2014

The Uncertain Future of the Corporate Contribution Ban

Richard Briffault
Columbia Law School, brfflt@law.columbia.edu

Recommended Citation

Richard Briffault, *The Uncertain Future of the Corporate Contribution Ban*, VALPARAISO UNIVERSITY LAW REVIEW, VOL. 49, P. 397, 2015; COLUMBIA PUBLIC LAW RESEARCH PAPER NO. 14-405 (2014).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/1868

COLUMBIA LAW SCHOOL

PUBLIC LAW & LEGAL THEORY WORKING PAPER GROUP

PAPER NUMBER 14-405

THE UNCERTAIN FUTURE OF THE CORPORATE CONTRIBUTION BAN

RICHARD BRIFFAULT

JULY 25, 2014

The Uncertain Future of the Corporate Contribution Ban

Richard Briffault

I. Introduction

Concern about the role of corporate money in corrupting democracy has been a longstanding theme in American politics. In the late nineteenth century, the states began to adopt laws restricting the use of corporate funds in elections. The first permanent federal campaign finance law – the Tillman Act of 1907 – targeted corporations by prohibiting federally-chartered corporations from making contributions in any election and prohibiting all corporations from making contributions in federal elections. Subsequently amended, continued, and strengthened by the Federal Corrupt Practices Act of 1925, the Taft-Hartley Act of 1947, the Federal Election Campaign Act of 1971, and the Bipartisan Campaign Reform Act of 2002, the federal ban on the contribution of corporate funds to federal candidates and to political parties and political committees that contribute to federal candidates is still on the books. Twenty-one states also prohibit corporate contributions to candidates in state elections.[1]

Although the Supreme Court sustained the federal corporate contribution ban as recently as 2003 in *Federal Election Commission v. Beaumont*,[2] that decision and the corporate contribution bans generally today rest on admittedly "shaky ground."[3] As the United States Court of Appeals for the Second Circuit observed, campaign finance law is "in a state of flux (especially with regard to campaign-finance laws regulating corporations)."[4] Over the past decade, the Roberts Court has demonstrated little respect for either legislative campaign finance restrictions[5] or the Court's own campaign finance precedents.[6] In *Citizens United v. FEC,* the Court disavowed one of the justifications *Beaumont* relied and

[1] National Conf. of State Legislatures, State Limits on Contributions to Candidates (Oct. 2013).
[2] FEC v. Beaumont, 539 U.S. 146 (2003).
[3] Minnesota Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 879 n.12 (8th Cir. 2012).
[4] Green Party of Connecticut v. Garfield, 616 F.3d 189, 199 (2d Cir. 2010).
[5] *See, e.g.,* McCutcheon v. FEC, 134 S.Ct. 1434 (2014) (invalidating federal aggregate contribution limit); Arizona Free Enterprise Club's Free Enterprise PAC v. Bennett, 131 S.Ct. 2806 (2011) (invalidating provision of Arizona public funding law); Citizens United v. FEC, 558 U.S. 310 (2010) (invalidating federal law prohibiting corporate and union independent expenditures and electioneering communications); Davis v. FEC, 554 U.S. 724 (2008) (invalidating federal "millionaire's amendment"); Randall v. Sorrell, 548 U.S. 230 (2006) (invalidating Vermont contribution limits). See also FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) (sharply restricting scope of the federal ban on corporate and union electioneering communications; that ban was subsequently invalidated outright in *Citizens United*).
[6] See, e.g., *McCutcheon, supra* (overturning portion of Buckley v. Valeo, 424 U.S. 1 (1976) which had sustained federal aggregate contribution limit); *Citizens United, supra* (overturning portions of McConnell v. FEC, 540 U.S. 93

called into question another.[7] To be sure, the *Citizens United* majority stressed that the case concerned only a spending ban -- not a contribution restriction -- and invoked the Court's longstanding practice of applying more stringent review of spending rules than of contribution limits.[8] But *Citizens United*'s emphatic assertion of the First Amendment rights of corporations[9] surely casts a shadow on the constitutionality of corporate contribution bans. This year's decision in *McCutcheon v. FEC* – which subtly ratcheted up the Court's standard of review of contribution restrictions – darkens that shadow still. If and when the Court decides to hear a constitutional challenge,[10] the ban on corporate contributions may prove difficult to sustain.

Nonetheless, assuming the Court continues to recognize the constitutional validity of contribution limits and to apply a less strict standard of review of contribution restrictions than expenditures – admittedly a big "if" – the ban on corporate donations ought to pass constitutional muster. The corporate contribution ban advances two long-recognized public interests that have been held to justify contribution restrictions: the protection of the rights of politically dissenting shareholders, and the prevention of the evasion of constitutionally valid limits on individual donations to candidates. Although *Citizens United* dismissed the shareholder-protection concern as a support for an expenditure ban, shareholder protection is an important interest previously acknowledged by the Court in the contribution restriction context, and a contribution ban is closely drawn to protect that interest. Shareholder-protection should be able to meet the less restrictive standard for contribution limits. So, too, the Court has long accepted the prevention of circumvention of individual-to-candidate contribution limits as a constitutionally sufficient justification for other contribution restrictions. In *Burwell v. Hobby Lobby Stores, Inc.*, the Court recognized that a corporation "is simply a form of organization used by human beings to achieve desired ends."[11] One of those ends can be making campaign contributions. In most states, a person can form a corporation simply by filing a few papers

---

(2003) and Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) which had sustained prohibitions on corporate campaign spending).

[7] *Compare Citizens United*, 588 U.S. at 348-56 (rejecting *Austin*'s "antidistortion" rationale) *with Beaumont*, 539 U.S. at 153-54 (citing and quoting *Austin*). *Compare also Citizens United,* 588 U.S. at 361-62 (rejecting shareholder protection rationale for corporate spending ban) *with Beaumont,* 539 U.S. at 154-55 (invoking that rationale).

[8] Citizens United, 588 U.S. at 345, 356-61.

[9] See id. at 342-66.

[10] The Court has now twice declined opportunities to address the issue. See Iowa Right to Life Comm., Inc. v. Tooker, 134 U.S. 1787 (2014) (denying petition for certiorari for Eighth Circuit decision that, inter alia, upheld Iowa law banning campaign contributions by corporations, insurance companies, savings associations, banks, and credit unions); Danielczyk v. United States, 133 S.Ct. 1459 (2013) (denying petition for certiorari for Fourth Circuit decision upholding constitutionality of federal corporate contribution ban).

[11] Burwell v. Hobby Lobby Stores, Inc., __ U.S. __ (2014) at *13.

and paying a nominal fee. A single individual can generate multiple corporations that he or she controls and can use to circumvent the legal rules governing campaign finance activities. The use of corporations to evade disclosure requirements has become a regular occurrence since *Citizens United* freed corporations to engage in independent spending. If corporations could also make contributions, they could easily become a means to avoid the donation limits on the "people (including shareholders, officers, and employees) who are closely associated with a corporation in one way or another."[12] Although *McCutcheon* tightened the "fit" required between the important public interest a campaign finance law is intended to sustain and the restrictions imposed by that law, the corporate contribution ban is narrowly tailored, and leaves room for other forms of campaign finance activity for the individuals affiliated with the corporation. Nor do there appear to be less restrictive alternatives that can effectively achieve the shareholder-protection and anti-circumvention goals.

In *Citizens United* and again in *McCutcheon*, the Court emphasized that the goal of reducing the political power of the wealthy cannot justify campaign finance restrictions, and it is surely the case that much of the impetus for the corporate contribution is public anxiety over corporate wealth and power. But the shareholder-protection and anti-circumvention justifications are not based on an effort to curb the role of wealth inequalities in politics. Rather, they reflect other key features of the corporate form – its artificial existence as a legal to achieve ends desired by the individuals who have created it, and the potential for the interests the control the corporation to exploit dissenting shareholders. These two interests work in tandem, with shareholder-protection having greater purchase for multi-shareholder publicly-held entities, and anti-circumvention more relevant for single-shareholder, closely-held or nonprofit corporations. Together, they make the case for the corporate contribution ban for reasons other than the equality-promoting goal that *Citizens United* and *McCutcheon* so vehemently rejected.

This Article explores the current constitutional status of the corporate campaign contribution ban.[13] Part II provides a brief history of corporate campaign finance restrictions, including an analysis of

---

[12] Id.

[13] This article does not address laws prohibiting contributions by labor unions, which has been part of the federal campaign finance system since 1943 and are on the books in sixteen states, *see* Nat'l Conf. of State Legs., *supra*. The two justifications this article relies on to sustain the corporate ban – shareholder-protection and anti-circumvention of the corruption-preventing limits on individual contributions to candidates -- do not apply to unions. As a result of a long string of Supreme Court decisions, dissenting employees (the equivalent of dissenting shareholders in the union context) required to pay unions the fees have a right not to have those fees used for political purposes and to have their required fee payments reduced accordingly. By enabling them to opt-out of compelled support for political activity, the Supreme Court has already provided objecting employees protection from compelled support of political activity. See generally Benjamin I. Sachs, "Unions, Corporations, and Political

the Supreme Court's case law dealing with the campaign finance rules applicable to corporations prior to *Citizens United*. Part III assesses *Citizens United,* its implications for the prohibition on corporate campaign contributions, and its impact on the shareholder protection rationale in the contribution setting. Part IV examines the anti-corruption argument in light of *McCutcheon* more restrictive analysis of that justification for campaign finance regulation. Part V concludes.

II. The Corporate Contribution Ban

A. Origins and Statutory Development

In his Fifth Annual Message to Congress in 1833 President Andrew Jackson hotly denounced the campaign spending of the Second Bank of the United States – "this great and powerful institution" which, he asserted, "had been actively engaged in attempting to influence the elections of the public officers by means of its money" in the 1832 election. In language that would fit right in today's campaign finance debates, Jackson declared "the question is distinctly presented whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions."[14] Three decades later, Abraham Lincoln also expressed anxiety about corporate corruption of the political process. With the Civil War generating enormous profits for government contractors, Lincoln wrote: "I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country. . . . [C]orporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its

---

Opt-Out Rights After *Citizens United*," 112 Colum. L. Rev. 800, 811-19 (2012). Nor are unions, unlike corporations as discussed in Part IV, plausible vehicles for evasion of the limits on individual contributions. Individual union dues or fee payments are generally well below the dollar cap on individual donations, and there seems to be little likelihood – or evidence – that a union could be created by a wealthy donor solely to end-run the cap on individual donations.

In addition, this article focus on bans on corporate donations to candidates, political parties, and political committees that contribute to candidates. It assumes that, consistent with *Citizens United*, corporations may not be barred from donating to political committees that engage only in independent expenditures. See, e.g. Republican Party of New Mexico v. King, 741 F.3d 1089 (10th Cir. 2013); Texans for Free Enterprise v. Texas Ethics Comm., 732 F.3d 535 (5th Cir. 2013).

[14] Andrew Jackson, Fifth Annual Message, Dec. 3, 1833.

reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed."[15]

Despite these early critical comments, corporations became a central focus of campaign finance concern only in the late nineteenth century. Civil service reform cut into the ability of candidates and parties to finance their campaigns through assessments on government employees, while the consolidation of major manufacturers, railroads, banks, and mining and oil companies created large and powerful firms with great stakes in government tariff, monetary, infrastructure, public lands development, and regulatory policies. In 1886, former President Rutherford B. Hayes, a Republican, lamented "this is a government of the people, by the people, and for the people no longer. It is a government by the corporations, of the corporations, and for the corporations."[16] Two years later President Grover Cleveland, a Democrat, pointed to the "existence of trusts, combinations, and monopolies" and warned Congress in his Fourth Annual Message that "corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters."[17] As a leading political scientist of the era observed, by 1900, in the funding of the political parties "[f]irst and foremost come the representatives of the big industrial or financial concerns."[18]

The growing role of corporate campaign money triggered a reaction. In 1891, Kentucky amended its constitution to become the first state to ban the use of corporate funds to influence any election in the state.[19] That provision is still part of the Kentucky Constitution.[20] In 1897, following the 1896 election in which the heavily business-funded Republican Party overwhelmed the Democratic and Populist presidential candidacy of William Jennings Bryan, three agrarian states that had supported Bryan – Tennessee, Florida, and Nebraska -- banned corporate contributions to candidates and parties.[21] Even some Republicans from the industrial northeast were troubled by the growing role of corporate

---

[15] Abraham Lincoln, Letter to Col. William F. Elkins, Nov. 21, 1864, quoted and cited in Rick Crawford, What Lincoln Foresaw: Corporations "Enthroned" After the Civil War and Re-Writing the Laws Defining their Existence, http://www.ratical.org/corporations/Lincoln.html.

[16] See Jack Beatty, Age of Betrayal: The Triumph of Money in America 1865-1900 (Vintage Books 2008) at xv.

[17] Grover Cleveland, Fourth Annual Message (first term), December 3, 1888, http://www.presidency.ucsb.edu/ws/?pid=29529.

[18] M.I. Ostrogorski, Democracy and the Organization of Political Parties, 1902, quoted in Robert E. Mutch, Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law (1988) at 165.

[19] See Adam Winkler, Other People's Money: Corporations, Agency Costs, and Campaign Finance Law, 92 Geo. L.J. 871, 883 (2004).

[20] Kentucky Const., § 150.

[21] Perry Belmont, Publicity of Election Expenditures, 180 No. Am. Rev. 166, 176 (1905).

money in politics. At New York's 1894 state constitutional convention, corporate lawyer Elihu Root (subsequently William McKinley's and Theodore Roosevelt's secretary of war and Roosevelt's secretary of state) led an unsuccessful effort to insert a corporate contribution ban into the state constitution. In 1901, William E. Chandler, a Republican senator from New Hampshire and a former Republican National Committee chairman, introduced the first federal bill to keep corporations out of congressional election campaigns.

Public attention to corporate campaign money mounted during the 1904 presidential election. More than a million dollars – or about $25 million in 2014 dollars – quietly flowed into Theodore Roosevelt's campaign from J.P. Morgan, Henry Clay Frick, and senior executives at Standard Oil, the New York Central Railroad, and major insurance companies.[22] Following up on earlier – and at-that-time inaccurate – allegations by Joseph Pulitzer in the New York *World* that the major trusts were making large contributions to Roosevelt to head off investigations by the recently-created federal Bureau of Corporations, Democratic candidate Alton Parker made a major campaign address in which he claimed that "debasing and corrupt" payments had been made to the GOP by "individuals of corporations . . . who would control the results of election contests."[23] His integrity as a trust-buster challenged, Roosevelt responded by denying that any business contributions he had received involved corrupt dealings and pointed to the "great corporate interests" that were financing his opponent.[24]

The following year, the New York Legislative Investigating Committee (the "Armstrong Committee") revealed in public hearings that New York's three major life insurance companies – the Equitable, New York Life, and Mutual Life – had contributed hundreds of thousands of dollars to the national Republican Party and Republican officeholders in the 1896, 1900, and 1904 elections. This "caused a profound sensation as it furnished the first tangible evidence of connections between the insurance company and a political party,"[25] and was seen as confirming the allegations Parker had hurled at Roosevelt the year before. In response, Roosevelt in his 1905 Annual Message to Congress pointed to the "corruption of the flagrant kind which has been exposed," and urged that "[a]ll contributions by corporations to any political committee or for any political purpose should be

[22] Edmund Morris, Theodore Rex 356-60 (2001).
[23] Id. at 361.
[24] Id. at 363.
[25] Mutch, supra, at 2 (quoting the Sept. 16, 1905 New York *Herald Tribune)*. As Mutch explains, the big insurance companies loomed much larger in the national economy in 1905 than they do today. In 1903, the three insurers "together took in more money than the entire internal revenue receipts of the federal government." Robert E. Mutch, Before and After *Bellotti:* The Corporate Political Contributions Cases, 5 Elec. L.J. 293, 295 n. 5 (2006).

forbidden by law."[26] Senator Benjamin R. "Pitchfork Ben" Tillman, a South Carolina Democrat, introduced a bill to implement Roosevelt's proposal as part of a broader, partisan effort to investigate corporate contributions in the three prior national elections. The Republican-led Senate quickly passed the bill without debate, avoiding the potentially embarrassing investigation Tillman had sought, but the measure died in the House.[27] Roosevelt repeated his call for a corporate contribution ban in his 1906 Annual Message; it was the very first item on his agenda.[28] When the House reconvened for its short lame-duck session in January 1907, it quickly passed Tillman's bill, which prohibited federally-chartered corporations from making contributions in any election, and prohibited all corporations from making contributions in federal elections.

Campaign finance law's early and intensive focus on corporations reflected two concerns. First, there was a sharp and growing anxiety about corporate influence over government. As Elihu Root argued to the 1894 New York Constitutional Convention, "great moneyed interests" "are exerting yearly more and more undue influence in political affairs." A corporate contribution ban would "prevent the great moneyed corporations of the country from furnishing the money with which to elect members of the legislature of this state, in order that those members may vote to protect the corporations. It is to prevent the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using corporate funds, directly or indirectly, to send members of the legislature to these halls, in order to vote for their protection and the advancement of their interest as against those of the public."[29] As Root explained, corporate campaign contributions put the political parties in their debt, "a debt to be recognized and repaid with the votes of representatives in the legislature and in Congress or by the actions of administrative and executive officers who have been elected in large measure through the use of money so contributed."[30] In its report to the New York state legislature, the Armstrong Committee made the same point:

> "The testimony taken by the Committee makes it abundantly clear that the large insurance companies systematically attempted to control legislation in this and other states. . . . It is apparent that contributions . . . . for use in State Campaigns were made with the idea that they would be protected in matters of legislation. Senator Platt, to whom the contributions were made, testified that it was supposed that an advantage would be derived through his relation to

[26] Theodore Roosevelt, Fifth Annual Message, December 5, 1905.
[27] Mutch, Campaigns, Congress and Courts, supra, at 5-7.
[28] Theodore Roosevelt, Sixth Annual Message, December 3, 1906.
[29] Elihu Root, "The Political Uses of Money," in E. Root, Addresses on Government and Citizenship (collected and edited by Robert Bacon and James Brown Scott, 1916, reprinted 1969).
[30] Id.

> the [Republican] State Committee . . . ; in short, that the use of the contributed moneys in the election of candidates to office would place them under more or less of an implied obligation not to attack the interests supporting them."[31]

Controlling corporate campaign contributions was part of a broader program of addressing corporate power. Theodore Roosevelt combined his call for a ban on corporate campaign contributions with other proposals for the "adequate regulation and supervision of the great corporations."

Second, there was evidence that corporate executives were misusing shareholder funds to advance their own interests – what has come to be known as the "other people's money" problem. The Armstrong Committee found that insurance company contributions were often inconsistent with the partisan preferences of policyholders, as "executive officers have sought to impose their political views upon a constituency of divergent convictions."[32] Sometimes the contributions were actually used to advance goals adverse to shareholder interests. The Committee noted that the big insurance companies were making large contributions at a time when the legislature was considering legislation that would affect the ability of policyholders to sue insurance companies for breach for fiduciary duty. In other words, the leaders of these companies were using policyholder funds to secure legislative protection for themselves against their own policyholders.[33]

Following the Teapot Dome scandal of the early 1920s, the Tillman Act was strengthened by the Federal Corrupt Practices Act of 1925 which broadened the contribution ban from money donations to include "anything of value," thereby picking up corporate loans, in-kind assistance, and the use of corporate facilities. In the 1940s, a similar ban was imposed on labor union contributions in federal elections, and in the Taft-Hartley Act of 1947 the contribution ban was expanded to include a prohibition on campaign expenditures by both corporations and unions. Unions responded to the restrictions on their campaign activities with the innovation of the political action committee ("PAC") – a formally separate, albeit affiliated, entity with its own officers and funds provided by nominally voluntary contributions by union members.

---

[31] Testimony Taken Before the Joint Committee of the Senate and Assembly of the State of New York to Investigate and Examine into the Business and Affairs of Life Insurance Companies Doing Business in the State of New York (Armstrong Committee) 1905, at p. 2916, quoted in Sikes, supra, at 109-10.

[32] Sikes, supra, at 10.

[33] Winkler, supra, at 895-96.

The Federal Election Campaign Act of 1971 ("FECA")[34] was primarily focused on individual contributions and the campaign practices of candidates, parties, and political committees but it clarified the legality of the PAC device and authorized certain corporate and union campaign finance activities. The 1971 Act, along with amendments in 1974 and 1976, confirmed that a corporation or union could set up a "separate, segregated fund" – that is, a PAC – which could solicit donations (subject to monetary limits) from individuals affiliated with the corporation or union and use those funds to contribute to, or spend money supporting or opposing, federal candidates.[35] The Bipartisan Campaign Reform Act of 2002 ("BCRA" or "McCain-Feingold") subsequently extended the reach of the corporate and union expenditure ban and expanded the corporate and union contribution prohibition to include all donations to the national political parties and all donations to state parties used to finance a defined set of federal election activities.

B. The Corporate Campaign Finance Restrictions in the Courts

(1) *The Early Years:* Early twentieth century courts had little difficulty upholding the special restrictions on corporations. Corporations were seen as artificial creatures with powers limited to the business purposes spelled out in their charters,[36] and corporate money was seen as presenting a particular danger of "corrupting the elector and debauching the election."[37] Before the 1940s the First Amendment played little role in the judicial assessment of campaign finance restrictions. Even when free speech concerns were considered, limits on corporate money were not a problem because, in the words of one state supreme court, "[t]he individual activities of the officers of the corporation are not

[34] Before FECA, President Kennedy's President's Commission on Campaign Costs, which recommended many changes to federal campaign finance law, include the abolition of the ceilings on individual contributions and on total expenditures by political committees called for the retention and strict enforcement of the prohibitions on corporate and union contributions and expenditures. See Financing Presidential Campaigns, Report of the President's Commission on Campaign Costs (1962).

[35] The parent organization could use its own funds – known as "treasury funds" – to pay the costs of administering the PAC and of raising funds for it; select the PAC's personnel; and set the PAC's contribution and expenditure activity. FECA exempted from restriction the expenditure of corporate or union treasury funds on "internal communications," that is "communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject." 2 U.S.C. § 441b(b)(2)(A). This essentially codified the decision in United States v. CIO, 335 U.S. 106 (1948), interpreting the 1947 campaign expenditure not to apply to such communications. The law further provided that nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive and administrative personnel and their families, or by a labor organization aimed at its members and their families, would not be treated as forbidden contributions or expenditures. 2 U.S.C. § 441b(b)(2)(B).

[36] See, e.g., People v. Gansley, 158 N.W. 195 (Mich. 1916); People ex rel Perkins v. Moss, 187 N.Y. 410 (1907); McConnell v. Combination Mining & Milling, 76 P.2d 194 (Mont. 1904).

[37] United States v. United States Brewers' Ass'n, 239 F. 163, 168-69 (W.D. Pa. 1916).

prohibited. They may freely speak, write, and publish their views."[38] The few constitutional challenges to the federal restrictions on corporations were rejected. The Tillman Act barring corporate campaign contributions in federal elections was upheld by a federal district court in 1916 as a measure preventing "undue influence" and "preserving the freedom of the voter and the purity of the ballot."[39]

The Supreme Court did not directly address the restrictions on corporate campaign activity before *Buckley v. Valeo*[40] ushered in the modern era of campaign finance jurisprudence, but in one important pre-*Buckley* decision dealing with the Taft-Hartley Act's prohibition of union campaign expenditures the Court demonstrated considerable sympathy for the view that corporate financial power poses a threat to democratic elections. In *United States v. Auto Workers,*[41] the Court considered the indictment of a union for spending treasury funds on television ads endorsing candidates in a congressional election. The district court had held that the union's spending fell within an exemption to the spending ban;[42] the Supreme Court reversed, holding the ads fell squarely within the statute, and reinstated the indictment.[43] Without resolving the question of whether the spending ban was constitutional, Justice Frankfurter's opinion for the Court provided a lengthy, sympathetic, and detailed account[44] -- dating back to the post-Civil War era and quoting from Elihu Root's address to the 1894 New York Constitutional Convention[45] -- of public concern about the concentration of wealth, the "felt threat to economic freedom created by enormous industrial combines," and the decades-long efforts by state and federal governments to control first corporate and then union money in electoral politics. In his words, these measures were intended to protect "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process."[46] The Taft-Hartley restrictions were the culmination of a "long series of congressional efforts calculated to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital."[47] The law was intended "to protect the political process from

---

[38] Gansley, supra, 158 N.W. at 201.
[39] United States Brewers' Ass'n, supra, 239 F. at 168-69.
[40] 424 U.S. 1 (1976).
[41] 352 U.S. 567 (1957).
[42] In an earlier decision, the Supreme Court had held that the spending prohibition did not apply to communications by a union to its own members and their families. *United States v CIO,* 335 U.S. 106 (1948). The district court had held that the Auto Workers spending fell within the *CIO* exemption.
[43] Id. at 588-89.
[44] Id. at 570-84.
[45] Id. at 570-71
[46] Id. at 570.
[47] Id. at 585.

what it [Congress] deemed to be the corroding effect of money employed in elections by aggregated power."[48]

(2) *Bellotti:* In 1976, *Buckley v. Valeo* laid the foundation of modern campaign finance jurisprudence by finding that campaign finance restrictions implicate the freedoms of speech and association protected by the First Amendment.[49] The Court applied strict judicial scrutiny to expenditure limits, but found that contribution restrictions may be sustained "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."[50] It then held that "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office" is a sufficiently important interest to justify contribution limitations.[51] *Buckley* did not address the special restrictions on corporate contributions and expenditures, but two years later, in *First National Bank of Boston v. Bellotti,*[52] the Court decided a corporate campaign finance case. *Bellotti* held that the First Amendment applies to restrictions on corporate campaign activity, and it invalidated a provision of the Massachusetts constitution barring a corporation from spending concerning a ballot measure that did not materially affect its business, property, or assets.

Writing for the majority, Justice Powell determined that even though a corporation lacks a natural person's "interest in self-expression,"[53] its electioneering is valuable because of the central role election-related speech plays in informing "democratic decision-making." Moreover, the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity

[48] Id. at 582. Despite the glowing words, the Court determined that it was premature to resolve the constitutional question as the case had not actually been tried. Id. at 589-92. On remand, the jury returned a verdict of not guilty, and the case did not return to the Supreme Court. Three justices, in an opinion by Justice Douglas would have invalidated the statute under the First Amendment. See id. at 593-98. One pre-Buckley court of appeals case directly addressed and sustained the federal prohibition of corporate campaign spending. See United States v. Lewis Food Co., 366 F.2d 710, 712-13 (9th Cir. 1966) (noting the "necessity for destroying the influence over elections which corporations exercised through financial contributions").

Only one pre-*Buckley* Supreme Court case dealt directly with corporate campaign activity. In *Cort v. Ash*, 422 U.S. 66 (1975), the Court held that Taft-Hartley did not endow shareholders with a private right of action to sue their corporation for illegal corporate campaign finance activities. *Cort* turned on the standards for implying private rights of action and the significance of Congress's creation of the Federal Election Commission to enforce federal election law rather than the constitutionality of the restrictions on corporations.

[49] 424 U.S. at 14-18.

[50] Id. at 25.

[51] Id. at 25-30.

[52] 435 U.S. 765 (1978).

[53] Id. at 777 n.12.

of the source, whether corporation, association, union or individual."[54] Corporate campaign speech is constitutionally protected not because of the corporation's interest in being able to speak in order to advance its self-interest -- which was taken care by the exception from the spending ban for ballot propositions affecting corporate business, property, or assets -- but because of the societal interest in voters being able to hear information and ideas relevant to the election. Following *Buckley*'s determination that strict judicial scrutiny must be applied to expenditure restrictions, the Court considered the two justifications the state asserted to justify its restriction: (i) "sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government," and (ii) protecting the rights of dissenting shareholders.

The Court agreed that the first justification was an interest "of the highest importance." The state's argument that campaign spending by "wealthy and powerful corporations" can "drown out other points of view" and thereby undermine active citizen participation and public confidence in government would deemed worthy of consideration, but only if there were "record or legislative findings that corporate advocacy imminently threatened to undermine democratic processes."[55] The Court found there had been "no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts" or posed any threat to public confidence in government.[56] More significantly, the majority expressed some doubt that such a negative consequence from corporate campaign spending could ever be shown. The Court then reframed the state's argument into *Buckley*'s concern with the *quid pro quo* corruption of campaign money on officeholders. It concluded that such a *quid pro quo* could not arise in a ballot proposition election because the spending did not concern a candidate who could be "corrupted."

The state's asserted interest in protecting the interests of dissenting shareholders received relatively short shrift. Shareholder protection was deemed to be "an interest that is both legitimate and traditionally within the province of state law," but banning corporate spending in elections was held to be both overinclusive and underinclusive. It was overinclusive because it would apply even if the spending received unanimous shareholder approval, and it was underinclusive because it targeted

---

[54] Id. at 776-77.
[55] Id. at 789.
[56] Id. at 789-90.

corporate campaign spending but not corporate lobbying, and only corporations and not other organizations, such as business trusts or unions.[57]

(3) *NRWC, MCFL, and Austin.* The four dissenters in *Bellotti* concluded that the case cast "considerable" doubt on all federal and state restrictions on corporate campaign finance activity.[58] Yet, those restrictions proved surprisingly resilient. Just four years after *Bellotti*, a unanimous Supreme Court, in an opinion by Justice Rehnquist, upheld the FECA provision restricting the ability of a corporation to solicit contributions for its federal election PAC. The case involved the National Right to Work Committee ("NWRC") a nonstock, nonprofit, ideological, anti-union corporation. FECA provides that a corporation may solicit contributions for its PAC only from executive and administrative personnel and shareholders; a nonstock corporation that has no shareholders may solicit its "members" but not the general public. NRWC did not have formal members but claimed that individuals affiliated with the organization by contributing to it, so that a contributor became a member for the purpose of future solicitations. In *FEC v. NRWC,*[59] the Supreme Court rejected NRWC's statutory interpretation of "member" -- thereby constraining the ability of the organization to raise campaign funds -- and then upheld the constitutionality of the solicitation restriction. The Court found that two government interests justified the corporate restriction: (i) ensuring that "substantial aggregations of wealth amassed by the special advantages of the corporate form . . . should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by contributions," and (ii) protecting the "individuals who have paid money into a corporation or union for purposes other than the support of candidates from having their money used to support political candidates to whom they may be opposed." Strikingly, the Court applied the general arguments for special restrictions on corporations to an entity totally unlike the paradigmatic powerful business corporation that had long been the inspiration for the special restrictions on corporations. The NRWC PAC had collected just $77,000 in the first year it claimed that its donors should be treated as members, which was hardly a "substantial aggregation of wealth." As a non-stock ideological organization, its putative members were voluntary donors who presumably had contributed to the PAC because they generally supported the organization's political views, not for unrelated investment purposes. But instead of closely examining the applicability of the general restrictions on corporations to the organization at hand, the Court

[57] Id. at 792-95.
[58] See id. at 802 (dissenting opinion of Justice White, joined by Justices Brennan and Marshall); 812 (dissenting opinion of Justice Rehnquist).
[59] 459 U.S. 197 (1982).

expressed its willingness to honor the “legislative judgment” that it was the “special characteristics of the corporate structure” not the wealth resulting from the corporate form or the use of the corporation as an investment device that “require particularly careful regulation.”[60] Tracing the development of the corporate and union restrictions from the Tillman Act and the Federal Corrupt Practices Act of 1925, through Taft-Hartley, FECA and its amendments, the Court concluded that this history of “careful legislative adjustment of the federal electoral laws . . . to account for the particular legal and economic attributes or corporations and labor organizations warrants considerable deference.”[61] The Court declined to “second-guess a legislative judgment as to the need for prophylactic measures where corruption is the evil feared.”[62]

Bellotti and *NRWC* were technically reconcilable – the latter involved contributions and candidate elections while the former dealt with expenditures and a ballot proposition election – but the tenor and reasoning were totally different, with *NRWC* drawing on the pre-*Buckley* era’s focus on corporate wealth and the misuse of “other people’s money.” Four years later, in *FEC v. Massachusetts Citizens for Life, Inc. (“MCFL”),*[63] the Court avoided choosing between the two approaches. MCFL, a nonprofit, nonstock corporation organized to engage in educational and political activities in support of the “right-to-life” cause, used its treasury funds to send voters literature presenting the voting records of federal and state candidates from a “pro-life” perspective. The FEC contended these campaign expenditures should have been funded by MCFL’s PAC, not the corporation’s treasury funds. The Supreme Court held that the First Amendment required the exclusion of campaign spending by

[60] Id. at 209-10.
[61] Id. at 208-09.
[62] Id. at 210.
[63] 479 U.S. 238 (1986). The federal ban on corporate spending also came up in *FEC v. National Conservative PAC (“NCPAC”)* 470 U.S. 480 (1985) but the corporate status of NCPAC was essentially peripheral to the case, which dealt with a constitutional challenge to the federal law capping independent spending to aid a presidential candidate who had accepted public funding. Defenders of the law pointed out that both NCPAC and another independent spending committee in the case were corporations, and argued that *NRWC*’s justifications for limits on solicitation by corporate PACs would also support limits on independent spending by these corporations. However, the *NCPAC* majority noted that the statute limiting independent spending in elections with publicly-funded candidates did not target only corporations but restricted any committee, association, or organization whether or not incorporated. Id. at 496. Accordingly *NCPAC* was not treated as a corporations case; the Court noted that, as in *Buckley,* it did not reach “the question whether corporations can constitutionally be restricted in making independent expenditures to influence elections for public office.” Id.

ideological non-profit corporations like MCFL from the general corporate spending ban, but did so in an opinion implying that the application of the ban to business corporations would be valid. [64]

Justice Brennan's opinion for the Court found that corporate campaign spending poses the danger of "the corrosive influence of concentrated corporate wealth" on the "integrity of the marketplace of political ideas." Justice Brennan emphasized that corporate resources are "not an indication of popular support for the corporation's political ideas but instead reflect nothing more than the "economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas."[65] But MCFL's spending did not raise these concerns. The organization was formed for a political, not an economic purpose; it did not engage in business activities or amass capital in the economic marketplace; and the donations it received necessarily reflected the donors' support for its political views. It did not accept contributions from business corporations, so it could not serve as a conduit for proscribed corporate expenditures. Moreover, donors had no economic stake in the organization which might discourage them from disassociating from it if they disagreed with its electioneering. Although corporate in form, MCFL was really a political association and not the kind of business that comes to mind when the term "corporation" is used. As a result, the First Amendment required that MCFL and comparable ideological entities be exempted from the spending ban. But the theory of the *MCFL* exemption supported application of the ban to business corporations that fit the spirit of the restriction. Four justices, in an opinion by Chief Justice Rehnquist, dissented, finding the ban should even have been applied to MCFL. They contended that, as in *NRWC,* the Court should defer to Congress's judgment that spending enabled by the corporate form inherently threatens the political process. The dissenters also stressed that given the availability of the PAC mechanism the law did not really "ban" corporate spending as much as it required that spending be channeled through a corporate PAC so the Court need not "consider the validity of a direct and absolute limitation on independent expenditures by corporations."[66]

---

[64] MCFL had also raised a statutory argument that its spending fell within FECA's exemption from the corporate expenditure ban for "any news story, commentary, or editorial distributed through the facilities of any . . . newspaper, magazine, or other periodical" other than one controlled by a candidate or political party. 2 U.S.C. § 431(9)(B)(i). The Court rejected that argument, 479 U.S. at 250-51, as well as MCFL's constitutional claim that its spending did not contain express advocacy. Id. at 249-50.

[65] Id. at 258.

[66] Id. at 271 n.4

Four years later, in 1990, in *Austin v. Michigan State Chamber of Commerce*,[67] the Court applied *MCFL*'s logic and expressly upheld the constitutionality of a state prohibition on the spending of corporate treasury funds in candidate elections. In an opinion by Justice Marshall for six justices, the Court agreed with *Bellotti* that restrictions on corporate campaign spending are subject to the First Amendment,[68] but found that corporate spending presents distinct dangers that justify its prohibition. Echoing *MCFL* and *NRWC, Austin* emphasized the state-createdness of corporations, the state grant of "special advantages" to corporations which give them the opportunity to amass great wealth, and the lack of any necessary connection between the resources corporations have for electoral activity and public support for their political ideas. *Austin* couched this in terms of preventing corruption. *Buckley* had discussed corruption as the *quid pro quo* between a donor and the candidate/elected official-recipient, but *Austin* held that such "'financial *quid pro quo*' corruption" is not the only kind of corruption that can justify campaign finance restrictions. Michigan's law addressed another type of corruption: "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."[69] That "antidistortion" argument sounds a lot like the egalitarian justification for limiting spending that *Buckley* rejected,[70] but *Austin* insisted that the law addressed corruption, not political inequality. The problem with corporate spending was not that corporations might spend more than other political actors – that is, spending inequality -- but *distortion* – that a corporation's resources for campaign spending reflects its economic success but has "little or no correlation to the public's support for the corporation's political ideas."[71] Unequal spending was all right if it reflected differences in the extent of support for different spenders' political positions, but not when based on wealth differences unconnected to political belief. Justice Brennan's concurring opinion emphasized the dissenting-shareholder-protection justification. Noting that most members who joined the Michigan Chamber of Commerce did so for economic and not political reasons, he determined "the

[67] 494 U.S. 652 (1990).
[68] Id. at 657, citing *Bellotti.*
[69] Id. at 660.
[70] Indeed, one of Justice Marshall's law clerks, who clerked for him during the term in which Austin was decided, has characterized the Court's *Austin* opinion as "hiding equality behind the mask of corruption." *See* Elizabeth Garrett, New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics, 52 Howard L.J. 655, 669-78 (2009).
[71] 494 U.S. at 660.

State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the Chamber's political message."[72]

Austin not only found anti-distortion to be a compelling justification but determined that the spending restriction was narrowly tailored to accomplish that end. According to the Court, the restriction was not an absolute ban on spending but merely a requirement that the corporation use a PAC – which Michigan, unlike the Massachusetts restriction at issue in *Bellotti,* allowed. Moreover, where *Bellotti* had imposed very tight "tailoring" requirements and was quick to fault the Massachusetts law for over- and under-inclusiveness, *Austin* was more forgiving. The law's application to closely held corporations without great reserves of capital was not a problem. As in *NRWC,* the Court emphasized the need to defer to the legislative judgment that it is the "potential for distortion" inherent in the capacity for the corporate form to facilitate the accumulation of great wealth that justifies regulation. Nor was the law's exclusion of unincorporated associations and unions from the spending ban a constitutional difficulty. Unincorporated groups might wield power and wealth but they did not benefit from the "advantages unique to the corporate form."[73] Union campaign funds were a more accurate reflection of employee support for union political activities than a corporation's general treasury funds because the law gave employees the right not to have their union dues used for political purposes if they objected.[74]

Taken together, *NRWC, MCFL* and *Austin* strongly validated the special restrictions on corporations, notwithstanding *Buckley* and *Bellotti*. Although the First Amendment applied, the state-created advantages associated with the corporate form and the protection of minority shareholders provided compelling justifications for requiring corporations to channel their contributions and spending through PACs. *Bellotti* was shunted aside as a ballot propositions case of little relevance to candidate elections.

(4) *Beaumont:* In 2003 in *FEC v. Beaumont,*[75] the Court rejected an effort to create an *MCFL*-type exemption from the corporate contribution ban for a nonprofit corporation, North Carolina Right to Life, Inc. ("NCRL"), and strongly affirmed the constitutionality of the corporate contribution prohibition. Although NCRL's resources – like MCFL's -- presumably reflected the extent of public support for its

[72] Id. at 675.
[73] Id. at 665.
[74] Id. at 666. So, too, the law's exemption of news and editorial expenditures was justified by the media's "unique societal role" in promoting public education, information, discussion, and debate. Id. at 666-68.
[75] 539 U.S. 146 (2003).

ideological activities and not its success in the economic marketplace -- the Court was unwilling to disturb "a congressional judgment that has remained essentially unchanged throughout a century" that all corporate treasury fund contributions should be excluded from federal elections. Citing *NRWC*, *MCFL*, and *Austin*, *Beaumont* invoked "the 'special characteristics of the corporate structure' that threaten the integrity of the political process."[76] *Beaumont* found that "[i]n barring corporate earnings from conversion into political 'war chests,'" the corporate spending ban "was and is intended to 'preven[t] corruption or the appearance of corruption"[77] -- the government interests that have been the basis for the constitutionality of restrictions on contributions since *Buckley*. *Beaumont* credited the shareholder-protection rationale: "[T]he ban has always done further duty in protecting 'the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.'"[78] *Beaumont* also gave great weight to the value of the corporate contribution ban in preventing evasion of the limits on individual contributions:

> "Quite aside from war-chest corruption and the interests of contributors and owners, however, another reason for regulating corporate electoral involvement has emerged with restrictions on individual contributions. . . . To the degree that a corporation could contribute to political candidates, the individuals 'who created it, who own it, or whom it employs,' . . . could exceed the bounds imposed on their own contributions by diverting money through the corporation. . . . . [E]xperience 'demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced.'"[79]

Anti-circumvention, thus, joined prevention of corruption and appearance of corruption, anti-distortion and dissenting-shareholder-protection as justifications for the ban on corporate contributions. The anti-circumvention argument was given special prominence in *Beaumont*'s justification of the application of the ban to a nonprofit like NCRL. As the Court observed "[n]onprofit advocacy corporations are, moreover, no less susceptible than traditional business companies to misuse as conducts for circumventing the contribution limits imposed on individuals."[80]

Beaumont also applied *Buckley*'s more deferential standard of review for contribution restrictions to a law that banned – and did not merely impose a dollar limit – on corporate donations. As

[76] Id. at 153, *quoting NRWC*, 459 U.S. at 209.
[77] Id. at 154, *quoting NCPAC,* 470 U.S. at 496-97
[78] Id., *quoting NRWC,* 459 U.S. at 208.
[79] Id. at 155, citing and quoting *FEC v. Colorado Republican Federal Campaign Comm*., 533 U.S. 431, 446-47, 456 & n. 18, 456; *Cedric Kushner Promotions, Ltd.* v. *King,* 533 U.S. 158, 163 (2001); and *Austin*, 494 U.S. at 664.
[80] Id. at 160.

the Court explained, "[g]oing back to *Buckley v. Valeo* . . . restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than the core of political expression."[81] As a result, whereas expenditure restrictions have to be "narrowly tailored to serve a compelling governmental interest, 'a contribution limit involving 'significant interference' with associational rights' passes muster if it satisfies the lesser demand of being ''closely drawn' to match a 'sufficiently important interest.''"[82] The question for the Court was whether the ban was closely drawn to the interests supporting the restriction on corporate contribution. At that point, the Court, as in *Austin*, rejected the characterization of the prohibition of the contribution of treasury funds as a "ban":

> "NCRL is simply wrong in characterizing § 441b as a complete ban. As we have said before, the section 'permits some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses of [PACs]. . . . The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments if some shareholders or members, and it lets the Government regulate campaign activity through registration and disclosure . . . without jeopardizing the associational rights of advocacy organizations' members."[83]

Beaumont noted that "a unanimous Court in *National Right to Work* did not think the regulatory burdens on PACs, including restrictions on their ability to solicit funds, rendered a PAC unconstitutional as an advocacy corporation's sole avenue for making political contributions."[84] Consequently limiting corporations to making contributions only through their PACs did not unduly burden their speech and associational rights.

A few months after *Beaumont,* the Court in *McConnell v FEC*[85] upheld BCRA's extension of the federal prohibition on the use of corporate and union treasury funds for independent expenditures to "electioneering communications" – broadcast ads aired during a defined preelection period that refer to a candidate by name but do not use the "magic words" of "express advocacy." In so doing the Court recapitulated the history of the special limits on corporations and unions -- from Elihu Root's 1894 speech and Theodore Roosevelt's 1905 Annual Message, through the Tillman Act, the 1925 Federal Corrupt Practices Act, Taft-Hartley, Justice Frankfurter's opinion in *Auto Workers,* and the enactment of

[81] Id. at 161.
[82] Id. at 162.
[83] Id. at 162-63.
[84] Id. at 163.
[85] 540 U.S. 93 (2003).

FECA[86] -- and then cited its more recent decisions as support for the proposition that *Buckley* had done nothing to undermine the longstanding special treatment of corporations and unions. "Since our decision in *Buckley*, Congress's powers to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates has been firmly embedded in our law."[87] The Court reiterated its position that the PAC option means it is "'simply wrong' to view the provision as a 'complete ban' on expression rather than a regulation." The "ability to form and administer" PACs "has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy."[88] Following hard upon the heels of *Beaumont, McConnell* was the post-*Buckley* Court's strongest endorsement of legislative authority to restrict corporate campaign activity. But with a 5-4 division and intense dissents, the ruling was a fragile one. Indeed, *McConnell* quickly proved to be the high water mark for the Court's support for public power to regulate corporate campaign finance activity. Following Justice O'Connor's retirement and her replacement by Justice Alito,[89] the doctrinal wheel began to turn,[90] and in 2010 in *Citizens United* the new majority adopted a sharply different approach.

III. *Citizens United*

A. Corporate Campaign Expenditures

In *Citizens United v. FEC,*[91] the Supreme Court struck down BCRA's prohibition on corporate and union electioneering communications and the underlying Taft-Hartley ban on corporate and union independent spending. In so doing, it overturned the relevant portions of both *McConnell* and *Austin*, and sharply shifted the Court's stance on such basic issues as whether corporation campaign participation poses a special threat to the political process, and the relevance of the PAC option to the

[86] Id. at 115-22.
[87] Id. at 203.
[88] Id at 203.
[89] While Justice O'Connor's departure was pending, Chief Justice Rehnquist died, and was replaced by Chief Justice Roberts. However, given the similarity of Roberts's views to Rehnquist's position in *McConnell* that did not affect the balance of votes on the Court.
[90] That shift actually began in 2007 in *FEC v. Wisconsin Right to Life, Inc*. ("*WRTL*"), 551 U.S. 449 (2007), in which the Court undid much of the four-year-old *McConnell* decision. Chief Justice Roberts' lead opinion found that the First Amendment permitted BCRA's restrictions on corporate and union spending only for a narrow set of ads that are "the functional equivalent" of express advocacy, id. at 469. Moreover, where *McConnell* had stressed that BCRA's restriction was merely a requirement that a corporation use its PAC to pay for electioneering communications and, thus, not a spending ban, Chief Justice Roberts asserted that the law was, indeed, a ban -- a "censorship" of political speech. Id. at 482.
[91] 558 U.S. 310 (2010).

assessment of restrictions on corporate spending. Although the Court took pains to emphasize that it was addressing only a law limiting expenditures, the case plainly has implications for the special restrictions on corporate campaign contributions.

Justice Kennedy's opinion for the majority found that corporate campaign expenditures, like other forms of political spending, are protected by the First Amendment. Invoking *Bellotti*, he emphasized that corporations, like individuals, can contribute to political discussion and debate.[92] He also stressed that the ban on the expenditure of corporate treasury funds really is "a ban on corporate speech notwithstanding that a PAC created by a corporation can still speak."[93] Breaking with *Austin* and *McConnell* he dismissed the relevance of the PAC option because a "PAC is a separate association from the corporation" and PACs are subject to "burdensome" organizational, reporting, and record-keeping requirements.[94] The Court then applied strict judicial scrutiny to the corporate spending ban and considered three possible justifications for it: (i) *Austin*'s "distortion" corruption; (ii) the protection of dissenting shareholders; and (iii) prevention of *quid pro quo* corruption and its appearance.

Justice Kennedy flatly rejected the idea that any electoral advantage corporations might enjoy from their state-created advantages to amass resources in the economic marketplace provides any basis for restricting their campaign spending. He also dismissed the relevance of the concern at the heart of *Austin*'s antidistortion rationale that corporate political funds may have little or no correlation with the extent of public support for a corporation's political ideas.[95] *Citizens United* also found the dissenting-shareholder-protection argument could not sustain the spending ban. Tracking *Bellotti,* the Court found the ban to be overinclusive – it applied to nonprofit corporations and for-profit corporations with only single shareholders where there could be not dissents – and underinclusive, applying only to certain forms of corporate election spending and not others.[96] Moreover, the Court observed "[t]here is little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'"[97] Finally, although recognizing that prevention of corruption and the appearance of corruption are "sufficiently important" interests to justify limits on contributions, the Court emphasized the point it had first made in *Buckley* that those concerns could not support spending limits.[98] The Court

[92] Id. at 342-43.
[93] Id. at 337.
[94] Id. at 337-39.
[95] Id. at 351.
[96] Id. at 362.
[97] Id. at 361-362, quoting *Bellotti,* 435 U.S. at 794.
[98] Id. at 356-61.

stressed the longstanding doctrinal distinction between contributions and expenditures when it dismissed the precedential significance of *NRWC.* As Justice Kennedy acknowledged, "the Court in *NRWC* did say there is a 'sufficient' governmental interest in 'ensur[ing] that substantial aggregations of wealth amassed' by corporations would not 'be used to incur political debts from legislators who were aided by the contributions,"[99] but he went on to explain that "*NRWC*, however, has little relevance here. . . . *NRWC . . .* involved contribution limits . . . which, unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption."[100]

Citizens United rejected the longstanding anxiety in campaign finance law about the power of corporate wealth to distort election outcomes and public policy that provided a conceptual foundation for *Austin* and *McConnell.* The survival of the corporate spending limits for nearly two generations after *Buckley* is testimony to the continuing power of this older idea in our campaign finance thinking. But *Citizens United* demonstrates that the Roberts Court is more determined than ever to limit the scope of campaign finance law and, especially, to reject equality as a justification for regulation. Nonetheless, the Court's continued adherence to the contribution/expenditure distinction and to the prevention of corruption and its appearance as justifications for campaign finance regulation provide some basis for thinking that the ban on corporate contributions may still be constitutional.

B. *Citizens United* and the Corporate Contribution Ban

As the *Citizens United* Court observed, Citizens United – the plaintiff – "has not made direct contributions to candidates"[101] and did not challenge the federal corporate contribution ban. That constitutional challenge has since been mounted but, with the prominent exception of one district court decision soon overturned by an appellate panel,[102] it has been repeatedly rejected, including by

[99] Id. at 358.
[100] Id. at 359.
[101] 558 U.S. at 359.
[102] United States v. Danielczyk, 788 F.Supp.2d 472 (E.D. Va. 2011), 791 F.Supp.2d 513 (E.D. Va. 2011), rev'd 683 F.3d 611 (4th Cir. 2012). It appears that the federal district court for the District of New Mexico, in an unreported opinion, has also invalidated a corporate contribution ban, in this case one adopted by the City of Albuquerque. Giant Cab Co. v. Bailey, No. 1:13-cv-00426-MCA-ACT, (D.N.M., filed May 6, 2103), discussed in Bob Bauer, "Breaking Bad in Albuquerque? Or: the Question of Corporate Contributions After Citizens United, http://www.moresoftmoneyhardlaw.com/2013/09/breaking-bad-in-albuquerque-or-the-question-of-corporate-contributions-after-citizens-united/ (Sept. 12, 2013).

the Second, Fourth, Eighth and Ninth Circuit courts of appeals.[103] In so doing, these courts have relied on two points.

First, *Beaumont* remains the governing precedent. *Citizens United* "did not discuss *Beaumont* and explicitly declined to address the constitutionality of the ban on direct contributions."[104] Even if *Citizens United*'s rejection of the antidistortion and shareholder protection justifications for prohibiting corporate treasury fund spending calls into question some of the rationales invoked by the *Beaumont* Court, the rule articulated in *Agostini v. Felton*[105] requires that lower courts must follow governing Supreme Court precedent: "[I]f precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[106]

Second, as several of these courts emphasized, *Citizens United* not only formally left *Beaumont* undisturbed, it also acknowledged the more deferential standard of review traditionally applied to contribution restrictions since *Buckley v Valeo*, and did nothing to question the anti-corruption and anti-circumvention arguments cited by *Beaumont* as important governmental interests justifying the corporate contribution prohibition.[107] As a result, *Beaumont* is not only binding precedent but also consistent with *Citizens United*'s analysis.[108]

Nonetheless, *Beaumont* drew heavily on the older strain in campaign finance law which treated corporations as an especially troublesome threat to the "integrity of the political process."[109] As

---

[103] *See* Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576 (8th Cir. 2013); Minnesota Citizens Concerned for Life, Inc. ("MCCL") v. Swanson, 692 F.3d 174 (8th Cir. 2012); United States v. Danielczyk, 683 F.3d 611 (4th Cir. 2012); Ognibene v. Parkes, 671 F.3d 174 (2d Cir. 2012); Thalheimer v. City of San Diego, 645F.3d 1109 (9th Cir. 2011); Green Party of Conn. v. Garfield, 616 F.3d 189 (2d Cir. 2010). Accord, United States v. Suarez, 2014 WL 8579 (N.D. Ohio, May. 8, 2104). *See also* Yamada v. Weaver, 872 F.Supp2d 1023 (D. Haw. 2012) (relying on appeals court cases sustaining corporate donation bans on upholding state law barring contributors to candidates for state office by government contractors); Lavin v. Husted, 803 F.Supp.2d 756 (N.D. Ohio 2011) (relying in part on *Beaumont* to reject a challenge to the constitutionality of an Ohio law barring candidates for state office from accepting donations from Medicaid providers).

[104] Danielczyk, supra, 683 F.3d at 617. Accord, Green Party, supra, 616 F.3d at 199.

[105] 521 U.S. 203 (1997).

[106] Id. at 237 (1997) (citing and quoting Rodriguez de Quojas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). Agostini was cited by the Eighth Circuit in *Iowa Right to Life Committee*, 717 F.3d at 601, and *MCCL*, 692 F.3d at 879, and by the Fourth Circuit in *Danielczyk,* 683 F.3d at 615.

[107] *Danielczyk, supra,* 683 F.3d at 617-19; *Ognibene, supra*, 671 F.3d at 195; *Thalheimer, supra*, 645 F.3d at 1124-25; *Green Party, supra*, 616 F.3d at 200.

[108] Accord, Dickerson, "What Remains of *Austin* After *Citizens United*?," 44 U. Tol. L. Rev. 569, 574 (2013) ("Despite *Austin*'s fate, *Beaumont* continues to be good law").

[109] 539 U.S. at 153.

Beaumont put it, the "special characteristics of the corporate structure" enable corporations to convert their "earnings . . . into political 'war chests'" that pose a special danger of political corruption.[110] *Citizens United* completely disavowed this line of thinking. The state-enabled capital-amassers of earlier cases are now simply "associations of citizens"[111] engaged in constitutionally protected political activity. Targeting corporations impoverishes the electoral debate by "prevent[ing] their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."[112] *Citizens United* emphasized that "the First Amendment does not permit Congress to make . . . categorical distinctions based on the corporate identity of the speaker."[113] Even if the expenditure ban at issue in *Citizens United* is distinguishable from the contribution prohibition upheld in ***Beaumont,*** the Roberts Court's "corporations-are-people-too" approach surely alters the doctrinal climate for considering special restrictions on corporations. As the Eighth Circuit observed, *Beaumont*'s precedential value rests on "shaky ground."[114] Preserving the corporate contribution ban will require a justification other than the concerns about corporate wealth and power and the state-created advantages intrinsic to the corporate form which shaped the law in this area from the late nineteenth century onward.

Those arguments will focus primarily on *Buckley v. Valeo*'s principal justifications for contribution limitations – the prevention of corruption and the appearance of corruption – together with the Court's repeated determination, beginning with *Buckley,* that some restrictions may also be justified as necessary to prevent circumvention or evasion of anti-corruption measures. The interplay of anti-corruption and anti-circumvention in the aftermath of *Citizens United* and *McCutcheon* will be addressed in Part IV. But it is also worth considering an argument that has been central for the case for limits on corporations since the start of the last century and was relied on in *Beaumont*[115] but dismissed in *Citizens United*[116] – the protection of dissenting shareholders. To be sure, one appeals court[117] and one commentator[118] have concluded that the shareholder-protection interest is no longer available to

---

[110] Id. at 152-54.
[111] 558 U.S. at 354.
[112] Id. at 354.
[113] Id. at 364.
[114] MCCL, 692 F.3d at 879 n. 12.
[115] 539 U.S. at 154-55.
[116] 558 U.S. at 361-62.
[117] See Danielczyk, supra, 683 F.3d at 618 n.3.
[118] Campbell, Down the Rabbit Hole with Citizens United: Are Bans on Corporate Direct Contributions Still Constitutional?, 45 Loyola L.A. L. Rev. 171, 198-99 (2011).

justify the corporate contribution ban, but that over-reads *Citizens United*.[119] Expenditure limitations are subject to more searching judicial review than contribution restrictions. Moreover, the "procedures of corporate democracy" *Citizens United* invoked are unlikely to adequately protect dissenting shareholder interests. Shareholder-protection ought to be able to justify the contribution ban, at least as to publicly-held multi-shareholder corporations.

C. Shareholder Protection after *Citizens United*

The shareholder-protection justification draws on multiple concerns. First, corporate executives may use treasury funds to advance their own interests, which may be adverse to those of shareholders. In 1905 the Armstrong Committee accused New York mutual life insurance companies of using policyholder funds to win legislative support for measures limiting the ability of policyholders to sue managers for breach of trust. More recently, one study that compared states with bans on corporate independent spending before *Citizens United* with states that permitted such spending found that states without limits on corporate spending were far more likely to adopt corporate anti-takeover laws that protected incumbent managers from hostile takeovers and thereby decreased incentives for management to run their firms as efficiently as possible.[120]

Second, even if corporate spending is not actually opposed to the interests of shareholders, it still may not be in the interest of the firm. A growing academic literature has found that, with the exception of firms dependent on government contracts or operating in heavily regulated industries, corporate political spending does not result in greater economic returns for the firm.[121] Rather, there is some evidence that firms that invest in political activity – again other than firms that are government contractors or in heavily regulated fields -- actually do worse than other firms. According to some studies, firms that invest in politics do not invest as much in research and development or physical

---

[119] The Second Circuit determined it was unnecessary to address the question as corporate contribution ban is justified by the anti-corruption and anti-circumvention concerns, see Ognibene, supra, 671 F.3d at 197.

[120] See Timothy Werner and John J. Coleman, "*Citizens United*, Independent Expenditures, and Agency Costs: Reexamining the Political Economy of State Antitakeover Statutes," July 11, 2013.

[121] See, e.g., Michael Hadani & Douglas Schuler, "In Search of El Dorado: The Elusive Financial Returns on Corporate Political Investments," 34 Strategic Mgmt J. 165 (2013); John C. Coates IV, "Corporate Politics, Governance, and Value Before and After *Citizens United*," 9 J. Empirical Legal Stud. 657 (2012); Rajesh K. Aggarwal, Felix Meschke and Tracy Yue Wang, "Corporate Political Donations: Investment or Agency?" 14 Business & Politics 1 (2012). But cf. Michael J. Cooper, Huseyn Gulen & Alexi Ovtchinnikov, "Corporate Political Contributions and Stock Returns," 65 J. Finance 687 (2010) (of firms that have PACs that contributed to federal candidates, those that gave to a greater number of candidates holding office in the same state that the firm is based in enjoyed above normal increases in value).

capital as other firms and they may be more likely to engage in risky strategies.[122] These studies suggest that corporate political activity is also often associated with higher levels of senior executive independence. In effect, corporate election spending is less an investment that increases shareholder wealth and more a "consumption good" for senior managers seeking to advance their partisan commitments, ideological beliefs, or personal careers. Harvard Law School Professor John Coates reports that a significant number of the CEOs and senior managers whose firms engaged in above-average political activity went on to be appointed or nominated to high level public office.[123]

The controversy following Target Corporation's 2010 donation of $150,000 to Minnesota Forward -- a Section 527 committee jointly organized by the Minnesota Chamber of Commerce and the Minnesota Business Partnership to support pro-business candidates in Minnesota state elections – indicates another way corporate spending can hurt a company.[124] Minnesota Forward used the funds provided by Target, the well-known Minnesota-based retailer, and other corporations to pay for independent spending in support of the Republican candidate for governor, who opposed marriage equality for same-sex couples. Target had made a point of its "gay-friendly" policies, so that when its donation became known the firm became the "target" of protests, a highly publicized consumer boycott, and a media campaign, including hostile YouTube videos by gay rights groups and the politically liberal MoveOn.org. It is not clear if the boycott affected company sales or stock price,[125] but the company's CEO quickly apologized to its employees, saying that although the "intent" of its contribution had been to "support economic growth and job creation" it recognized that its action had "affected many of you in a way I had not anticipated." Target also said it would begin a "strategic review and analysis of our decision-making process for financial contributions in the public policy arena." The Target episode and other instances of attempted consumer boycotts aimed at companies that donate to

[122] Aggarwal, et al, supra at 14.
[123] Coates, supra, at 678-80.
[124] See generally Taren Kingser and Patrick Schmidt, "Business in the Bulls-Eye? Target Corp. and the Limits of Campaign Finance Disclosure," 11 Elec. L. J. 21 (2011); Brody Mullins and Anne Zimmerman, "Target Discovers Downside to Political Contributions," Wall St. J., August 7, 2010; John Gibeaut, "A Cautionary Tale of Corporate Political Spending Emerges in Minnesota, ABA Journal (Oct. 2010).
[125] According to Kingser and Schmidt, by August 18, 2010, or roughly three weeks after the bad publicity concerning Target's campaign activity had begun, had lost $1.3 billion in stock market capitalization, although Target "questioned whether the boycott was the cause for the decline in stick price arguing that there were 'too many factors that we can't attribute it to just one thing." 11 Elec. L.J. at 30. In any event, Target's stock price soon "rebounded and August sales rose at a comparable rate to the year before." Id. at 31.

controversial causes[126] suggest the potential for reputational risk and resulting harm to investors when a company's political donations become known.[127]

Even if a corporation's election spending may be in the interest of the organization as a whole it may not be in the interest of all shareholders. Corporate shareholders are presumably interested in using their investment to increase their wealth. But shareholders – or, at least, the individuals among them – are not just investors; they may also be parents, employees, retirees, consumers, environmentalists, community residents, and citizens with a host of interests and concerns that are affected by electoral politics and that in turn affect their individual views about elections. Their interests as parents or consumers or citizens may differ from their interests as investors. As investors, they might be better off with lower corporate taxes and weaker environmental or consumer protection regulations. But as citizens, consumers, or users of public services they may prefer higher corporate taxes or more stringent rules. When it comes time to vote in an election, each investor-consumer-parent-citizen has to balance out these potentially conflicting preferences and values and make a decision, a decision in which the non-investment interests could come out ahead. As a shareholder, an individual might be better off if her firm supports the anti-tax, anti-regulation candidate, because of all her other interests, that individual might vote for the candidate concerned about better funding for public schools and addressing the emission of greenhouse gases that contribute to climate change. When corporate managers make campaign contributions they do not take the shareholders' non-investment interests into account, nor is it easy to see how they could given their fiduciary duty to the corporation. In other words, a fundamental problem with the use of corporate treasury funds in elections is not the *misuse* of shareholder funds against shareholder economic interests but the *overrepresentation* of shareholders' economic interest relative – and in opposition to -- their other interests.

In both of the Supreme Court's cases dealing with restrictions on corporate contributions, the Court found that shareholder protection justified the federal corporate contribution ban. In *NRWC,* a unanimous Court noted that one argument put forward for the prohibition on the contribution of

---

[126] See, e.g., Center for Political Accountability, Taking Initiative: How corporate contributions to ballot measures pose a risk to shareholders, and why directors must oversee company political spending 38-54 (Dec. 2008) (discussing consumer boycotts aimed at companies that donated to controversial ballot proposition campaigns)

[127] See, e.g., Michael Stocker & Matthew Moehlman, "Are Shareholders Happy With Your Company's Political Spending," Corporate Counsel, Sept. 26, 2012, http://knowledgenetwork.labaton.com/upload/2012_415-2.pdf; Rick Cohen, "What to Do about 'Reputational Risk' to Nonprofits from Political Spending," NonProfit Quarterly, March 23, 2012, http://www.nonprofitquarterly.org/policysocial-context/20018-what-to-do-about-reputational-risk-to-nonprofits-from-political-spending.html.

corporate treasury funds is to "protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed" and it "agree[d] with the government" that this was a constitutionally sound justification.[128] *Beaumont* quoted the NRWC language and restated the point.[129]

Citizens United did not directly address or reject the argument that shareholder protection is a compelling interest – the standard in an expenditure limit case – let alone a "sufficiently important" interest that would justify a contribution restriction. Instead, the Court concluded that the federal corporate spending ban was insufficiently narrowly tailored because it was both underinclusive – it applied to "corporate speech in only certain media within 30 or 60 days before an election" -- and "overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders."[130] The federal corporate contribution ban is not underinclusive as it applies to all donations to federal candidates, national political party committees, and other political committees that give to candidates. The overinclusiveness concern is more apposite. *Beaumont* held that the federal corporate contribution ban applied to nonprofit corporations without shareholders, but that was due to the ban's role in advancing the anti-corruption and anti-circumvention concerns, not shareholder protection. If the only argument for barring corporate contributions was shareholder protection, nonprofits and single-shareholder corporations would have to be exempted. However, the shareholder-protection argument could justify the ban with respect to contributions by multi-shareholder, publicly traded for-profit corporations. The Court in *Burwell v. Hobby Lobby Stores, Inc.* took a similar approach in recognizing the distinction between publicly traded and closely held corporations and providing only the latter the opportunity to assert religious objections to the application of the federal mandate that employers provide their employees with health insurance coverage for certain contraceptive methods. The "corporate giants" that *Hobby Lobby* found would be unlikely to assert a religious objection because of the wide range of religious beliefs among their "unrelated shareholders – including institutional investors with their own set of stakeholders"[131] are precisely the corporations whose shareholders need protection against the misuse of corporate funds for political purposes they do not share. An *MCFL*-type exclusion for single shareholder, closed

[128] 459 U.S. at 208.
[129] 539 U.S. at 154-55.
[130] 558 U.S. at 362.
[131] Hobby Lobby, supra, at *18.

corporations, and non-profits would solve the overinclusiveness problem for the shareholder-protection justification.

Citizens United hinted at an alternative reason the shareholder-protection interest failed to save the corporate spending ban. The Court contended that shareholder protection could be effectively advanced with less burden on First Amendment rights "'through the procedures of corporate democracy.'"[132] Chief Justice Roberts made a similar point in the *Citizens United* oral argument when it contended it is "extraordinarily paternalistic for the government to take the position that shareholders are too stupid to keep track of what their corporations are doing and can't sell their shares" if they object to corporate political activity.[133]

But in fact it is extremely difficult for shareholders "to keep track of what their corporations are doing," or to use the "procedures of shareholder democracy" to defend their interests. Corporations are under no legal obligation to disclose their election spending to shareholders. To be sure, in recent years, many major corporations have agreed to report to their shareholders about their political activities,[134] but these reports are often limited to a general statement of corporate political spending policies or total amounts of spending and do not necessarily include the amounts donated to or spent independently for or against particular candidates. [135] And the vast majority of corporations have no self-imposed reporting policies at all. Election laws do generally require the disclosure of contributions and expenditures, but these reports are made to public agencies, not to shareholders; moreover, it is the recipients of the contributions, not the donors, who are required to disclose, again making it difficult for shareholders to keep track of what their corporations are up to.[136]

---

[132] 558 U.S. at 361-62 (quoting *Bellotti)*. See also Campbell, supra, at 198-99.

[133] Transcript, Citizens United oral argument at 58.

[134] See Center for Political Accountability, <u>The 2013 CPA-Zicklin Index of Corporate Political Accountability and Disclosure</u> (2013) (study of the campaign spending practices of 195 of the top 200 companies in the Standard & Poor's 500 index).

[135] See id. at 15 (only 46% of the companies surveyed "fully described" to which political entities, such as candidates, political parties, 527 groups, 501(c)(4) organizations or trade associations "they would or would not give money"). In addition, only 37% of the companies surveyed provided "detailed information on the public policy priorities" that were the basis of their political decisions; another 22% of the companies "provided more vague language on why they give." Id.

[136] In July 2011, a committee of ten corporate and securities law professors filed a petition with the Securities and Exchange Commission urging the SEC to develop rules requiring public companies to disclose their spending on politics. In the following two years, the SEC received more than 600,000 comments letters on the petition – more than on any other rulemaking proposal in the Commission's history. The Commission placed the rulemaking petition on its regulatory agenda for 2013 but in late 2013, when the Commission disclosed its regulatory agenda

Even if a shareholder is informed about a particular corporation's campaign activity there is little she can do about it. Voluntary corporate disclosures are made in annual reports released long after the election in which the contributions were made, and even election law disclosures – though often reported before Election Day so as to inform the voters – report contributions only after they have occurred. At that point the sale of shares would be too late from the unhappy shareholder's perspective as the damage is already done. Further, any post-disclosure sale of shares could require the shareholder to take a loss or trigger the application of a capital gains tax. Either consequence would operate as a monetary penalty discouraging sale. And, of course, many people do not directly own shares in the corporation that engages in election spending but instead invest through mutual funds or pension plans. Disinvesting would require selling the interest in the mutual fund (thereby potentially disinvesting from dozens of other companies with which the investor has no political quarrel); for many employment-based pension plans it may not even be possible for the employee- or retiree- investor to change plans.

As for "object[ing] in the corporate context," it is not clear what that means. General corporate law principles vest the vast majority of corporate policy-making decisions in management. That includes the decisions whether to make campaign contributions and how much and to whom to give are for management. Shareholders have no legal say on these questions. A recent Securities & Exchange Commission ruling – which applies only to the public companies traded on the exchanges subject to its jurisdictions – requires companies to place shareholder-initiated resolutions concerning company political spending on the annual meeting proxy statements for a shareholder vote.[137] But under general corporate law principles such a shareholder resolution must be advisory only and cannot bind the company. The closest the shareholders get to having a voice is when they vote for the members of the board of directors, although in only a little more than half of large public companies do the boards of directors "regularly oversee" company political spending.[138] Of course, elections to the board of directors are only rarely contested. Typically, the board itself nominates a slate, which it places on the corporation's proxy card, and the slate runs unopposed. And even if there is an election contest, a shareholder discontented with a company's campaign contributions may still think the incumbent board

---

for 2014 the political spending rulemaking petition was not on it. See Dina ElBoghdady, "SEC drops disclosure of political spending from its priority list," Wash. Post, Nov. 30, 2013.

[137] SEC, Shareholder Proposal Submitted by Home Depot to NorthStar Asset Management Funded Pension Plan, March 25, 2011.

[138] Id. at 16.

has generally done a good job in running the company. As a result, the exercise of "voice," like the exercise of "exit" through sale, to protest corporate election spending is also discouraged.[139]

Nor are there less restrictive alternatives to a complete ban that would adequately protect dissenting shareholders. Employees required to pay a fee to the union that represents them in collective bargaining are entitled to "opt-out" of the union's political spending to which they object by obtaining a dues reduction proportionate to the share of the union's political spending.[140] Professor Ben Sachs has proposed that shareholders be given a comparable opt-out right which would be realized as an annual dividend equal to their pro rata share of the company's political expenditures.[141] But as even Professor Sachs acknowledges, "such a rule would be difficult to administer,"[142] probably fatally so. With many investors buying and selling stock on a frequent if not daily basis, it will be extremely difficult to determine what any stockholder's pro rata share of corporate assets will be on an annual basis. Many shareholders invest through mutual funds, which also buy and sell shares throughout the year, making the shareholder's stake in any one company even more difficult to calculate.[143] And as Professor Sachs notes, "corporations do not have an obligation to pay dividends to shareholders at any set time or based on any particular set of financial circumstances" so that a political opt-out right "that took the form of a mandatory dividend would be novel in U.S. law."[144] Other scholars have recognized that "[a]dministering an objection system would be complex, particularly for shareholders whose stocks are managed by a pension or mutual fund. Sending out rebate checks as dividends . . . would not be a simple task."[145] The differences between the very specific annual agency fee assessment imposed on employees and the constantly fluctuating investment a shareholder has in a specific corporation mean that opt-out is not a feasible or adequate alternative in the corporate context.[146]

---

[139] See Thomas W. Joo, Corporate Governance and the Constitutionality of Campaign Finance Reform, 1 Elec. L. J. 361, 367-68 (2002).
[140] See, e.g., Communication Workers of America v. Beck, 487 U.S. 735 (1987).
[141] See Benjamin I. Sachs, "Unions, Corporations, and Political Opt-Out Rights After *Citizens United*," 112 Colum. L. Rev. 800, 864. For a similar proposal, see Jeremy G. Mallory, "Still Other People's Money: Reconciling *Citizens United* with *Abood* and *Beck*," 47 Cal. W. L. Rev. 1, 36-38 (2010).
[142] Sachs, supra, 112 Colum. L. Rev. at 864.
[143] Professor Sachs also acknowledges these concerns. See id. at nn. 314, 316.
[144] Id. at n. 317.
[145] See Catherine L. Fisk & Erwin Chemerinsky, "Political Spending and Association Rights After *Knox v. SEIU, Local 1000*," 98 Corn. L. Rev. 1023, 1088 (2013).
[146] Indeed, Professor Sachs appears to have proposed the shareholder opt-out largely to underscore his view that the employee opt-out is burdensome for unions and to make the case for "symmetrical" treatment for corporations and unions. See id. at 858-862.

Alternatively, corporate contributions could be conditioned on a shareholder vote. The United Kingdom requires that any company that intends to spend more than £5,000 on campaign activity must first obtain the approval of its shareholders. The British law does not require shareholder approval of specific donations or expenditures but instead provides general authority to use corporate funds for political purposes and the total amount that may be spent until either the next annual meeting of the shareholders or over the next four years.[147] Given that any shareholder vote would probably occur at the corporation's annual meeting, which will likely be held at a time unrelated to any elections calendar, it seems inevitable that shareholder authorization would be address only the overall level or, perhaps, type of political expenditure – contributions, independent expenditures, support for candidates, parties, ballot propositions, political committees – but not the identity of amounts spent with respect to specific beneficiaries or recipients.[148] It is also unclear what fraction of shareholders would be necessary to approve a corporation's electoral spending. Only a 100% rule would fully protect the interests of all potentially dissenting shareholders,[149] but that would be tantamount to a ban.[150]

Citizens United has surely lain to rest for some time to come the question of whether shareholder-protection can justify a ban on corporate treasury fund *spending*, but that does not resolve the issue of whether than interest can justify a *contribution* ban. The Court has determined that contribution restrictions are less of a burden on First Amendment interests and so are subject to a less rigorous degree of scrutiny – merely that they be "closely drawn" to match a "sufficiently important interest."[151] The Court has repeatedly recognized shareholder protection as an important interest; *Citizens United* did not question that and instead focused on the tailoring of the spending ban to the interest and the availability of alternative, less burdensome means of vindicating that interest. However,

---

[147] See Michael Smyth, Patricia Barratt and Fraser Campbell, The Law of Political Donations 122-24 (Wildy, Simmonds & Hill Pub. 2012). For a call for Americans to adopt the British approach, *see* Ciara Torres-Spelliscy & Kathy Fogel, "Shareholder-Authorized Corporate Political Spending in the United Kingdom," 46 U.S.F.L. Rev. 525 (2011).

[148] Shareholders vote on a one share, one vote not a one person, one vote basis. Most of the shares of large, publicly traded companies are held by institutional investors, such as mutual funds and private pension plans, and most individuals who own stock do so through such funds and plans. *See* Jennifer S. Taub, "Money Managers in the Middle: Seeing and Sanctioning Political Spending After *Citizens United,"* 15 Legis. & Pol'y 443, 462 (2012). As a result, a shareholder approval requirement might simply give decision-making authority to a small number of powerful money managers. As Taub tartly put it, "[i]f the procedures of corporate democracy are lacking, the procedures of mutual fund democracy are nearly non-existent." Id. at 483.

[149] See Victor Brudney, "Business Corporations and Stockholders' Rights Under the First Amendment," 91 Yale L.J. 235, 259-60 (1981).

[150] Lucian A. Bebchuk & Robert J. Jackson, Jr., "Corporate Political Speech: Who Decides?" 124 Harv. L. Rev. 83, 115 (2010).

[151] FEC v. Beaumont, 539 U.S. at 162.

as *McCutcheon* observed, in the context of contribution restrictions, what is required for a law to be "closely drawn" is "a fit that is . . . reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective."[152] The contribution ban is not underinclusive as was the expenditure restriction in *Citizens United*; the overinclusiveness problem can be addressed by an *MCFL*-type exception; and there is no less restrictive means of protecting shareholder interests than a complete ban on the contribution of corporate treasury funds. When coupled with the mechanism in current law of allowing the corporation to maintain a PAC which can make campaign contributions and to use corporate funds to solicit voluntary donations to that PAC from shareholders, the burden of the ban on the ability of people associated with a corporation to make a contribution that reflects the fact of that association is greatly reduced. The ban-plus-PAC option may not have been sufficiently narrowly tailored to justify a ban on corporate spending, given the extremely high value the Court has placed on spending aimed at the general public and the strict scrutiny applied to restrictions on such spending. But given the different standard of review for contribution restrictions, shareholder protection (for the shareholders of multi-shareholder for-profit corporations) is a sufficiently important interest, and the ban (with PAC option) proportionately tailored to protect that interest to justify the ban.

IV. Corruption and Circumvention

A. Anti-corruption

From *Buckley* on, the Supreme Court has consistently held that contributions may be restricted because of the important governmental interests in preventing corruption and the appearance of corruption. As the Court explained, "[t]o 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."[153] And the corruption danger justifying contribution limits goes beyond "the giving and taking of bribes," which are "only the most blatant and specific attempts of those with money to influence governmental action."[154] Rather, as the Court subsequently observed, the anti-corruption concern is "not confined to bribery of public officials, but extend[s] to the broader

[152] McCutcheon, 134 S.Ct. at 1456-47 (quoting Board of Trustees of SUNY v. Fox, 492 U.S. 469, 480 (1989).
[153] 424 U.S. at 26-27.
[154] Id. at 27-28.

threat from politicians too compliant with the wishes of large contributors."[155] *Buckley* also found "[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from opportunities for abuse inherent in a regime of large individual financial contributions. . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative government is not to be eroded to a disastrous extent.'"[156] Although contribution restrictions burden the freedom of association *Buckley* found that even a "significant interference" with the right of association may be sustained if the government "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."[157] The prevention of corruption and the appearance of corruption were held to meet that standard.

The Court has consistently adhered to this position over the last four decades.[158] Contribution restrictions have occasionally been invalidated when the Court deemed them to be unrelated to the prevention of corruption – such as limits on donations to ballot measure committees,[159] or limits on the total amount an individual can give to all candidates and committees[160] -- or when the limits were so low as to interfere with the ability of candidates, particularly challengers, to compete effectively.[161] *Citizens United* restated the difference in the treatment of expenditure and contribution restrictions and *Buckley*'s validation of "limits on direct contributions in order to ensure against the reality and appearance of corruption."[162] Chief Justice Roberts's opinion for the Court in *McCutcheon* noted that the parties and amici had spent "significant energy debating whether the line *Buckley* drew between contributions and expenditures should remain the law," but determined there was "no need in this case to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review."[163] While hardly a ringing reaffirmation of the traditional doctrine, the Chief Justice's opinion indicated that the anti-corruption justification *Buckley* relied on "may

[155] Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 389 (2000).
[156] 424 U.S. at 27.
[157] Id. at 25.
[158] See, e.g., NRWC, supra; Nixon, supra; Beaumont, supra; McConnell, supra.
[159] Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981).
[160] McCutcheon.
[161] Randall v. Sorrell, 548 U.S. 230 (2006).
[162] 558 U.S. at 357.
[163] 134 S.Ct. at 1445.

properly be labeled 'compelling,'"[164] and so could be a basis for sustaining contribution restrictions even if the Court were to impose the strict scrutiny heretofore reserved for expenditure restrictions.

Of course, *Buckley* and the Court's other cases relying on the anti-corruption interest to sustain restrictions on individual contributions addressed dollar limits on donations not complete bans. To justify a complete ban on corporate treasury fund donations requires turning to the closely related concern with preventing evasion of the dollar limits on individual donations – the anti-circumvention justification invoked by *Beaumont* when it upheld the corporate donation ban – and it involves doing so in light of the tighter review of closeness of fit embraced by *McCutcheon*.

B. Anti-Circumvention

The Supreme Court first recognized an anti-circumvention justification for restricting campaign finance activity in *Buckle*y itself. In sustaining FECA's $25,000 limit on the total contributions an individual may give to federal candidates, parties and political committees in a calendar year – in addition to the dollar limit on how much an individual may give to any particular candidate -- the Court found the aggregate limit justified by the concern "to prevent evasion of the $1000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party."[165] It was thus "no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid."[166] Although *McCutcheon* concluded that due to subsequent changes in campaign finance law FECA's aggregate limit is no longer needed to prevent circumvention of the limits on individual donations to candidates, it did not challenge circumvention-prevention as a justification for laws intended to backstop contribution limits.

Indeed, the Court has frequently turned to the prevention of the evasion of the limits on direct donations to candidates as a justification for other contribution restrictions. In *California Medical Ass'n v. FEC,*[167] the Court sustained FECA's limit on the amount of money an unincorporated association can contribute to its own PAC. Although there was no danger the association would "corrupt" its PAC, the measure was needed "to prevent circumvention" of the individual- and association-to-candidate

[164] Id.
[165] 424 U.S. at 38.
[166] Id.
[167] 453 U.S. 182 (1981)

donation limits previously upheld in *Buckley.*[168] Similarly, in *FEC v. Colorado Republican Federal Campaign Comm*. ("*Colorado Republican"*),[169] the Court upheld the federal statutory limits on expenditures by a political party that are coordinated with the party's candidate as a constitutionally valid means "to minimize circumvention of contribution limits" on individual donations to candidates.[170] The majority opinion explained that "all Members of the Court agree that circumvention is a valid theory of corruption."[171] As previously noted, the prevention of circumvention was one of the justifications *Beaumont* gave for upholding the federal corporate contribution ban, even when applied to nonprofit corporations. And in *McConnell v. FEC*[172] the Court repeatedly invoked the anti-circumvention justification in support of the extension of the ban on soft money contributions to the national political parties to the funding of the federal election activities of state political parties;[173] to solicitations by national, state and local political parties of donations by tax-exempt organizations;[174] and to the funding of the public communications of state and local officeholders concerning federal candidates.[175] Although *McCutcheon* indicates that the Court will more closely probe the fit between the seriousness of a circumvention problem and the restriction intended to prevent it,[176] there is nothing in the Court's recent campaign finance jurisprudence that suggests that prevention of the circumvention of

[168] See id. at 197-98 (plurality opinion of Justice Marshall; accord, id. at 202-03 (concurring opinion of Justice Blackmun)(applying a more "rigorous standard of review" than the plurality but agreeing that contributions to a PAC may be limited "as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee upheld in *Buckley*).
[169] 533 U.S. 431 (2001).
[170] Id. at 465.
[171] Id. at 456. See also id. at 456-57 n. 18 (referring to "the long-recognized rationale of combating circumvention of contribution limits designed to combat the corrupting influence of large contributions to candidates from individual and nonparty groups, The dissent does not take issue with his justification as a theoretical matter.").
[172] 540 U.S. 93 (2003).
[173] Id. at 161-66 ("Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to [the ban on soft money donations to the national political parties] by scrambling to find another way to purchase influence.").
[174] Id. at 174-81. See id. at 176 ("Experience under the current law demonstrates that Congress' concerns about circumvention are not merely hypothetical.").
[175] Id. at 184-85 (citing "Congress' strong interest in preventing circumvention of otherwise valid contribution limits").
[176] Chief Justice Roberts had previously signaled some skepticism about just how far the anti-circumvention argument can go when he condemned as "prophylaxis-upon-prophylaxis" the effort to apply BCRA's definition of "electioneering communications" – itself an extension of the definition of corporate and union independent expenditures to cope with evasion of the statutory spending ban – to communications not the functional equivalent of express advocacy. *See* FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 479 (2007) (opinion of Roberts, C.J.). Of course, *Citizens United* subsequently struck down the independent spending ban. He then quoted the "prophylaxis-upon-prophylaxis" phrase in *McCutcheon*, 134 S.Ct. at 1458, in rejecting the anti-circumvention of the individual contribution limits justification for the aggregate contributions, implying that the contribution limit is itself a prophylactic that reaches all contributions above a dollar amount in order to prevent corrupt quid pro quo contributions.

corruption-preventing and appearance-of-corruption-preventing contribution limits is no longer a constitutionally substantial interest capable of justifying a campaign finance restriction.

The possibility that individuals would use the ability of corporations to make donations to evade the limits on individual donations is surely substantial. It is extremely easy to create a corporation. In most states a new corporation can be formed simply by filing a few papers and paying a nominal fee. A single individual can generate multiple corporations that he or she controls and can use to end-run the cap on donations. The adoption of a dollar limit on the size of an individual's donations to a candidate would be meaningless if the individual could proliferate new corporations, each of which could separately donate to the same candidate. Similarly, enabling corporations to participate in election campaigns can lead to the frustration of disclosure requirements, as a donor can easily disguise his role in a campaign by creating and putting money in a corporation which contributes to a candidate. Individuals may be able to use their minor children to evade contribution limits but it is far easier and quicker to generate multiple corporations (not to mention not having to pay for their college educations).

The use of corporations to evade disclosure requirements became a regular occurrence after *Citizens United* authorized corporate independent spending. In one notorious incident, an entity known as Specialty Group, Inc., which was first incorporated on September 26, 2012,[177] contributed $10,575,000 million to FreedomWorks for America, an independent expenditure political committee between October 1 and November 1, 2012.[178] That made Specialty Group, Inc. the fourth largest donor to independent spending groups in the 2012 election.[179] FreedomWorks itself was the sixth largest outside spender in 2012, and Specialty Group accounted for more than half of its funds.[180] However, according to news accounts, "Specialty Group appeared to have no website describing its products or services," gave as its address a Knoxville, Tennessee residence, and was not required to make any disclosure concerning the source of its funds.

[177] Jack Gillum, AP, "Specialty Group, Inc., Mystery Firm, Formed Days Before $5 Million Campaign Gift," Huffington Post, Oct. 27, 2012.
[178] Center for Responsive Politics, OpenSecrets.org, "Specialty Group, Inc.: Donor Detail," http://www.opensecrets.org/outsidespending/donor_detail.php?cycle=2012&id=Specialty+Group+Inc&type=O&super=N.
[179] Id. at "2012 Top Donors to Outside Spending Groups," http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=D&type=O.
[180] Id. at 2012 "Outside Spending, by Super PAC," http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&type=S.

Similarly, corporations and similar artificial entities like limited liability corporations (LLCs) can go out of existence, change names, re-form, or work through subsidiaries or affiliates in ways that at the very least hinder the ability of media, voters, and campaign finance agencies to track the flow of funds from original donor to ultimate campaign recipients.[181] In the *Western Tradition Partnership ("WTP")* litigation, -- this is the post-*Citizens United* case in which Montana unsuccessfully sought to sustain its century-old ban on corporate campaign spending in state elections -- the Montana Supreme Court found that WTP – despite the word "partnership" in its name, the entity is a corporation – was created "to act as a conduit of funds for persons and entities including corporations who want to spend money anonymously to influence Montana elections."[182] Often little more than "shadow money mailboxes,"[183] these legal persons have become a key mechanism for evading campaign finance laws. The ease with which politically-active artificial entities can be proliferated, reorganized and dissolved makes the enforcement of constitutionally sound campaign finance laws far more difficult. If these entities could make direct contributions to candidates as well as engage in independent spending, those difficulties would be further exacerbated.

Corporations have quickly come to play a large and growing role in enabling donors to avoid disclosure. As Ann Ravel, then-chair of California's Fair Political Practices Commission (FPPC) and now a member of the Federal Election Commission, has observed, "people are willing to use circuitous routes to avoid telling the voters who is behind campaigns."[184] Ravel made her statement while announcing the imposition of a record $1 million civil fine as part of the settlement of a case brought by the FPPC and the California Attorney General against two nonprofit corporations that together funneled more than $15 million into a campaign against two ballot propositions – dealing with taxes and union political rights --- on the 2012 California ballot. The money, which ultimately derived from a handful of superwealthy individuals, was channeled from the originating donors to a group called Americans for Job Security, which then transferred the money to the Center to Protect Patients' Rights (the ballot propositions had nothing to do with patients' rights) and then on to the Arizona-based Americans for Responsible Leadership and the Iowa-based American Future Fund before the funds were finally being

---

[181] See, e.g., Robert Maguire & Viveca Novak, Exclusive: Largest Dark Money Donor Groups Share Funds, Hide Links, OpenSecretsblog, Sept. 10, 2013, http://www.opensecrets.org/news/2013/09/exclusive-largest-dark-money-donor-groups-hide-ties-using-new-trick.html. See also Mike McIntire & Nicholas Confessore, Tax-Exempt Groups Shield Political Gifts of Business, N.Y. Times, July 7, 2012.
[182] Western Tradition P'ship v. Attorney General, 271 P.3d 1, 4 (Mont. 2011).
[183] Maguire and Novak, supra.
[184] Matea Gold and Tom Hamburger, California donor disclosure case exposes how nonprofits can play in politics, Washington Post, Nov. 4, 2013.

sent on to the Small Business Action Committee and the California Future Fund for Free Markets for spending to oppose the ballot measures.[185] It was, as one news account put it, "a daisy chain of organizations" "that operatives took to skirt disclosure obligations."[186] Similarly, Western Tradition Partnership touted to prospective donors: "'[W]e're not required to report the name or the amount of any contribution that we receive. So if you decide to support this program, no politician, no bureaucrat, and no radical environmentalist will ever know you helped make this program possible. . . . You can just sit back on election night and see what a difference you have made."[187]

It is not difficult to imagine corporations, if allowed to make campaign contributions, playing a similar role in enabling individuals to evade the limits on individual donations. The role of corporations in channeling funds to SuperPACs engaged in independent spending could easily provide a model for individuals seeking to enhance their ability to make contributions to candidates beyond the statutory ceiling. An individual who has "maxed out" on her permissible donation to a candidate could then also create a corporation, fund that entity, and use that entity to make another legally permissible maximum contribution. A recent investigation of campaign practices in New York State, which permits contributions by both corporations and LLCs, found that it is standard practice for organizations to generate LLCs and subsidiaries to make campaign contributions. The New York study found that one entity had utilized 25 separate LLCs and subsidiary entities to make 147 separate political contributions totaling more than $3.1 million over a four-year period.[188] Alternatively, nonprofit corporations that engage in a mix of electoral and other forms of political activity could be used as conduits for additional contributions to candidates. To be sure, corporate contributions to candidates would likely be smaller than the hundreds of millions spent by SuperPACs if Congress responds to any invalidation of the corporate spending ban with the enactment of a monetary limit on corporate donations similar to those currently imposed on individual and PAC donations.[189] But they would still enable individuals to give more than the individual-to-candidate limits that the courts have found to be valid.

---

[185] See Nicholas Confessore, Group Linked to Kochs Admits to Campaign Finance Violations, N.Y. Times, Oct. 24, 2013.
[186] Gold and Hamburger, supra.
[187] WTP v. AG, supra, 271 P.3d at 7.
[188] State of New York, The Commission to Investigate Public Corruption, Preliminary Report, Dec. 2, 2013, at 37, http://publiccorruption.moreland.ny.gov/sites/default/files/moreland_report_final.pdf.
[189] Cf. Matea Gold, Koch-backed political coalition, designed to shield donors, raised $400 million in 2012, Washington Post, Jan. 5, 2014.

The anti-circumvention argument has most purchase for single-shareholder, closely-held, and non-profit corporations – precisely those corporations for which the shareholder-protection argument is least persuasive. These are the entities most likely to be dominated by a small number of individuals who can use them to advance their personal political concerns. With these organizations, the problem is not the corporate "warchest" concern underlying *Austin* that *Citizens United* so powerfully repudiated but the ease with which they can be deployed to circumvent the limits on individual donations to candidates. The anti-circumvention concern also explains why an absolute ban, rather than a dollar limit on corporate donations comparable to that on individual donations is needed. Assuming there are substantial if not compelling public interests in preventing corruption and the appearance of corruption that validates the statutory dollar limits on individual donations, then every dollar above the statutory limit that is channeled through a corporation triggers those interests.

After *McCutcheon*, the main question for the corporate contribution ban is whether it is sufficiently narrowly tailored to preventing the use of the corporate form to circumvent the limits on individual donations, or whether there are alternative less burdensome means of achieving that goal. In *McCutcheon*, the Court focused on three sets of factors in determining whether a restrictions is sufficiently narrowly tailored for it to be justified by the anti-circumvention interest: (i) the existence of other legal rules addressing circumvention;[190] (ii) the practical likelihood of circumvention if the challenged restriction were eliminated;[191] and (iii) the burden on the restriction on First Amendment rights in light of the availability of other forms of campaign participation.

In *McCutcheon*'s aggregate limit context, the Court concluded that there were multiple other campaign finance laws that either already prevented or could be adopted to prevent circumvention of contribution limits, such as limits on donations by individuals to political committees,[192] limits on donors creating or controlling multiple affiliated political committees,[193] limits on donations to political committees that support or which the donor anticipates will support a candidate the donor has directly supported,[194] limits on committee-to-committee and candidate-to-committee transfers,[195] and strengthened rules on earmarking, that is, the practice of giving to a political committee with an implicit

[190] 134 S.Ct. at 1446-47. See also id. at 1458-59 (proposing other legal rules to address circumvention).
[191] Id. at 1452-57.
[192] Id. at 1446.
[193] Id. at 1446-47.
[194] Id. at 1447.
[195] Id. at 1458-59.

understanding that the committee will use the donation to aid a specific candidate.[196] But these rules would not preclude the use of the corporate form to evade individual-to-candidate contribution limits. There are, of course, no federal laws that limit the number of corporations an individual can create, the amount of money an individual can invest in a for-profit corporation or donate to a nonprofit corporation, or controls on the ability of directors, executives, shareholders, or donors to a nonprofit to influence the election-related activities of a corporation. Although a corporation could be subject to the restrictions applicable to political committees,[197] the Supreme Court has interpreted the statutory definition of "political committee" to apply only to organizations that have the "major purpose" of nominating or election of a candidate.[198] As a result, any business corporation – both large public companies and closely held companies like Hobby Lobby -- or a nonprofit that engages primarily in spending that falls outside the definition of election-related activity, including political advertising that does not consist of express advocacy or the functional equivalent of express advocacy, would probably not be considered a "political committee" and not subject to the constraints that were crucial to *McCutcheon*'s finding of alternative statutory or potential statutory limitations on circumvention. The earmarking restrictions would do little good in limiting the ability of donors who are also dominant voices in the corporations on whose boards they sit, manage, or own shares, as they need not make any "contribution" to the corporation as a predicate to directing the corporation to making a contribution to candidates to whom they have already given the maximum contribution. Nor would they need to formally earmark any contribution they do make if they also control the decisions of the corporations that receive the funds. As the Court previously observed in *Colorado Republican*, relying on the anti-earmarking rule "ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions."[199] Similarly, although rules could be framed that attempt to subject all related entities to a single contribution ceiling, such rules would likely be difficult to administer. Corporations can be structured to avoid formal affiliations or with complex ownership structures, so determining whether and how two or more firms are connected can be a difficult task for enforcement agencies.

[196] Id. at 1459.
[197] FECA defines a "political committee" as a "committee, club, association or other group of persons" that receives campaign contributions or makes campaign expenditures above the statutory $1000 threshold, 2 U.S.C. § 431(4)(A), and then defines "person" to "include[] an individual, partnership, committee, association, or corporation," 2 U.S.C. § 431(11).
[198] See Buckley, supra, 424 U.S. at 79.
[199] 533 U.S. at 462.

In *McCutcheon*, the Court focused on the practical unlikelihood that donors who have "maxed out" on their donations to the candidates they support would take advantage of the elimination of aggregate contribution limits by channeling additional contributions to those candidates through contributions to political party committees or the committees of other candidates. According to the Court, "all indications are that many types of recipients have scant interest in regifting donations they receive."[200] More specifically, "state parties rarely contribute to candidates in other States,"[201] and "candidates contribute only a small fraction of their campaign funds to other candidates."[202] As the Court explained, both political parties and candidates have their own distinct electoral interests, which may not include donating to specific candidates favored by certain donors. But the political interests of the many small corporations controlled by their principal shareholders or nonprofits controlled by their executives or boards are likely to be exactly the same as those of their shareholders, executives, and boards. These firms may be entities legally distinct from their shareholders, managers, and directors, but when it comes to politics – like the religious beliefs at issue in *Hobby Lobby* – their electoral goals may be precisely the same as their shareholders and others than control them. In other words, they are less intermediaries like political parties and more alter egos for their shareholders and controlling individuals who are practically quite capable of using the corporate form for circumvention of the individual donation limits.

As for the magnitude of the burden on First Amendment rights in light of the availability of other forms of campaign participation, *McCutcheon* emphasized that the aggregate donation limit prevented donors from giving the non-corrupting base limit amount to as many candidates as they wanted, and that other means of providing support, such as personally volunteering for those candidates, were not "a realistic alternative for those who wish to support a wide variety of candidates or causes."[203] The corporate contribution ban is a much less burdensome restriction on the rights of the individuals affiliated with a corporation. After *McCutcheon*, those individuals have the right to contribute the base amount to as many candidates as they desire. The corporate contribution ban simply limits their ability to give more than the base amount to a candidate. The ban does restrict the ability of individuals associated with a corporation to give as a group by having the contribution given by the corporation, but other means of providing support from the corporation are available. Given *Citizens United*, the

[200] 134 S.Ct. at 1457.
[201] Id. See also id. at 1455-56 ("The Government provides no reason to believe that many state parties would willingly participate in a scheme to funnel money to another State's candidates").
[202] Id. at 1457.
[203] Id. at 1449.

corporation can engage in unlimited independent spending. Although not a perfect substitute for a donation, *McCutcheon* noted that "from the *donor*'s point of view" this is still a valuable alternative.[204] Such independent spending also provides information to voters and the public about the corporation's views about the election. And, of course, the law provides an alternative mechanism for individuals associated with the corporation to support candidates in the name of the corporation – the PAC. The corporation can establish a PAC, select its managers, spend corporate funds soliciting donations from individuals affiliated with the corporation, and exercise total authority over which candidates the PAC will support and how much – up to the statutory ceiling – those candidates will receive. Although *Citizens United* rejected the idea that a corporation's ability to create a PAC and direct the spending of PAC funds solved the First Amendment problem posed by the banning of corporate independent spending,[205] the PAC is a more adequate alternative in the contribution context. The Court has repeatedly held that there can be no limit but independent spending, but limiting a corporation's spending to its PAC funds, with the size of individual donations to the PAC subject to a statutory ceiling, makes it likely the corporation will have less money to spend on elections than if it could also draw on its treasury funds. But assuming that corporate donations to individual candidates would be subject to a dollar cap, the requirement that the PAC draw its funds from voluntary donations from persons affiliated with the corporation is much less of a restriction on the ability of a corporation to contribute to a candidate. Moreover, as previously noted, the PAC device also protects dissenting shareholders from having their share of corporate resources given to candidates they do not support.[206]

The combination of unlimited corporate independent spending and the availability of the corporate PAC device for contributions mitigates the burden on freedom of association posed by the corporate contribution ban. Individuals associated with a corporation can still participate in campaign financing under the name of the corporation through its PAC, and the corporation as a distinct entity can still support candidates through the independent spending of treasury funds. The relatively modest burden on associational rights resulting from the corporate treasury fund contribution bans is surely not more than the "'significant interference' with protected right of political association"[207] that the Court

---

[204] Id. at 1454 & n.9.
[205] 558 U.S. at 337-39.
[206] Citizens United also expressed concern about the recordkeeping and reporting requirements FECA imposes on PACs. See id. But these are comparable to the rules imposed on all political committees engaged in federal electoral activity. Moreover, if corporations were able to make campaign contributions they might be subjected to reporting and disclosure requirements which would likely be constitutional.

[207] McCutcheon, 134 S.Ct. at 1444, quoting *Buckley,* 424 U.S. at 25.

has repeatedly indicated it is willing to allow to prevent evasion of the important public interests in preventing corruption and its appearance that support limits on individual contributions to candidates.

V. Conclusion

The corporate contribution ban is closely drawn to accomplish two substantial public interests – the protection of dissenting shareholders and the prevention of the circumvention of the limits on individual contributions to candidates, which vindicate the public's interests in preventing corruption and the appearance of corruption. The Supreme Court has repeatedly held these are important public interests; indeed, *McCutcheon* indicates that the anti-corruption interest is "compelling." The two interests work in tandem, with the shareholder-protection interest most salient for publicly held for-profit corporations, and anti-circumvention for closely held and for nonprofit corporations. Both interests support a complete ban, rather than a dollar limit, on corporate contributions as *any* corporate donations raise the prospect of the political use of money inconsistent with shareholder preferences or the evasion of the statutory caps on individual donations to candidates. And, as *McCutcheon* requires, the ban is proportionate to these interests. There are no effective alternative mechanisms for vindicating these interests than the ban. Given management's complete control over the decision whether to make campaign contributions, the "procedures of corporate democracy" are inadequate to protect dissenting shareholder interests. So, too, given the ease with which individuals have already used the corporate form to evade the disclosure of donors to entities that engage in independent spending, it is evident that the corporate form could easily be used to circumvent the individual contribution limits. And the corporate contribution ban still permits many forms of corporate participation in elections, including unlimited independent spending, and contributions by PACs created, financed and controlled by their parent corporations.

Of course, this analysis depends on the Court's continuing adherence to the contribution/expenditure distinction with its less stringent review of contribution restrictions. *Buckley* held that contributions are a less protected form of campaign finance activity than expenditures because a contribution "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. . . . 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 a contributor."[208] As a result, the Court has not applied strict scrutiny to contribution restrictions; has found that contribution controls can be justified by interests that are "weighty"[209] even if not "compelling;" and have required restrictions to be "closely drawn" but "not necessarily the least restrictive means"[210] to achieve the public interest the restriction is intended to vindicate. However, the Court has recently hinted that the more relaxed standard of review of contribution restrictions may be up for reconsideration.

In *McCutcheon*, Chief Justice Roberts noted that the parties and *amici* had spent "significant energy" on the question "whether the line *Buckley* drew between contributions and expenditures should remain law."[211] The Court declined to reach the question or "parse the difference between the two standards" because it found that there was so "substantial" a "mismatch" between the aggregate limit at issue in that case and the anti-corruption and anti-circumvention goals said to justify it that the limit flunked even *Buckley*'s less restrictive "closely drawn" test.[212] In his concurring opinion, Justice Thomas called for applying strict scrutiny to contribution restrictions -- a position he has frequently taken before,[213] occasionally joined by Justice Scalia.[214] Justice Kennedy has also indicated some restiveness with the contribution/expenditure distinction.[215] A few months after *McCutcheon* was handed down, in *McCullen v. Coakley*, the Court confirmed that *McCutcheon* had "assume[d], without deciding" whether *Buckley*'s "less stringent level of scrutiny applies,"[216] implying that the Court is not necessarily still committed to *Buckley*'s approach. Moreover, *McCutcheon* plainly ratcheted up the "closely drawn" test as it invalidated a contribution restriction *Buckley* had previously upheld – the first time the Court has overruled any part of *Buckley*. I have indicated that the corporate contribution ban can survive even *McCutcheon*'s tighter approach to narrow tailoring. But if *McCutcheon* is signaling the Court's abandonment of *Buckley*'s "relatively complaisant review"[217] of contributions then the contribution ban will be difficult, if not impossible, to sustain.

---

[208] 424 U.S. at 21.
[209] Id. at 29.
[210] McCutcheon, supra, 134 S. Ct. at 1456-57.
[211] Id. at 1445.
[212] Id. at 1446.
[213] Id. at 1462 (citing cases).
[214] *See* Beaumont, *supra*, 539 U.S. at 164-65; Colorado Republican, *supra*, 533 U.S. at 465-66; Shrink Missouri, *supra*, 528 U.S. at 412-420.
[215] *See* Shrink Missouri, 528 U.S. at 409-10.
[216] 134 S.Ct. 2518, 2530.
[217] Beaumont, supra, 539 U.S. at 161.

Citizens United rejected the shareholder-protection justification for an expenditure ban. If contribution restrictions are to receive the same treatment as expenditure regulations, then it would be unlikely shareholder protection could validate a contribution ban. And if contribution restrictions start to fall because they are insufficiently narrowly tailored to advance the anti-corruption interest, as Justice Thomas has contended, then the anti-circumvention justification would disappear because there would be no individual contribution restrictions to circumvent. In the end, then, the fate of the corporate contribution ban is likely to turn on the constitutional status of contribution limits generally rather than a particular jurisprudence of corporate campaign finance activity.

There is, of course, a reasonable question as to whether the corporate contribution ban (or any contribution restrictions for that matter) make much sense in light of *Citizens United* and *McCutcheon*. In light of the ability of corporations, individuals, and a host of other campaign actors to spend as much as they want on communications aimed at the voters, and of wealthy individuals to give to an unlimited number of candidates, political party committees, and other political committees that support or oppose candidates, it is unclear exactly what contribution limits do to stem the influence of big spenders and donors on elections and on the governmental decisions of elected officials. Even under the Court's relatively narrow focus on the corruption of individual officeholders rather than on the impact of campaign money on the political system more broadly, it is undeniable that big independent spenders and mega-donors are able to use their campaign money to obtain greater political influence, even without the quid pro quos that the Court has made the focus of the corruption concern. So, why even bother attempting to defend the corporate contribution restriction?

There are two answers to that. First, there may be some merit to the Court's position that money given directly to a candidate is likely to be more valuable to the candidate dollar and, as a result, a source of greater influence for the donor than an equivalent amount of money spent independently in support of that candidate. Unlike independent spending, the candidate has complete control over the use of the donation, including whether it should be used for ads, and if so, the content of and audience for the ads. Independent spending can sometimes strike the wrong notes or distract from the candidate's messages. Although there are modes of informal cooperation between spender and candidate that can allay this problem, it is surely the case that a candidate would prefer to have total control over his or her campaign's money. Moreover, even when the candidate's and the independent's committees messages are in complete accord, candidate broadcast advertising can benefit from the requirement that candidates can be charged only the lowest unit rate while independent committees may have to pay more for the same volume of advertising in the same markets. As a result, a dollar of candidate broadcast ad spending can go further than the independent spending dollar. To be sure, the ability of independent groups to engage in unlimited spending can offset some of the disadvantages of unlimited spending relative to contributions to a candidate, but dollar-for-dollar a candidate is likely to prefer, and feel more gratitude for, a contribution than an expenditure, so there may still be some anti-corruption benefit in limiting contributions even when there are no limits on spending.

Second, and perhaps more importantly, this article is concerned with the constitutionality of corporate contribution limits, not their wisdom. The question of whether the federal government, a state, or a locality decides to bar corporate contributions should be up to the elected representatives of the jurisdiction (or the voters in a jurisdiction with the voter initiative) not the courts. Campaign finance regulation involves highly contested issues of both political philosophy and empirical assessment of the impact of money on elections and governance. The Constitution provides no clear answers to these questions and it is far from obvious that unelected federal judges with little experience in electoral politics are better at resolving these questions than democratically accountable representatives or the voters themselves. Nonetheless, for close to forty years the Supreme Court has assumed a leading role in setting campaign finance policy and restricting the regulatory options available to the public. In so doing, the Court has followed a complex and inconsistent path, relying on difficult distinctions, and changing its position on such basic questions as the justifications for regulation and the deference due to elected decision-makers or the voters. In the past decade the Court has tightened its control, with a narrow majority striking down multiple federal and state laws, in decisions such as *Citizens United* and *McCutcheon* that have entailed overturning the Court's own precedents.

Given the lack of a clear constitutional mandate for the Court's campaign finance jurisprudence, the difficulty the Court has experienced in developing workable doctrines or sticking with the rules it has articulated, and the general absence of obvious right answers for campaign finance law it would be desirable to leave some discretion to democratically accountable decision-makers. There is certainly a "laboratories of democracy" justification for such an approach: With some states barring corporate contributions and some allowing them, we can get a better understanding of their impact on elections, governance, and the interests of corporations, than if the bar is pronounced unconstitutional. And then there is the plain-old democracy justification for not striking down laws that have enjoyed public support for more than a century, have had no apparent deleterious impact on the political process, have not discriminated against any individuals or ideas, and have long been accepted as consistent with prevailing constitutional doctrine. Barring corporate contributions may or may not make sense in light of the constitutional protection for unlimited spending, but that judgment should be entrusted the democratic process, not the courts.