First Amendment Is to Protect Political Speech

The Supreme Court has applied the First Amendment with great fervor to the protection of political speech and discussion. In 1966, in *Mills v. Alabama*,⁶¹ the Court found that a state statute imposing criminal sanctions for the publication of editorials endorsing or opposing candidates on an election day “flagrant[ly]” violated the First Amendment.⁶² In so holding, the Court stated that “there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”⁶³ This political discourse, the Court noted, includes “discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.”⁶⁴ Though the First Amendment fiercely guards political speech generally,⁶⁵ the protection of free political speech is

55. See *infra* Part II.B.

56. See *infra* Part II.C.1.

57. See *infra* Part II.C.2.

58. See *infra* Part II.C.

59. See *infra* Part II.D.

60. See *infra* Part II.D.

61. 384 U.S. 214 (1966).

62. *Id.* at 218–19.

63. *Id.* at 218.

64. *Id.* at 218–19.

65. See, e.g., *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007) (“[T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it.”).

particularly salient in the context of elections for public office. In *Monitor Patriot Co. v. Roy*,⁶⁶ the Court emphasized the unique position of campaign speech under the First Amendment, stating that “it can hardly be doubted that the [First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office.”⁶⁷

This vigorous protection of political speech is undergirded by the Court’s protection of the marketplace of political speech in the interest of promoting self-government. Protection of both speech and the press stems from the Framers’ intent “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”⁶⁸ Moreover, Justice Brandeis, concurring in *Whitney v. California*,⁶⁹ suggested that public discussion is not merely permitted but represents a “political duty,” and “that the greatest menace to freedom is an inert people.”⁷⁰ This duty exists because public discussion of political ideas is a means to an end, the end being the “discovery and spread of political truth.”⁷¹

Where the governmental interest underlying a restriction on funding the production and dissemination of political speech is the suppression of communication, the Court has stated that such a restriction is aimed at the expressive element of spending, not the conduct.⁷² Therefore, the Court in *Buckley v. Valeo* applied the strict scrutiny standard of review to a provision of the Federal Election Campaign Act of 1971 (“FECA”)⁷³ that established

66. 401 U.S. 265 (1971).

67. *Id.* at 271–72.

68. *Roth v. United States*, 354 U.S. 476, 484 (1957). The *Roth* Court derived this objective from a 1774 letter sent by the Continental Congress to the residents of Quebec, which explained that its decision to ensure the freedom of the press lies in “[t]he importance of . . . [the] general . . . diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.” *Id.*

69. 274 U.S. 357 (1927).

70. *Id.* at 375 (Brandeis, J., concurring).

71. *Id.*

72. See *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (per curiam) (“[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.”). The *Buckley* Court contrasted the making of campaign expenditures with the burning of a draft card. *Id.* at 15–16. In *United States v. O’Brien*, 391 U.S. 367 (1968), the Court upheld a statute prohibiting the burning of a draft card. The Court found the statute to be a restriction on conduct, not expression, because the governmental interest in protecting the draft registration system was sufficiently justified and “unrelated to the suppression of free expression.” *O’Brien*, 391 U.S. at 376–77.

73. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–56 (2006)).

political expenditure limits on individuals.⁷⁴ In striking down the statute,⁷⁵ the *Buckley* Court stressed the political marketplace of ideas problem presented by the statute, stating that “[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”⁷⁶

B. State Legislatures and Congress Responded to the Threat Corporations Pose to the Democratic Process and the Supreme Court Deferred to These Legislatures on Campaign Finance Laws

With the rise of corporate wealth over the last century came the concern that corporate wealth would translate into inordinate corporate power in the political arena.⁷⁷ Legislatures responded to these concerns by passing corporate campaign financing restrictions, including restrictions on both campaign contributions and campaign expenditures.⁷⁸ The Supreme Court granted considerable deference to the legislature in cases involving First Amendment challenges.⁷⁹

1. Legislatures Have Responded to Urgent Calls to Address the Threat Corporations Pose to the Political Process

Despite staunch protection of political speech under the First Amendment, the rise of corporate political speech presented a pointed problem for legislatures and the Court’s campaign speech jurisprudence. In 1894, Elihu Root,⁸⁰ addressing the Constitutional Convention of the State of New York, advocated for legislation prohibiting political contributions by corporations so as “to prevent . . . the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the

74. See *Buckley*, 424 U.S. at 7, 44–45 (explaining that the constitutionality of the statute depended “on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression”). The expenditure provision at issue in *Buckley* limited expenditures by “individuals or groups” to \$1,000 per candidate per election and by candidates themselves when using personal funds for their campaigns. *Id.* at 7. See generally Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431–56 (2006)) (amending the FECA and establishing the specific expenditure limitations at issue in *Buckley*).

75. *Buckley*, 424 U.S. at 45–49.

76. *Id.* at 19.

77. See *infra* text accompanying notes 80–82.

78. See *infra* Part II.B.1.

79. See *infra* Part II.B.2.

80. Root was a prominent statesman who served in several political offices, including Secretary of War, Secretary of State, and United States Senator. *Introductory Note to ELIHU ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP*, at vii (Robert Bacon & James Brown Scott eds., 1916).

legislature . . . to vote for their protection and the advancement of their interests as against those of the public.”⁸¹ In 1905, President Theodore Roosevelt, delivering his annual message to Congress, echoed Root’s concerns, calling for legislation prohibiting “[a]ll contributions by corporations to any political committee or for any political purpose” to stop “the evils aimed at in corrupt practices acts.”⁸²

For over one hundred years, Congress repeatedly responded to the concerns raised by Root, Roosevelt, and others by enacting legislation designed to prevent the corrupting influence of corporate political spending.⁸³ For example, the Tillman Act of 1907,⁸⁴ precipitated by President Roosevelt’s speech, prohibited corporate contributions of any kind to any federal election.⁸⁵ Congress extended the prohibition on contributions in 1925 by defining corporate contributions to include “anything of value” and imposing criminal sanctions for making or accepting corporate contributions.⁸⁶ In 1939, responding to the “enormous financial outlays” made by unions “in connection with national elections,”⁸⁷ Congress brought unions under campaign spending regulations, restricting union contributions under the Hatch Act⁸⁸ and later prohibiting union spending on federal elections entirely under the War Labor Disputes Act of 1943.⁸⁹

The first restrictions on corporate campaign expenditures (as distinguished from contributions⁹⁰) came in 1947 when Congress passed

81. *United States v. UAW-CIO*, 352 U.S. 567, 571 (1957) (quoting ROOT, *supra* note 80, at 143).

82. *Id.* at 572 (quoting 40 CONG. REC. 96 (1905)).

83. *McConnell v. FEC*, 540 U.S. 93, 115 (2003), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

84. Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2006)), *invalidated by* *Citizens United*, 130 S. Ct. 876.

85. *Id.* Just a few years after passing the Tillman Act, Congress extended restrictions by requiring federal candidates to provide financial disclosures before and after elections. *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208–09 (1982).

86. *Nat’l Right to Work Comm.*, 459 U.S. at 209 (quoting Federal Corrupt Practices Act of 1925, Pub. L. No. 68-506, §§ 302, 313, 43 Stat. 1070, 1071, *repealed by* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 405, 86 Stat. 3, 20 (1972)).

87. *McConnell*, 540 U.S. at 116 (citation omitted) (internal quotation marks omitted).

88. Act of Aug. 2, 1939 (Hatch Act), ch. 410, 53 Stat. 1147 (codified at scattered sections of 5 and 18 U.S.C. (2006)), *amended by* Act of July 19, 1940 (Hatch Act Amendments), ch. 640, 54 Stat. 767; *McConnell*, 540 U.S. at 116.

89. War Labor Disputes Act (Anti-Strike Act), ch. 144, § 9, 57 Stat. 163, 167–68 (1943); *Nat’l Right to Work Comm.*, 459 U.S. at 209.

90. Contributions are donations made to political candidates, while expenditures are monies spent to disseminate independent messages that advocate for the election or defeat of a political candidate. See 2 U.S.C. § 431(8)(A)(i–ii) (2006) (defining contribution as “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or the payment by any person of compensation for the

the Taft-Hartley Act,⁹¹ which prohibited corporations and unions from making campaign expenditures from their general treasuries in both primary and general elections.⁹² Though the Court did rule on cases in which corporations and unions raised facial challenges to the constitutionality of regulations on campaign contributions and expenditures, for decades the Court did not decide these constitutional questions and instead rested the cases on other grounds.⁹³ These opinions did, however, provide some insight into how the Court might decide a facial challenge to campaign expenditure prohibitions. For example, Justice Rutledge, concurring in *United States v. Congress of Industrial Organizations*,⁹⁴ stated that the restrictions at issue targeted “the bloc power of unions” because unions had made such large campaign expenditures that they had disproportionately swayed political sentiment.⁹⁵ This targeting, Justice Rutledge explained, stifled rights that are “essential to the full, fair and untrammelled operation of the electoral process.”⁹⁶ In *Pipefitters Local Union No. 562 v. United States*,⁹⁷ the Court came to a more telling conclusion when it held that a ban on union campaign expenditures⁹⁸ did not apply to expenditures made from political funds financed through voluntary donations by employees,⁹⁹ thus drawing a clear distinction between monies given to the union

personal services of another person which are rendered to a political committee without charge for any purpose”); *supra* note 52 (providing a definition of expenditure).

91. Labor-Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136, 159 (1947), *repealed and replaced by* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112, 90 Stat. 475, 490 (codified as amended at 2 U.S.C. § 441b (2006), *invalidated by* Citizens United v. FEC, 130 S. Ct. 876 (2010)).

92. *Id.*

93. *See, e.g.*, *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 387–88, 400 (1972) (declining to decide whether the Labor Management Relations Act of 1947’s prohibitions on contributions or expenditures by corporations and unions was unconstitutional); *United States v. UAW-CIO*, 352 U.S. 567, 568, 589–93 (1957) (same); *United States v. CIO*, 335 U.S. 106, 107–08 n.1, 110 (1948) (same).

94. 335 U.S. 106.

95. *Id.* at 143 (Rutledge, J., concurring in the result) (internal quotation marks omitted).

96. *Id.* at 144.

97. 407 U.S. 385.

98. In *Pipefitters*, the Court discussed the ban on union campaign expenditures in the Labor Management Relations Act of 1947. *Id.* at 387–88, 427.

99. *Id.* at 409. The Court looked to § 205 of FECA for additional support for this conclusion. *Id.* at 409. Section 205 makes it unlawful for unions to make a campaign expenditure using “money or anything of value secured by physical force, job discrimination, financial reprisals” or by “threat” of such action or by “monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.” *Id.* at 409–10 (emphasis omitted) (quoting Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 205, 86 Stat. 3, 10 (1972)).

voluntarily for political purposes and those given for nonpolitical purposes.¹⁰⁰

In the early 1970s, Congress expanded campaign spending regulation once more by enacting the FECA,¹⁰¹ legislation that the Court in *Buckley* referred to as “by far the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress.”¹⁰² By the end of that decade, legislatures in more than thirty states had enacted restrictions on corporate political activity, finding these restrictions “both politically desirable and constitutionally permissible.”¹⁰³ Congress passed the BCRA¹⁰⁴ to further restrict corporations from making expenditures except through political action committees (“PACs”).¹⁰⁵ The justification for these regulations was generally the ability of unions and corporations to actually or apparently cause political corruption and gain political clout by making excessively large campaign contributions and expenditures.¹⁰⁶

2. *The Supreme Court Granted Considerable Deference to Legislatures on Corporate Campaign Finance Regulation*

The Court afforded campaign finance regulation a considerable level of deference throughout the wave of federal and state regulations from the early 1900s through the 2000s. In *FEC v. National Right to Work Committee*,¹⁰⁷ the Court stated that the “careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for

100. Nonpolitical purposes of the labor union fund at issue in *Pipefitters* included “educational, . . . charity and defense purposes.” *Id.* at 394 n.6.

101. Pub. L. No. 92-225, § 405, 86 Stat. 3, 20.

102. *Buckley v. Valeo*, 424 U.S. 1, 7 (1976) (per curiam) (alteration in original) (quoting *Buckley v. Valeo*, 519 F.2d 821, 831 (1975), *rev’d in part by Buckley*, 424 U.S. 1).

103. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 822–23 (1978) (Rehnquist, J., dissenting). In his dissent, Justice Rehnquist commented that “such a broad consensus of governmental bodies expressed over a period of many decades is entitled to considerable deference from [the] Court.” *Id.* at 823.

104. Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 18, 28, 36, and 47 U.S.C. (2006)).

105. *Id.* Political action committees are funds that are independent of a corporation and are used exclusively to collect campaign contribution and expenditure funds. See *McConnell v. FEC*, 540 U.S. 93, 118 (2003) (defining PACs as “separate segregated funds . . . for election-related contributions and expenditures”), *overruled on other grounds by Citizens United v. FEC*, 130 S. Ct. 876 (2010).

106. See, e.g., *McConnell*, 540 U.S. at 115 (“BCRA is the most recent federal enactment designed ‘to purge national politics of what was conceived to be the pernicious influence of “big money” campaign contributions.’” (quoting *United States v. UAW-CIO*, 352 U.S. 567, 572 (1957))).

107. 459 U.S. 197 (1982).

the particular legal and economic attributes of corporations and labor organizations warrants considerable deference.”¹⁰⁸

In 2003, the Court in *FEC v. Beaumont*¹⁰⁹ echoed the deference exhibited in *National Right to Work*, stating that the Court’s “cases on campaign finance regulation represent respect for . . . legislative judgment.”¹¹⁰ In holding that FECA’s restriction on nonprofit advocacy corporations was permissible under the First Amendment,¹¹¹ Justice Souter, writing for the majority, opened by noting, “Since 1907, federal law has barred corporations from contributing directly to candidates for federal office.”¹¹² The Court stressed the strong support behind the law at issue, describing the “century of congressional efforts” that went into carefully crafting a prohibition on corporate political spending.¹¹³ Describing cases in which it upheld such prohibitions, the Court demonstrated that these congressional efforts also had a history of judicial support.¹¹⁴ Finally, to clarify that the Court’s respect for legislative restrictions on corporate political spending was not a mere rubberstamp, the Court stated that “deference to legislative choice is warranted,” especially with respect to campaign contributions.¹¹⁵

Notably, the Court in *National Right to Work* deemed Congress’s finding that corporations and unions posed dangers to the electoral process sufficient justification for regulating the contributions of those entities.¹¹⁶ These dangers included both actual corruption and the appearance of corruption and the corporate form’s potential to exert improper influence on the political process.¹¹⁷ Additionally, the *National Right to Work* Court emphasized the strength of its deference to Congress on corporate campaign finance regulation, declining to “second-guess a legislative determination as

108. *Id.* at 209 (citation omitted) (internal quotation marks omitted).

109. 539 U.S. 146 (2003).

110. *Id.* at 155 (internal quotation marks omitted). *But see* *United States v. CIO*, 335 U.S. 106, 130 (1948) (Rutledge, J., concurring in the result) (arguing that the majority, in avoiding deciding questions of constitutionality, misconstrued and effectively rewrote the statute, which the Court should have found “patently invalid as applied”); *see also UAW-CIO*, 352 U.S. at 593 (Douglas, J., dissenting) (arguing that the restrictions on corporate and union speech are violations of the First Amendment).

111. *Beaumont*, 539 U.S. at 149. The restriction at issue in *Beaumont* was FECA’s restriction on any corporation attempting to make contributions or expenditures in relation to certain federal elections. *Id.* (quoting Pub. L. No. 94-283, § 321, 90 Stat. 490, 490–92 (codified as amended at 2 U.S.C. § 441b (2006))).

112. *Id.*

113. *Id.* at 152–53.

114. *Id.* at 153–55.

115. *Id.* at 155 (reasoning that corporate campaign contributions are a “plain threat to political integrity”).

116. *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 209 (1982).

117. *Id.* at 209–10.

to the need for prophylactic measures where corruption is the evil feared.”¹¹⁸ In granting such great deference to Congress, the Court relied upon its finding in *California Medical Association v. FEC*¹¹⁹ that “the differing structures and purposes of different entities may require different forms of regulation in order to protect the integrity of the electoral process.”¹²⁰

C. Regulation Based on the Speaker’s Wealth or a Corporate Speaker’s Business Interests Is Unconstitutional

In the late 1970s, the Court issued two opinions addressing the constitutionality of statutes that restricted campaign expenditures. The first of these opinions, *Buckley v. Valeo*, established the principle that a campaign expenditure restriction based on a speaker’s wealth is a violation of the First Amendment’s free speech protection.¹²¹ The *Buckley* Court, however, faced a blanket limitation on campaign expenditures, not a limitation specific to corporate or union expenditures.¹²² Shortly thereafter, in *First National Bank of Boston v. Bellotti*, the Court struck down a statute that restricted corporate speech on referenda if the referenda did not materially affect the corporation.¹²³

1. The Buckley Court Prohibited Campaign Expenditure Restrictions Based on the Speaker’s Wealth

In *Buckley*, the Court addressed the constitutionality of various provisions of FECA, including the Act’s limits on campaign expenditures made by individuals or groups that are “relative to a clearly identifiable candidate.”¹²⁴ The Court in *Buckley* considered two FECA provisions: one that set campaign expenditure limits and another that set limits on political contributions by groups or individuals.¹²⁵ Under either provision, the Court found that “the quantity of expression[,] . . . the number of issues

118. *Id.* at 210.

119. 453 U.S. 182 (1981).

120. *Nat’l Right to Work Comm.*, 459 U.S. at 210 (quoting *Cal. Med. Ass’n*, 453 U.S. at 201) (internal quotation marks omitted). In *National Right to Work*, the Court noted that its decision was consistent with *Bellotti* because the *Bellotti* Court stated that its decision did not evaluate the constitutionality of laws prohibiting corporate influence over candidate elections. *Id.* at 210 n.7 (citing *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 788 n.26 (1978)); *see also infra* Part II.C.2.

121. *See infra* Part II.C.1.

122. *See infra* Part II.C.1.

123. *See infra* Part II.C.2.

124. *Buckley v. Valeo*, 424 U.S. 1, 6, 13 (1976) (per curiam) (quoting Federal Election Campaign Act of 1971, Pub. L. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–56 (2006))).

125. *Id.* at 13 & n.12.

discussed, the depth of their exploration, and the size of the audience reached” in the context of a political campaign was necessarily reduced.¹²⁶

Recognizing that both provisions therefore implicated First Amendment interests, the Court drew a distinction between the provisions on the basis of the degree of restriction that each placed on an individual’s or group’s freedom of expression and association, finding that expenditure limits placed a substantially more severe limitation on the freedoms of political expression and association than contribution limits.¹²⁷

The Court in *Buckley* found the governmental interest in preventing corruption adequate to sustain the statute’s contribution limits.¹²⁸ The Court grounded its holding in the governmental interest in preventing actual or apparent quid pro quo¹²⁹ corruption.¹³⁰ The Court noted, however, that Congress was permitted to address not only the threat posed by quid pro quo corruption but also the broader threat posed by politicians who are too compliant with large contributors.¹³¹ Conversely, the Court struck down

126. *Id.* at 19. The Court reasoned that a restriction on spending during a political campaign necessarily restricts political speech “because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.” *Id.*

127. *Id.* at 23. Limitations on campaign contributions, according to the *Buckley* Court, place “only a marginal restriction upon the contributor’s ability to engage in free communication” of political speech. *Id.* at 20–21. Contributions provide only a rough indicator of a contributor’s support for a candidate and are merely “symbolic expression[s] of support.” *Id.* at 21. More importantly, a contribution is not speech by the contributor per se but is transformed into speech by others. *See id.* (“While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.”).

128. *See id.* at 29 (finding that “the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the \$1,000 contribution ceiling”). Thirty years after *Buckley*, the Court qualified its holding by striking down a Vermont statute that set contribution limits so low that they threatened the viability of political campaigns. *See Randall v. Sorrell*, 548 U.S. 230, 261–62 (2006) (plurality opinion) (explaining that the Vermont statute “goes too far” because “its contribution limits mute the voice of political parties; they hamper participation in campaigns through volunteer activities; and they are not indexed for inflation”).

129. Quid pro quo corruption is the receipt of money, as contributions or expenditures, in cases of campaign speech, in exchange for improper commitments from a political candidate. *Buckley*, 424 U.S. at 47.

130. *Id.* at 26–27. Stressing the importance of fundraising to the execution of a successful campaign and the threat that political quid pro quo presents to democracy, the *Buckley* Court found the need to prevent actual quid pro quo corruption to be quite clear. *See id.* (stating that actual corruption is not an illusory problem and citing the 1972 presidential election Watergate scandal as a particularly glaring example). The Court also recognized that the appearance of corruption—the “public awareness” of the possibility of corruption stemming from large campaign contributions—is almost as great a concern as actual corruption because apparent corruption could erode public confidence in our representative democracy. *Id.* at 27.

131. *See Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000) (citing *Buckley*, 424 U.S. at 28) (stating that the *Buckley* Court recognized “that the Congress could constitutionally address the power of money ‘to influence governmental action’ in ways less ‘blatant and specific’ than bribery”).

the statute's limits on campaign expenditures by groups and individuals, finding the governmental interest in preventing corruption and the appearance of corruption insufficient justification for such restrictions.¹³² The Court found that the danger of quid pro quo corruption was alleviated in the case of expenditures because expenditures do not entail coordination with the political candidate.¹³³

The *Buckley* Court also established a key campaign finance regulation doctrine: The government may not impose regulations on speech in the interest of "equalizing the relative ability of individuals and groups to influence the outcome of elections."¹³⁴ *Buckley* rejected any possibility that the government could restrict political speech on the basis of an equalization interest, arguing that such an interest unjustifiably inhibits the political marketplace of ideas.¹³⁵ Relying upon its reasoning in *New York Times Co. v. Sullivan*,¹³⁶ the Court in *Buckley* found that equalization is "wholly foreign to the First Amendment," as that Amendment was drafted "to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."¹³⁷ Specifically identifying campaign expenditures as speech,¹³⁸ the Court stated that the First Amendment's freedom of speech provisions "cannot properly be made to depend on a person's financial ability to engage in public discussion."¹³⁹ Notably, in its holdings on campaign expenditures, the Court did not distinguish among various "individuals" and "groups" for First Amendment freedom of speech purposes.¹⁴⁰

2. *The Government Cannot Restrict Corporate Political Speech Based on Corporate Interests and Identity*

In 1978, the *Bellotti* Court, following on the heels of *Buckley*, held unconstitutional a statute that prohibited corporations from making campaign expenditures related to referenda that did not affect the material interests of the corporation.¹⁴¹ Specifically, the Court addressed the

132. *Buckley*, 424 U.S. at 45.

133. *Id.* at 47.

134. *Id.* at 48–49.

135. *See id.* at 48–49.

136. 376 U.S. 254 (1964).

137. *Buckley*, 424 U.S. at 48–49 (internal quotation marks omitted) (quoting *Sullivan*, 376 U.S. at 266, 269).

138. *Id.* at 16–19.

139. *Id.* at 49.

140. *See id.* at 39–51 (discussing the constitutionality of campaign expenditure restrictions without differentiating between restrictions on individuals and restrictions on groups).

141. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 767–68, 776 (1978).

constitutionality of a Massachusetts statute that prohibited certain businesses from making expenditures “for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, businesses or assets of the corporation.”¹⁴² The statute at issue in *Bellotti* also provided that “[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation,” thus precluding the businesses from making independent expenditures relative to these issues.¹⁴³

In reaching its holding, the Court reasoned that “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source,” and moreover, that political speech is the very type of speech that is essential to democratic decision making.¹⁴⁴ Therefore, the fact that the government has determined that a corporation has no material interest in a referendum does not dampen the capacity of that corporation to inform the public on that referendum.¹⁴⁵ Acknowledging the divisive role that the corporate identity plays in campaign finance regulation, the Court stated that “[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech.”¹⁴⁶ The Court also stressed that the First Amendment protects speech that is highly persuasive as much as it protects speech that is unpersuasive.¹⁴⁷ Thus, the fact that a corporation’s political speech has substantial sway in the political marketplace is an impermissible basis for restricting that speech.¹⁴⁸

The Court turned next to the section of the statute that permitted corporations to make expenditures should a referendum “materially affect” the corporation.¹⁴⁹ The Court found that the statute was “an impermissible legislative prohibition of speech based on the identity of the interests” proffered by a speaker if that speaker were unable to prove a substantial

142. *Id.* at 768 (alteration in original) (quoting MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)).

143. *Id.* at 767–68 (alteration in original) (quoting MASS. GEN. LAWS ANN. ch. 55, § 8).

144. *Id.* at 777.

145. *See id.* at 776–77 (noting that while “[t]he importance of the referendum issue to the people and government of Massachusetts is not disputed,” the merits of the referendum “are the subject of sharp disagreement,” and suggesting that the corporation’s speech may have a “capacity for informing the public” on the referendum issue).

146. *Id.* at 777. The Court characterized campaign speech as “the type of speech indispensable to decisionmaking in a democracy.” *Id.*

147. *Id.* at 790.

148. *See id.* (“[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it . . .”).

149. *Id.* at 784.

interest in a particular subject.¹⁵⁰ In so finding, the Court did not draw a clear distinction between corporate identity discrimination and corporate interest discrimination.

Though blanket restrictions on campaign expenditures like the restriction at issue in *Buckley* are subject to strict scrutiny,¹⁵¹ restrictions based on the characteristics of a particular speaker or on the context of the speech are not foreclosed by the Court's jurisprudence. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,¹⁵² the Court stated that differential treatment of speakers is suspect "unless justified by some special characteristic" of the regulated class.¹⁵³ Moreover, the rights of certain speakers may turn on the context of the speech. For example, in the school context, a student's right to speak may not be "automatically coextensive with the rights of adults in other settings" because the context requires limitation of those rights.¹⁵⁴ Additional examples of constitutionally permissible identity-based restrictions include restrictions on the speech rights of prisoners,¹⁵⁵ foreigners,¹⁵⁶ government employees,¹⁵⁷ and members of the military.¹⁵⁸

150. *Id.*

151. *See* *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976) (per curiam). Because expenditure limitations impose a large burden on the freedom of speech and association, the governmental interests underlying the limitations are subject to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.*

152. 460 U.S. 575 (1983).

153. *See id.* at 585, 591 (holding that a Minnesota tax on ink and paper violated the First Amendment because "it single[d] out the press, . . . target[ed] a small group of newspapers," and no special characteristic of the press justified the tax).

154. *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007) (quoting *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

155. *See, e.g., Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977) (stating that the First Amendment rights of inmates are limited by "the legitimate penological objectives of the corrections system" and the involuntary nature of incarceration, which sets prisons apart from normal society (internal quotation marks omitted)).

156. *See, e.g., 2 U.S.C. § 441e(a)(1)* (2006) (prohibiting foreign nationals from making contributions or expenditures toward a federal, state, or local election).

157. *See, e.g., U.S. Civil Serv. Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 554, 556 (1973) (upholding the Hatch Act's prohibition on executive branch employees "taking an active part in political management or political campaigns").

158. *See, e.g., Parker v. Levy*, 417 U.S. 733, 758 (1974) (stating that the unique "character of the military community and of the military mission" permits the differential treatment of members of the military under the First Amendment).

D. The Court Created an Exception for Certain Nonprofit Corporations Whose Expenditures Reflected Actual Political Support for Its Speech, and It Subsequently Built Its Antidistortion Rationale from This Reasoning

In the 1980s, the Court began to clearly articulate and uphold the government's interest in restricting corporate campaign expenditures—to ensure that political speech reflected the actual views of those persons whose money was used to propagate the speech. In 1986, the Court, in *FEC v. Massachusetts Citizens for Life, Inc.* (“MCFL”), ruled on an as-applied challenge to Section 316 of FECA, which specifically “prohibits corporations from using [general] treasury funds to make an expenditure ‘in connection with’ any federal election.”¹⁵⁹ Massachusetts Citizens for Life (“MCFL”) is “a nonprofit, nonstock corporation” that used its general treasury funds to make an expenditure affecting a federal election rather than making its expenditure using contributions drawn from a segregated fund established for political purposes.¹⁶⁰ The Court held that the restriction on the use of the general treasury to make campaign expenditures was unconstitutional as applied to MCFL and in doing so established a three-prong exception—the *MCFL* exception—to FECA’s prohibition on corporate expenditures using general treasury funds.¹⁶¹ To satisfy the exception, a corporation must (1) be “formed for the express purpose of promoting political ideas, and cannot engage in business activities,” (2) have no shareholders or other persons with claims to the corporation’s “assets or earnings,” and (3) not accept contributions from businesses corporations or labor unions.¹⁶²

The *MCFL* exception derived from the governmental interest that was a primary driver of campaign finance reform: preventing “the corrosive influence of concentrated corporate wealth” from affecting “the integrity of the marketplace of political ideas.”¹⁶³ The Court, however, did not find

159. 479 U.S. 238, 241 (1986) (quoting Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 316, 90 Stat. 475, 490 (codified as amended at 2 U.S.C. § 441b (2006), *invalidated by* Citizens United v. FEC, 130 S. Ct. 876 (2010)).

160. *Id.* This separate, segregated fund would constitute a PAC. For a definition of PACs, see *supra* note 105.

161. *MCFL*, 479 U.S. at 263–64.

162. *Id.* at 264.

163. *Id.* at 257. In assessing the FEC’s argument that the application of FECA § 316 to MCFL was permissible, the Court briefly described its extensive history of permitting corporate campaign finance regulation. *Id.* This history includes permitting the restriction of “political war chests” amassed using the corporate form, *FEC v. Nat’l Conservative Pol. Action Comm.*, 470 U.S. 480, 501 (1985), permitting restrictions in the interest of eliminating the impact of aggregated corporate wealth on federal elections, *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 416 (1972), stemming the influence of “large aggregations of capital,” *United States v. UAW-CIO*, 352 U.S. 567, 585 (1957), and regulating money amassed due to the

this interest sufficient to support a restriction on corporate campaign expenditures where the corporation met the Court's three-prong test.¹⁶⁴ Though the *MCFL* Court may have appeared to lean toward supporting an equalization rationale because it supported legislative restrictions on the political speech of wealthy corporations that threatened to drown out the voices of others,¹⁶⁵ it explicitly disavowed such a justification, stating that “[p]olitical ‘free trade’ does *not* necessarily require that all who participate in the political marketplace do so with exactly equal resources.”¹⁶⁶ Rather, the *MCFL* Court found that political expenditures from a corporation's general treasury do not necessarily reflect “popular support for the corporation's political ideas,” but instead merely reflect “the economically motivated decisions of investors and customers.”¹⁶⁷ Thus, corporate resources create the risk of a corporation becoming “a formidable political presence,” despite the fact that a corporation's political ideas likely have no foundation in actual public support.¹⁶⁸ In sum, wealth itself is not the problem: The problem is that wealth amassed by a corporation and spent on campaign expenditures does not reflect actual public support for the expenditures.

As the *MCFL* Court explained, FECA's PAC provisions prevent corporate resource dominance in the political marketplace by ensuring that a corporation promulgates its political ideas using a fund that “in fact reflect[s] popular support for the [corporation's] political positions.”¹⁶⁹ This interest is tied to protecting the integrity of the political marketplace of ideas because it ensures that competition in the marketplace “is truly competition among ideas.”¹⁷⁰ Massachusetts Citizens for Life was granted an exception under FECA specifically because the three characteristics

benefits that accompany the corporate form, *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207 (1982).

164. See *MCFL*, 479 U.S. at 256–63 (explaining how *MCFL*'s satisfaction of the three-factor test eliminates the concerns that underlie the corporate expenditure restriction).

165. See *supra* note 134 and accompanying text.

166. *MCFL*, 479 U.S. at 257 (emphasis added).

167. *Id.* at 258.

168. See *id.* (explaining that “the power of the corporation”—its corporate resources—“may be no reflection of the power of its ideas”).

169. *Id.*

170. *Id.* at 259. The Court's reverence for the protection of the marketplace of ideas under the First Amendment can be traced back to Justice Holmes's dissent in *Abrams v. United States*, 250 U.S. 616 (1919) in which he championed an open marketplace, stating,

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

250 U.S. at 630 (Holmes, J., dissenting).

outlined by the Court¹⁷¹ ensure that MCFL and other exempt corporations do not pose a threat to the integrity of the political marketplace.

In 1990, the Court used its reasoning in *MCFL* to articulate an antidistortion rationale for regulating corporate campaign expenditures. Faced with a state statute that prohibited corporations from using corporate treasury funds to make expenditures in relation to a candidate for state office, the Court in *Austin v. Michigan Chamber of Commerce* used the *MCFL* reasoning to formulate and define the governmental interest in preventing corporate wealth from distorting the political marketplace.¹⁷²

This governmental antidistortion interest, according to the *Austin* Court, “aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”¹⁷³

As did the Court in *MCFL*,¹⁷⁴ the Court in *Austin* clarified that the statute it held constitutional did not attempt “to equalize the relative influence of speakers on elections”¹⁷⁵ but rather “ensure[d] that expenditures reflect actual public support for the political ideas espoused by corporations.”¹⁷⁶

Applying this antidistortion rationale to the operation of the statute at issue, the Court held that the restriction on corporate expenditures was constitutional.¹⁷⁷ The Court acknowledged that the corporate identity of the Michigan State Chamber of Commerce did not remove it from First Amendment protections.¹⁷⁸ Nevertheless, the Court applied the *MCFL* reasoning in upholding the statute, stating that the “state-created advantages” of the corporate form permit corporations to “obtain an unfair

171. *See supra* text accompanying notes 161–162.

172. 494 U.S. 652, 654, 658–60 (1990), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

173. *Id.* at 659–60. The Court noted that the statute in question did permit corporations to establish segregated funds specifically for raising monies earmarked for political expenditures, which ensures, like the *MCFL* exception, that the speech generated by the fund actually reflects contributors’ support for the corporation’s political views. *Id.* at 660–61.

174. *See supra* text accompanying notes 165–166.

175. *Austin*, 494 U.S. at 660 (internal quotation marks omitted). *But see id.* at 705 (Kennedy, J., dissenting) (“[T]he notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections is antithetical to the First Amendment.”); *id.* at 683–84 (Scalia, J., dissenting) (arguing that the majority in *Austin* effectively adopted an equalization rationale that has no logical foundation because corporations are prohibited from spending amassed wealth on expenditures while wealthy individuals can spend without limit).

176. *Id.* at 660 (majority opinion).

177. *Id.* at 655.

178. *Id.* at 657 (citing *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978)).

advantage in the political marketplace.”¹⁷⁹ The Court explicitly pointed to the misuse of the state-conferred advantages to potentially corrupt politics though the use of “political war chests funneled through the corporate form.”¹⁸⁰

Applying *Austin*’s antidistortion rationale and the Court’s prior opinions, which afford great deference to the legislature’s judgment in campaign finance law,¹⁸¹ in the 2003 case *McConnell v. FEC*, the Court upheld BCRA’s Section 203 prohibitions on the use of corporate general treasuries to make campaign expenditures.¹⁸² The Court recognized that since *Buckley*, Congress’s power to ban corporations from using general treasury funds to finance campaign expenditures “has been firmly embedded in our law.”¹⁸³ In finding that BCRA Section 203 was not a complete ban, the Court emphasized the important role that PACs play in corporate political speech.¹⁸⁴ Quoting its opinion in *FEC v. Beaumont*, the Court noted that PACs allow corporations to engage in political speech “without the temptation to use corporate funds for political influence” that may not align with the interests of the corporation’s shareholders.¹⁸⁵ Thus, prior to *Citizens United*, restrictions on corporate campaign expenditures were firmly embedded in the law, and the Court had not overturned any laws that barred corporations from making campaign expenditures using general treasury funds.

III. THE COURT’S REASONING

In *Citizens United v. FEC*,¹⁸⁶ the United States Supreme Court overruled its earlier rulings in *Austin* and *McConnell*, holding that the government may not suppress political speech on the basis of a speaker’s corporate identity, that the government cannot restrict expenditures for electioneering communications, and that BCRA Section 203’s ban on corporate campaign expenditures is unconstitutional.¹⁸⁷ The Court further

179. *Id.* at 658–59 (quoting *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 257 (1986)) (internal quotation marks omitted).

180. *Id.* at 659 (quoting *FEC v. Nat’l Conservative Pol. Action Comm.*, 470 U.S. 480, 500–01 (1985)) (internal quotation marks omitted).

181. *See supra* text accompanying notes 108–120.

182. 540 U.S. 93, 204–07 (2003).

183. *Id.* at 203.

184. *See id.* at 203–04 (“The ability to form and administer separate segregated funds . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy.”).

185. *McConnell*, 540 U.S. at 204 (quoting *FEC v. Beaumont*, 539 U.S. 146, 163 (2003)) (internal quotation marks omitted).

186. 130 S. Ct. 876 (2010).

187. *Id.* at 913, 917.

held that BCRA's disclosure and disclaimer provisions were constitutional as applied to the film *Hillary*.¹⁸⁸

Writing for the majority, Justice Kennedy first attempted to resolve the case on narrower grounds by addressing whether Section 203 was unconstitutional as applied to *Hillary*.¹⁸⁹ After determining that *Hillary* fell within the BCRA's definition of electioneering communication,¹⁹⁰ Justice Kennedy applied the *WRTL* test for the functional equivalent of express advocacy.¹⁹¹ The *WRTL* test provides that "a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."¹⁹² In light of *Hillary*'s extended criticism of then-Senator Clinton, the majority determined that the movie could be reasonably interpreted as nothing other than "an appeal to vote against Senator Clinton," and that *Hillary* was therefore the functional equivalent of express advocacy.¹⁹³ Upon finding that Citizens United did not fall under the *MCFL* nonprofit exception to Section 203,¹⁹⁴ the majority found that *Hillary* fell squarely within BCRA's prohibition on corporate electioneering communications and so rejected Citizens United's as-applied challenge.¹⁹⁵

Justice Kennedy then turned to Citizens United's facial challenge to BCRA Section 203.¹⁹⁶ The Court concluded that Section 203's independent expenditure prohibition "is an outright ban" on political speech, a set of "onerous restrictions" akin to the sort of sixteenth and seventeenth century English laws "the First Amendment was drawn to prohibit."¹⁹⁷ The majority rejected the argument that corporations can make expenditures via PACs, finding that PACs do not provide a sufficient means of engaging in campaign expenditures because they are independent

188. *Id.* at 916–17.

189. *Id.* at 888.

190. *Id.*

191. *Id.* at 889.

192. *Id.* at 889–90 (alterations in original) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469–70 (2007)).

193. *Id.* at 890.

194. *Id.* at 891 ("Citizens United does not qualify for the *MCFL* exemption . . . since some funds used to make the movie were donations from for-profit corporations.").

195. *Id.* at 889–90. The Court also rejected Citizens United's claims that § 203 is invalid as applied to video-on-demand distribution, declining "to draw, and then redraw, constitutional lines based on the particular media or technology" used for political speech. *Id.* at 890–91. Video-on-demand services permit digital cable customers "to select programming from various menus, including movies, television shows, sports, news, and music . . . and watch the program at any time" they prefer, with the ability to "rewind or pause the program." *Id.* at 887.

196. *Id.* at 892.

197. *Id.* at 895–97.

of corporations.¹⁹⁸ Section 203, according to Justice Kennedy, failed the strict scrutiny test because the Government had shown no compelling interest in restricting corporations and unions as speakers.¹⁹⁹ Justice Kennedy further asserted that because “[t]he First Amendment protects speech *and* speaker, and the ideas that flow from each,” the Government cannot impose speech restrictions based on corporate identity.²⁰⁰ To shore up this assertion, the Court listed examples of cases in which the Court recognized that First Amendment protection applies to corporations, relying primarily on *Buckley* and *Bellotti*.²⁰¹

Justice Kennedy then characterized *Austin* as a departure from the Court’s history of acknowledging the unconstitutionality of corporate campaign expenditure restrictions.²⁰² The Court rebuffed *Austin*’s antidistortion rationale on the ground that *Buckley* had rejected the notion that the government may restrict corporate political speech in an effort to equalize the marketplace of ideas.²⁰³ Furthermore, the majority concluded that the government’s antidistortion rationale was undercut by the fact that most corporations are actually small corporations whose receipts total less than one million dollars per year.²⁰⁴ Applying the *Buckley* Court’s anticorruption rationale to Section 203’s independent expenditure limits, the majority found that the rationale did not justify these limits because they extended far beyond the government’s interest in preventing quid pro quo corruption, which the majority concluded was the only governmental

198. *See id.* at 897 (describing the burdensome red tape associated with the operation of a PAC).

199. *Id.* at 898–99.

200. *Id.* (emphasis added).

201. *See id.* at 899–903. The Court explained that the *Buckley* Court invalidated § 608(e)’s expenditure restrictions, which applied to both individuals and corporations, but that *Buckley* in no way suggested that the restrictions would have been constitutional if placed only on corporations. *Id.* at 902 (citing *Buckley v. Valeo*, 424 U.S. 1, 23, 39 n.45, 50 (1976) (per curiam)). Similarly, *Bellotti*, the Court stated, confirmed First Amendment protection of corporations when it struck down a state law that prohibited corporate expenditures on referenda issues. *Id.*

202. *Id.* at 903.

203. *Id.* at 904. Moreover, the Court stated that “[i]t is irrelevant for purposes of the First Amendment that corporate funds may ‘have little or no correlation to the public’s support for the corporation’s political ideas.’” *Id.* at 905 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)). The Court also warned that the antidistortion rationale would inevitably lead to Congress banning the “political speech of media corporations” without constitutional concern. *Id.* (citing *McConnell v. FEC*, 540 U.S. 93, 283 (2003) (Thomas, J., concurring in part, concurring in the judgment, and dissenting in part) (“The chilling endpoint of the Court’s reasoning is not difficult to foresee: outright regulation of the press.”)).

204. *Id.* at 907. The Court reasoned that the statute could not in fact target amassed wealth because three quarters of corporations subject to federal income tax bring in less than one million dollars in receipts each year. *Id.*

interest that could sustain a restriction on campaign expenditures.²⁰⁵ Furthermore, the Court stated that “it is our law and our tradition that more speech, not less, is the governing rule,” and thus an “outright ban” on corporate political speech is not an appropriate remedy for real or apparent corruption.²⁰⁶ The majority concluded that *Austin* and the part of *McConnell* that upheld Section 203’s restrictions on corporate independent expenditures must be overruled, and that the Court must “return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker’s corporate identity.”²⁰⁷

Finally, the majority determined that the Section 201 and Section 311 disclosure and disclaimer requirements were not unconstitutional facially or as applied to *Hillary*.²⁰⁸ In so holding, Justice Kennedy relied on two pieces of precedent: (1) *Buckley*’s support of the government’s interest in informing the public about the source of election spending; and (2) *McConnell*’s application of this interest to uphold Sections 201 and 311 against facial challenges.²⁰⁹ Though the *McConnell* Court recognized that Section 201’s disclosure requirements would be unconstitutional as applied to a particular organization if the disclosures were likely to lead to threats and reprisals against its members, the Court found that Citizens United had produced no evidence showing that its satisfaction of the requirements would lead to such a result.²¹⁰

Justice Thomas joined all of Justice Kennedy’s majority opinion except for the part upholding Sections 201 and 311 both facially and as applied to *Hillary*.²¹¹ Finding the BCRA’s disclosure and disclaimer requirements unconstitutional, Justice Thomas argued that political speech is entitled to more robust protection in the face of evidence of threats and retaliation against certain donors and that political speech is unduly chilled where courts only handle these cases on an as-applied basis.²¹²

205. See *id.* at 908–11. The Court also rejected the shareholder protection and prevention of foreign influence rationales. *Id.* at 911.

206. *Id.*

207. *Id.* at 913. To justify its departure from stare decisis, the Court stated that *Austin* abandoned established First Amendment principles and was undermined by subsequent experience and “[r]apid changes in technology,” and asserted that there was no compelling reliance interest at stake in its overruling. *Id.* at 912–13.

208. *Id.* at 913–14.

209. *Id.* at 914.

210. *Id.* at 916.

211. *Id.* at 979 (Thomas, J., concurring in part and dissenting in part).

212. See *id.* at 980–82 (“I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in core political speech, the primary object of First Amendment protection.” (internal quotation marks omitted)).

Chief Justice Roberts wrote a concurring opinion, in which Justice Alito joined, to elaborate on the majority's justification for departing from *stare decisis*.²¹³ Chief Justice Roberts asserted that the Court had properly abandoned *Austin* because it "departed from the robust protections [the Court] had granted political speech in [its] earlier cases," its value as precedent had weakened over time and in light of controversy surrounding the decision, and it threatened to permit government prohibition of speech in the interest of equalizing political voices.²¹⁴

Justice Scalia also filed a concurring opinion, in which Justice Alito joined and Justice Thomas joined in part, criticizing Justice Stevens's dissent for failing to show in his discussion of "*Original Understandings*" that the Framers did not intend to protect corporate speech.²¹⁵ Instead, Justice Scalia argued, the Framers intended for the First Amendment freedom of speech to extend to both individuals speaking alone and individuals speaking in association with others, with the latter of these two classes of protected speakers including corporations.²¹⁶

Justice Stevens, joined by Justice Ginsburg, Justice Breyer, and Justice Sotomayor, wrote an opinion concurring in part and dissenting in part ("the dissent").²¹⁷ The real question in this case, the dissent believed, "concern[ed] how, not if, [Citizens United] may finance its electioneering" communications.²¹⁸ Justice Stevens argued that the BCRA does not ban corporations from promulgating political speech, as the majority claimed, but only imposes justified restrictions on corporate speakers.²¹⁹

Justice Stevens opened by explaining that the majority improperly raised the issue of whether to overrule *Austin* and, effectively, *McConnell* sua sponte when the Court could have decided the case on narrower grounds.²²⁰ Additionally, the dissent claimed, the majority departed from *stare decisis* without satisfying any standard for doing so.²²¹

213. *See id.* at 917 (Roberts, C.J., concurring).

214. *Id.* at 921–22.

215. *Id.* at 925 (Scalia, J., concurring).

216. *Id.* at 928–29.

217. *Id.* at 929 (Stevens, J., concurring in part and dissenting in part).

218. *Id.*

219. *See generally id.* at 961–79.

220. *See id.* at 931–38. Citizens United, Justices Stevens noted, abandoned its facial challenge to § 203 in its motion for summary judgment, "and the parties stipulated to the dismissal of that claim." *Id.* at 931. Justice Stevens argued that the majority's resurrection of the claim was both "a technical defect" and a departure from "the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* at 932–33 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)). Justice Stevens noted the following alternative paths to deciding the case on narrower grounds: (1) determine that a movie distributed by video-on-demand is not an electioneering communication under § 203; (2) "expand[] the *MCFL*

The dissent characterized Section 203 not as a ban on corporate political speech but as a narrow restriction justified by anticorruption, antidistortion, and shareholder protection rationales.²²² Like the disclosure and disclaimer requirements, Justice Stevens argued, the Section 203 restrictions and PAC exceptions impose a justified burden on corporate speech.²²³ According to the dissent, the Court had previously upheld identity-based restrictions such as these in a variety of circumstances on the basis of compelling government interests.²²⁴ Justice Stevens argued that political speech restrictions based on corporate identity are constitutionally sound because the Framers intended the First Amendment right to free speech to extend to individuals, not corporations.²²⁵ The dissent used the history of campaign finance reform and the Court's corporate campaign finance jurisprudence to support this historical interpretation.²²⁶ Justice Stevens noted that, at the time the First Amendment was drafted, "the term 'speech' referred to oral communication by individuals," such that corporations, which "were conceived of as artificial entities" lacking "the technical capacity to 'speak,'" could not plausibly have been encompassed in the Framers' concept of freedom of speech.²²⁷

Justice Stevens then cited an extensive record of corruption that he argued provided the basis for the government's anticorruption interest and, by extension, *Austin's* antidistortion rationale.²²⁸ Finally, the dissent

exemption to cover § 501(c)(4) nonprofits that accept only . . . *de minimis* [contributions] from for-profit corporations"; or (3) find that Citizens United falls within the *MCFL* exception, as "Citizens United looks so much like the *MCFL* organizations [the Court has] exempted from regulation" in the past. *Id.* at 937–38.

221. *See id.* at 938–42 (rejecting reliance, antiquity, and workability as justifications for the majority's departure from *stare decisis*).

222. *See id.* at 961–79. Shareholder protection is the governmental interest in ensuring that shareholders are not made to pay for political speech that they do not support themselves. *See infra* text accompanying note 229.

223. *Citizens United*, 130 S. Ct. at 942–43 (Stevens, J., concurring in part and dissenting in part).

224. *Id.* at 945–46. Justice Stevens cited government restrictions on the speech rights of "students, prisoners, members of the Armed Forces, foreigners, and its own employees." *Id.* at 945 & n.41 (citing *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (students)); *id.* at 945 & n.42 (citing *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977) (prisoners)); *id.* at 945 & n.43 (citing *Parker v. Levy*, 417 U.S. 733, 758 (1974) (members of the Armed Forces)); *id.* at 945 & n.44 (citing 2 U.S.C. § 441e(a)(1) (foreign nationals)); *id.* at 945 & n.45 (citing *U.S. Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 554, 556 (1973) (federal government employees)).

225. *Id.* at 949–50.

226. *See id.* at 952–61 (extensively detailing the legislative and jurisprudential histories of campaign finance law).

227. *Id.* at 950 n.55.

228. *Id.* at 961–70. Justice Stevens argued that the *Austin* antidistortion rationale is essentially an anticorruption rationale that is specifically tied to unique considerations relevant to corporations. *Id.* at 970.

maintained that Section 203 actually protects First Amendment values by protecting shareholders from having to “effectively foot[] the bill” for political speech that they may or may not support.²²⁹

IV. ANALYSIS

In *Citizens United v. FEC*, the Supreme Court wrongly concluded that banning the use of corporate and union general treasuries to fund speech that advocates for the election or defeat of a political candidate violates the First Amendment.²³⁰ Contrary to the majority’s contention, *Citizens United* did not bring the Court back to its rulings in *Buckley* and *Bellotti*²³¹ but instead took a sharp turn away from the Court’s history of recognizing the government’s anticorruption interests and its tradition of granting deference to the legislature on campaign finance reform.²³² Indeed, the Court failed to recognize that *Buckley* and *Bellotti* cannot be so readily extrapolated to apply to the corporate expenditure restrictions at issue in *Citizens United*, as the reasoning in those cases is far more nuanced than the Court’s opinion suggests.²³³ By misconstruing *Buckley* and *Bellotti*, the Court also characterized *Austin* as an outlier, when in fact *Austin* accords with these cases and is a logical extension of the *Citizens United* Court’s reasoning in *MCFL*.²³⁴ Finally, in striking down BCRA Section 203’s²³⁵ restrictions on corporate expenditures, the Court opened the door for throngs of so-called phantom speakers to enter the political marketplace.²³⁶

A. Citizens United Took a Sharp Turn Away from the Court’s Long-Standing History of Acknowledging a Governmental Interest in Combating Actual and Apparent Corruption

The majority in *Citizens United* failed to give sufficient weight to the governmental interest in preventing corruption.²³⁷ Corruption has

229. *Id.* at 977–79.

230. *Id.* at 886–87, 896–97, 913 (majority opinion).

231. *See supra* note 207 and accompanying text.

232. *See infra* Part IV.A.

233. *See infra* Part IV.B.

234. *See infra* Part IV.C.

235. 2 U.S.C. § 441b (2006), *invalidated by Citizens United*, 130 S. Ct. 876.

236. *See infra* Part IV.D.

237. Perhaps pursuing a governmental interest in preventing corruption by limiting campaign expenditures is a futile endeavor. Scholars have argued that the system of campaign financing is “hydraulic” in nature—that money always finds a pathway into campaigns—and so the problem of money and politics is simply intractable. Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 120 (2010) (citing Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999)) (noting that political money has used outlets such as PACs to circumvent the regulatory system).

infiltrated politics via corporate contributions and expenditures in two distinct ways: (1) actual corruption wherein corporate political spending directly influenced politicians and policy; and (2) apparent political corruption, which eroded the American public's trust in its government.²³⁸

The majority in *Citizens United* failed to fully address these modes of corruption because it mistakenly used dicta from *Buckley* to find that the only governmental interest that can sustain a campaign expenditure restriction is the prevention of quid pro quo corruption.²³⁹

Numerous instances of quid pro quo corruption have been documented throughout this nation's history.²⁴⁰ In the 1830s, banks and corporations began making sizable donations to political parties in an effort to sway policy in their favor.²⁴¹ They did not limit their efforts to contributions. When Andrew Jackson "declared himself an enemy of the Bank of the United States," the president of the bank spent \$42,000 to conduct a campaign against Jackson, a candidate in the 1832 presidential election.²⁴² In response to this long history and riding the tide of anger over the Watergate scandal, Congress passed the 1974 FECA amendments, tightening restrictions on campaign finance.²⁴³

Despite FECA's restrictions on contributions, corporations were able to skirt these restrictions throughout the 1980s and 1990s by making expenditures for "issue advocacy." Issue advocacy involves those expenditures for political speech that avoid the use of "magic words" identified in *Buckley* to represent express advocacy for a candidate's election or defeat, and thus avoid contribution limits.²⁴⁴ Throughout election cycles in the 1990s and in the 2000 election cycle, corporations

238. See *McConnell v. FEC*, 251 F. Supp. 2d 176, 555–60, 622–25 (D.D.C.) (per curiam) (opinion of Kollar-Kotelly, J.) (analyzing numerous examples of the corrupting influence of corporate expenditures on politics in the years prior to BCRA's passage), *judgment rev'd in part by* 540 U.S. 93 (2003). But see *Citizens United*, 130 S. Ct. at 910 ("The *McConnell* record was over 100,000 pages long, yet it does not have any direct examples of votes being exchanged for . . . expenditures." (alteration in original) (citations omitted) (internal quotation marks omitted)).

239. See *Citizens United*, 130 S. Ct. at 909 ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.").

240. See, e.g., MELVIN I. UROFSKY, *MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS* 5–11 (2005) (providing numerous examples of quid pro quo corruption among politicians and corporations dating back to the late 1700s).

241. *Id.* at 7.

242. *Id.* Jackson prevailed and later did close the bank. *Id.*

243. *Id.* at 46.

244. *McConnell v. FEC*, 540 U.S. 93, 126 (2003) (internal quotation marks omitted). *Buckley* identified "Elect John Smith" or "Vote Against Jane Doe" as "magic words" that constituted express, rather than issue, advocacy. *Id.* Issue advocacy avoids such words so that the related campaign speech cannot be classified as an express call to vote for or against a candidate, thus skirting FECA restrictions. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam)).

spent millions of dollars from their general treasuries on issue advertisements, scheduled them to air close to primary and general elections, and even used misleading names that resembled grassroots organizations to conceal the identity of corporate speakers.²⁴⁵ Where corporations make campaign expenditures under the guise of a grassroots organization, the disclosure and disclaimer requirements that the majority upheld in *Citizens United*²⁴⁶ will be of little use in ensuring that the public is properly informed of the identity of a political speaker.

The majority in *Citizens United* brushed aside these clear examples of corruption by oversimplifying *Buckley*. The Court concluded that *Buckley* only permitted campaign finance restrictions if the governmental interest was to prevent quid pro quo corruption,²⁴⁷ yet in *Nixon v. Shrink Missouri Government PAC*,²⁴⁸ the Court had stated that *Buckley* did not, in fact, limit permissible governmental interests in restricting campaign finance to only the prevention of quid pro quo corruption.²⁴⁹ Indeed, *Buckley* expressly stated that quid pro quo corruption is the most blatant form of corruption, but that Congress is certainly permitted to restrict spending where even the appearance of corruption was of concern.²⁵⁰

B. The Citizens United Court Mistakenly Extrapolated the Reasoning in Buckley and Bellotti to Strike Restrictions on Corporate Campaign Speech

The majority in *Citizens United* incorrectly took the holdings and reasoning in both *Buckley* and *Bellotti* and extrapolated from them to reach the erroneous conclusion that these cases prohibited the government from regulating corporate expenditures. Both *Buckley* and *Bellotti*, however, addressed statutes that were distinguishable from BCRA's Section 203 ban

245. *Id.* at 127–28. For example, Citizens for Better Medicare “was not a grassroots organization of citizens, as its name might suggest,” but instead was the misleading platform of Pharmaceutical Research and Manufacturers of America, an association of drug manufacturers. *Id.* at 128 & n.22.

246. *See supra* text accompanying note 209.

247. *See supra* text accompanying note 205.

248. 528 U.S. 377 (2000).

249. *See id.* at 389 (citing *Buckley*, 424 U.S. at 28) (“In [*Buckley*], we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.”).

250. *See Buckley*, 424 U.S. at 27–28 (acknowledging that “the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action,” and commenting that “Congress was surely entitled to conclude that . . . contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in [the] system”).

on corporate expenditures and reached holdings that did not prohibit the government from restricting corporate expenditures.²⁵¹

The campaign expenditure provision at issue in *Buckley* applied not only to corporations but also to groups and individuals generally.²⁵² As Justice Stevens pointed out in his *Citizens United* dissent, *Buckley* explicitly distinguished between contributions and expenditures with respect to the degree of restriction placed on political speech, but it was silent on whether a restriction on expenditures would be constitutional if it were narrowly tailored to restrict *only* corporations.²⁵³ Thus, *Buckley* effectively left the door open for legislatures to impose restrictions on corporate expenditures on the basis of the threat that the corporate form poses to the integrity of our political marketplace of ideas and, by extension, our democratic system as a whole.²⁵⁴ Legislatures did, in fact, walk through that door with BCRA Section 203 and other restrictions on corporate campaign finance, and, as a result, the “power to prohibit corporations and unions from using funds in their treasuries to finance [campaign expenditures] . . . [became] firmly embedded in our law.”²⁵⁵

Additionally, in holding expenditure limits on individuals and groups unconstitutional, the *Buckley* Court emphasized that a governmental interest in equalizing the relative voices of individuals is “wholly foreign to the First Amendment”—that First Amendment protections do not depend upon an individual’s “financial ability to engage in public discussion.”²⁵⁶ By emphasizing the wealth of an individual as an impermissible basis for regulating expenditures and remaining silent on the permissibility of regulating expenditures on the basis of the corporate form, the *Buckley* Court’s reasoning is not incompatible with corporate expenditure restrictions. Where corporate expenditure restrictions are aimed not merely at restricting corporations because of their wealth, but because of the “state-created advantages” that promote the aggregation of wealth that could have a corrosive effect on the marketplace of political ideas, corporate

251. The *Buckley* Court confronted a statute that placed a blanket restriction on campaign expenditures from *any* individual or group. *Id.* at 13 (citing Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 205, 86 Stat. 3, 9–10 (1972) (codified as amended at 2 U.S.C. §§ 431–56 (2006))). The *Bellotti* Court faced a statute that restricted corporations from making expenditures in relation to referenda *if* the referenda did not affect the corporation’s “material interest.” *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 767–68 (1978) (quoting MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)).

252. *Buckley*, 424 U.S. at 7.

253. *Citizens United v. FEC*, 130 S. Ct. 876, 954 (2010) (Stevens, J., dissenting).

254. *See id.* (“[*Buckley*’s] silence on corporations only reinforced the understanding that corporate expenditures could be treated differently from individual expenditures.”).

255. *McConnell v. FEC*, 540 U.S. 93, 203 (2003), *overruled by Citizens United*, 130 S. Ct. 876.

256. *Buckley*, 424 U.S. at 48–49.

restrictions are not in tension with *Buckley*.²⁵⁷ For this same reason, the *Citizens United* majority was incorrect in focusing on the effect that a restriction on corporate expenditures would have on small corporations, which make up the vast majority of corporations²⁵⁸—because the governmental interest in restricting corporate expenditures is based on the corporate form. The majority in *Citizens United* mistakenly believed that the governmental interest in restricting corporate expenditures had a basis in wealth itself.²⁵⁹

The *Citizens United* Court similarly erred in its analysis of *Bellotti*. The statute at issue in *Bellotti* imposed a ban on corporate expenditures in support of referenda unless the referenda substantially affected the corporation's interests,²⁶⁰ a restriction that is easily distinguished from the restriction at issue in *Citizens United*. Unlike BCRA Section 203, which restricted corporate expenditures regardless of the corporate interest at hand or the political candidate in question, the statute in *Bellotti* restricted corporations based on the government's assertion that corporations did not have a sufficient interest in particular issues, and therefore they should be banned from participating in political discussion of those issues.²⁶¹ For this reason, the statute at issue in *Bellotti* was a viewpoint-discrimination statute,²⁶² as opposed to BCRA Section 203, which was aimed at the corrosive effect of corporations generally, regardless of viewpoint. The majority in *Citizens United* erred in rejecting this distinction;²⁶³ thus, the

257. Cf. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659–60 (1990) (emphasizing that an antidistortion interest is not an interest in equalizing the relative voices of political speakers based on wealth), *overruled on other grounds by Citizens United*, 130 S. Ct. 876.

258. See *Citizens United*, 130 S. Ct. at 907 (noting that most corporations “are small corporations without large amounts of wealth”).

259. *Id.* at 904–05. This misguided focus led the Court to delve into a discussion of the logical fallacy of a campaign finance regulatory regime that prohibits corporate campaign expenditures because of their inordinate wealth but does not limit campaign expenditures made by wealthy individuals. *Id.* at 908.

260. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 767–68 (1978).

261. See *id.* at 784 (“The ‘materially affecting’ requirement . . . amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.”).

262. *Citizens United*, 130 S. Ct. at 959 (Stevens, J., dissenting). In his dissent, Justice Stevens described the legislative background of the Massachusetts statute at issue in *Bellotti*, revealing that, at the time the statute was enacted, the state legislature was attempting to adopt a constitutional amendment establishing a graduated income tax. *Id.* Despite the support of many legislators, the referendum to establish the tax had been overwhelmingly rejected by voters. *Id.* In preparation for a renewed referendum on the tax, the legislature passed the restriction on corporate expenditures on referenda and included a provision that stated that referenda related to income tax did not affect the substantial interests of a corporation. *Id.*

263. See *id.* at 903 (majority opinion) (stating that the *Bellotti* decision “rested on the principle that the Government lacks the power to ban corporations from speaking,” not “on the existence of a viewpoint-discriminatory statute”).

majority also erred in simply reaching the blunted conclusion that *Bellotti* “rested on the principle that the Government lacks the power to ban corporations from speaking.”²⁶⁴ The Court should have instead acknowledged that the statute in *Bellotti* effectively banned corporate speech on specific issues that the government identified, effectively barring the corporate viewpoint on those issues, while BCRA Section 203 barred corporate expenditures because of the unique threat that corporations pose to political speech.

C. Austin’s Antidistortion Rationale Was Not an Outlier in the Court’s Campaign Expenditure Jurisprudence, but a Logical Extension of the MCFL Exception

The majority failed to recognize that *Austin* was in step with the Court’s prior decisions on campaign expenditures, including the cases in which the Court tacitly accepted bans on corporate expenditures²⁶⁵ and the holdings in *Buckley* and *Bellotti*.²⁶⁶ In *United States v. CIO*,²⁶⁷ *United States v. UAW*,²⁶⁸ and *Pipefitters Local Union No. 562 v. United States*,²⁶⁹ the Court faced challenges to bans on corporate expenditures, yet in each case the Court declined to address the constitutionality of those statutes.²⁷⁰ Thus, these cases left the door open for Congress to restrict corporate expenditures. Contrary to the assertion of the *Citizen’s United* majority,²⁷¹ *Buckley*, in holding unconstitutional a blanket cap on individual and group expenditures,²⁷² and *Bellotti*, in holding unconstitutional a state statute that precluded corporate expenditures toward particular issues based on the nature of the corporation’s interest,²⁷³ did not foreclose restrictions on corporate expenditures because of the corporate form.

264. *Id.*

265. *See supra* Part II.B.2.

266. *See supra* Part II.C.

267. 335 U.S. 106, 107, 124 (1948) (declining to decide whether a statute prohibiting the use of corporate or labor organization funds for expenditures was unconstitutional).

268. 352 U.S. 567, 568, 589–93 (1957) (declining to decide the constitutionality of 18 U.S.C. § 610, which prohibited corporations and labor organizations from making any contribution or expenditure in relation to any election for federal office).

269. 407 U.S. 385, 387–88, 409 (1972) (declining to decide the constitutionality of 18 U.S.C. § 610, and holding that § 610 does not apply to union campaign spending from funds financed by voluntary employee donations).

270. *See supra* notes 267–269.

271. *See* *Citizens United v. FEC*, 130 S. Ct. 876, 902–03 (2010).

272. *See supra* Part II.C.1.

273. *See supra* Part II.C.2.

Following *Buckley* and *Bellotti*, the Court in *MCFL* faced a challenge to FECA Section 316,²⁷⁴ which prohibited corporate expenditures, but rather than hold the statute unconstitutional, the Court carved out an exception for certain nonprofit corporations.²⁷⁵ Just four months after *Buckley*, and despite the *MCFL* decision, Congress recodified the Section 316 ban.²⁷⁶ The majority in *Citizens United* maintained that if this ban had been challenged following *Buckley*, it could not have been reconciled with *Buckley*'s reasoning and analysis.²⁷⁷ Nevertheless, *MCFL* did not strike down Section 316 as an unconstitutional violation of corporate freedom of speech. Rather, the *MCFL* Court held the statute unconstitutional as applied to *MCFL* and created a three-prong exception for nonprofit corporations.²⁷⁸ In formulating the exception, the Court clearly articulated the governmental interest that justified a ban on corporate expenditures that do not meet the *MCFL* exception: "the corrosive influence of concentrated corporate wealth" on the political marketplace, wealth that generally does not reflect public support for a corporation's political ideas.²⁷⁹ The *MCFL* Court's decision to deliberately articulate a rationale for restrictions on corporate expenditures (save for a narrow exception) is therefore wholly incompatible with the *Citizen United* Court's assertion that a corporate expenditure ban would not have survived following *Buckley*.

Thus, *Austin*'s antidistortion rationale was not an outlier in the Court's campaign expenditure jurisprudence but a logical extension of the Court's *MCFL* corporate campaign expenditure exception. Restrictions on corporate expenditures were not barred by *Buckley* or *Bellotti*. Accordingly, *MCFL* articulated and acquiesced to the reasoning behind such restrictions, and *Austin*, in turn, fully developed *MCFL*'s reasoning to produce the antidistortion rationale. Specifically, *Austin*'s antidistortion rationale melded two characteristics of corporations that pose a "corrosive" threat: (1) the massive quantities of wealth that corporations can acquire;

274. Pub. L. No. 94-283, § 316, 90 Stat. 490 (codified at 2 U.S.C. § 441b (2006)), *invalidated by Citizens United*, 130 S. Ct. 876.

275. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263–64 (1986) (outlining the three factors of the *MCFL* exception).

276. *Citizens United*, 130 S. Ct. at 902.

277. *Id.* at 902. The majority reasoned that because "[t]he *Buckley* Court did not invoke the First Amendment's overbreadth doctrine" to find that the limits on individual and group expenditures would have been constitutional as applied to corporations, and because some of the plaintiffs in *Buckley* were in fact corporations, the *Buckley* Court's reasoning precluded restrictions based on corporate identity. *Id.*

278. *MCFL*, 479 U.S. at 263–64. Chief Justice Rehnquist, in his dissent, argued that the Court should not have granted this exemption, and that the Court should not "fine-tune" congressional judgment that a prophylactic measure against the corporate form is necessary given the Court's previous deference toward such measures. *Id.* at 268–69 (Rehnquist, C.J., concurring in part and dissenting in part).

279. *Id.* at 257–59 (majority opinion).

and (2) the state-conferred advantages of the corporate form that enable corporations to acquire such large quantities of wealth.²⁸⁰ The first characteristic, massive quantities of wealth acquired using the corporate form, presented the risk of corruption that has long been recognized as a sufficient governmental interest in regulating campaign financing.²⁸¹ By focusing on the wealth as a product of the corporate form and not the wealth per se, the *Austin* Court was careful to identify the corporate *form* as the target of restrictions on corporate expenditures. Thus, the antidistortion rationale was not an equalization rationale but an anticorruption rationale.²⁸²

The second characteristic that *Austin* described was critical to its holding because this characteristic set *Austin*'s holding apart from the equalization rationale prohibited in *Buckley*.²⁸³ *Austin* targeted the state-conferred advantages of the corporate form that facilitate the accumulation of wealth in the economic marketplace;²⁸⁴ it did not target the wealth of the corporation as an isolated characteristic that justified a restriction on expenditures. Thus, *Austin*'s antidistortion rationale was not, as the *Citizens United* majority argued,²⁸⁵ an equalization rationale aimed at restricting the voices of some political speakers in order to increase the relative voices of others.²⁸⁶

280. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990) (pinpointing the state-conferred benefits as the reason why the government can regulate corporations in ways that it cannot regulate individuals), *overruled by Citizens United*, 130 S. Ct. 876.

281. See *supra* notes 80–82; see also *supra* Part II.D. Indeed, corporations are more than capable of acquiring staggering amounts of wealth that they can turn into campaign speech. In 2010, more than 100 countries had a gross domestic product of less than \$20 billion. *The World Factbook*, CIA.GOV, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (last visited Apr. 14, 2011). During that same year, 119 American corporations had revenues that exceeded \$20 billion, and forty American corporations boasted more than \$50 billion in revenues. *2010 Fortune 500*, FORTUNE (May 3, 2010), http://money.cnn.com/magazines/fortune/fortune500/2010/full_list/.

282. *Citizens United*, 130 S. Ct. at 970 (Stevens, J., concurring in part and dissenting in part). Justice Stevens stressed that the Court “*expressly* ruled [in *Austin*] that the compelling interest supporting Michigan’s statute was not one of equaliz[ing] the relative influence of speakers on elections, but rather the need to confront the distinctive corrupting potential of corporate electoral advocacy financed by general treasury dollars.” *Id.* at 958 (second alteration in original) (citation omitted) (internal quotation marks omitted).

283. See *supra* text accompanying notes 134–139.

284. See *supra* note 173 and accompanying text.

285. *Citizens United*, 130 S. Ct. at 904. The majority oversimplified the antidistortion rationale by stating simply that it is “a means to prevent corporations from obtaining an unfair advantage in the political marketplace by using resources amassed in the economic marketplace.” *Id.* (quoting *Austin*, 494 U.S. at 659) (internal quotation marks omitted). Thus, the majority glossed over the significance of the use of state-conferred corporate advantages, providing superficial support for the majority’s equalization rationale accusation.

286. *Id.* at 904; see also *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam) (articulating the equalization rationale as follows: “the concept that government may restrict the speech of

The majority in *Citizens United* misconstrued the antidistortion rationale used in *Austin* to stand for the proposition that corporations are a threat to the political process simply because of their ability to amass wealth in the economic marketplace.²⁸⁷ If the majority were correct on this point, then the antidistortion rationale *would* be in direct opposition to *Buckley*'s prohibition on regulating political speakers on the basis of wealth alone.²⁸⁸ The antidistortion rationale in *Austin*, however, was concerned with both (1) *how* corporations acquire the money to fund campaign expenditures and (2) the potentially corrosive *effect* that money acquired using the corporate form can have on the political process. First, the corporate treasury consists of money that shareholders deposited in order to produce a return, not necessarily to support the political speech of that corporation; as a result, expenditures from the corporate treasury are generally not traceable to an individual who had the intent of promulgating the political views of the corporation.²⁸⁹ Second, because of *the way* corporations acquire money to fund campaign expenditures, corporations can have a distorting *effect*; this is so because the corporate general treasury does not accurately reflect public support, regardless of whether the corporation is wealthy.²⁹⁰

*D. By Failing to Uphold Restrictions on Corporate Expenditures,
Citizens United Released Phantom Speakers into the Political
Marketplace of Ideas*

By overruling *Austin* and permitting corporate expenditures from the general treasury, *Citizens United* effectively released phantom speakers into the political marketplace of ideas. The term phantom speakers refers to the specious nature of political speech emanating from a corporation's general

some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

287. *Citizens United* characterizes the antidistortion rationale as based solely on the wealth of a corporation, then proceeds to attack this straw man argument by noting that most corporations are actually not immensely wealthy. See *supra* note 204 and accompanying text.

288. See *supra* text accompanying notes 134–139.

289. *Austin*, 494 U.S. at 659–60. Compare this scenario to a wealthy individual who makes a campaign expenditure out of his own funds. The speech promulgated via that expenditure can be traced to an individual, whereas the corporate expenditure is traced to a fictional, state-created "individual." Where this Note focuses on the "phantom speaker" threat that manifests itself when political speech cannot be traced to individual support, other scholars have delved further into the notion that corporations are not "people" and thus should not be afforded First Amendment protection. See, e.g., Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 245 (2010) ("Corporations are not people, nor are they entitled to all the constitutional rights of individual citizens.").

290. But see Issacharoff, *supra* note 237, at 122 (citing David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994) (stating that the distortion theory of political corruption is a poor definition of corruption because it frames corruption as a "derivative" of social inequalities generally)).

treasury, as was described in *MCFL* and later in *Austin*.²⁹¹ Money in a corporation's general treasury, regardless of the size of the treasury, does not necessarily reflect the political ideas of those whose money makes up the general treasury.²⁹² Instead, this money reflects "the economically motivated decisions" of those individuals, which may or may not correspond to the corporation's political beliefs.²⁹³ Segregated funds established under PACs, which permit corporations to raise funds for the express purpose of putting them toward expenditures,²⁹⁴ were established to ensure that corporate expenditures reflected actual political support for the corporation's political speech.²⁹⁵

The principle that expenditures should reflect actual public support for the political ideas espoused by the speaker does not require that the speech reflect the degree of actual political support behind the expenditure: the amount of money used to promulgate speech need not be proportional to the strength of the speaker's belief in that speech.²⁹⁶ To require that kind of alignment between campaign spending and the strength of the public's political ideas would be a clear attempt at equalization.²⁹⁷ Rather, the speech must be tied to the actual support of the speakers whose money is being used to promulgate that speech.²⁹⁸ This reasoning is the precise purpose behind the PAC exception and a common theme across the Court's

291. *See supra* Part II.D.

292. *See supra* text accompanying note 167.

293. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986).

294. 2 U.S.C. § 441b(b)(2)(C) (2006), *invalidated by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

295. *MCFL*, 479 U.S. at 258 ("The resources available to [a political action committee] fund, as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee."). *But see Citizens United*, 130 S. Ct. at 897 ("A [political action committee] is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak.").

296. *Austin* made no such assertion. The *Austin* Court stated only that restrictions on expenditures "ensure[] that expenditures reflect actual public support for the political ideas espoused by corporations," *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990), not that the expenditure be "equal to," or in any way "proportional to," political support for a corporation's political ideas.

297. Professor David A. Strauss has argued that corruption is merely a derivative of broader inequalities in society. *See Strauss, supra* note 290, at 1371–82. This is so, according to Strauss, because when competing campaign spending is allowed to take place in an open market in a society with underlying inequality, corruption is inevitable. *Id.* Therefore, the only way to eradicate corruption is to eradicate the inequality in the marketplace of campaign spending. *Id.* at 1382–89.

298. *Cf. Austin*, 494 U.S. at 660–61 (stating that the antidistortion rationale "ensures that expenditures reflect actual public support for the political ideas espoused by corporations" and that political action committees fulfill that purpose "[b]ecause persons contributing to such funds understand that their money will be used solely for political purposes, [and therefore] the speech generated accurately reflects contributors' support for the corporation's political views").

decisions addressing the constitutionality of corporate and labor organization expenditures.²⁹⁹

Ensuring that corporate speech is prohibited unless that speech reflects the political views of those whose money the corporation has used to promulgate it maintains the integrity of the political marketplace. One prominent theory of First Amendment freedom of speech protection is that the marketplace of ideas is a critical component of our system of government.³⁰⁰ Another, and related, prominent theory of First Amendment freedom of speech protection is the promotion of self-government, which occurs in part through the exchange of political ideas in the marketplace of ideas.³⁰¹ Both of these theories serve to undergird the heightened protection political speech receives under the First Amendment.³⁰²

Traditionally, a free marketplace of ideas implies an almost complete absence of restrictions on speech so that all ideas may battle each other in the marketplace and listeners can, in deciding which ideas to accept, reach the truth.³⁰³ The marketplace of ideas theory emerged in early writings defending the freedom of speech and expression. John Milton's *Areopagitica*, for example, characterized the marketplace of ideas as a battleground of truth and falsehoods and argued that the battleground should remain open to all ideas, allowing listeners to hear all arguments and debate their merits, so that truth could ultimately prevail.³⁰⁴ John Stuart Mill characterized the marketplace of ideas theory as a means to an end, the

299. This theme is evident in the Court's finding that restrictions on corporate and labor union campaign spending do not apply to funds to which individuals voluntarily make donations. *See generally, e.g.,* *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972) (holding that restrictions on labor union campaign spending do not apply to political funds to which members voluntarily contributed).

300. *See* *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.").

301. *See* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (describing the necessity and virtues of an open political marketplace of ideas).

302. *See supra* notes 68, 170, 299.

303. *See* Brian K. Pinaire, *A Funny Thing Happened on the Way to the Market: The Supreme Court and Political Speech in the Electoral Process*, 17 J.L. & POL. 489, 491 (2001) ("[W]hile a 'free market' of ideas has traditionally implied the (near) absence of restrictions on speech, restrictions are now sanctioned—and even, in some cases, recommended—in the interest of a genuinely open, ordered, and accessible marketplace of ideas.").

304. *See* John Milton, *Areopagitica*, in *THE FIRST AMENDMENT FREEDOM OF THE PRESS: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE* 29, 37 (Garrett Epps ed., 2008) ("And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?").

end being listeners' search for and ultimate discovery of the truth.³⁰⁵ To reach the truth, the marketplace must be free of suppression and restraint.³⁰⁶ The theory of the open marketplace of ideas is later embodied in Justice Holmes's famous dissenting opinion in *Abrams v. United States*,³⁰⁷ as well as in Justice Brandeis's concurring opinion in *Whitney v. California*.³⁰⁸

Another prominent First Amendment freedom of speech theory—freedom of speech as a means to self-government—is associated with Alexander Meiklejohn's writings and his town meeting analogy.³⁰⁹ According to Meiklejohn's town meeting analogy of free expression, the town meeting is open to all and “[t]he basic principle is that the freedom of speech shall be unabridged.”³¹⁰ Nevertheless, the meeting must be abridged in some respects so that the discussion is “responsible”; the town meeting is self-government, not a “dialectical free-for-all.”³¹¹ Under the self-government theory, participants must have access to information that is necessary to informed decision making and be able to communicate their opinions to elected officials; if denied this opportunity, participants cannot self-govern.³¹² Meiklejohn's self-government theory places a premium on the protection of political speech.³¹³ The heightened protection for speech that is conducive to self-government is embodied in the Court's First

305. JOHN STUART MILL, *ON LIBERTY* 75–77 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859); see also Pinaire, *supra* note 303, at 496 (“Emphasizing openness, liberty and perpetual questioning, Mill refined the imagery of the free exchange of ideas. His notion that free speech was essential to the permanent interests of man as a progressive being, therefore, adjusted the model from that of ‘grappling’ to ‘discovery,’ or a search engaged in by free and equal individuals.”).

306. MILL, *supra* note 305, at 75–77; see also Pinaire, *supra* note 303, at 496 (“Truth [for Mill] could only be realized, or rediscovered, in the absence of restraint and suppression.”).

307. See *supra* notes 170, 301 and accompanying text.

308. See *supra* text accompanying notes 69–71.

309. Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 72–73 (1989).

310. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22–25 (1948). Meiklejohn's self-government theory emphasizes political speech above all other forms of expression. *Id.*

311. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 258–59.

312. Solum, *supra* note 309, at 73.

313. Indeed, Meiklejohn's theory posits that nonpolitical speech should not be afforded any First Amendment freedom of speech protection. See MEIKLEJOHN, *supra* note 310, at 23. *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255–57, 261 (listing and describing the forms of expression that he believes must be protected under the First Amendment because they are essential to self-governing and asserting that all forms of expression that do not facilitate self-government fall outside the scope of the First Amendment freedom of speech).

Amendment jurisprudence that has long afforded heightened protection to political speech.³¹⁴

Yet the theories of promoting an open political marketplace of ideas and of promoting self-government clash in the realm of corporate campaign expenditures. Whereas the marketplace of ideas theory would support the introduction of corporate political speakers as a means of permitting a variety of political ideas to compete in the marketplace,³¹⁵ the self-government theory would be undermined if corporations entered the political speech arena. Corporate speech may, at first blush, appear to comport with the self-government theory of First Amendment protection because this theory endorses stringent political speech protection so that listeners have access to all information necessary for informed decision making.³¹⁶ Corporate political speakers, however, hinder self-government because corporate speech is promulgated in the interest of a fictional individual³¹⁷ that cannot vote³¹⁸ and may promulgate political speech using money in its general treasury that was provided by shareholders who directly oppose the corporation's political ideas.³¹⁹

Though corporations can add speech to the political marketplace of ideas that individuals weigh when making political decisions, corporate political speech threatens the notion of self-government because an "individual" that cannot vote infiltrates the marketplace among individuals that can vote.³²⁰ Moreover, a corporation infiltrates the marketplace of ideas using funds obtained from voting individuals, money that voting individuals likely *did not provide to the corporation to support or aid in promulgating the corporation's political ideas.*³²¹ Because general treasuries do not consist of funds provided by individuals for the purpose of

314. See *supra* Part II.A.

315. The majority in *Citizens United* supported this result, stating that the First Amendment errs on the side of more speech, not less. See *supra* text accompanying note 206.

316. See *supra* text accompanying notes 309–313.

317. In his dissent, Justice Stevens argued that the First Amendment freedom of speech protection does not extend to corporations because the Framers only intended for the protection to extend to human beings. See *supra* text accompanying notes 225–227.

318. Cf. *Citizens United v. FEC*, 130 S. Ct. 876, 930 (2010) (Stevens, J., concurring in part and dissenting in part) (arguing that corporations should not be afforded the same First Amendment protections as human beings because, inter alia, corporations "cannot vote or run for office").

319. See *supra* text accompanying notes 167–168.

320. Granted, many other types of associations and organizations, including PACs and nonprofits that met the *MCFL* exception, were permitted to engage in political speech while corporations were not. But these entities were permitted to do so because the human beings whose money funded these entities' speech donated voluntarily and *with the intent that the money would go toward promulgating the entities' political speech.* See *supra* text accompanying note 99.

321. Shareholders invest in corporations for financial gain, not necessarily to support corporations' political positions. See *supra* text accompanying note 167.

promulgating political speech, corporate speech may very well be in direct opposition to the actual political leanings of the shareholders whose monies the corporation uses are used to fund campaign expenditures.³²² This result threatens the integrity of the marketplace of political ideas in relation to the First Amendment theory of self-government because the speech of voting individuals³²³ is effectively pitted against the speech of nonvoting, fictional individuals that use these same voting individuals' money to engage in this opposing speech. The ability of corporations to amass great wealth through the corporate form can exacerbate this threat, possibly drowning out the voices of the very individuals whose money funds corporate speech. In turn, voting individuals are hindered in their ability to engage in informed decision making.³²⁴ By holding that the legislature cannot restrict corporate expenditures, the *Citizens United* Court effectively unleashed phantom speakers into the political marketplace of ideas, posing a threat to the ability of individuals to self-govern.

V. CONCLUSION

In *Citizens United v. FEC*, the Supreme Court held that a ban on the use of corporate general treasuries to fund speech advocating the election or defeat of a political candidate violated the First Amendment.³²⁵ In so holding, the Court understated the threat of corruption that corporations pose to the political process.³²⁶ The majority incorrectly characterized *Austin*'s antidistortion rationale as an outlier in the Court's corporate expenditure jurisprudence³²⁷ when it failed to recognize that both *Buckley* and *Bellotti* did not entirely preclude regulation of corporate expenditures based on the unique identity of corporations.³²⁸ *Austin*'s antidistortion rationale was not an anomaly but a natural extension of the *MCFL* exception, which the Court created in light of the governmental interest in ensuring that expenditures reflect actual public support.³²⁹

322. This is the precise problem the Court articulated in both *MCFL* and *Austin*. See *supra* Part II.D.

323. The term "voting individual" encompasses both individuals acting as individuals and in association for political purposes. See *supra* note 320.

324. If individuals are denied access to information because the voices of those whose money funds corporate speech are drowned out, they are unable to effectively self-govern. See *supra* text accompanying note 312.

325. 130 S. Ct. 876, 913 (2010).

326. See *supra* Part IV.A.

327. See *Citizens United*, 130 S. Ct. at 903 (stating that *Austin* "bypass[ed]" *Buckley* and *Bellotti*" by adopting an antidistortion rationale and noting that "[n]o case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity"); see also *supra* Part IV.B.

328. See *supra* Part IV.B.

329. See *supra* Part IV.C.

State-conferred benefits place corporations in the unique position of being able to create the appearance of strong political backing for political positions that may only have the backing of a handful of actual individuals.³³⁰ It is this corporate form, created by state-conferred benefits, and the disconnect between the general treasury and the political views of those who fund the treasury, that the *MCFL* and *Austin* Courts pointed to as the key rationale for restricting corporate expenditures.³³¹ The majority in *Citizens United* did not recognize that treating corporations differently for expenditure purposes on the basis of the corporate form actually aligns with *Buckley*, *Bellotti*, and the Court's prior corporate expenditure jurisprudence.³³² As a result, the *Citizens United* majority invited phantom speakers to participate in, and distort, American politics through the marketplace of political speech.³³³

330. *See supra* Part IV.C.

331. *See supra* Part IV.C.

332. *See supra* Part IV.A–B.

333. *See supra* Part IV.D.