Loyola of Los Angeles Law Review

Volume 45
Number 1 *Fall 2011*

Article 5

9-1-2011

Down the Rabbit Hole with Citizens United: Are Bans on Corporate Direct Campaign Contributions Still Constitutional?

Jason S. Campbell

DOWN THE RABBIT HOLE WITH *CITIZENS UNITED*: ARE BANS ON CORPORATE DIRECT CAMPAIGN CONTRIBUTIONS STILL CONSTITUTIONAL?

*Jason S. Campbell**

Since the early twentieth century, the Tillman Act has barred corporations from contributing directly to candidates for federal office. In Citizens United v. FEC*, the U.S. Supreme Court overturned a related ban that prevented corporations from making independent expenditures in candidate elections. The legal foundation of the independent expenditure ban was similar to that which still supports the corporate direct contributions ban, thus calling into question the continuing validity of the direct contributions ban. This Note argues that if the Court follows the logical path that it laid down in* Citizens United*, it should overturn the corporate direct contributions ban.*

* J.D. Candidate, 2012, Loyola Law School Los Angeles; A.B. Georgetown University. I thank Professor Rick Hasen for inspiring this Note, Associate Professor Justin Levitt for his time and incomparable guidance, and the editors and staff of the *Loyola of Los Angeles Law Review* for their hard work and dedication.

TABLE OF CONTENTS

> *"Of what avail would a law be to prohibit the contributing direct to a candidate and yet permit the expenditure of large sums in his behalf?"*[1]

I. INTRODUCTION

In his first State of the Union address to Congress, President Barack Obama may have broken a bit of protocol. In a direct and public tussle with the Justices of the U.S. Supreme Court sitting just feet away, President Obama said, "With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests . . . to spend without limit in our elections."[2] The line was as powerful as it was controversial: although *Citizens United v. FEC*[3] does declare unconstitutional a federal ban on corporate independent expenditures on behalf of candidates in elections,[4] the prohibition had only been in place since the Labor Management Relations Act of 1947, commonly known as the Taft-Hartley Act.[5] Further, only in 1976's landmark case of *Buckley v. Valeo*[6] did the Supreme Court first encounter independent expenditures by persons,[7] and only in 1990 did the Court in *Austin v. Michigan Chamber of Commerce*[8] uphold a ban on specifically *corporate* independent expenditures.[9]

What President Obama was likely referring to in his mention to a century of law, and what this Note will focus on, is corporate direct campaign contributions to candidates in federal elections. A ban on such contributions has been in place for more than a century—since

1. United States v. United Auto. Workers, 352 U.S. 567, 581 (1957) (quoting H.R. REP. NO. 79-2739, at 40 (1947)).

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

3. 130 S. Ct. 876 (2010).

4. *Id.* at 917.

5. Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–197 (2006)).

6. 424 U.S. 1 (1976) (per curiam).

7. *Id.* at 7.

8. 494 U.S. 652 (1990).

9. *Id.* at 655.

1907's Tillman Act[10]—and *Citizens United* does not reach the question of the constitutionality of the ban. The reasoning that Justice Kennedy used in his majority opinion, however, has raised the specter that the bans, long upheld as constitutional, are now at least constitutionally suspect.[11] Indeed, as this Note argues, if a challenge to the ban reaches the Supreme Court as the Court is currently composed, it is likely the Court will declare unconstitutional bans on corporate direct campaign contributions to candidates.

Such a challenge in the Supreme Court may not be too far off: statewide bans in Iowa[12] and Minnesota[13] and a municipal ban in San Diego[14] have faced challenges in those jurisdictions,[15] and while district courts have so far inconsistently extended *Citizens United*'s holding to contribution bans,[16] appellate courts have continued to uphold the bans because the Court's decision upholding the ban in *FEC v. Beaumont* is still "good law" unless and until the Court overrules it.[17]

Part II of this Note will briefly outline the origins of the ban on corporate direct campaign contributions. Part III will analyze how the Court historically has dealt with each step of the constitutional question the federal direct contributions ban implicates, and how *Citizens United* vastly alters the Court's analytical framework. Part IV will look at the corporate direct contribution ban through the

10. Tillman Act of 1907, ch. 420, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b(a) (2006)).

11. *See* Lloyd Hitoshi Mayer, *Breaching a Leaking Dam?: Corporate Money and Elections*, 4 CHARLESTON L. REV. 91, 139 (2009) (stating that *Citizens United*'s overruling of *Austin v. Michigan Chamber of Commerce* might foreshadow the unconstitutionality of the contribution ban).

12. Iowa Right to Life Comm., Inc. v. Tooker, No. 4:10-cv-416 RP-TJS, 2011 WL 2649980 (S.D. Iowa June 29, 2011) (upholding the ban).

13. Minn. Citizens Concerned for Life, Inc. v. Swanson, 640 F.3d 304 (8th Cir. 2011) (upholding the ban).

14. Thalheimer v. City of San Diego, 645 F.3d 1109 (9th Cir. 2011) (upholding the ban).

15. *E.g.*, United States v. Danielczyk, No. 1:11cr85 (JCC), 2011 WL 2268063, at *6 (E.D. Va. June 7, 2011) (declaring the ban unconstitutional). *Danielczyk* is currently on appeal to the Fourth Circuit.

16. *E.g.*, *Tooker*, 2011 WL 2649980, at *10 (finding constitutional the ban on corporate direct campaign contributions); *Danielczyk*, 2011 WL 2268063, at *6 (declaring the ban unconstitutional).

17. *Thalheimer*, 645 F.3d at 1125 (quoting Green Party of Conn. v. Garfield, 616 F.3d 189, 199 (2d Cir. 2010)).

Citizens United frame and argue that the ban is no longer constitutional.

II. THE ORIGIN OF THE BAN ON CORPORATE DIRECT CAMPAIGN CONTRIBUTIONS

The history of bans on corporate direct campaign contributions runs deep in both the state and federal levels of government. This Part looks into the origins of the federal ban, which began with the Tillman Act in 1907.[18] Since similar state bans will remain or fall on the same logic as the federal ban, for clarity this Note will focus on the federal ban only.

Congress passed and President Theodore Roosevelt signed the Tillman Act at the height of the progressive era in 1907.[19] The legislation's precise purpose is the subject of a fair amount of disagreement,[20] and, as discussed later, the two main positions that emerged both found homes in the Court's campaign finance jurisprudence. The first is that the Tillman Act's primary purpose was to protect the political process from the real or perceived corruption caused by the undue influence that resulted from corporate financial contributions.[21] Corporate involvement in elections, while a well-known fact in political circles, was considered to be illegitimate and so was deliberately hidden.[22] The second position is that Congress passed the Tillman Act because of its concern that "company executives were opportunistically

18. In 1891 Kentucky passed the first statewide ban on corporate campaign contributions. Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 883 (2004). In 1897 Nebraska, Tennessee, Missouri, and Florida also passed bans. Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOV'T L. REV. 1, 13 (2008). Since that time states and municipalities have passed their own bans on corporate direct contributions. Today, twenty-three states have bans in effect. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, STATE LIMITS ON CONTRIBUTIONS TO CANDIDATES (Jan. 20, 2010), *available at* http://www.ncsl.org/Portals/1/documents/legismgt/limits_candidates.pdf. California is not among them.

19. Tillman Act of 1907, ch. 420, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b(a) (2006)).

20. *E.g.*, Winkler, *supra* note 18, at 880–81 (disagreeing with prevailing scholarly interpretation of the purpose of the Tillman Act).

21. ANN B. MATASAR, CORPORATE PACS AND FEDERAL CAMPAIGN LAWS: USE OR ABUSE OF POWER? 8 (1986); *see* EDWIN M. EPSTEIN, CORPORATIONS, CONTRIBUTIONS, AND POLITICAL CAMPAIGNS: FEDERAL REGULATION IN PERSPECTIVE 12 (1968).

22. ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 1–2 (1988).

misappropriating [shareholders'] money"[23] without permission—in other words, the legislation aimed to prevent company management from using the corporate treasury to influence elections without shareholder approval.[24] Each came to the fore in the corporate and political scandals of the early twentieth century.[25]

Expenses for and corporate involvement in presidential elections grew steadily, beginning with Abraham Lincoln's 1860 campaign and continuing through Theodore Roosevelt's 1904 campaign.[26] Lincoln's campaign cost his supporters some $100,000 (at least $2 million today),[27] and corporations became a part of campaign financing during the Civil War.[28] In 1864 Lincoln wrote that corporations had become enthroned as a result of the war, "and an era of corruption in high places will follow. The money power of the country will endeavor to prolong its rule by preying upon the prejudices of the people until all wealth is concentrated in a few hands and the Republic is destroyed."[29]

If corporations had become a source of campaign funding in the 1860s, by the mid-1880s they had become the principal source.[30] Some corporations then began making donations of $50,000 or more to the national party committees.[31] A Republican Party boss institutionalized corporate giving in the ensuing decade,[32] and by 1896 William McKinley raised and spent as much as $7 million (almost $140 million today) for his presidential campaign.[33] Still, an organized movement calling for campaign finance reform did not

23. Winkler, *supra* note 18, at 873.

24. MATASAR, *supra* note 21, at 8.

25. *See, e.g.*, Winkler, *supra* note 18, at 887–900 (discussing how the nation's three largest insurance companies used "other people's money" to influence the political process in the years preceding the passage of the Tillman Act in 1907).

26. Urofsky, *supra* note 18, at 7–12.

27. Bradley A. Smith, *The Sirens' Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POL'Y 1, 10 (1997).

28. Urofsky, *supra* note 18, at 7.

29. *Id.* (quoting JEFFREY H. BIRNBAUM, THE MONEY MEN: THE REAL STORY OF FUNDRAISING'S INFLUENCE ON POLITICAL POWER IN AMERICA 26 (2000)).

30. *See* Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 10 (2005).

31. *Id.*; *see also* BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 21 (2001) (listing examples of corporate contributions).

32. *See* Corrado, *supra* note 30, at 10.

33. Smith, *supra* note 27, at 10.

emerge until after Roosevelt's 1904 election and the Great Wall Street Scandal of 1905.[34]

The Great Wall Street Scandal was the great corporate scandal of its day.[35] The New York State Legislature had begun an investigation into the alleged self-dealing of insurance company executives.[36] The stories of company-paid opulent parties and other exploits that emerged filled the tabloids, and soon the "whole country was in a state of hysteria over [the] insurance matters."[37] The investigation then revealed that several major companies had given large contributions to the Republican campaign, including $48,000 (more than $1 million today) from New York Life to Roosevelt's reelection fund.[38] In an era in which it was customary to burn records of campaign contributions,[39] the revelation caused a nationwide, front-page sensation "as it furnished the first tangible evidence of connections between the insurance company and a political party."[40] Subsequent inquiry revealed that 72.5 percent of Roosevelt's campaign funding came from corporations.[41]

Roosevelt quickly reacted to the New York Life disclosure, and his 1905 call for a ban on corporate contributions is regarded as creating the forward momentum that was needed for Congress to pass the ban on corporate contributions.[42] Roosevelt's 1905 State of the Union address set forth the two main rationales behind the Tillman Act.[43] The President said,

> All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of

34. Corrado, *supra* note 30, at 10; Winkler, *supra* note 18, at 887.

35. Winkler, *supra* note 18, at 887.

36. *Id.* at 887–88.

37. *Id.* at 888 (quoting MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 67–68 (1994)).

38. *Id.* at 891–92. The contribution launched more than simply a scandal, but its uncovering made a hero out of investigator Charles Evans Hughes, transforming him from a "scarcely known" and "mediocre corporate lawyer . . . to Governor of New York in just a year." *Id.* at 889–90. Hughes later became Chief Justice of the U.S. Supreme Court.

39. HENRY F. PRINGLE, THEODORE ROOSEVELT: A BIOGRAPHY 356 (1987).

40. MUTCH, *supra* note 22, at 2 (quoting N.Y. TRIB., Sept. 16, 1905, at 1).

41. PRINGLE, *supra* note 39, at 357.

42. *See* MUTCH, *supra* note 22, at 4.

43. Urofsky, *supra* note 18, at 15–16.

> this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts.[44]

The Tillman Act ban on corporate contributions thus became "merely the first concrete manifestation of a continuing congressional concern for elections 'free from the power of [corporate] money.'"[45]

The insurance company campaign finance scandals and the resultant public sentiment in favor of reform propelled the Tillman Act forward.[46] The scandal distilled two main concerns about corporate involvement in elections: corruption and the ultra vires appropriation of shareholder wealth. The worry over corruption included the concern that congressional representatives had become the "instrumentalities and agents of the corporations" from which they raised campaign funding.[47] Under this view, the underlying basis for the Tillman Act's passage was a move to prevent the subversion, or corruption, of the political process in which corporate donations were considered illegitimate.[48]

The other hypothesis of the Tillman Act's origins rests in agency theory.[49] According to Professor Adam Winkler, concern about excessive corporate involvement in elections was in fact "overshadowed by a different conception of corporate political corruption."[50] After the New York Life scandal, the public became outraged that insurance company executives had given company money without approval to influence political campaigns.[51] That

44. *Id.* (alteration in original) (quoting 40 CONG. REC. 96 (1905)).

45. United States v. United Auto. Workers, 352 U.S. 567, 575 (1957) (quoting Hearing for H. Comm. on Elections, 59th Cong. 12 (1906) (statement of Samuel Gompers, President, Am. Fed'n of Labor)).

46. Corrado, *supra* note 30, at 12. Edwin Epstein placed the Tillman Act's motivational origins in the 1890s, when President Benjamin Harrison's cabinet was known as the Businessman's Cabinet and the U.S. Senate was known as The Millionaire's Club. EPSTEIN, *supra* note 21, at 1–2.

47. Smith, *supra* note 27, at 24; *see* MUTCH, *supra* note 22, at 6 (quoting the Tillman Act's sponsor). Many were also concerned that corporations were bribing voters to support a given candidate. *See* Corrado, *supra* note 30, at 11 ("[The law] should include severe penalties against him who gives or receives a bribe intended to influence his act or opinion as an elector . . . ." (quoting Theodore Roosevelt, State of the Union Address (Dec. 6, 1904) (transcript available at http://www.presidency.ucsb.edu/ws/index.php?pid=29545#axzz1dRYNtK5h))).

48. Winkler, *supra* note 18, at 893.

49. *See id.* at 873.

50. *Id.*

51. *Id.* at 887.

money belonged to the company or, more specifically, to the policyholders who were considered to be the company owners.[52] Democrats picked up on the theme, and in legislative floor debate they emphasized the agency-costs theme repeatedly.[53] Under this view, Congress passed the Tillman Act to protect the owners of companies—shareholders or policyholders—from the use of their money against their will for political purposes. Both this shareholder-protection theory and the corruption-based theory have lived on in Court jurisprudence on the issue.

Both the anticorruption theory and the shareholder-protection theory emerged as two of the compelling government interests that the Court has recognized when it has considered the constitutionality of bans on corporate donations and similar regulations concerning corporate involvement in political funding.[54] Following the well-worn framework for analyzing the constitutionality of a statute, the next Part will consider the Court's jurisprudence at each analytical step. Although the concerns that propelled the Tillman Act into the United States Code are more than a century old, they and others remain hotly contested.

III. THE CONSTITUTIONAL FRAMEWORK FOR THE CORPORATE DIRECT CAMPAIGN CONTRIBUTION BAN

In *Citizens United*, the Court followed the basic judicial review template: define the right, determine whether the right is burdened, and weigh the government interest against the burden using the appropriate level of scrutiny.[55] The Court did, however, fundamentally alter the options available at each level of the analysis, and this Part will detail those alterations. As will be discussed below, the right at issue in campaign contribution cases is

52. *Id.*

53. *Id.* at 923.

54. *See, e.g.*, FEC v. Beaumont, 539 U.S. 146, 154 (2003) ("[N]ot only has the original ban on direct corporate contributions endured, but so have the original rationales for the law. In barring corporate [donations,] . . . the ban was and is intended to 'preven[t] corruption or the appearance of corruption.'" (quoting FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985))); FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 208 (1982) ("[The ban protects shareholders] from having th[eir] money used to support political candidates to whom they may be opposed.").

55. *See* Citizens United v. FEC, 130 S. Ct. 876, 896–98 (2010).

the right of association.[56] *Citizens United* strongly suggests that corporations have a right to associate that is analogous to that which individuals enjoy. *Citizens United* further suggests that the Court views bans on certain kinds of political funding with increasing skepticism, and therefore it will find the right of association extremely burdened by the corporate contribution ban. Finally, *Citizens United* significantly narrows the government interests that the Court finds important enough to warrant the burden on First Amendment rights. If the Court is willing to follow *Citizens United*'s logical extensions, the Court should find the corporate contribution ban unconstitutional.

A. A Corporate Right to Associate?

When the issue before the Court involves campaign finance, the 1976 decision of *Buckley v. Valeo*[57] is the prism through which the Court looks. The *Buckley* Court considered the constitutionality of the 1974 amendments[58] to the Federal Election Campaign Act of 1971.[59] The Court considered, among other things, individual limits on both campaign contributions to candidates and independent expenditures, upholding the former[60] and striking down the latter.[61] The distinction, the Court reasoned, was that while independent-expenditure limits place a "more severe"[62] restriction on "political expression 'at the core of . . . First Amendment freedoms,'"[63] caps on contributions to candidates "entail[] only a marginal restriction upon the contributor's ability to engage in free communication."[64] More specifically, the contribution limitation's primary effect was to restrict "one aspect of the contributor's freedom of political *association*."[65] This is so because contributing is a symbolic act of

56. Buckley v. Valeo, 424 U.S. 1, 22 (1976) (per curiam).

57. 424 U.S. 1 (1976) (per curiam).

58. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

59. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

60. *Buckley*, 424 U.S. at 29.

61. *Id.* at 143–44.

62. *Id.* at 23.

63. *Id.* at 39 (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)).

64. *Id.* at 20–21.

65. *Id.* at 24–25 (emphasis added).

associating one's self with the speech of a candidate.[66] Moreover, giving a candidate a contribution leaves the contributor otherwise free to exercise her freedom of speech by discussing candidates and issues.[67] This Part will look at the nature of the freedom to associate and its relation to the express rights of speech and assembly in the First Amendment of the Constitution, and it will conclude that the corporations now have a strong claim to freedom of association themselves.[68]

Although the freedom of association is not expressly mentioned in the First Amendment to the Constitution,[69] the Court has acknowledged that the First Amendment supports such a freedom in two distinct senses.[70] In one sense, choices to associate in certain intimate human relationships like marriages are secured against undue government intrusion because of the role that such relationships play in safeguarding individual freedom.[71] This sense of association is protected as a fundamental liberty by the Fourteenth Amendment under the doctrine of substantive due process[72] and is not the focus of this Part. In the other sense, the right to associate as an instrument for exercising First Amendment rights like speech is protected[73] and is therefore derived from those rights. The freedom of association exists in this context within the "close nexus" between the freedoms of speech and assembly.[74] There the freedom to associate functions to preserve the exercise of those rights,[75] but it is

66. *Id.* at 21.

67. *Id.*

68. To be clear, in considering whether a corporation has a right to associate that is analogous to the individual right, the right for individuals to associate *as* a corporation is not at issue. Rather, the issue is whether a corporation *itself* has a right to associate itself with a candidate for political office.

69. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

70. Roberts v. U.S. Jaycees, 468 U.S. 609, 617 (1984).

71. *Id.* at 617–18.

72. *See* Zablocki v. Redhail, 434 U.S. 374, 383–86 (1978) (holding that marriage is protected under the Fourteenth Amendment because "[i]t is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.").

73. *Roberts*, 468 U.S. at 618.

74. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

75. SHELDON LEADER, FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW AND POLITICAL THEORY 22 (1992).

no less fundamental simply for being derived from them.[76] This sense of the freedom is the focus of this Part.

For individuals, it is easy to see how the freedom of association is a necessary derivative of the other rights in the First Amendment. It is simply the avenue by which individuals exercise collectively their individually held First Amendment rights.[77] Collective exercise is protected because if the government "forbid[s] two or more people from banding together to express a point of view, [it] may have effectively forbidden them singly to express that point of view."[78] In *Citizens Against Rent Control v. City of Berkeley*[79] Chief Justice Burger briefly described why it is so essential to protect political association:

> [T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th-century Committees of Correspondence and the pamphleteers were early examples of this phenomena and the Federalist Papers were perhaps the most significant and lasting example. The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus on a candidate or on a ballot measure. Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.[80]

Notwithstanding this importance, because the freedom to associate is derived from other First Amendment rights, its contours cannot be broader than those of its source rights.[81] It is necessary, then, to determine the scope of a corporation's right to freedom of speech, and only then to consider whether a corporation has the derivative right to associate.

76. *See* De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

77. LEADER, *supra* note 75, at 22.

78. *Id.*

79. 454 U.S. 290 (1981).

80. *Id.* at 294.

81. LEADER, *supra* note 75, at 23.

1. The Source of the Corporate Freedom of Association

The corporate right to the freedom of speech is defined by two animating concepts. First, in general the freedom of speech is protected because of the interests of two parties: the speaker and the listener.[82] The second concept is more of an open question as to whether, when a corporation is speaking,[83] the expression is that of the corporation as an entity apart from its shareholders, or whether the expression represents the collective voice of those shareholders.

The distinction between speaker and listener interests is particularly important in the context of corporate speech. For the individual speaker, the freedom of speech protects fundamental aspects of personhood,[84] including self-expression and self-realization.[85] For individual speakers, "[t]he First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression."[86]

The Court has recognized something of a need for expression in corporations, but the need is far more circumscribed than the personal self-expression need.[87] Under the commercial speech doctrine, commercial speech is that which is "closely related to effecting commercial transactions . . . and/or speech whose occurrence and content are motivated largely by the speaker's economic interests."[88] The early rationale for protecting corporate speech in the form of retail advertising was to enable consumers to make better commercial decisions,[89] and thus it was consumers' need

82. Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CALIF. L. REV. 1229, 1233 (1991).

83. A corporation cannot, of course, speak. This Note will nonetheless engage in the fiction that messages transmitted on behalf of a corporation represent the corporation speaking.

84. Dan-Cohen, *supra* note 82, at 1232–33.

85. *Id.* at 1233; *see also* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 32 (1986) (Rehnquist, J., dissenting) ("This Court has recognized that natural persons enjoy negative free speech rights because of their interest in self-expression . . . .").

86. Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

87. *See* Tom Bennigson, Nike *Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379, 386 (2006) (recognizing that the First Amendment protects commercial expression, though less so than it protects noncommercial expression).

88. *Id.* at 388–89.

89. *See id.* at 389 ("The principal rationale given for protecting commercial speech is the interests of consumers and of society in general in 'the free flow of commercial information.'"

for information that was burdened by restrictions on corporate speech. Later cases, however, emphasized the burden that regulation placed on corporate retailers themselves, and the cases paid only lip service to any burden on the consumer.[90] In *Lorillard Tobacco Co. v. Reilly*,[91] the Court spoke specifically of the burden on a tobacco retailer in terms of the corporate retailer's need to convey information about its product.[92] Insofar as commercial speech is concerned, if corporations have an interest or need in expression, it is only to the extent that the expression is tied to the corporation's economic interests. In other words, corporations can advertise their business in the hopes of transacting business.[93]

Apart from the commercial speech doctrine, the freedom of speech protects the listener's right to hear political speech, but the speech itself is protected for the listener's sake—not, in this case, for the corporate speaker's sake.[94] Meir Dan-Cohen created a useful example to illustrate the point:

> A right may be recognized in *A* out of [a self-expression and self-realization] concern for *A* himself. In such a case, *A* has . . . an *original right*. A right in *A* may also result from a concern not for him but for *B*['s need to hear the speech]. In this case, *A* will be said to have a *derivative right*.[95]

This derivative right is also passive, since in this context *A*'s interest is not in *speaking*, which is an active right, but in *A*'s *not being interrupted* so that *B* has the opportunity to hear him.[96] We are left with two classes of rights that the freedom of speech protects: the active *original right* and the passive *derivative right*.[97]

(citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763–64 (1976))).

90. *Id.* at 391.

91. 533 U.S. 525 (2001).

92. *Id.* at 564.

93. *See* United States v. United Foods, Inc., 533 U.S. 405, 409 (2001) ("A quarter of a century ago, the Court held that commercial speech, usually defined as speech that does no more than propose a commercial transaction, is protected by the First Amendment.").

94. *See* Dan-Cohen, *supra* note 82, at 1245.

95. *Id.* at 1233.

96. *Id.* at 1234.

97. *Id.* at 1234, 1244.

Because corporations do not share the natural person's need for self-expression[98] beyond their economic interest, or, as former Chief Justice Rehnquist more broadly termed it, the need for freedom of conscience,[99] it follows that, before *Citizens United*, corporations as entities apart from their shareholders did not have an original right to freedom of speech in the political context. Political speech, though difficult to define precisely, is surely self-expressive.[100] However, corporate speech in the political context is important because it increases the "stock of information from which . . . the public may draw."[101] As described more fully below, corporate political speech before *Citizens United* therefore fit within the First Amendment's protection because the Court viewed it as a passive derivative right—derivative because it was based on the public's right to listen, and passive because it was based on the public's right to hear, not the corporation's right to speak.[102]

2. Corporate Speech and Association Rights Before *Citizens United*

The Supreme Court adopted for corporate political speech the passive derivative model described above[103] in 1978's *First National Bank of Boston v. Bellotti*.[104] First National Bank challenged the constitutionality of a Massachusetts state law that prohibited business corporations from making contributions or expenditures to influence the outcome of a ballot measure.[105] In characterizing the right at

98. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 804–05 (1978) (White, J., dissenting) ("Indeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech.").

99. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 32 (1986) (Rehnquist, J., dissenting).

100. *See* Erwin Chemerinsky, *How Will* Morse v. Frederick *Be Applied?*, 12 LEWIS & CLARK L. REV. 17, 23 (2008) ("Professor Baker said: '[t]o engage voluntarily in a speech act is to engage in self-definition [and] expression. A Vietnam war protestor may explain that when she chants "Stop This War Now" at a demonstration, she does so without any expectation that her speech will affect continuance of the war . . .; rather, she participates and chants in order to *define* herself publicly in opposition to the war.'" (quoting C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 994 (1978))).

101. *Bellotti*, 435 U.S. at 783.

102. *See* Dan-Cohen, *supra* note 82, at 1245.

103. *Id.*

104. 435 U.S. 765 (1978).

105. *Id.* at 768 n.2.

issue, the Court dismissed the subject of corporate First Amendment rights[106] by stating that the questions were not whether corporations have First Amendment rights and whether those rights are coextensive with individuals' rights.[107] The Court asked instead whether Massachusetts's law abridged expression that the First Amendment protected,[108] thus focusing on the speech itself rather than on the speaker.[109] The Court held that the law did so abridge protected expression not because the corporation *had* a right to freedom of speech that was analogous to the personal right, but because of the First Amendment interest in "affording the public access to discussion, debate, and the dissemination of information and ideas."[110] Thus, *Bellotti* rested not on the basis of any rights or interests of the corporation itself[111] but on "protecting the constitutional rights of people"[112] to receive the information the speech conveys. The Court was very careful never to say that it was protecting a corporation's active right to speak.

The Court gave perhaps its clearest endorsement of the view that the corporate speech right is less fundamental in 1990's *Austin v. Michigan Chamber of Commerce*.[113] There the Court upheld as constitutional a ban on corporate independent expenditures on behalf of candidates in federal election campaigns.[114] In contrast, the *Buckley* Court held that such expenditures by individuals could not be limited because they were a "*severe* restriction[]" on protected freedoms.[115]

Returning to the premise that the right to associate is itself derivative of the freedom of speech, it becomes difficult to discern whether in the pre-*Citizens United* era corporations had the right to

106. Robert E. Mutch, *Before and After* Bellotti*: The Corporate Political Contributions Cases*, 5 ELECTION L.J. 293, 310 (2006).

107. *Bellotti*, 435 U.S. at 776; *see also* Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 870 (2007) ("*Bellotti* . . . is of potentially limited significance when it comes to corporate political speech rights.").

108. *Bellotti*, 435 U.S. at 776.

109. JAMIN B. RASKIN, OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE 187 (2003).

110. *Bellotti*, 435 U.S. at 783.

111. Bennigson, *supra* note 87, at 399.

112. *Id.*

113. 494 U.S. 652 (1990), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

114. *Id.* at 655.

115. Buckley v. Valeo, 435 U.S. 1, 23 (1976) (per curiam) (emphasis added).

associate politically. Before *Citizens United*, business corporations had a direct right to speak, as the commercial speech doctrine recognized;[116] political speech, however, was protected only insofar as it was necessary to protect the right of people to hear the corporate message.[117] While it may be said that collective association enhances listeners' rights, the Court never held that corporations had the right of political association. It is therefore unclear whether a corporate right to associate existed in an era when the Court conceived of corporate rights as derivative.[118]

3. Corporate Speech and Association Rights After *Citizens United*

The *Citizens United* decision fundamentally recasts the nature of a corporate right to speak,[119] taking it much closer to the original right discussed above. Justice Kennedy's majority opinion jettisoned the carefully circumscribed language of *Bellotti* in favor of language that significantly broadened both the question presented and the answer that followed. As a result, the post-*Citizens United* argument for a corporate right to associate in the form of direct campaign contributions to candidates became much stronger, if not unassailable.

In the first sentence of the section in which it explicated the corporate speech right, the *Citizens United* majority cited no fewer than twenty-one Supreme Court decisions spanning fifty years of jurisprudence for the proposition that "[t]he Court has recognized that First Amendment protection extends to corporations."[120] The

116. *See* Bennigson, *supra* note 87.

117. *Id.* at 423–24.

118. Nevertheless, in *Pacific Gas and Electric Co. v. Public Utilities Commission of California*, the Court recognized at least a corporate right not to be *forced* to associate. 475 U.S. 1, 12–17 (1986). The Commission required Pacific Gas and Electric Co. (PG&E) to allow a utility ratepayer's advocacy group to enclose insertions in PG&E's billing envelopes. *Id.* at 4. Chief Justice Burger likened this to forcing PG&E to print the messages of others on its utility trucks and other property. *Id.* at 21 (Burger, C.J., concurring). Justice Powell, writing for the majority as he had in *Bellotti*, wrote that such forced associations were impermissible, even for corporations. *Id.* at 15. A right not to be forced to do something, however, does not create or imply a right to do the thing. *Pacific Gas* therefore does not show that corporations, before *Citizens United*, had the right to associate with candidates via contributions.

119. *See* Citizens United v. FEC, 130 S. Ct. 876, 958 (2010) (Stevens, J., concurring in part and dissenting in part) ("The only thing about *Bellotti* that could not be clearer is that it declined to adopt the majority's position.").

120. *Id.* at 899 (majority opinion).

seeming consistency of fifty years, however, was later undermined when the Court acknowledged that "[o]ur Nation's speech dynamic is changing . . . ."[121] Its discussion of *Bellotti* plainly shows the change.

The Court put broad and inexact language to work in the service of making it seem as though its decision merely returned to and reapplied the sound principles that it had announced in *Bellotti*.[122] The Court first made it clear that in no context could the government distinguish the First Amendment rights of corporations from those of individuals.[123] It then referenced *Bellotti*, unqualifiedly stating that the "central principle" of *Bellotti* was "that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity."[124] *Bellotti*, however, expressly circumscribed its own holding by indicating that the speech protection that it found was contextually limited.[125] Nowhere in the *Citizens United* opinion did the majority offer a similar limiting principle on its holding. The closest that the Court came to recognizing such a principle was in passively noting that corporate contribution limits have been an accepted means of preventing quid pro quo corruption, and that the petitioners had not suggested that the Court reconsider this position.[126] Thus, while the Court took great pains to make clear *Citizens United*'s logical commonalities with *Bellotti*, its holding in *Citizens United* was far broader.

The Court further departed from *Bellotti* by repeatedly equating the corporate speaker to the individual human speaker.[127] It held that, as opposed to merely recognizing protection of a corporation's right to speak because of listeners' rights, "[t]he Court has . . . rejected the argument that political speech of corporations . . . should be treated differently under the First Amendment simply because such

121. *Id.* at 912.

122. *See id.* at 913 ("We return to the principle established in *Buckley* and *Bellotti* . . . .").

123. *See id.* at 900.

124. *Id.* at 903.

125. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788 n.26 (1978) ("[O]ur consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office."); *see also Citizens United*, 130 S. Ct. at 958 (Stevens, J., concurring in part and dissenting in part) (discussing the "explicit limitation" on the scope of the *Bellotti* holding).

126. *Citizens United*, 130 S. Ct. at 909.

127. *See id.* at 884, 900, 912, 929.

associations are not 'natural persons.'"[128] Adding to this clear equivalence of corporate speech rights and individual speech rights, the Court noted that corporations "have the need or the motive to communicate their views."[129] Although the Court recognized the role of listener rights, it recognized that corporations have the need for self-expression and self-realization—one of the primary rationales that underlies the personal freedom of speech—and thus that corporations have an original speech right.[130] This explains how the Court held that, in the context of political speech, the First Amendment does not permit Congress to make categorical distinctions based on whether the speaker is a corporation or an individual.[131]

Another way to say that the First Amendment allows for no categorical distinctions between corporations and individuals is to say that corporations and individuals enjoy a right that is coextensive. Individuals, as discussed above, have an original right to speech, meaning that they have a right to self-expression for their own sake completely apart from any concern for the listener or for increasing the information that is available to the public. *Bellotti* and later holdings acknowledged a distinction between corporations and individuals on the basis that corporate speech rights were derivative, not original, and the Court thus carefully limited those decisions in the context of political speech from categorically equating a corporation with a person. Because it recognizes corporate original speech rights, the *Citizens United* opinion finds any distinction repugnant in the context of political expression.

This has direct implications for the corporate contributions ban because the recognition of corporate original speech rights bolsters a corporate claim to the freedom of association. If political speech rights for corporations are tied to the corporation as an entity, as *Citizens United* strongly implies they are, then corporate political expression would "undeniably [be] enhanced by group association."[132] *Citizens United* is therefore where the corporate

128. *Id.* at 900 (quoting *Bellotti*, 435 U.S. at 776).

129. *Id.* at 906.

130. *See id.* at 906–08.

131. *Id.* at 913.

132. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981) (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958)).

rubber meets the freedom-of-association road. This has direct implications for the corporate direct contribution ban because, with the full protection of a corporate original speech right in hand, corporations now may invoke their right of political association in order to make direct contributions to political candidates.

B. Alternative Means for Expression and the Burden That Bans Place on Corporate Association Rights

Finding that corporations have a right to political association does not require a finding that any regulation that implicates the right is unconstitutional.[133] Instead, the given regulation must also burden the right.[134] The Court has gone so far as to say that even a significant burden that contribution regulations place on association rights may be sustained.[135]

Beginning with *Buckley* in 1976, the Court set out a relatively unworried view of the burden that contribution limits place on associational rights. The *Buckley* Court considered individual campaign contribution limits that Congress had enacted in the early 1970s.[136] The Federal Election Campaign Act (FECA) limited individual contributions to $1,000 per candidate.[137] The Court set out its analysis by noting that the primary problem that contribution limits raise is their restriction on one aspect of a contributor's association right, as described above.[138] The Court then noted that even if the contributions limit affected this "narrow aspect" of political association, individuals remained free to engage in independent political expression, to volunteer their services to political campaigns, and to assist campaigns with the limited donation that FECA permitted.[139] The limitations therefore failed to

133. Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam) ("[N]either the right to associate nor the right to participate in political activities is absolute . . . ." (quoting U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973))).

134. *See id.*

135. *Id.*

136. *Id.* at 6.

137. *Id.* at 7.

138. *Id.* at 24–25.

139. *See id.* at 28–29.

undermine "to any material degree" the individual's rights at issue, and the Court upheld the limits.[140]

Since a corporation cannot physically volunteer for a candidate, Congress created the political action committee (PAC) option as an alternative means for corporate expression.[141] A PAC is a separate, segregated fund that a corporation forms to raise and spend money to get candidates elected.[142] Each PAC is distinct from its corporate parent, and shareholders may donate funds to support the PAC's political activities.[143] Each PAC must be registered with the Federal Elections Commission (FEC), appoint a treasurer, keep for three years records of receipts and disbursements, and file financial reports disclosing its contributors and their contributions.[144] The FEC regulates in some form almost all aspects of PAC activity.[145]

In 2003 the Court addressed the current federal ban on corporate contributions in one of four cases that one scholar deemed the "New Deference Quartet."[146] *FEC v. Beaumont*[147] and the other Quartet members marked the Court's very deferential approach to legislative determinations on the need for campaign finance regulation.[148] The Court in *Beaumont* confronted a split among the circuit courts of appeals as to the constitutionality of the Tillman Act[149] as applied to to nonprofit advocacy corporations.[150] A political advocacy corporation funded by individual member contributions mounted an

140. *Id.* at 29.

141. *See* FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 201–02 (1982).

142. THOMAS GAIS, IMPROPER INFLUENCE: CAMPAIGN FINANCE LAW, POLITICAL INTEREST GROUPS, AND THE PROBLEM OF EQUALITY 5 (1996).

143. Citizens United v. FEC, 130 S. Ct. 876, 887–88 (2010) (discussing 2 U.S.C. § 441b(b)(2) (2006)); *see also Nat'l Right to Work Comm.*, 459 U.S. at 204–06 (upholding the requirement that funds come only from shareholders and union members).

144. *See generally* FED. ELECTION COMM'N, CAMPAIGN GUIDE FOR CORPORATIONS AND LABOR ORGANIZATIONS (Jan. 2007), *available at* http://www.fec.gov/pdf/colagui.pdf (explaining the rules each PAC must follow).

145. *See generally id.* (describing the various regulations PACs must follow).

146. *See* Richard L. Hasen, Buckley *Is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 67–68 (2004).

147. 539 U.S. 146 (2003).

148. *See generally* Hasen, *supra* note 146 (discussing how two cases within the Quartet, *McConnell* and *Beaumont*, were overturned or significantly undermined by *Citizens United*).

149. *Beaumont*, 539 U.S. at 150.

150. *See* 2 U.S.C. § 441b(a) (2006) ("It is unlawful for any . . . corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election . . . .").

as-applied challenge to the ban.[151] Justice Souter, writing for the six-member majority,[152] hardly addressed and all but dismissed whether a contribution ban burdened the freedom of association.[153] The Court considered contribution restrictions, a phrase that it broadly defined to include the ban, as "closer to the edges than to the core of political expression."[154] Further, the Court saw a corporation's option of channeling contributions through a PAC as ameliorating any concern about the burden on associational rights.[155] As such, any burden on or interference with the plaintiff corporation's associational right, if any, was cause for little concern.[156]

Beaumont viewed the ban on corporate direct campaign contributions in two contexts—the broader regulatory scheme on the one hand,[157] and the relationship between a corporation and its PAC on the other.[158] As to the broader regulatory scheme, Justice Souter situated the contributions ban within the "careful legislative adjustment of the federal electoral laws."[159] More important, however, the Court emphasized that the associative burden was on the shareholders, not on the corporation itself.[160] Although the corporate plaintiff argued that the regulation in question was a complete ban on the *corporation's* ability to donate to candidates,[161] the Court disagreed and held that the PAC option did not "jeopardiz[e] the associational rights of [shareholders]."[162] The focus on the shareholders, rather than on the corporation itself, reflected Justice Souter's view that corporate speech rights are derivative—not only in the sense described above with respect to listener rights, but also in the sense that a speaking corporation is really the sum of its

151. *Beaumont*, 539 U.S. at 151.
152. Justice Kennedy concurred only in the judgment.
153. *Beaumont*, 539 U.S. at 161–62.
154. *Id.* at 161.
155. *See id.* at 162–63.
156. *Id.* at 162.
157. *See id.* at 152–56.
158. *See id.* at 156–59.
159. *Id.* at 153 (quoting FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 209 (1982)).
160. *Id.* at 162–63.
161. *Id.* at 162.
162. *Id.* at 163.

shareholders.[163] The prohibition on corporate contributions therefore amounted to a ban in name only, since the PAC option still allowed shareholder participation in federal elections.

In *FEC v. Wisconsin Right to Life*[164] (*WRTL II*), however, the Court shifted on the issue of the rights in question and on its view of whether the PAC option alleviated the burden on that right.[165] Chief Justice Roberts wrote in *WRTL II*'s plurality opinion that Justice Souter's "dissent overstates its case when it asserts that the 'PAC alternative' gives corporations a constitutionally sufficient outlet to speak."[166] Instead, "PACs impose well-documented and onerous burdens, particularly on small nonprofits."[167] Thus, in Chief Justice Roberts's view, the burden was on the corporation itself, not on the shareholders.

Later, in *Citizens United*, Justice Kennedy cemented this shift. Justice Kennedy, who had dissented in part in *McConnell v. FEC*[168] and there likened PACs to "compulsory ventriloquism,"[169] now wrote for an outright majority of the Court. The Court described PACs as burdensome alternatives that failed to alleviate the burden that an independent expenditure ban placed on the First Amendment.[170] Thus, the *Citizens United* Court focused on the corporation itself, holding that the PAC option "does not allow corporations to speak."[171] This shift on whose right is being burdened tracks the broader move from viewing corporate speech rights as derivative to viewing corporate speech rights as original. Where a corporate right is derived from those of shareholders and listeners, as in *Beaumont* and *Bellotti*, the focus necessarily is on them; on the other hand, when the corporation itself has the original right, as in *Citizens United*, the focus necessarily is on the corporation.

163. *See id.* ("The PAC option allows corporate political participation without . . . jeopardizing the association[] rights of advocacy organizations' members.").

164. 551 U.S. 449 (2007).

165. *Id.* at 532.

166. *Id.* at 536 n.9. Although only Justice Alito joined Chief Justice Roberts' opinion, their position between the opinions of Justice Souter and Justice Scalia made decisive the Chief Justice's opinion. Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in* FEC v. Wisconsin Right to Life, 92 MINN. L. REV. 1064, 1079 (2008).

167. *WRTL II*, 551 U.S. at 536 n.9.

168. 540 U.S. 93 (2003).

169. *Id.* at 333 (Kennedy, J., concurring in part and dissenting in part).

170. Citizens United v. FEC, 130 S. Ct. 876, 897 (2010).

171. *Id.*

The shift of focus to the rights of the corporation will change the calculus if and when the Court again confronts the corporate direct contribution ban. While in *Beaumont* and the other New Deference Quartet cases a PAC option satisfied the Court that shareholders' associative rights were adequately protected, now it is likely that the PAC option is inadequate because the law forcing corporations to channel donations through PACs prevents the corporation itself from donating to candidates. It is simply not enough that shareholders can donate, and thus express themselves, via the PAC. The burden placed on the right is not alleviated.

C. Citizens United *Discards Many of the Government Interests That Have Supported and Could Continue to Support the Ban*

Thus far this Note shown how the logic of *Citizens United* militates for finding a corporate right to associate and a significant burden on that right. But the inquiry does not end there. The Court also overtly and drastically limited the range of government interests against which to balance the burden. This Part will outline the government interests that the Court previously recognized, and it will show that *Citizens United* significantly narrows or discards all but one. Before *Citizens United*, the Court had recognized three interests on which the government could support contribution and expenditure limits.

1. The Anticorruption Rationale

The anticorruption rationale is a derivative of the popular sentiment against corporate involvement in elections that the insurance scandals of the early twentieth century sparked.[172] The Court's seminal decision in *Buckley*, of course, laid the foundation on which the anticorruption interest would expand and, ultimately, contract.[173] In discussing contribution limits applicable to individuals, the *Buckley* Court explained:

172. *See* EPSTEIN, *supra* note 21, at 12 ("[The] primary purpose [of the Tillman Act of 1907] was to destroy the influence over elections that corporations exercised through their financial contributions.").

173. *See* Buckley v. Valeo, 424 U.S. 1, 26–30 (1976) (per curiam); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 384 (2009) ("[*Buckley*] sets up the modern framework for analyzing corruption . . . .").

> To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, . . . the problem is not an illusory one.
>
> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.[174]

At least as far as *Buckley* is concerned, the baseline of corruption seems to be limited to the actual or perceived existence of a quid pro quo—"dollars for political favors."[175] But, as one scholar has argued, the vagueness of the definition of corruption "left an important word/concept as a big lacuna to be filled by the political philosophy of each of the Justices."[176]

Cases after *Buckley* bear this out. Only nine years later, for instance, the Court described a more conceptual, less definite baseline for corruption.[177] In *FEC v. National Conservative Political Action Committee*[178] the Court explained that corruption is "a subversion of the political process" to the extent that "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."[179] The *McConnell* Court adopted this addition and held that corruption encompasses not only *Buckley*'s appearance of a quid pro quo but also the "more subtle but equally dispiriting" appearance of undue influence.[180] The *McConnell* Court wrote that undue influence—the danger that office holders would decide issues not on their merits or on the preferences of their constituents but

174. 424 U.S. at 26–27.

175. FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985).

176. *See* Teachout, *supra* note 173, at 385.

177. *Nat'l Conservative Political Action Comm.*, 470 U.S. at 497.

178. 470 U.S. 480 (1985).

179. *Id.* at 497.

180. *See* McConnell v. FEC, 540 U.S. 93, 143–44, 153 (2003) (stating that the Government's interest in combating the appearance or perception of corruption would be impeded if the Court took away Congress's authority to regulate the appearance of undue influence), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

instead in favor of their large donors—was as troubling as the danger of exchanging money for favorable votes.[181] Justice Kennedy vigorously dissented on this point, saying that favoritism and influence are unavoidable in representative politics, and that one reason for a donor to make a contribution to a candidate is that the candidate will respond by producing the outcomes that the donor favors.[182] "Democracy," Justice Kennedy said, "is premised on [such] responsiveness."[183]

There is one wrinkle to the anticorruption rationale that the Justices have agreed on: it includes an interest in avoiding circumvention of laws that limit individual contributions.[184] The *Beaumont* Court recognized that "restricting contributions by various organizations hedges against their use as conduits for 'circumvention of [valid] contribution limits.'"[185] That is, if an individual is limited in how much she may lawfully donate to a candidate, she could exceed those limitations simply by forming multiple corporations and diverting her money through them.[186] At one point, all members of the Court agreed that the anticircumvention interest is a form of the anticorruption interest.[187] Because *Citizens United* concerned independent expenditures that individuals are not limited in making, the Court did not address the anticircumvention interest. *Beaumont* was the last time that the Court addressed the issue.

The *Citizens United* Court did discuss the anticorruption interest generally.[188] The Court circumscribed the anticorruption rationale, largely retreading Justice Kennedy's dissent in *McConnell*.[189] The Court dismissed the notion that favoritism and influence are corruptive and held that reliance on them is at odds with standard First Amendment analyses because they are susceptible to no

181. *See id.* at 153.

182. *Id.* at 296–97 (Kennedy, J., concurring in part and dissenting in part).

183. *Id.* at 297.

184. *E.g.*, FEC v. Beaumont, 539 U.S. 146, 155 (2003).

185. *Id.* (alteration in original) (quoting FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 456 (2001)).

186. *Id.*

187. *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 456.

188. Citizens United v. FEC, 130 S. Ct. 876, 909–11 (2010).

189. *Id.* at 909–10.

limiting principle.[190] Moreover, the Court wrote that the appearance of influence or access would not cause voters to lose faith in American democracy.[191] Instead, in spending money on advertising in an attempt to persuade voters, makers of independent expenditures presumed that the voters were the ultimate source of influence over their representatives.[192]

Thus, *Citizens United* strictly limits the anticorruption rationale to reach only the threat of actual quid pro quo corruption or the appearance of it. Also left standing within this definition is *Beaumont*'s anticircumvention interest. Together, they remain the only government interests that a court may use to sustain the corporate contributions ban.

2. The Shareholder-Protection Rationale

After considering the anticorruption principle, *Beaumont* considered other rationales for upholding the ban, including shareholder protection.[193] As we have seen, shareholder protection is part of the agency theory on which the Tillman Act prohibition was originally based.[194] In *Beaumont*, Justice Souter quoted *FEC v. National Right to Work Committee*[195] (*NRWC*) for the proposition that the corporate contribution ban protects "the individuals who have paid money into a corporation for purposes other than the support of candidates"—in other words, the shareholders—"from having that money used to support political candidates to whom they may be opposed."[196] The *NRWC* Court agreed with the government's argument that protecting the interests of dissenting shareholders was "sufficient to justify" the regulation.[197]

190. *Id.* at 910 (citing McConnell v. FEC, 540 U.S. 93, 296–97 (2003) (Kennedy, J., concurring in part and dissenting in part)); *see also* Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 596–97 (2011) (discussing Justice Kennedy's opinion in *McConnell*).

191. *Citizens United*, 130 S. Ct. at 910.

192. *Id.*

193. FEC v. Beaumont, 539 U.S. 146, 154–55 (2003).

194. *See supra* notes 49–53 and accompanying text.

195. 459 U.S. 197, 207–08 (1982).

196. *Beaumont*, 539 U.S. at 154 (quoting *NRWC*, 459 U.S. at 208). The *NRWC* Court did not directly face the question of the corporate contribution ban's validity, but it upheld a limitation on the solicitation of a PAC's funds to members of the Committee. *See NRWC*, 459 U.S. at 198.

197. *NRWC*, 459 U.S. at 208.

The shareholder-protection principle received its most robust defense in Justice Brennan's concurring opinion in *Austin*.[198] *Austin*, which *Citizens United* overrules, considered Michigan's ban on corporate independent expenditures.[199] The Court upheld the ban,[200] with Justice Brennan joining the Court's opinion in addition to writing separately.[201] The expenditure ban, he explained, "protects dissenting shareholders of business corporations . . . to the extent that such shareholders oppose the use of their money, paid as dues . . . out of general corporate treasury funds, for political campaigns."[202]

In his dissent in *Austin*, Justice Kennedy protested that "[t]o the extent that members disagree with a nonprofit corporation's policies, they can seek change from within, withhold financial support, cease to associate with the group, or form a rival group of their own."[203] Justice Brennan rejected this notion, writing that such measures would impose a financial sacrifice on objectors.[204] But while the state may have no constitutional *duty* to protect the objecting shareholder, the state has a compelling interest in preventing a corporation from exploiting those shareholders who do not wish to contribute to the corporation's supposed political message.[205] Although for the purposes of *Austin* Justice Kennedy lost the argument as to the validity of shareholder protection as a valid governmental interest, his point of view would "in time . . . command the support of a majority of th[e] Court."[206]

As it did with the anticorruption interest, the *Citizens United* majority adopted Justice Kennedy's view.[207] In overruling *Austin*,[208] the Court held in just two paragraphs that there was little evidence that shareholders are unable to use the shareholder voting process to

198. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 673 (1990) (Brennan, J., concurring), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

199. *Id.* at 655 (majority opinion).

200. *Id.*

201. *Id.* at 669–78 (Brennan, J., concurring).

202. *Id.* at 673.

203. *Id.* at 710 (Kennedy, J., dissenting).

204. *Id.* at 674 (Brennan, J., concurring).

205. *Id.* at 674–75.

206. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting).

207. *See* Citizens United v. FEC, 130 S. Ct. 876, 911 (2010).

208. *Id.* at 913.

correct perceived abuses or are unable to simply sell their shares of stock in corporations that support candidates with whom the shareholders disagree.[209] Because of the ease of opting out in some way, it seems that *Citizens United* vanquishes the shareholder-protection interest in all contexts, not merely in the narrow independent expenditure situation that the Court addressed there.

3. The Antidistortion Interest

The final traditional basis for upholding the corporate direct contribution ban is the antidistortion rationale. Like the shareholder-protection interest, antidistortion is ultimately a concern about undue influence.[210] Unlike the anticorruption and shareholder-protection rationales that had their origins in the scandal surrounding the 1904 election, antidistortion became a concern in the 1940s.[211] In 1943 Congress passed the Smith-Connolly Act, thereby bringing labor unions under the Tillman Act's prohibition for the remainder of World War II.[212] In 1947, Congress made the union prohibition permanent when it passed the Taft-Hartley Act[213] "to protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power."[214] However, in *Austin*—a case that bore directly on corporate, not union, campaign activity—the Court expressly applied the antidistortion rationale to corporations.[215]

The *Austin* Court wrote of "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[216] Corporate wealth, in the Court's view, had the potential to unfairly influence

209. *See id.* at 911.

210. Hasen, *supra* note 190, at 602 (citing *Citizens United*, 130 S. Ct. at 942 (Stevens, J., concurring in part and dissenting in part)).

211. United States v. United Auto. Workers, 352 U.S. 567, 577–83 (1957).

212. MUTCH, *supra* note 22, at 153 ("Congress had banned corporation contributions after revelations of secret business gifts to Theodore Roosevelt's 1904 reelection campaign, and it was labor gifts to his cousin Franklin's 1936 reelection campaign that prompted similar action against unions.").

213. Winkler, *supra* note 18, at 928.

214. *United Auto. Workers*, 352 U.S. at 582.

215. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

216. *Id.* at 660.

elections when that wealth is deployed in the form of independent expenditures.[217] By limiting direct corporate expenditures and requiring them to be financed through PACs funded by donations from the corporation, its employees, and others, the Court sought to ensure that expenditures would reflect actual public support for the political ideas that PACs—and by extension their corporate parents—espoused.[218] The Court stressed, however, that a corporation's ability to accumulate large amounts of wealth was, itself, not what justified the expenditure ban; instead, the state-conferred corporate structure that *facilitated* the amassing of large treasuries warranted the limit on independent expenditures.[219]

As he did with respect to the shareholder-protection rationale, Justice Kennedy vigorously disagreed with the antidistortion interest that the majority recognized.[220] He argued that

> [T]here is no reason to assume that the corporate form has an intrinsic flaw that makes it corrupt, or that all corporations possess great wealth, or that all corporations can buy more media coverage for their views than can individuals or other groups. There is no reason to conclude that independent speech by a corporation is any more likely to dominate the political arena than speech by the wealthy individual, . . . or by the well-funded PAC . . . .[221]

Once again, although he lost the battle in *Austin*, Justice Kennedy would later prevail on the question of the validity of the antidistortion interest.[222]

Before Justice Kennedy would have that opportunity, however, the Court decided *Beaumont*. *Austin*, as noted above, concerned a ban on corporate independent expenditures, not on corporate direct campaign contributions. In *Beaumont*, however, the Court recognized the antidistortion rationale in the context of the ban on corporate direct contributions.[223] The Court held that a nonprofit

217. *Id.*

218. *Id.* at 659–60.

219. *Id.* at 660.

220. *See id.* at 702 (Kennedy, J., dissenting).

221. *Id.* at 704–05.

222. *See* Citizens United v. FEC, 130 S. Ct. 876, 904–08 (2010).

223. *See* Thalheimer v. City of San Diego, 706 F. Supp. 2d 1065, 1084 (S.D. Cal. 2010) ("In *Beaumont*, the Court relied on *Austin v. Michigan Chamber of Commerce* . . . .").

advocacy corporation benefitted from state-created advantages just as its for-profit counterparts did and that the nonprofit potentially could amass just as substantial political "war chests."[224] Justice Kennedy, noting his dissent in *Austin*, concurred in *Beaumont*'s judgment only.[225]

As it did with the shareholder-protection interest, *Citizens United* essentially nullifies the antidistortion interest that the Court had recognized for at least twenty years.[226] The Court held that antidistortion is a rationale that seeks to equalize the speech of different speakers—a holding that is inconsistent with *Buckley* and other cases.[227] In what is perhaps *Buckley*'s most famous single sentence, seven members of the Court agreed that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."[228] In contrast, *Austin* defended the antidistortion rationale as a means of preventing corporations from using vast wealth to obtain an unfair advantage in the market for political ideas.[229] The *Citizens United* majority emphatically rejected this, writing that "[t]he rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."[230] In the Court's view, the antidistortion rationale is a form of viewpoint discrimination and is thus invalid in any analysis of First Amendment freedoms.[231]

In sum, *Citizens United* vastly undermines the interests that the Court had traditionally used as the basis for upholding the independent expenditure ban along with the ban on corporate direct

224. FEC v. Beaumont, 539 U.S. 146, 160 (2003).

225. *Id.* at 163–64 (Kennedy, J., concurring) (citing FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986)).

226. *See Mass. Citizens for Life, Inc.*, 479 U.S. at 257–58 (citing cases that recognized some form of the antidistortion interest).

227. Hasen, *supra* note 190, at 595.

228. Richard L. Hasen, *The Untold Drafting History of* Buckley v. Valeo, 2 ELECTION L.J. 241, 249–50 (2003) (quoting Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam)).

229. Citizens United v. FEC, 130 S. Ct. 876, 905 (2010) (citing Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 658–59 (1990), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010)).

230. *Id.*

231. *See id.* at 908.

contributions. The Court severely circumscribed the anticorruption interest and rejected the shareholder-protection and antidistortion interests with such force that their future use is doubtful. With those interests on the ash heap of jurisprudential history, only the narrowed anticorruption interest and the anticircumvention interest remained as bases for upholding campaign finance regulations—the corporate direct contribution ban among them.

IV. THE *CITIZENS UNITED* FRAMEWORK MILITATES AGAINST THE CORPORATE DIRECT CONTRIBUTION BAN

Citizens United creates a new framework in which to analyze corporate First Amendment rights. First, the case limits the rationales that are available to the government in arguing that the Court should uphold the corporate campaign contribution limitation, making it probable that the Justices will be more skeptical of the ban when a party contests its constitutionality before the Court. Second, the Court recognized that a corporation has an original speech right, making it clear that corporations have the full benefits of the derivative-association right. Third, *Citizens United* marks a shift in perspective on whose right is being burdened by regulations on corporate involvement in campaign funding—making it more likely that the Court will find the contribution ban to be a significant burden on corporations themselves, rather than on corporate shareholders or on hearers of the corporate message. To stay logically consistent with this new framework, the Court should overrule the weakened *Beaumont* precedent that upholds the corporate contributions ban. The following analysis explains why.

A. The Level of Scrutiny

Because the *Citizens United* Court did not confront the question of direct contributions, it did not have the opportunity to alter the level of scrutiny to which it would subject the corporate ban. In *Buckley*, the Court applied the "closely drawn" level of scrutiny.[232] At this level, a regulation that involves a significant burden on association rights will be upheld "if the State demonstrates a

232. Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam); *see* FEC v. Beaumont, 539 U.S. 146, 162 (2003).

sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."[233] Closely drawn scrutiny is thus less probing than strict scrutiny is, but it is greater than simple rational basis review is. Although some members of the Court have argued that strict scrutiny ought to apply in all cases that involve political speech, including those involving contribution limits,[234] the oracular nature of *Buckley*'s position in campaign-finance cases means that the Court is unlikely to change course. The totality of the ban, however, means that the closely drawn standard will be sufficient for the Court to use to strike down the ban.

B. The Corporate Contributions Ban Severely Burdens Corporate Associational Rights

The burden that the ban places on corporations' associational rights is severe. In *Green Party of Connecticut v. Garfield*,[235] a case concerning a state law that banned individuals registered as lobbyists from making donations to political candidates,[236] the Second Circuit explained that where a law imposes contribution bans on *discrete groups*, the ban "utterly eliminates [that group's] right to express [its] support for a candidate by contributing money to the candidate's cause."[237] Quoting *Buckley*, the court wrote that a contribution ban "cuts off even 'the symbolic expression of support evidenced by' a small contribution"[238] that a contributions limit would allow. Moreover, none of this is alleviated by the corporation's ability to divert its donations though a PAC, since *Citizens United* shows that the corporation's rights are not the same as—and thus are not affected by—the PAC's rights. To that end, a general ban on corporate direct campaign contributions, like the ban in *Green Party*, not only significantly burdens the corporate right to associate but

233. *Buckley*, 424 U.S. at 25.

234. *E.g.*, Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 640 (1996) (Thomas, J., concurring in the judgment and dissenting in part) (writing that there is no constitutionally significant distinction between contributions and expenditures, and that strict scrutiny should be applied to limits on both).

235. 616 F.3d 189 (2d Cir. 2010).

236. *Id.* at 192.

237. *Id.* at 201, 206.

238. *Id.* at 206 (quoting *Buckley*, 424 U.S. at 21).

extinguishes its exercise entirely. The ban allows for not even the slightest symbolic donation.

C. The Remaining Interests Are Important, but the Law Is Inadequately Tailored

Against this significant burden the Court has only the circumscribed anticorruption interest, along with its included anticircumvention interest, to weigh. Moreover, the *Green Party* court quoted *Buckley* to hold that if the state's interest could be achieved by the means of a limit—as opposed to a ban—"the ban should be struck down for failing 'to avoid unnecessary abridgement of associational freedoms.'"[239] In other words, the ban should be struck down because it is poorly tailored.

As to anticorruption, the ban is poorly tailored, indeed, since a law could satisfy anticorruption concerns simply by subjecting corporations to the individual limit rather than by banning corporate donations altogether. As described above, *Citizens United* dismisses any distinction between individual and corporate speech rights in the political context. Laws must therefore avoid unnecessarily burdening a corporation's associational freedoms in the same way that they must avoid burdening the associational freedoms of individuals. An outright ban on corporate donations leaves corporations unable to exercise their associational freedoms in even a symbolic way, let alone in the limited way in which an individual may exercise her coextensive rights. Subjecting corporations to individual limits would satisfy anticorruption concerns in the same way that the individual limitations do. The complete ban on corporate direct contributions is simply not necessary to achieve the narrow anticorruption interest that remains after *Citizens United*.

Additionally, it is unclear whether the anticircumvention interest is adequate on its own where the anticorruption rationale is not sufficiently tailored. The anticircumvention interest has, alone, never served as a sufficiently important rationale for upholding the corporate ban.[240] Even if it were sufficiently important on its own, the ban is still inadequately tailored. As one court recently recognized, other means of preventing the fraudulent circumvention of valid

239. *Id.* (quoting *Buckley*, 424 U.S. at 25).

240. *See* FEC v. Beaumont, 539 U.S. 146, 155 (2003).

limits exist in the form of laws that make it illegal for one person to make a contribution in the name of another person.[241] The ban is therefore not the least restrictive means to satisfy any circumvention concerns, and it is therefore poorly tailored.

By banishing the shareholder-protection and anticircumvention interests and limiting the anticorruption interest, *Citizens United* removes two legs of the three-legged stool upon which the contributions ban has rested. Moreover—and more important—by equating corporate speech rights with individual speech rights, *Citizens United* makes the tailoring of the ban far too loose. *Beaumont* theoretically remains good law, but the Court decided it at a time when the Court viewed corporate speech rights as derivative of the original rights that listeners and shareholders hold. *Citizens United* makes it clear that this framework is inappropriate under the First Amendment because the corporate right is original, not derivative, and because restrictions based on the corporate identity of the speaker are unconstitutional. To remain consistent with this framework, the Court should overrule *Beaumont* because within the framework a ban on corporate contributions is unconstitutional.

V. CONCLUSION

Although *Citizens United* does not address the question of the constitutionality of the corporate direct contribution ban, it makes important and far-reaching changes to the doctrine that a future Supreme Court will use if the ban comes before it again. If that happens—and several cases are under way trying to ensure that it does[242]—to remain consistent with *Citizens United*, the Court should find the ban unconstitutional.

Citizens United recognizes corporate original speech rights, and thereby ensures that corporations have a freedom to associate with a candidate via a campaign contribution in the same way that an individual does. Although the anticorruption and anticircumvention interests remain, the ban is poorly tailored to account for the

241. United States v. Danielczyk, No. 1:11cr-85 JCC, 2011 WL 2268063, at *4 (E.D. Va. June 7, 2011) (citing 2 U.S.C. § 441f (2006)). The court also recognized that 18 U.S.C. § 1001 makes it illegal to make false statements or representations to the government, as would occur if someone diverted her own contributions through a corporation. *Id.*

242. Thalmheimer v. City of San Diego, 645 F.3d 1109 (9th Cir. 2011) (upholding the ban); Minn. Citizens Concerned for Life, Inc. v. Swanson, 640 F.3d 304 (8th Cir. 2011) (upholding the ban).

corporate original speech right that *Citizens United* recognizes. Under the *Citizens United* framework, the century-old corporate direct contributions ban is unconstitutional.

President Obama's controversial statements in his 2010 State of the Union address reflected a general apprehension over *Citizens United* among those who believe in the benefits of campaign finance reform.[243] The concerns are probably motivated by the same concerns that motivated President Roosevelt and others to advocate for the ban in the early 1900s. But all need not be lost. Soon after *Citizens United*, the retailer Target gave $150,000 toward the election of a Minnesota gubernatorial candidate.[244] Although *Citizens United* had nothing to do with that state-level donation, the increased public engagement on corporate campaign finance issues post-*Citizens United* made the donation a minor scandal.[245] Target's contribution provoked anger from shareholders and a threat of a boycott from consumers, and Target later apologized for the donation and changed its political donation policy.[246] For those who are concerned about money in politics, the upshot of *Citizens United* may be that it will spark renewed vigilance among the voting public.

243. *See, e.g.*, Press Release, Sen. John McCain, Statement by Senator John McCain in Response to the Supreme Court's Decision in Citizens United v. FEC (Jan. 21 2010), *available at* http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=011b4f81-ecaa-33b0-dc61-32bd9f81b631&Region_id=&Issue_id=15a904d0-1277-40f2-843d-904f077cb0fb; Richard L. Hasen, *Money Grubbers: The Supreme Court Kills Campaign Finance Reform*, SLATE (Jan. 21, 2010, 12:58 PM), http://www.slate.com/id/2242209/.

244. Kim Geiger & Noam N. Levey, *Target Changes Political Donations Policy After Controversy*, L.A. TIMES, Feb. 19, 2011, at 22, *available at* http://articles.latimes.com/2011/feb/19/nation/la-na-target-20110219.

245. *See id.*

246. *Id.*