

## THE ORIGINAL SIN OF CAMPAIGN FINANCE LAW: WHY *BUCKLEY V. VALEO* IS WRONG

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### I. INTRODUCTION

The 2012 elections were the most expensive elections in history.<sup>1</sup> That candidates, political parties, and outside groups raised and spent approximately \$6 billion in these elections<sup>2</sup> is accepted as our reality. But this did not need to be the case, nor should it have been.

The current discourse surrounding campaign finance law focuses on the U.S. Supreme Court's now-infamous decision in *Citizens United v. Federal Elections Commission*<sup>3</sup> and the resulting rise of so-called "Super PACs."<sup>4</sup> Reform proposals inside and out-

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1. John Hudson, *The Most Expensive Election in History by the Numbers*, THE ATLANTIC WIRE (Nov. 6, 2012), <http://www.theatlanticwire.com/politics/2012/11/most-expensive-history-numbers/58745/>; *PBS NewsHour: Big Donors Saw Diminishing Returns in Most Expensive Election in History* (PBS television broadcast Nov. 21, 2012), available at [http://www.pbs.org/newshour/bb/politics/july-dec12/campaign\\_11-21.html](http://www.pbs.org/newshour/bb/politics/july-dec12/campaign_11-21.html).

2. *PBS NewsHour: Big Donors Saw Diminishing Returns in Most Expensive Election in History*, *supra* note 1.

3. 558 U.S. \_\_\_, 130 S. Ct. 876 (2010).

4. Super PACs are independent expenditure-only political action committees that, as a result of a court of appeals decision and advisory opinions by the Federal Election Commission, can raise and spend unlimited sums. See *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010); Michael E. Toner et al., *What Is a Super PAC?*, WILEY REIN LLP (September 2011), <http://www.wileyrein.com/publications.cfm?sp=articles&id=7458>; see, e.g., A.O. 2012-34 at 3, 2012 WL 6186764, at \*2 (F.E.C. 2012); A.O. 2010-09 at 3, 2010 WL

side of academic circles revolve around limiting corporate political speech,<sup>5</sup> strengthening disclosure,<sup>6</sup> and increasing public funding programs.<sup>7</sup>

The present proposals to “fix” our campaign finance system, however, are incremental suggestions that do not get to the heart of the problem. To solve what ails our government, we must turn off the faucet that pumps virtually unlimited sums of money through our electoral system. A re-examination of the Court’s decision to equate political money—money given and spent in elections—to political speech is overdue.<sup>8</sup> That decision, in *Buckley v. Valeo* in 1976,<sup>9</sup> changed the face of American politics. Had the Court not subjected restrictions on political spending to the same scrutiny as restrictions<sup>10</sup> on political speech under the mistaken theory that the two are the same, nearly every aspect of our electoral, political, and governmental processes could be different.

In this article, I first seek to show that the Court simply got it wrong when it concluded that spending money is essentially the

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3184267 at \*2 (F.E.C. 2010). As discussed later in this article, in *Citizens United*, the Court held that limits on independent expenditures violate the First Amendment and specifically that independent expenditures have no potential to corrupt or appear to corrupt candidates. See 558 U.S. at \_\_\_, \_\_\_, 120 S. Ct. at 909, 911. It follows that restrictions on contributions to independent expenditure groups serve no compelling or important governmental interest. See *SpeechNow.org*, 599 F.3d at 695. Therefore, fewer than two months after the *Citizens United* opinion was issued, the United States Court of Appeals for the District of Columbia Circuit invalidated limits on contributions to independent expenditures-only committees. *Id.* at 696.

5. See, e.g., Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 CARDOZO L. REV. 2365, 2385–89 (2010); *MTA Coalition, MOVE TO AMEND*, <http://movetoamend.org/about-us> (last visited Feb. 18, 2013).

6. See, e.g., Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 691–713 (2012). Congress has proposed various versions of the so-called “DISCLOSE Act.” See, e.g., S. 3369, 112th Cong. (2d Sess. 2012); S. 2219, 112th Cong. (2d Sess. 2012); H.R. 4010, 112th Cong. (2d Sess. 2012); S. 3628, 111th Cong. (2d Sess. 2010); H.R. 5175, 111th Cong. (2d Sess. 2010). The purpose of the act was to increase transparency in political campaigns and give the public information about the individuals and entities giving and spending campaign funds. See S. 3369; S. 2219; H.R. 4010; S. 3628; H.R. 5175.

7. See, e.g., Fair Elections Now Act, H.R. 1404, 112th Cong. §§ 101–05 (1st Sess. 2011); Fair Elections Now Act, S. 750, 112th Cong. §§ 101-04 (1st Sess. 2011); Nicholas Bamman, *Campaign Finance: Public Funding After Bennett*, 27 J.L. & POL. 323, 344–52 (2012).

8. See *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). This article differs from other scholarship in the area because I argue not only that the Court has erroneously equated money with speech, but, I also track the Court’s jurisprudence through an instrumentalist lens.

9. *Id.* at 1.

10. I discuss the issue of whether and why campaign finance restrictions should be considered content-neutral restrictions in Section III.A.3.

equivalent of speaking and therefore entitled to the same high level of First Amendment protection. By doing so, the Court erroneously rejected other analytical frameworks it has used for other content-neutral restrictions and decided to instead apply a much higher level of scrutiny. While money may—like a bullhorn—enable, facilitate, or help to disseminate speech, it is simply not speech itself.

Second, I suggest that while the Court has thus employed “strict” or “close” scrutiny to restrictions on campaign expenditures and contributions, respectively, in an effort to promote First Amendment rights, the Court’s approach has ironically often hindered rather than bolstered the First Amendment interest that it seeks to protect.

When analyzing the constitutionality of campaign finance restrictions, the Court has consistently adopted an instrumentalist view of the First Amendment focused on the listener,<sup>11</sup> rather than an individual rights view focused on the speaker. Under the instrumental view of the First Amendment, the importance of protecting speech lies with fostering an open and robust marketplace of ideas and democratic self-government.<sup>12</sup>

While the Court has adhered reliably to an instrumental, listener-based philosophy of speech, it has been less than consistent about how best to promote these First Amendment values.<sup>13</sup> On some occasions, the Court has viewed campaign finance restrictions as harming listeners’ interests.<sup>14</sup> In these cases, liberty or personal autonomy may be the Court’s goal.<sup>15</sup> At other times, the Court has seen such restrictions as promoting listeners’ rights.<sup>16</sup> In these cases, the Court views equality as its primary goal.<sup>17</sup> In both instances, members of the Court believe they are promoting First Amendment rights under an instrumental perspective; they just disagree about which ideals to prize and

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11. In this article, I use the term “instrumentalist” to refer to a perspective of the First Amendment which, I argue, is focused primarily on the rights of listeners, as opposed to speakers. Other writers use the word “structural” to refer to this view.

12. *See infra* notes 24–26 and accompanying text.

13. *See infra* notes 158–61 and accompanying text.

14. *See infra* Section IV.A.1.

15. *See infra* Section IV.A.1.

16. *See infra* Section IV.A.2.

17. *See infra* Section IV.A.2.

diverge in deciding whether to uphold or strike down particular campaign finance restrictions.<sup>18</sup>

Like the justices and scholars who adhere to an equality view of the First Amendment,<sup>19</sup> I suggest that campaign finance restrictions actually promote First Amendment values. With restrictions on spending (spending that enables speech, but is not speech itself), listeners in effect will hear from a greater depth and breadth of sources, rather than merely from a relatively small group of moneyed interests that has the ability to drown out non-spending or low-spending speakers.

There is no question that an instrumental view of the First Amendment presents some defects, for it essentially invites policy-based arguments. While I argue that the Court should espouse an instrumental view grounded in equality, others contend that the Court should maintain such a view based on the notion of liberty.<sup>20</sup> These value-laden, policy-based arguments should not be the foundation of any doctrinal model.

Hence, although it is sometimes difficult to determine who “wins” under an instrumental view of the First Amendment—as it lacks textual grounding—in the case of restrictions on campaign spending one does not have to decide whether restrictions on pure speech further certain governmental interests or ideals. Rather, the Court is weighing restrictions on the *antecedent* to speech against other interests.<sup>21</sup> Therefore, it is appropriate for the Court to consider and prize the ideal of equality when analyzing campaign finance restrictions.

While this article draws on case law and legal and political theories to explain why political money should not be treated as

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18. The Court’s differing approaches to this issue also are manifest in terms of more or less deference to legislative judgments. *See infra* Section IV.A. When prizing the ideal of liberty, the Court typically strikes down regulations, and hence displays less deference to the legislature than when the Court prizes the ideal of equality and upholds regulations on campaign spending. *See infra* Section IV.A.

19. *See, e.g.*, Martin H. Redish, *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. PA. J. CONST. L. 783, 808–11 (2001).

20. *See infra* notes 166–69 and accompanying text.

21. *See, e.g.*, *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 398–99 (2000) (Stevens, J., concurring) (arguing that the First Amendment does not provide the same level of protection to the use of money to enable speech as it does to pure speech). In this setting we are not concerned with silencing the speech of some in order to enhance the speech of others. I discuss this idea of silencing the speech of spenders in order to foster the speech of others in depth in Section IV.A.2.

political speech and why restrictions on expenditures in fact promote speech rights under an instrumental philosophy of speech, the practical implications of this piece are timely and far-reaching. Even a slightly different approach to the question of how to treat political spending could have an enormous impact on our system of government.

Section II of this article addresses the fundamental question of who the First Amendment is designed to protect. In Section III, I discuss the Court's seminal decision in the area of campaign finance law, *Buckley v. Valeo*, and the Court's decision to equate political spending with political speech.<sup>22</sup> Section IV of this article focuses on subsequent campaign finance decisions and demonstrates that the Court has adopted an instrumental view of the First Amendment when analyzing such restrictions. I discuss the notions of liberty and equality and whether and how to consider those notions when analyzing campaign finance restrictions. I conclude that under an instrumentalist view, the Court should prize equality rather than liberty because it is not analyzing a restriction on the speech of some to enhance the speech of others; instead, it is analyzing a restriction on money—which can produce speech—in order to protect speech rights.<sup>23</sup> If the Court were to adopt this view, it likely would uphold many more restrictions on spending as promoting First Amendment values. I conclude in Section V by arguing that the government has an obligation to place reasonable restrictions on political spending in order to protect speech rights.

## II. WHO DOES THE FIRST AMENDMENT PROTECT: SPEAKERS OR LISTENERS?

Views differ as to the purpose of the First Amendment and who and what it is meant to protect. There are, however, two primary

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22. See 424 U.S. 1, 19 (1976).

23. When the Court analyzes a restriction on pure speech, a decision to prize liberty over equality is often quite appropriate. See *infra* Section IV.A.

perspectives on this issue.<sup>24</sup> These two perspectives inform the Court's campaign finance jurisprudence.

One school of thought provides that the First Amendment is an instrumental right.<sup>25</sup> Under this view, the First Amendment is not focused on individual speakers but on the value or utility of speech.<sup>26</sup> The importance of free speech arguably lies primarily with the listener, not the speaker.<sup>27</sup>

When viewed as an instrumental right, the First Amendment is seen as protecting two similar, and perhaps overlapping, ideals.<sup>28</sup> First, protection of the freedom of expression is seen to foster the marketplace of ideas where the truth will emerge.<sup>29</sup> Second, protection of the freedom of expression is viewed as promoting democratic self-government by facilitating a robust debate about candidates, public officials, and public policies.<sup>30</sup> These two

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24. See, e.g., Daniel R. Ortiz, *Recovering the Individual in Politics*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 263, 264–70 (2012) (discussing much of the scholarship on the two perspectives); Redish, *supra* note 19, at 806 (explaining that “for a number of years free speech theorists have debated competing individualist and communitarian models of free expression”) (discussing another view on the First Amendment jurisprudence and purpose). See generally Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

25. Ortiz, *supra* note 24, at 265–66.

26. See *id.* For a Supreme Court examination of the importance of speech to self-governance, see *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–71 (1964).

27. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (Lawbook Exch., Ltd. 2002) (1948) (arguing that the purpose of the First Amendment is to protect the rights of listeners, not speakers); see also Ortiz, *supra* note 24, at 265–66; Charles N. Eberhardt, Note, *Integrating the Right of Association with the Bellotti Right to Hear*—*Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 72 CORNELL L. REV. 159, 165 (1986) (footnotes omitted) (“Listeners, as well as speakers, have a first amendment interest in free expression. The Court has drawn primarily on the ‘marketplace of ideas’ theory of the first amendment to support a general right to hear.”).

28. For a slightly different view, see Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. REV. 1, 26 (1995) (arguing that “[free speech] enables individuals to make ‘informed’ and ‘intelligent[]’ choices, and it allows them to ‘persuade’ others to share their views”).

29. See, e.g., *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) (citation omitted) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . .”); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (explaining that it would be a “barren marketplace of ideas that had only sellers and no buyers”); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

30. See *Connick v. Myers*, 461 U.S. 138, 145 (1983) (finding that speech on public issues “is the essence of self-government” and therefore should be subject to special protection under the First Amendment); *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966) (finding that the primary purpose of the First Amendment is to “protect the free discussion of governmental affairs”); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 55 (Oxford Univ. Press 1966) (1948); Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245,

ideals however, need not be viewed as wholly distinct. Instead, a functioning marketplace can be seen to foster a better-informed electorate and democratic self-government. Put another way, a robust and open marketplace allows for a meaningful discussion of electoral, political, and governmental issues.<sup>31</sup> In both cases the purpose of protecting speech seems to be providing the public, and specifically members of the electorate, with information. Again, this is a listener-based view of the First Amendment, which takes precedence over the speaker-based view discussed below.

It is worth briefly questioning the propriety of giving credence to an instrumental view of the First Amendment. The text of the First Amendment neither states nor implies that it is meant to protect anything other than an individual's right to speak freely.<sup>32</sup> The text of the First Amendment does not mention a listener's right.<sup>33</sup> Hence, this instrumental, listener-based approach arguably lacks any grounding in the text. Rather, it was born from the writings of scholars and eventually adopted by the justices as a viable framework to employ when analyzing restrictions implicating First Amendment rights.<sup>34</sup>

A full discussion of the propriety of acknowledging and weighing the rights of listeners is beyond the scope of this article. It is worth noting, however, that this lack of textual grounding invites the type of policy-based arguments that we see play out in the Court's campaign finance jurisprudence. The cases discussed below essentially point to a normative battle between justices prizing the notion of liberty against those elevating the ideal of equality.<sup>35</sup> Such value-laden squabbling should have no place in the

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253 (2002); Fiss, *supra* note 24, at 1410 ("We allow people to speak so others can vote. Speech allows people to vote intelligently and freely, aware of all the options and in possession of all the relevant information."); Larry E. Ribstein, *Corporate Political Speech*, 49 WASH. & LEE L. REV. 109, 128 (1992) ("[F]ree speech is important to help people make decisions in a democratic society.").

31. See, e.g., Brian K. Pinaire, *A Funny Thing Happened on the Way to the Market: The Supreme Court and Political Speech in the Electoral Process*, 17 J.L. & POL. 489, 498–99 (2001) (arguing that the Supreme Court has adopted the idea that the "marketplace of ideas" [i]s the means toward the end of self-governance").

32. I credit Professor Allan Ides with bringing this argument to my attention and for pointing out that the First Amendment appears in the Bill of Rights, not the Bill of Structures.

33. See U.S. CONST. amend. I.

34. See *Lamont*, 381 U.S. at 308; MEIKLEJOHN, *supra* note 27, at 25.

35. Professor Brian Pinaire has posited that there are three distinct values—liberty,

development and application of legal doctrine. But nonetheless, it does.<sup>36</sup>

Another school of thought provides that the First Amendment is primarily an individual right, which fosters a natural person's right of free expression. This protection promotes personal autonomy and encourages self-expression, self-realization, and/or self-actualization.<sup>37</sup> Generally speaking, this theory provides that through the freedom of expression, speakers can realize—on a deep level—who they are.<sup>38</sup> This theory of the First Amendment focuses more on protecting the speaker than on protecting either the speech or the listener.<sup>39</sup>

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equality, and civility—that promote the marketplace model, which itself fosters freedom and self-government. Pinaire, *supra* note 31, at 501. I view the Court's campaign finance jurisprudence as essentially a battle between those prizing liberty and those prizing equality. Hence, I do not focus on the ideal of civility, as Pinaire does.

36. While I argue throughout this article that the Court should prize the ideal of equality over that of liberty, I do so based on the assumption that money enables speech, but is not speech itself. However, I concede that by engaging in this argument, I am guilty of the same error for which I fault the Court.

37. *See, e.g.*, *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . .”); C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 51 (1989) (arguing that the primary purpose of the First Amendment is to protect self-fulfillment); THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 4–7 (1966) (discussing individual self-fulfillment); MEIKLEJOHN, *supra* note 27, at 25–26 (arguing that the importance of the First Amendment lies with the fostering of self-government); MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 4–5 (1984) (arguing that the First Amendment serves to promote self-realization); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 653–54 (1982); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) (arguing that the purpose of the First Amendment is to protect individual liberty which promotes self-realization and self-determination); Ashutosh Ghagwat, *Associational Speech*, 120 YALE L.J. 978, 993–94 (2011); Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 202 (1964); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that the purpose of the First Amendment is to protect self-realization). *See generally* Brian C. Murchinson, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443 (1998).

38. *See, e.g.*, Ortiz, *supra* note 24, at 264–65.

39. Under another view there are three purposes of the First Amendment: “truth, democracy, and self-realization.” Wayne Batchis, *Citizens United and the Paradox of “Corporate Speech”*: *From Freedom of Association to Freedom of The Association*, 36 N.Y.U. REV. L. & SOC. CHANGE 5, 39 (2012) (quoting R. George Wright, *What Counts as “Speech” in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217, 1231 (2010)).

When analyzing campaign finance restrictions, the Court has adopted an instrumental perspective (which focuses on the marketplace of ideas, democratic self-government, and hence the listener), rather than on the individual rights perspective (which focuses on self-realization, self-actualization, and therefore the speaker).<sup>40</sup> This may be because in the campaign finance arena the speech interests of speakers are comparatively low. With respect to corporate spenders, the “speaker” is an artificial entity that possesses no ability for self-realization, self-actualization, or self-discovery.<sup>41</sup> Corporate “speech” is, by definition, derivative speech which is based on the speech rights of its members.<sup>42</sup> In many instances it is less than clear that the entity’s speech can be traced to the individual members of the corporation.<sup>43</sup> Hence, the corporation’s “speech” often does not promote the speech rights of either the corporate entity or its members.<sup>44</sup>

With respect to restrictions on individual spenders, it is easier to argue that individuals, unlike corporations, do in fact exercise some speech rights when they spend money. Even if spending is merely the antecedent to speech, the ability to disseminate one’s views through the use of money no doubt raises serious First Amendment interests. Money clearly allows speakers to reach more listeners, and perhaps with greater frequency, than if the speaker did not use funds to disseminate her message. However, the spending of money to speak does not implicate First Amendment values in the same way as pure speech. Even if candidates’ campaign expenditure limits were set at relatively low levels, each contributor or candidate still would be free to actually *speak* as much as she wanted.

In sum, I posit that when it comes to campaign finance restrictions, the speech interest of spenders—whether they be corporations or natural persons—is relatively low. The focus on listeners also makes sense in this arena because their rights arguably are

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40. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1975). Again, this article refers to an instrumental approach, which is primarily a listener-based approach, and an individual rights approach, which is primarily a speaker-based approach.

41. Jessica A. Levinson, *We the Corporations? The Constitutionality of Limitations on Corporate Election Speech after Citizens United*, 46 U.S.F. L. REV. 307, 323–24, 329–30 (2011).

42. *Id.* at 330.

43. *Id.* at 322.

44. *Id.*

elevated in the electoral context, where the public has a compelling interest in learning about candidates and proposed laws. Hence the Court's focus, particularly when striking down campaign finance restrictions, is on the rights of listeners, not speakers.

### III. *BUCKLEY V. VALEO* ERRONEOUSLY EQUATED POLITICAL SPENDING WITH POLITICAL SPEECH

"[N]othing in the First Amendment commits us to the dogma that money is speech."<sup>45</sup>

"Money may register intensities, in one limited sense of the word, but money by itself communicates no ideas. Money, in other words, may be related to speech, but *money itself is not speech*."<sup>46</sup>

#### A. *The Buckley Court Rejected Alternative Frameworks*

Campaign finance laws are built on a desire to prevent people (including artificial entities) from transferring power amassed in the economic marketplace to power in the political marketplace.<sup>47</sup> In the wake of the Watergate scandal—a scandal involving campaign finance abuses<sup>48</sup>—Congress passed the Federal Election Campaign Act ("FECA"), the nation's first comprehensive campaign finance scheme.<sup>49</sup> The FECA limited the size of campaign contributions that donors could give and federal candidates could

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45. J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005 (1976).

46. *Id.* at 1019.

47. Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 895 (1998) ("[R]eform arguments all rest on a single fear: that, left to themselves, various political actors will transform economic power into political power and thereby violate the democratic norm of equal political empowerment."); see, e.g., J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 378 (1990) ("[R]egulation of campaign [sic] finance is necessary because what passes for free speech is really more like unregulated economic power that is used to influence (and corrupt) the political process."). See generally J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?* 82 COLUM. L. REV. 609 (1982); Wright, *supra* note 45, at 1005.

48. John Blake, *Forgetting a Key Lesson from Watergate?*, CNN (Feb. 4, 2012) [www.cnn.com/2012/02/04/politics/watergate-reform](http://www.cnn.com/2012/02/04/politics/watergate-reform) ("Watergate was basically a campaign finance scandal.").

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

receive,<sup>50</sup> the amount of money that candidates' campaigns could spend,<sup>51</sup> and the amount of money that independent groups could spend in order to advocate the election or defeat of a federal candidate.<sup>52</sup> The FECA also required that money given and spent over certain thresholds be disclosed,<sup>53</sup> instituted a system of voluntary public campaign financing for presidential candidates,<sup>54</sup> and created the Federal Election Commission ("FEC") to administer and enforce the FECA.<sup>55</sup> This article discusses the contribution and expenditure limits contained in the FECA with a particular focus on expenditure limits.

The Court's 1976 decision in *Buckley v. Valeo*, in which it reviewed the constitutionality of the FECA,<sup>56</sup> remains the bedrock of campaign finance law. The *Buckley* Court equated political spending with political speech and therefore established political spending as deserving a high level of First Amendment protection.<sup>57</sup> The Court rejected arguments by appellees that campaign contributions and expenditures should be viewed as mixed speech and conduct or as the manner of speech, but not speech itself.<sup>58</sup> Had the Court adopted any of these approaches, it would have employed a relatively relaxed level of First Amendment scrutiny to campaign finance restrictions.<sup>59</sup> It is likely that under that more lenient standard of review the Court would uphold many more campaign finance restrictions. However, the Court refused to take such an approach.<sup>60</sup>

### 1. *Buckley* Rejected *United States v. O'Brien* as an Analytical Framework

When the United States Court of Appeals for the District of Columbia Circuit reviewed the FECA's contribution and expendi-

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50. Federal Election Campaign Act, § 101(b)(1–6).

51. § 101(c)(1)(A–F)

52. § 101(e)(1).

53. §§ 201–208, 308.

54. §§ 403–406, 408.

55. § 310.

56. See 424 U.S. 1, 6 (1976).

57. See *id.* at 16, 21–25.

58. *Id.* at 15–19.

59. See generally Edward J. Eberle, *The Architecture of First Amendment Free Speech*, 2011 MICH. ST. L. REV. 1191 (2011).

60. See *Buckley*, 424 U.S. at 18.

ture limits in *Buckley*, it treated those restrictions as regulating conduct and only incidentally affecting speech.<sup>61</sup> The court of appeals relied on *United States v. O'Brien*,<sup>62</sup> where the Supreme Court found no First Amendment violation when the defendant was prosecuted for burning his draft card.<sup>63</sup> The Court based its decision in *O'Brien* on a finding that the defendant's actions included both speech (an anti-war statement) and nonspeech (the physical burning of a draft card) elements.<sup>64</sup> The Court concluded that there was a sufficiently important governmental interest in regulating the nonspeech element that was "unrelated to the suppression of free expression" and that had an "incidental restriction on alleged First Amendment freedoms . . . no greater than [was] essential to the furtherance of that interest."<sup>65</sup> The *O'Brien* Court emphasized that its ruling rested on the conclusion that the government's interest in regulating the conduct—in this case, an interest in preserving draft cards—was unrelated to a desire to suppress communication thought to be harmful.<sup>66</sup>

The Supreme Court in *Buckley* rejected the court of appeals' approach and concluded that *O'Brien* was inapplicable to its analysis of the contribution and expenditure limitations contained in the FECA, distinguishing spending money from burning a draft card.<sup>67</sup> The Court concluded that "[s]ome forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two."<sup>68</sup> With one sentence the Court erroneously equated the act of spending money with the act of speaking, stating: "[T]his Court has never suggested that the dependence of a communication on the expenditure of money oper-

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61. *Buckley v. Valeo*, 519 F.2d 821, 840–41 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976); *see also* Wright, *supra* note 45, at 1006 (arguing that contributions and expenditures are not pure speech and "should be treated as speech-related conduct" under *United States v. O'Brien*).

62. *Buckley*, 519 F.2d at 840–41 (citing *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968)).

63. *O'Brien*, 391 U.S. at 376–77.

64. *Id.* at 376.

65. *Id.* at 377.

66. *Id.* at 382. Professor Jed Rubenfeld argues that "[t]he obvious concern was that excessive campaign advertising by the wealthy *will persuade people who hear or see it*." Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 804 (2001). This article, however, posits that Congress was concerned about a drowning out effect, discussed in Section IV.B.2.b.iv, and allowing listeners to hear.

67. *Buckley*, 424 U.S. at 16.

68. *Id.*

ates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.”<sup>69</sup>

The Court essentially inverted the issue when it stated that the dependence of speech on the spending of money does not introduce a nonspeech element into the First Amendment analysis. The question is not whether speech is entitled to less protection when one speaks by spending money. Instead, the question is whether the act of spending money, which may produce political expression, is less deserving of First Amendment protection than pure speech.<sup>70</sup> Having asked itself the wrong question, the Court unsurprisingly arrived at the wrong answer. Judge Skelly Wright, a judge on the Court of Appeals for the District of Columbia Circuit when that court reviewed the constitutionality of the FECA, has argued persuasively that the FECA targeted money, not speech.<sup>71</sup> As Wright explained, “Congress was not trying to justify suppression of pure speech by seizing on money as a nonspeech element. It was trying to justify a straightforward regulation of the excessive use of money as a blight on the political process.”<sup>72</sup>

The Supreme Court next found that even if it categorized the giving and spending of money as speech intertwined with conduct, the restrictions contained in the FECA would fail under the second prong of *O'Brien* because the government’s interests *did* involve the suppression of communication thought to be harmful.<sup>73</sup> Specifically, the *Buckley* Court found that the government’s interest involved “restricting the voices of people and interest groups who have money to spend and reducing the overall scope

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69. *Id.* (citation omitted). To support its specious conclusion that the act of giving and spending money should not be considered both conduct and speech, the Court cited to *Cox v. Louisiana*. *See id.* (citing 379 U.S. 559, 563–64 (1965)). There, the Court contrasted picketing and parading with a newspaper comment and a telegraph to a public official. *Cox*, 379 U.S. at 563–64. The *Cox* Court found that the activities of picketing and parading involved conduct entangled with expression but that the newspaper comment and telegram involved pure expression. *Id.* The *Buckley* Court concluded that contributions and expenditures were more akin to the newspaper comment and the telegraph than the picketing and parading. *Buckley*, 424 U.S. at 17.

70. *See* Wright, *supra* note 45, at 1007 (“The real question in the case was: Can the use of *money* be regulated, by analogy to conduct such as draft-card burning, where there is an undoubted incidental effect on *speech*? However, what the Court asked was whether *pure speech* can be regulated where there is some incidental effect on *money*.”).

71. *See id.* at 1008.

72. *Id.*

73. *Buckley*, 424 U.S. at 17 (quoting *United States v. O'Brien*, 391 U.S. 367, 382 (1968)).

of federal election campaigns.”<sup>74</sup> While the Court admitted that the limits in the FECA do “not focus on the ideas expressed by persons or groups subject to its regulations,” it nevertheless found that the purpose of the act was to limit purportedly harmful expression, stating that it was “aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups.”<sup>75</sup> In *O’Brien*, in contrast, the government’s interest was purportedly in preserving draft cards, which was wholly unrelated to their use as a means of communication.<sup>76</sup>

The Court’s analysis again misses the mark with respect to the second prong of the *O’Brien* test. The Court’s conclusion that the aim of the FECA was to restrict expression thought to be harmful stems from its erroneous inversion of the initial question presented by the case—whether political spending may be fairly categorized as mixed speech and conduct.<sup>77</sup>

Professor Jed Rubenfeld also has argued that spending money may be viewed as conduct. He explains that “although spending money may (like all other conduct) be expressive, a generally applicable spending regulation can in some cases be constitutionally unproblematic.”<sup>78</sup> Rubenfeld states that campaign expenditure limits could be constitutional if tailored to show that they are not targeted to speech thought to be harmfully persuasive.<sup>79</sup> While for certain reasons Rubenfeld argues that the campaign limits in the FECA *were* directed at speech thought to be harmfully persuasive,<sup>80</sup> this article adopts a different perspective. Consistent with the thesis of this article, Rubenfeld describes a law “arguably similar” to the restriction contained in the FECA, which he contends would be constitutional.<sup>81</sup>

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74. *Id.*

75. *Id.* The Court’s rejection of the equalization rationale is discussed in depth in Section III.

76. *Id.* (citing *O’Brien*, 391 U.S. at 382).

77. *See id.* at 15.

78. Rubenfeld, *supra* note 66 at 805.

79. *Id.* at 806.

80. *Id.* at 804.

81. *Id.* at 806–07 (“[I]n principle, a generalized spending cap directed at limiting the total amount of money spendable in political campaigns should be constitutional, provided it is genuinely tailored—not *narrowly* tailored, but *broadly* tailored—to address the non-communicative harms of having too much money in the political process. These non-communicative harms are not limited to conventional quid-pro-quo corruption; they also in-

The Court's decision to find *O'Brien* inapplicable to questions regarding the constitutionality of campaign finance restrictions misses the point of Congress's legislation. The limits in the FECA were aimed at acts of giving and spending, and specifically the *volume of dollars* spent in elections, not the speech (whether persuasive or not) uttered in elections.<sup>82</sup>

## 2. *Buckley* Rejected "Time, Place, or Manner" as an Analytical Framework

After rejecting the court of appeals' conclusion that the limits in the FECA could be analyzed as mixed speech and conduct under *O'Brien*, the Court next rejected appellees' argument that the limits could be reviewed as restrictions on the time, place, or manner of speech.<sup>83</sup> Under Supreme Court jurisprudence, such restrictions can be upheld if the regulations do not "discriminate against speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication."<sup>84</sup> The Court has applied this test to uphold certain content-neutral restrictions on picketing, parading, demonstrating, and using a soundtruck.<sup>85</sup> This test is, of course, similar to the *O'Brien* analysis. Under both tests, content-neutral restrictions pass constitutional scrutiny if the reason for the restriction is unrelated to any governmental interest in limiting potentially harmful expression.<sup>86</sup>

The appellees in *Buckley* correctly likened the volume of dollars spent in campaigns to the volume of sound emitted by a soundtruck.<sup>87</sup> The Court, however, found that analogy to be unpersuasive, concluding that the decibel restriction "limited the *manner* of operating a soundtruck, but not the *extent* of its proper use."<sup>88</sup> The limitations contained in the FECA, the Court found,

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clude excessive responsiveness of politicians to the interests of the wealthy and excessive time spent by politicians raising funds.").

82. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 83 Stat. 1263.

83. See *Buckley v. Valeo*, 424 U.S. 1, 18-19 (1976).

84. *Id.* (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)).

85. *Id.*

86. See *id.*; *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

87. See *Buckley*, 424 U.S. at 18 n.17 (citing Paul A. Freund, *Commentary in ALBERT J. ROSENTHAL, FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS* 72 (1971)).

88. *Id.* at 18.

“restrict[ed] the extent of the reasonable use of virtually every means of communicating information.”<sup>89</sup> The Court reasoned that the law restricting the volume of soundtrucks did not restrict “the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers,’ or by soundtrucks operating at a reasonable volume.”<sup>90</sup>

The Court’s analysis again misperceives the limitations contained in the FECA. All speakers remain free to say as much as they want. The only question is whether they can also give, receive, and spend money as a vehicle to help disseminate expression to a wider audience, just as increasing the volume on a soundtruck allows the sound emitted by the speakers to reach a wider audience.<sup>91</sup> This is a different inquiry from the one discussed by the Court.

In addition to other legal commentators,<sup>92</sup> Justice White has long argued against the *Buckley* Court’s decision to reject the *O’Brien* framework and the time, place, and manner frameworks as the appropriate means by which to analyze campaign finance restrictions.<sup>93</sup> Similarly, in 2006, three decades after *Buckley*, Justice Stevens argued that the Court erred in equating money with speech and contended that “our earlier jurisprudence provided solid support for treating these limits as permissible regulations of conduct rather than speech.”<sup>94</sup> He concluded that “limits on expenditures are far more akin to time, place, and manner restrictions than to restrictions on the content of speech.”<sup>95</sup> Justice Stevens described limits on contributions and expenditures as laws that do not impose “any restrictions whatsoever on what

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89. *Id.*

90. *Id.* (quoting *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949)).

91. Campaign spending arguably increases the “volume” of speech by increasing the size of the audience that is reached and the frequency with which the message may be disseminated.

92. See, e.g., Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1260–61 (1995).

93. See, e.g., *FEC v. Nat’l Conservative Political Action Comm.* 470 U.S. 480, 508 (1984) (White, J., dissenting); *Buckley*, 424 U.S. at 262–64 (White, J., concurring in part and dissenting in part).

94. *Randall v. Sorrell*, 548 U.S. 230, 274 (2006) (Stevens, J., dissenting) (citing *Buckley v. Valeo*, 519 F.2d 821, 859 (D.C. Cir. 1975), *aff’d in part, rev’d in part*, 424 U.S. 1 (1976)).

95. *Id.* at 277.

[candidates] may say in their speeches, debates, and interviews.”<sup>96</sup>

The *Buckley* Court, however, concluded that the restrictions in the FECA could not be categorized as restrictions on the time, place, or manner of speech because the FECA imposed “direct quantity restrictions on political communication and association” in addition to any reasonable time, place, and manner restrictions.<sup>97</sup> Far from restricting expression, restrictions on political money actually promote political speech. When the volume of dollars spent in elections is reduced, there is more breathing room to hear from a greater diversity of speakers. Laws reducing the giving and spending of political money (which may *produce* political speech) actually promote the First Amendment rights of non- and lower-spending speakers, as well as all listeners.<sup>98</sup>

### 3. *Buckley* Equated Spending with Speech

Having rejected the use of the First Amendment tests applied to content-neutral restrictions, the *Buckley* Court ultimately concluded that political spending should be treated as political speech.<sup>99</sup> The Court found that restrictions on political spending reduce “the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached” because “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”<sup>100</sup>

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96. *Id.* at 281.

97. *Buckley*, 424 U.S. at 18.

98. Justice Stevens, in his lengthy and powerful dissent in *Citizens United*, rightly described the restriction at issue as a limitation on the time, place, and manner of spending money. 558 U.S. \_\_\_, \_\_\_, 130 S. Ct. 876, 944 (2010) (Stevens, J., concurring in part and dissenting in part). The portion of the Bipartisan Campaign Reform Act (“McCain-Feingold Act”) under review in *Citizens United* restricted corporations from using general treasury funds on advertisements advocating the election or defeat of a federal candidate made over certain mediums sixty days before the general election or thirty days before the primary. *Id.* at \_\_\_, 130 S. Ct. at 887 (majority opinion) (citing 2 U.S.C. § 441b (2006)). Stevens concluded that the restriction “functions as a source restriction or a time, place, and manner restriction.” *Id.* at \_\_\_, 130 S. Ct. at 944 (Stevens, J., concurring in part and dissenting in part). Admittedly, that restriction more clearly dealt with the time when corporations and unions could spend money than the restrictions in the FECA. Hence, Stevens’s conclusion on this point has limited applicability.

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

100. *Id.* at 19.

In fact, many times the opposite is true. Carefully tailored restrictions on political spending can increase the breadth and depth of political debate and the diversity of viewpoints available to listeners by allowing both spending speakers and non- or lower-spending speakers to be heard in the proverbial marketplace.<sup>101</sup> This is true even in the “Internet age.”<sup>102</sup>

In its oft-quoted metaphor, the Court stated, “Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.”<sup>103</sup> The implication is that when the car runs out of gas it stops driving, and when the speaker runs out of money she stops speaking. The Court’s gas tank metaphor has initial rhetorical appeal. However, it simply does not hold water. While the car will stop driving, the person can keep talking. Speech may not reach as many people with the same frequency as when money is used to more widely disseminate the speech, but it remains speech, which is unlimited.<sup>104</sup>

The *Buckley* Court’s rejection of analytical frameworks applicable to restrictions on mixed conduct and speech, or on the manner of speech, are in error. The contribution and expenditure limits in the FECA are content-neutral restrictions in the sense that they limit only the amount of money given and spent in campaigns, regardless of the identity of the spender<sup>105</sup> or the content of any expression ultimately produced by the giving and spending of money.<sup>106</sup> These viewpoint-neutral restrictions do, of course,

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101. Timothy K. Kuhner, *Citizens United as Neoliberal Jurisprudence: The Resurgence of Economic Theory*, 18 VA. J. SOC. POL’Y & L. 395, 426 (2011).

102. See *infra* notes 347–48 and accompanying text.

103. *Buckley*, 424 U.S. at 19, n.18.

104. See, e.g., Burt Neuborne, *One Dollar-One Vote: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L.J. 1, 27 (1997) (“[T]he *Buckley* Court may have been guilty of a logical error in assuming that because money leads to campaign speech, campaign speech is impossible without money.”); see also *Randall v. Sorrell*, 548 U.S. 230, 277 (2006) (Stevens, J., dissenting).

105. Laws that restrict only certain spenders, such as corporations, may be seen as the exception to this statement.

106. See *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 509 (1985) (White, J., dissenting); see also Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1292 (1994) (“Campaign spending limits are, in these terms, content neutral: all expenditures above a limit are forbidden without regard to the content of the communications they might purchase.”); Wright, *supra* note 45, at 1009 (arguing that limits on contributions and expenditures can be viewed as “content-neutral controls on

have a content-based aspect to them, as they apply only to *campaign* contributions and expenditures.<sup>107</sup> It is still possible to apply the *O'Brien* analysis to campaign finance restrictions as the court of appeals did when ruling on the constitutionality of the FECA.<sup>108</sup>

The frameworks applicable to content-neutral restrictions are employed appropriately as the correct standards to use when analyzing campaign finance restrictions. Spending produces,<sup>109</sup> facilitates,<sup>110</sup> or enables<sup>111</sup> speech; it is not speech itself.<sup>112</sup> Money can help convey ideas at a higher volume,<sup>113</sup> but money itself conveys little.<sup>114</sup> Money, as the antecedent to speech, is not deserving of the same level of First Amendment protection as speech itself<sup>115</sup> because “[t]he burden on actual speech imposed by limitations on the spending of money is minimal and indirect.”<sup>116</sup>

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political abuses”).

107. See Cass R. Sunstein, *Political Equality of Unintended Consequences*, 94 COLUM. L. REV. 1390, 1394 n.15 (1994) (citation omitted) (“The restrictions are not entirely content-neutral, because political speech relating to campaigns is being singled out for special treatment. But this should not affect the analysis. Content-based regulations—like a ban on advertising on buses—are disfavored in part because we rightly suspect that illegitimate motivations lie behind them. The content discrimination in campaign finance laws—singling out campaign-related speech—is not similarly a basis for suspicion.”).

108. See *Buckley v. Valeo*, 519 F.2d 821, 840 (D.C. Cir. 1975) (citing *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968)), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).

109. *Nat'l Conservative Political Action Comm.*, 470 U.S. at 508 (White, J., dissenting).

110. See Wright, *supra* note 45, at 1007. Wright, in referring to the court of appeals' decision in *Buckley* (a decision in which he took part) stated, “[T]he use of money in political campaigns serves as nothing more than a vehicle for political expression.” *Id.*

111. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (“[A] decision to contribute money to a campaign is a matter of First Amendment concern—not because money *is* speech (it is not); but because it *enables* speech.”).

112. See, e.g., *Nat'l Conservative Political Action Comm.*, 470 U.S. at 509 (White, J., dissenting). See generally Deborah Hellman, *Money Talks But It Isn't Speech*, 95 MINN. L. REV. 953, 956 (2011). Hellman argues, in part, that money incentivizes and facilitates speech. *Id.* She also posits that while giving and spending money are sometimes expressive acts, “giving and spending alone are not expressive enough to bring that activity within the First Amendment.” *Id.* at 967.

113. I use the word “volume” to designate the size of the audience and the frequency with which it can be reached, but not the actual noise level of speech.

114. The symbolic act of giving money may, as *Buckley* recognizes, demonstrate a general expression of support. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). And of course the spending of money can help to disseminate a message. However, neither of these conclusions provides that money is speech.

115. *Nat'l Conservative Political Action Comm.*, 470 U.S. at 508 (White, J., dissenting).

116. *Id.* As Justice White further points out, the restrictions at issue affect views on specific candidates, not general political issues. See *id.* at 509.

In its rejection of the *O'Brien* test and the time, place, and manner test, the Court confuses the ability to speak, which is not affected by campaign finance restrictions, with the ability to use money to reach a wider audience. However, those are two different activities. The second deals not just with the freedom of speech, but the ability to exert power and influence through the use of funds.<sup>117</sup>

Justice Stevens has contrasted speech with the spending of money, which may produce speech. He provided the following examples:

Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.<sup>118</sup>

On this topic, Professor Timothy Kuhner usefully elucidates a dichotomy between what I will term “accessible speech” and “inaccessible speech.”<sup>119</sup> Accessible speech includes such things as “speaking with people in a public square, handing out 200 humble leaflets, posting position papers on a website or blog, or organizing a protest in the town square.”<sup>120</sup> This is “real” or “actual” speech. Inaccessible speech, by contrast, is speech “acquired only through wealth, which might include a full-page ad in the *New*

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117. Kuhner, *supra* note 101, at 421–22 (quoting MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 101 (1983)).

118. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (footnote omitted). In *Nixon*, the Court concluded that *Buckley* is authority for state limits on campaign contributions. *Id.* at 381–82 (majority opinion). Similar to arguments contained in this article that money is not speech but rather its antecedent, it is worth noting that others, such as Justice Stevens in *Nixon*, have contended that “[m]oney is property; it is not speech.” *Id.* at 398 (Stevens, J., concurring); see Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1235, 1236 (2000); Redish, *supra* note 19, at 783–84 (detailing some of the arguments contending that restrictions on the use of political money should be viewed as restrictions on property). While arguing that money is not in fact the same as speech, this article does find that limits on political money should be analyzed under the First Amendment. Money, as stated before, is the *antecedent* to speech. It *produces* speech. Hence, limits on political spending sit comfortably within a First Amendment analysis. The Court, however, has erred in finding that such restrictions should be subject to a strict analysis because they infringe on pure speech. See, e.g., *Citizens United v. FEC*, 558 U.S. \_\_\_, \_\_\_, 130 S. Ct. 876, 898 (2010); *Buckley*, 424 U.S. at 16.

119. See Kuhner, *supra* note 101 at 416.

120. *Id.*

*York Times*, a political advertisement on ABC tested by focus groups and refined by psychologists, or the hiring of a major convention center for a rally.”<sup>121</sup> This is speech produced by spending money. As Professor Kuhner points out, however, the *Buckley* Court ignores this distinction.<sup>122</sup> Hence, under *Buckley*, the volume of speech a person can utter depends on how much money she can and desires to spend, not on the content of what she has to say.<sup>123</sup>

The implication of the *Buckley* Court’s ruling is clear: “[E]conomic currency is transformed into political currency . . . [and] economic power obtains political legitimacy, avoids regulation, and continues translating into political power.”<sup>124</sup> The Court’s decision created a system in which people have as much speech (or, more specifically, volume) as they can buy.<sup>125</sup> The *Buckley* decision therefore goes directly against the goal of campaign finance laws—to prevent people from transferring economic power into political power, which harms the rights of listeners, the very group the Court purportedly seeks to protect.<sup>126</sup>

Indeed, more than three decades after *Buckley*, Justice Souter described the current campaign finance system as making huge sums indispensable.<sup>127</sup> High-dollar contributors and spenders, who often give to both major political parties, buy special access

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121. *Id.*; see also Batchis, *supra* note 39, at 49 (footnote omitted) (“For those who are able to foot the bill, political messages can be conveyed in a wide variety of high production formats, propagating powerful imagery intended to provoke emotional reactions that ultimately promote or deter desired outcomes. At this level, communication is merely a tool to achieve narrow ends; it is not speech.”).

122. Kuhner, *supra* note 101, at 416 & n.101.

123. *Id.* at 421.

124. *Id.* at 417.

125. As Spencer Overton persuasively has argued, “[T]he donor class effectively determines which candidates possess the resources to run viable campaigns. This reality undermines the democratic value of widespread [political] participation.” Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 73 (2004).

126. See, e.g., James A. Gardner, *Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns*, 54 BUFF. L. REV. 1413, 1463–64 (2007) (“Ironically, this judicial reengineering left Americans with a system of campaign finance regulation that, in its actual operation, works in a way very much at odds with the goals the Court claimed it was trying to achieve.”); Kuhner, *supra* note 101, at 423 (quoting JOHN RAWLS, *A THEORY OF JUSTICE* 224–25 (1971)). In another piece, Rawls argued that “[t]he liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate.” RAWLS, *supra*, at 225.

127. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 506 (2007) (Souter, J., dissenting).

to politicians and an outsized voice in the political debate.<sup>128</sup> This in turn leads to “pervasive public cynicism.”<sup>129</sup> The current framework, in other words, fosters a marketplace controlled by speech produced by a few high-dollar spenders. This hardly can be said to promote an open and robust marketplace which supports democratic self-government.

B. *Buckley Created a Bifurcated Framework for Analyzing Campaign Finance Restrictions*

“By equating money with speech, expenditure limits became censorship.”<sup>130</sup>

In *Buckley*, the Court created the much-maligned “bifurcated framework.”<sup>131</sup> The Court found that expenditures are closer to (or the equivalent of) pure speech than contributions, and that the government had a compelling interest in reducing corruption or its appearance<sup>132</sup> that was not served by expenditure limits but by limits on contributions.<sup>133</sup> Hence, both sides of the First Amendment analysis—the spender’s interest in speaking by spending money and the government’s interest in curbing corruption or its appearance—weighed against upholding restrictions on expenditures but in favor of upholding limits on contributions. Since

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128. *Id.*

129. *Id.*

130. Kuhner, *supra* note 101, at 427.

131. See *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976). Many commentators and justices have disagreed with *Buckley*’s creation of a bifurcated framework. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 265-66 (2005) (Thomas, J., concurring); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 413-14 (2000) (Thomas, J., dissenting); *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 509 (1985) (White, J., dissenting); *id.* at 519 (Marshall, J., dissenting); *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 201-02 (1981) (Blackmun, J., concurring in part and concurring in the judgment); *Buckley*, 424 U.S. at 241 (Burger, C.J., concurring in part and dissenting in part) (“For me contributions and expenditures are two sides of the same First Amendment coin.”); *id.* at 261 (White, J., concurring in part and dissenting in part); *id.* at 290 (Blackmun, J., concurring in part and dissenting in part). However *Buckley* does have its defenders. See Rubinfeld, *supra* note 66, at 802; Eugene Volokh, *Why Buckley v. Valeo is Basically Right*, 34 ARIZ. ST. L.J. 1095, 1103 (2002).

132. In fact, the Court stated that reducing corruption or the appearance of corruption were the only compelling or sufficiently important government interests served by campaign finance restrictions. *Buckley*, 424 U.S. at 26-27.

133. Compare *id.* at 47-48 (“[T]he independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process”), with *id.* at 30 (“Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.”)

*Buckley*, the Court typically has applied “strict” or “exacting” scrutiny to limits on expenditures, but a more relaxed “close scrutiny” analysis to limits on contributions.<sup>134</sup>

First, with respect to expenditures, the Court found that limits on expenditures are a “substantial rather than merely theoretical restraint on the quantity and diversity of political speech.”<sup>135</sup> The expenditure limits, the Court held, would “restrict the quantity of campaign speech by individuals, groups, and candidates.”<sup>136</sup> According to the Court, the expenditure limits also did not adequately serve to prevent corruption or its appearance.<sup>137</sup>

Second, by contrast, the Court found that limits on contributions are only a “marginal restriction” on a contributor’s rights and that the primary right implicated by contribution limits is that of association.<sup>138</sup> The Court further found that contributions are merely a “general expression of support.”<sup>139</sup> Contribution limits, the Court stated, do not prevent individuals from discussing candidates or issues.<sup>140</sup>

The Court further distinguished contributions from expenditures by stating that contributions are speech by proxy because someone else must spend them before the message reaches an audience.<sup>141</sup> That contributions are one link removed from expenditures in the speech chain does not alone explain why they should be treated differently from expenditures; even expenditures by candidates typically are given to television, radio stations, or advertising agencies before any communication is disseminated to the public.<sup>142</sup> Finally, the Court found that restrictions on contri-

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134. See *McConnell v. FEC*, 540 U.S. 93, 134 (2003); *FEC v. Beaumont*, 539 U.S. 146, 161 (2003); *Nixon*, 528 U.S. at 387–88.

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

136. *Id.* at 39.

137. *Id.* at 45.

138. See *id.* at 20–22. The Court found that contributing to a candidate’s campaign was akin to other forms of political association, like joining a political group as a member or volunteer. See *id.* at 22.

139. *Id.* at 21.

140. *Id.* The same, of course, is true for expenditure limits. Individuals are free to discuss candidates and issues, the only limitation is how much money they can spend to disseminate that speech. *Contra id.* at 19 n.18.

141. See *id.* at 21; see also *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 195–97 (1981) (finding that contributions are “speech by proxy” and applying the *Buckley* bifurcated framework to uphold a \$5000 annual contribution limit on the amount that individuals and unincorporated associations could contribute to political committees).

142. See *Nixon v. Shrink Mo. PAC*, 528 U.S. 377, 413 (2000) (Thomas, J., dissenting)

butions serve the compelling governmental interest of preventing corruption or the appearance of corruption that may result from large contributions.<sup>143</sup>

The *Buckley* bifurcated framework, however, misconceives the interests at stake. The Court's analysis puts the First Amendment rights of speakers on one side of the balance and the government's interest in reducing corruption or its appearance on the other.<sup>144</sup> However, First Amendment interests lie on both sides of the equation.<sup>145</sup> Restrictions can promote First Amendment rights by reducing the volume of speech, thereby bolstering the marketplace of ideas and the ability of listeners and low- or non-spending speakers to hear and speak.

As a result of the Court's creation of this bifurcated framework, the ability to raise large funds from one source may be restricted, but the thirst for raising and spending campaign funds is not. Indeed, "the *Buckley* opinion took a Congressional program designed to minimize the impact of wealth on politics and turned it into an engine for the glorification of money."<sup>146</sup>

#### IV. TREATING POLITICAL SPENDING AS POLITICAL SPEECH HARMS FIRST AMENDMENT INTERESTS

As I discussed earlier, there are two primary schools of thought concerning the purpose of the First Amendment and who and what it is meant to protect. Under the first view, the First Amendment is an instrumental, listener-based right.<sup>147</sup> Under

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(quoting *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 638–39 (1996) (Thomas, J. concurring in judgment and dissenting in part)); *Ortiz*, *supra* note 24, at 273–74.

143. *Buckley*, 424 U.S. at 28; *see, e.g., Cal. Med. Ass'n*, 453 U.S. at 196–97 (applying the lower level of scrutiny elucidated in *Buckley* to uphold contribution limits).

144. *Compare Buckley*, 424 U.S. at 19 (explaining that expenditure limits put substantial restraints on political speech), *with id.* at 28 (explaining that contribution ceilings are necessary to deal with corruption or its appearance).

145. *Randall v. Sorrell*, 548 U.S. 230, 278 (2006) (Stevens, J., dissenting) (quoting *United States v. UAW-CIO*, 352 U.S. 567, 590 (1957)) ("When campaign costs are so high that only the rich have the reach to throw their hats into the ring, we fail 'to protect the political process from undue influence of large aggregations of capital and to promote individual responsibility for democratic government.'").

146. *Neuborne*, *supra* note 104, at 33. *Neuborne* further explained that "the *Buckley* opinion dramatically increased the relative political power of the very rich . . . [and] *Buckley* has increased the relative political power of special interests." *Id.*

147. *See supra* notes 25–31 and accompanying text.

this understanding, the First Amendment fosters a free marketplace of ideas where the truth will emerge and democratic self-government will flourish. Under the second view, the First Amendment is an individual, speaker-based right.<sup>148</sup> The First Amendment promotes an individual's self-expression, self-actualization, and/or self-realization irrespective of the benefit that may accrue to the listener. As I seek to demonstrate below, the Court adheres to an instrumental approach when analyzing campaign finance restrictions.

This article posits that because of the Court's initial error of equating money with speech, the second part of the Court's analysis—how best to protect speech rights under an instrumental view of the First Amendment—is also in error. Quite obviously, the Court's erroneous conclusion that money is the equivalent of speech means that the Court views restrictions on giving and spending money as reducing speech, at least the speech of the spender.<sup>149</sup> The government therefore has a much higher burden to overcome in demonstrating that its restrictions are constitutional.<sup>150</sup> In addition, the government's position becomes more arduous because the Court has also concluded that it is impermissible to restrict the *speech* of some to promote the speech of others.<sup>151</sup> Had the Court instead acknowledged that campaign finance restrictions do no more than reduce the *volume* of some in order to accomplish goals such as fostering the *speech* of others, it would have been more likely to uphold reasonable restrictions on expenditures. As discussed in Section IV, had the Court weighed volume against speech, instead of speech against speech, it would have also been more likely to view political equality as being entirely consistent with the First Amendment.

While the Court has rather consistently adhered to an instrumental view of the First Amendment in its campaign finance jurisprudence, its view of how to promote the marketplace of ideas and democratic self-government (which I argue demonstrates a focus on the rights of listeners) has changed based on the identity of the spender, the recipient of the spending, and, perhaps most

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148. See *supra* notes 37–39 and accompanying text.

149. See *Buckley*, 424 U.S. at 19–21.

150. See *id.* at 44–45.

151. See *id.* at 48–99.

significantly, the composition of the Court.<sup>152</sup> In some cases the Court strikes down campaign finance restrictions, finding that they harm listeners' interests, while in others the Court upholds restrictions for the same reasons.<sup>153</sup>

What accounts for these differences in perspective? It largely depends on whether the majority favors the ideal of liberty (in which case it will strike down campaign finance restrictions) or the ideal of equality (in which case it will uphold campaign finance restrictions).<sup>154</sup> The Court's liberty-based approach actually harms listeners' liberty interests by skewing the marketplace of ideas and hindering democratic self-government.<sup>155</sup> The opposite is true of the Court's equality-based approach, which in fact promotes listeners' interests.<sup>156</sup>

Unfortunately, the Court's 2010 decision in *Citizens United* likely sounded the death knell for those espousing the Court's equality-based approach and argument that campaign spending restrictions can promote First Amendment values under an instrumentalist view—though it is possible that upon further reflection some members of the Court could change their views.

In this section, I first focus on the Court's decision to analyze political spending under an instrumental view of the First Amendment. Regardless of the Court's conclusion—whether it is to uphold or strike down campaign finance restrictions—the Court's focus is on listeners. This is in part due to the low speech interests at issue when artificial entities and individuals spend money in the political marketplace.<sup>157</sup> I next discuss the various positions espoused by justices and scholars, all of whom contend they are adhering to an instrumental view of the First Amendment but nonetheless arrive at different results.

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152. *See supra* Section II.

153. *See supra* Section III.B.

154. *See infra* Section IV.A.

155. *See infra* Section IV.A.1.

156. *See infra* Section IV.A.2.

157. *See infra* Section IV.B.2.b.

A. *An Instrumental View of the First Amendment: Focusing on the Listener's Interest*

Supreme Court jurisprudence in the campaign finance arena hinges on an instrumental view of the First Amendment, which is concerned primarily with promoting the listener's interest by fostering a marketplace of ideas and/or democratic self-government.<sup>158</sup> Again, while consistently adopting an instrumental view of the First Amendment, the Court's jurisprudence has been less than consistent.<sup>159</sup> Members of the Court simply disagree on how best to promote the freedom of speech under an instrumental view of the First Amendment.<sup>160</sup> Despite the rigorous level of scrutiny that it applies to campaign finance restrictions, due to its decision to equate spending with speech, the Court at times has recognized that listeners' rights are in fact fostered when the government restricts political spending and therefore reduces the *volume* of speech.<sup>161</sup> This allows listeners to obtain comprehensive information from a variety of sources.<sup>162</sup> In the majority of cases, however, the Court, still adhering to an instrumental view of the First Amendment, strikes down campaign finance restrictions<sup>163</sup> and hence actually harms listeners' rights. As a result it is moneyed interests, not non-spending speakers, who "set the parameters of political debate."<sup>164</sup>

The following provides a brief description of the ideals of liberty and equality and how they can factor into an analysis of campaign finance restrictions under an instrumental view of the First Amendment.<sup>165</sup>

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158. See, e.g., Pinaire, *supra* note 31, at 500–01.

159. See *supra* notes 40–44 and accompanying text.

160. See Pinaire, *supra* note 31, at 547.

161. See Eberhardt, *supra* note 27, at 166 & n.36 (explaining that the right to hear is premised on the need to provide complete information and a variety of views).

162. See *id.* at 166.

163. See Neuborne, *supra* note 104, at 11.

164. Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 277 (1993).

165. Some have argued that campaign finance restrictions promote the quality of the political debate by bolstering the quality of the electoral and legislative debate. See, e.g., Ortiz, *supra* note 47, at 898–899; see also Neuborne, *supra* note 104, at 18 ("Campaign finance reform is often urged as a means of improving the quality of democratic debate."); Sunstein, *supra* note 107, at 1392; Wright, *supra* note 45, at 1019 (discussing the effect of campaign finance restrictions on electoral debate).

## 1. Liberty/Personal Autonomy

If one views the First Amendment as primarily prizing the notion of liberty, then state regulation almost always is viewed with disfavor.<sup>166</sup> Government regulation on spending is seen to reduce the quantity of speech, the number of speakers, and the freedom of expression.<sup>167</sup> Similarly, under this view, limits on contributions and expenditures may be seen as an impermissible government interference on the right to be let alone.<sup>168</sup> Constitutional scholar Eugene Volokh, espousing this liberty model, has argued that people have a First Amendment right to voice their opinions, and that right cannot “be sacrificed in the name of equality.”<sup>169</sup>

However, it is of course true that the government imposes—and the Court upholds—restrictions on speech (actual speech, not the antecedent to speech) in a number of scenarios in order to promote equality and/or civility. For instance, the Supreme Court itself limits the amount of time litigants are given for oral arguments.<sup>170</sup> Congress limits the time for legislative debates.<sup>171</sup> In addition, with respect to elections, the government limits electioneering space near polls<sup>172</sup> and can exclude certain candidates from taking part in debates.<sup>173</sup>

Members of the Court prizing the ideal of liberty typically vote to strike down campaign finance restrictions because such limitations are seen as threatening to the free functioning of the marketplace and democratic self-government.<sup>174</sup> However, as I discuss

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166. See Pinaire, *supra* note 31, at 502.

167. See *id.* I disagree with none of those ideals, but instead argue that restrictions on political spending (not political speech) promote liberty interests.

168. See Neuborne, *supra* note 104, at 2.

169. Volokh, *supra* note 131, at 1096, 1103; see also James Weinstein, *Campaign Finance Reform and the First Amendment: An Introduction*, 34 ARIZ. ST. L.J. 1057, 1074 (2002) (discussing Volokh’s arguments).

170. See SUP. CT. R. 28.

171. See Paul Bender, *The Constitutionality of Campaign Finance Legislation: After Buckley v. Valeo*, 34 ARIZ. ST. L.J. 1105, 1110 (2002); see also Weinstein, *supra* note 169, at 1074 (discussing Bender’s arguments).

172. Weinstein, *supra* note 169, at 1083 (citing *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (holding that the State of Tennessee’s restriction on solicitors around polling places was necessary to protect from “intimidation and fraud”).

173. *Id.* (citing *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 669 (1998)).

174. See *Citizens United v. FEC*, 558 U.S. \_\_\_, \_\_\_, 130 S. Ct. 876, 884 (2010) (citing *N.Y. Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)).

below, even if one prizes the ideal of liberty, campaign finance restrictions should be upheld.

## 2. Equality

If one views the First Amendment as mainly protecting the notion of equality, then one is concerned with improving both equal access to the debate and, perhaps, the quality of the debate.<sup>175</sup> Under this view, in order to reduce barriers to entry and allow all views to be spoken and heard, the government must at times assume a regulatory role.<sup>176</sup>

The notion of promoting equality in the marketplace of ideas demonstrates that regulations can foster a debate in which information can be obtained from a variety of sources.<sup>177</sup> I argue that striking down spending limits harms the goal of fostering a robust and diverse marketplace because without such limits, the marketplace is flooded with “speech” produced only by the well-funded.<sup>178</sup> Indeed, under one perspective, “regulations on speech can produce a greater quantity of speech, or at least speech from a greater number of sources.”<sup>179</sup>

In this way, the limits contained in the FECA are similar to the antitrust and anti-monopoly regulations we view as promoting a functioning marketplace and reducing barriers to entry.<sup>180</sup> One

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175. See Pinaire, *supra* note 31, at 528.

176. *Id.* at 520–21.

177. See Gardner, *supra* note 126, at 1461–62 (“FECA’s emphasis on equality of resources among candidates and voters suggests an underlying congressional belief that the proper unit of currency in election campaigns should be ideas, and that each idea is entitled to an equal hearing. If spending money bears some rough relation to the ability to persuade by increasing either the depth in which ideas may be communicated or the breadth of their dissemination, then limiting the amount of money that voters and candidates may spend restricts the ability of rich individuals to dominate the marketplace of ideas by reaching deeper and more extensively into the market than other individuals who back competing ideas.”); Kuhner, *supra* note 101, at 425 (“It is easy for a court to condemn expenditure limits by focusing on how equality reduces freedom. It is just as easy, however, to validate such limits by focusing on how equality increases freedom.”).

178. See, e.g., Gardner, *supra* note 126, at 1461 (“Equalizing candidates’ resources thus puts them on an equal footing in competing for both rational and irrational votes, and this equality in turn improves the substance and rationality of election campaigns by depriving any candidate of the ability to compete unfairly for irrational votes in virtue of having greater resources to devote to the kind of expensive, showy appeals to which certain voters, in the view of Congress, unfortunately respond.”).

179. Kuhner, *supra* note 101, at 426.

180. See *id.* at 433.

therefore may understand the limits in the FECA as designed to eliminate causes of market failures, not to hinder a competitive market.<sup>181</sup>

Restrictions on campaign spending, therefore, allow voters to have a comparable opportunity to affect electoral outcomes.<sup>182</sup> It is improper to allow economic power to translate into political power<sup>183</sup> because this transfer of power from one marketplace to another fundamentally threatens the functioning of democratic self-government.<sup>184</sup> It should not be those with the largest microphone that are able to reach the largest audience when access to the microphone is based upon success in the economic marketplace, not the power of one's ideas.

In *Buckley*, the Court rejected the argument that promoting political equality is properly within the government's purview when crafting restrictions on the way we give and spend money in elections.<sup>185</sup> The Court famously held:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.<sup>186</sup>

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181. See *id.* Professor Kuhner further argued: "Free markets require that the state guarantee open access to the market by policing anti-competitive behavior. Any free market of any appreciable size is also a regulated market." *Id.* at 434.

182. Ortiz, *supra* note 47, at 899–900 (summarizing some of the arguments on this point); see also Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 6 (1996) ("In an egalitarian political market, each person has roughly equal political capital regardless of preexisting disparities in wealth, education, celebrity, ability, or other attributes."); Neuborne, *supra* note 104, at 10–11; Frank Pasquale, *Reclaiming Equalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599 *passim* (2008); Sunstein, *supra* note 107, at 1392.

183. Ortiz, *supra* note 47, at 899–900; Sunstein, *supra* note 107, at 1390; see also Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 291 (1992) ("Many people have justified restrictions on campaign expenditures as an effort to promote political deliberation and political equality by reducing the distorting effects of disparities in wealth. On this view, such laws promote the system of free expression by ensuring that less wealthy speakers do not have much weaker voices than wealthy ones.").

184. See Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19; see also Sunstein, *supra* note 107, at 1392. Sunstein succinctly noted that "disparities in wealth ought not lead to disparities in power over government." *Id.* at 1393.

185. *Buckley v. Valeo*, 424 U.S. 1, 54 (1976).

186. *Id.* at 48–49 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)).

This dismissal of equality as an important or compelling governmental interest pervades the Court's decision not only in *Buckley*, but also in subsequent campaign finance cases.<sup>187</sup> Had the Court properly characterized political equality as an ideal which promotes, rather than harms, First Amendment interests, then the Court's campaign finance jurisprudence would be markedly different. Now, when justices wish to espouse equality as an important or compelling governmental interest, they must do so either in the face of numerous cases holding otherwise, or they must disingenuously couch their desire to foster political equality in misleading language.<sup>188</sup>

Members of the Court possess different views as to how much weight, if any, to give to the idea of promoting equality when analyzing restrictions on campaign spending. Justices who view equality as properly a part of the analytical calculus are more likely to uphold restrictions on campaign spending. This is because once they acknowledge equality as an important governmental interest, they then see expenditure limits as promoting that goal by reducing barriers to entry in the political marketplace and lessening the distortion of the marketplace caused by large influxes of campaign spending.<sup>189</sup>

Promoting the goal of equality therefore can be seen to foster a marketplace defined by ideas rather than noise. Money, by facilitating or enabling speech, may at some point raise the volume of the debate at the cost of the tenor of the discussion. The government should not restrict pure speech, but it should at times restrict the antecedent to speech in order to reduce the signal-to-noise ratio.

Judge Wright framed this problem as a clash between “*ideas*” and “*intensities*,”<sup>190</sup> arguing that the First Amendment is de-

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(internal quotation marks omitted).

187. See, e.g., *Davis v. FEC*, 554 U.S. 724, 741–42 (2008).

188. See, e.g., Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 992 (2011) (explaining that while *Austin v. Michigan Chamber of Commerce* referred to a “different type of corruption,” the issue at hand “fairly can be understood as voicing a type of political equality concern”).

189. Kuhner, *supra* note 101, at 424. Kuhner argues that if expenditure limits are seen as promoting political equality, then they are viewed as promoting a strong governmental purpose, but if the limits are seen as promoting economic equality—and hence as interfering in the free market—then they are perceived as serving an improper or weak governmental purpose. *Id.*

190. Wright, *supra* note 45, at 1019; see also Ortiz, *supra* note 28, at 20.

signed to protect the former but not the latter.<sup>191</sup> When campaign spending is unregulated, intensities can overcome ideas.<sup>192</sup> Put another way, the volume of speech can threaten a wider dissemination of ideas. This is problematic because listeners have a finite ability to hear and digest information. While no idea should be silenced, the volume at which some are blasted should be limited in order to foster a truly diverse debate.<sup>193</sup>

In the remainder of this article, I seek to show that when restricting the giving and spending of campaign funds, the government has a proper role in promoting equality, and that such restrictions actually promote, rather than curtail, the liberty of speakers as well as listeners.

When the government restricts the giving and spending of money, the question is not whether the government can restrict the speech of some to enhance the speech of others; rather, it is whether the government can restrict campaign funds (which may produce speech) in order to protect the speech rights of others. The government is not choosing between favored and disfavored speakers. Rather, it is reducing the influence of money, the antecedent to speech, which suppresses the breadth and depth of issues spoken and heard. Once properly categorized, restrictions on spending can be seen to promote First Amendment values.

Here, I diverge from many other scholars in the area because I do not accept the conclusion that political spending is political speech. I therefore have an easier time concluding that restrictions promoting political equality are properly within the government's purview and, further, that restrictions on spending promote speech rights and, thus, liberty interests. Hence, even assuming that an instrumental view of the First Amendment is

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191. Wright, *supra* note 45, at 1019 (“*I*deas, and not intensities, form the heart of the expression which the First Amendment is designed to protect.”).

192. See, e.g., *Davis*, 554 U.S. at 751 (Stevens, J., concurring in part and dissenting in part) (“After all, orderly debate is always more enlightening than a shouting match that awards points on the basis of decibels rather than reasons.”). *But see* Ortiz, *supra* note 28, at 20–23.

193. Professor Ortiz persuasively argues that money creates an intensity problem if voters are “civic slob[s]” rather than “civic smart[ies].” Ortiz, *supra* note 28, at 29; *see also* Neuborne, *supra* note 104, at 43 (“At some point, the argument goes, unlimited expenditures stop acting as the source of new ideas, and become a form of repetitive propaganda, making it impossible for other candidates to get a fair hearing.”).

proper, I contend that campaign finance restrictions serve the ideals of both equality and liberty.<sup>194</sup>

It is important to note that these values likewise can be seen as promoting the rights of speakers, not just of listeners. For instance, the liberty or political autonomy model may be best understood as promoting the freedom for speakers to say what they wish, and the equality model may be viewed as fostering equal access by promoting the ability of all speakers to participate in the marketplace.

This simply shows that divisions between an individualist perspective and an instrumentalist view are not always clear. Certain ideals, such as liberty and equality, may foster both perspectives. For instance, the liberty model also provides that listeners must be free to hear an open and unrestricted exchange of ideas.<sup>195</sup> The equality model allows listeners to hear more speech from a greater diversity of viewpoints.<sup>196</sup>

This article focuses on the extent to which the Court's decisions in fact foster an instrumental view of the First Amendment—the view that members of the Court—in majority opinions and in concurrences and dissents—endorse based on the instrumentalist language used in defending their positions. Yet as we will see, while the justices may espouse an instrumentalist view of the First Amendment, they may come to different outcomes depending on whether their goal is liberty (or political autonomy) or equality.

## B. *The Court Champions an Instrumental View of the First Amendment*

### 1. The Foundation—*Buckley*

In *Buckley*, the seminal case in the area of campaign finance law, the Court established an instrumental view as the proper perspective through which to review restrictions on campaign

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194. See Sunstein, *supra* note 107, at 1390 (footnote omitted) (“Government has a legitimate interest in ensuring not only that political liberties exist as a formal and technical matter, but also that those liberties have real value to the people who have them. The achievement of political equality is an important constitutional goal.”).

195. See Pinaire, *supra* note 31, at 497.

196. *Id.* at 520–22.

spending.<sup>197</sup> The Court explained that a chief purpose of the First Amendment “was to protect the free discussion of governmental affairs. . . .”<sup>198</sup> The Court continued that the First Amendment demonstrates the country’s “commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>199</sup> Finally, the Court noted, “In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential . . . .”<sup>200</sup>

This view comports with an instrumentalist view of the First Amendment whose chief concern is to protect an open marketplace that promotes democratic self-government and fosters the rights of listeners. Noticeably absent from the *Buckley* Court’s initial description of the interests at issue, or specifically the purpose of the First Amendment, was any mention of that amendment as creating an individual right meant to protect the rights of speakers and to enjoy self-expression, self-realization, and/or self-actualization.

The *Buckley* Court espoused the liberty conception of the marketplace of ideas, and specifically the idea that liberty is offended by restrictions on spending.<sup>201</sup> Hence *Buckley* teaches us that “the number of speakers involved—or the amount of speech—is the central concern of the properly functioning marketplace, with nearly any limitation viewed as an unhealthy and dangerous deviation.”<sup>202</sup> Under this view of the First Amendment, “[a]ll ideas about policy must be admitted into debate so that people can

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197. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). But Professor Daniel Ortiz argues that the *Buckley* bifurcated framework should be grounded in an individualist view of the First Amendment, even though the Court purports to adopt an instrumental perspective. Ortiz, *supra* note 24, at 271. Ortiz argues that making expenditures require more active engagement than making contributions. *Id.* at 273–74. Viewed from a different perspective, *Buckley* still can be seen as consistently espousing an instrumental view of the First Amendment. The *Buckley* Court assumed that candidates would be able to spend as much as they did prior to the imposition of contribution limits, but they would just have to get more donors to raise the same amount of money. *See Buckley*, 424 U.S. at 26 n.27. From an instrumental perspective then, the amount of speech available for public consumption would remain the same. With independent groups and candidates free to spend as much as they want, listeners are purportedly left free to hear as much speech as they want. The only difference is how the candidate raises money in order to disseminate her speech to the electorate.

198. *Buckley*, 424 U.S. at 14 (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

199. *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

200. *Id.* at 14–15.

201. *See id.* at 15–17; Pinaire, *supra* note 31, at 503.

202. Pinaire, *supra* note 31, at 504.

compare them and make an educated choice.”<sup>203</sup> Ironically, unrestrained spending actually can act as a barrier to entry of actual speech into the political debate.

In its per curiam opinion, the Court rejected the equality conception of the marketplace, finding that the government could not silence the speech of some to promote the speech of others.<sup>204</sup> The question in *Buckley* may be viewed as when and how to consider equality when analyzing First Amendment issues.<sup>205</sup> The ability to speak and have one’s voice heard should not depend on monetary backing, and the Court’s failure to give full consideration to political equality exacerbates the problem of money in politics.

The Court misconceived the proper roles of equality and liberty in its analysis in part because it treats spending as speech. The Court, therefore, considered whether it is proper to restrict the *speech* of some to promote the speech of others. Instead what the Court should ask is whether it is permissible to reduce the *volume* of some speech to foster political equality and a robust marketplace of ideas. Had the Court’s foundational assumption about how to categorize political spending not been in error, then the second part of its analysis—whether and how to weigh the political equality interest—might not also have been in error. The Court further failed to recognize that restrictions can promote speech under the liberty notion of the marketplace by increasing the number of actual speakers (not just spenders) and the amount of speech (not spending).

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203. Ortiz, *supra* note 28, at 13. Ortiz argues that *Buckley*’s view of campaign spending as being a positive development under the instrumental view of the First Amendment is premised erroneously on the conclusion that citizens are civically engaged, or civic smarties. *Id.* at 13, 23.

204. *Buckley*, 424 U.S. at 48–49. Professor Rubinfeld argues that the real issue in *Buckley* was “whether Congress can limit spending on political advocacy in order to offset the phenomenally greater ability of wealthy people and groups to broadcast their messages to the electorate.” Rubinfeld, *supra* note 66, at 803.

205. Rubinfeld, *supra* note 66, at 803–04; *see also* Hasen, *supra* note 188, at 1002 (“[P]romoting political equality is the real unspoken motivating force . . . to defend existing campaign finance laws against First Amendment challenge.”).

## 2. The Court's Campaign Finance Decisions

The Court has confronted restrictions on two main types of spenders: individuals and corporations.<sup>206</sup> This section considers the Court's rulings on restrictions for each of type of spender.

### a. The "Individual Spender" Cases

#### i. *Nixon v. Shrink Missouri Government PAC* (2000)

Sixteen years after its seminal decision in *Buckley*, the Court revisited many of the issues addressed in that case in *Nixon v. Shrink Missouri Government PAC*.<sup>207</sup> There, the Court concluded that *Buckley* was the authority for state limits on campaign contributions.<sup>208</sup> For purposes of this article, *Nixon* is important not for the majority's less-than-startling conclusion, but for the separate opinions of the justices.<sup>209</sup>

Justice Breyer, in a concurring opinion, espoused an instrumental view of the First Amendment as he focused on the speech, not the speaker.<sup>210</sup> He championed the notion of equality when he argued that limits on the amount of money given to candidates actually promote free speech ideals.<sup>211</sup> Indeed, Justice Breyer directly attacked the *Buckley* Court's rejection of equality as an important or compelling governmental interest.<sup>212</sup> The Court had concluded erroneously that the government cannot "restrict the speech of some elements of our society in order to enhance the relative voice of others."<sup>213</sup> Breyer points out that as a society we permit restrictions on speech in order to prevent others from be-

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206. This article leaves for another day an examination of restrictions on political parties. For a discussion of such, see *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001); *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996).

207. 528 U.S. 377 (2000).

208. *Id.* at 381–82.

209. For instance, in his dissenting opinion in *Nixon*, Justice Kennedy adopted an instrumental view of the First Amendment, finding that campaign contributions are "speech upon which democracy depends." *Id.* at 405 (Kennedy, J., dissenting).

210. *See id.* at 400 (Breyer, J., concurring).

211. *Id.* at 401; *see also* Pinaire, *supra* note 31, at 528.

212. *Nixon*, 528 U.S. at 401–02 (Breyer, J., concurring).

213. *Id.* at 402.

ing drowned out all the time.<sup>214</sup> Speech is limited for the purpose of promoting equality in a number of situations—the amount of time that members of Congress and attorneys in most courthouses can argue their points is limited.<sup>215</sup> Further, states impose many restrictions on ballot access for similar reasons.<sup>216</sup> Here, there is an easier case for limiting spending because courts are limiting the *antecedent* to speech in order to prevent others from being drowned out.

The theme of Justice Breyer's separate opinion in *Nixon* is that when analyzing restrictions on campaign contributions, "constitutionally protected interests lie on *both* sides of the legal equation."<sup>217</sup> Breyer accepted the argument that limits on campaign contributions can burden First Amendment rights but also pointed out that they can "open discussion that the First Amendment itself presupposes."<sup>218</sup> Breyer explicitly acknowledged that limitations on spending can promote speech rights.

By contrast, in his lengthy dissent in *Nixon*, Justice Thomas adhered to the liberty conception of the marketplace model under which governmental intrusion is always viewed with hostility.<sup>219</sup> He criticized limits on campaign contributions as harming the "free exchange of political information."<sup>220</sup> Justice Thomas's focus, like that of the majority, was on the dissemination of political information.<sup>221</sup> However, Justice Thomas, more than many of the other justices, focused on speakers' rights as well. He argued that limits on contributions harm donors' abilities to disseminate information,<sup>222</sup> "depriv[e] donors of their right to speak through the candidate,"<sup>223</sup> and "curtail[] individual participation."<sup>224</sup> Justice Thomas further averred that contribution limits harm the speech rights of candidates.<sup>225</sup> However, in the end, his argument came full circle back to an instrumentalist view of the freedom of

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214. *Id.*

215. *See supra* notes 162–63 and accompanying text.

216. *See Nixon*, 528 U.S. at 402. (Breyer, J., concurring).

217. *Id.* at 400 (emphasis added).

218. *Id.* at 401.

219. *Id.* at 410–11 (Thomas, J., dissenting); *see also* Pinaire, *supra* note 31, at 515.

220. *Nixon*, 528 U.S. at 411. (Thomas, J., dissenting).

221. *Id.* at 414.

222. *Id.*

223. *Id.* at 418.

224. *Id.*

225. *Id.* at 418–19.

speech, proclaiming that “the silencing of a candidate has consequences for political debate and competition overall.”<sup>226</sup>

ii. *Randall v. Sorrell* (2006)

In *Randall v. Sorrell*, the Court applied the teachings of *Buckley* to Vermont’s campaign finance statute.<sup>227</sup> The Court unsurprisingly struck down limits on campaign expenditures but, for the first time since *Buckley*, also invalidated limits on the size of individual campaign contributions.<sup>228</sup> Finding that the restrictions raised a number of concerns, the Court concluded that the limitations were not “closely drawn” because they would cause “a severe impact on political dialogue.”<sup>229</sup>

Again, the Court championed an instrumental view of the First Amendment when it stated that the pertinent question was whether the limits affected “political dialogue.”<sup>230</sup> The Court worried not about the individual rights of the contributor or the candidate, but the instrumental concerns of promoting “democratic accountability” and electoral fairness.<sup>231</sup> *Randall* stands as yet another example of the Court’s adherence to an instrumentalist view of the First Amendment in which the majority prized the ideal of liberty over that of equality.

iii. *Davis v. FEC* (2008)

The Court has been fairly consistent in rejecting equalization as a government interest sufficient to uphold campaign expenditure provisions in cases dealing with individual spenders. In *Davis v. Federal Election Commission*, the Court struck down a portion of the Bipartisan Campaign Reform Act of 2002 commonly known as the “Millionaire’s Amendment.”<sup>232</sup> The amendment provided that opponents of self-financed candidates could raise contributions three times the normal limit when the self-financed

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226. *Id.* at 420.

227. 548 U.S. 230, 236–37 (2006).

228. *See id.*

229. *Id.* at 247 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)).

230. *See id.* at 246–48.

231. *See id.* at 248–49.

232. *Davis v. FEC*, 554 U.S. 724, 729, 738 (2008) (citing 2 U.S.C. § 441a-1(a) (2006)).

candidate spent more than a threshold amount.<sup>233</sup> Once a self-financed candidate spent more than \$350,000 in her own funds, her opponents could raise contributions of \$6900 rather than the normal limit of \$2300.<sup>234</sup>

Justice Alito, writing for the majority, found that this “asymmetrical regulatory scheme” acted as an expenditure limit on the self-financed candidate.<sup>235</sup> Specifically, the Court found that the self-financed candidate would have a disincentive to spend her own funds, lest she trigger the higher contribution limits for her opponent.<sup>236</sup> Justice Stevens, in his dissent, disagreed with this characterization of the Millionaire’s Amendment.<sup>237</sup> Stevens argued that the Millionaire’s Amendment “does no more than assist the opponent of a self-funding candidate in his attempts to make his voice heard; this amplification in no way mutes the voice of the millionaire, who remains able to speak as loud and as long as he likes in support of his campaign.”<sup>238</sup> Stevens concluded that the amendment actually promoted speech because “[i]f only one candidate can make himself heard, the voter’s ability to make an informed choice is impaired.”<sup>239</sup>

The Court found no governmental interest sufficient to uphold the limitation at issue.<sup>240</sup> It first found this framework could not serve to reduce corruption or its appearance because the law allowed non-self-financed candidates to raise larger single contributions and disincentivized candidates from using their own money, which could not lead to corruption.<sup>241</sup> Therefore, the Court found that the purpose of the Millionaire’s Amendment was the equalization of resources among candidates.<sup>242</sup> The Court relied on

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233. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81; *Davis*, 554 U.S. at 729.

234. Pub. L. No. 107-155, 116 Stat. 81; *Davis*, 554 U.S. at 729. Under the “Millionaire’s Amendment,” the non-self-financing candidate could raise contributions under the more generous limits until he raised \$350,000 (at which point the normal limits are revived). Pub. L. No. 107-155, 116 Stat. 81; *Davis*, 554 U.S. at 729.

235. *Davis*, 554 U.S. at 729, 738–40.

236. *See id.* at 739–40.

237. *See id.* at 753 (Stevens, J. dissenting).

238. *Id.*

239. *Id.* at 753–54.

240. *Id.* at 740–41 (majority opinion).

241. *Id.*

242. *See id.* at 741.

*Buckley*, concluding that equalization is not a government interest sufficient to uphold expenditure limits.<sup>243</sup>

b. The “Corporate Spender” Cases

Much of the Court’s campaign finance jurisprudence concerns corporate spenders. Because corporations are artificial entities, it is easy to see why their speech rights are low.<sup>244</sup> Hence, the Court’s analysis naturally focuses on the listeners’ rights.<sup>245</sup> While the Court typically has adhered to a liberty-based view of the First Amendment, its jurisprudence has not been entirely consistent on this point.<sup>246</sup>

i. *First National Bank of Boston v. Bellotti* (1978)

Shortly after its landmark decision in *Buckley*, the Court addressed the questions of whether and how to give protection to corporate electoral spending under the First Amendment in *First National Bank of Boston v. Bellotti*.<sup>247</sup> The Court reviewed a state law restricting the ability of certain corporations to spend money from their general treasury funds to advocate for the passage or

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243. See *id.* at 741–42.

244. See generally Batchis, *supra* note 39; Levinson, *supra* note 41. In that article, I attempt to demonstrate that “[c]orporate speech simply does not foster self-actualization of the corporate entity itself.” *Id.* at 322 (footnote omitted).

245. This article takes the position that regardless of the identity of the spender, the Court is concerned primarily with protecting the freedom of expression under an instrumental view of the First Amendment when analyzing campaign finance restrictions.

246. It is also worth noting that while not a corporate speech case, the restriction at issue in *Federal Election Commission v. National Conservative Political Action Committee* affected a spender who was an artificial entity. 470 U.S. 480, 490 (1985). The Court invalidated the restriction contained in the FECA which prohibited political action committees from spending more than \$1000 to affect the election of a presidential candidate. *Id.* at 491, 501 (citing 26 U.S.C. § 9012(f) (1982 & Supp. II)). The Court again adhered to an instrumental view of the First Amendment, citing *Buckley* for the proposition that the First Amendment protects political speech in order to foster “[the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Id.* at 493 (alteration in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). Consistent with an instrumental view of the First Amendment under which the source of the speech is irrelevant, the Court also rejected the idea that because the speaking spender was a political action committee, it necessarily would lead to less First Amendment protection for its speech. *Id.* at 494. Significantly, the Court explained that the expenditure limit permitted “a speaker in a public hall to express his views while denying him the use of an amplifying system.” *Id.* at 493.

247. 435 U.S. 765, 767 (1978).

defeat of certain ballot measures.<sup>248</sup> The law at issue prevented corporations from making independent expenditures on ballot measures that did not materially affect the business of that corporation.<sup>249</sup>

The lower court viewed the issue as “whether business corporations, such as [appellants], have First Amendment rights coextensive with those of natural persons or associations of natural persons.”<sup>250</sup> The Supreme Court, however, found that the question was not whether corporations have First Amendment rights and whether those rights are the same as those of individuals, but rather whether the law infringed on “expression that the First Amendment was meant to protect.”<sup>251</sup> Later the Court stated that the issue, “simply put, [was] whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection.”<sup>252</sup>

In re-framing the proper issue in the case, the Court placed the burden on the government to prove why speech which otherwise would be protected is deprived of that protection because the spender is a corporation, rather than placing the burden on the corporation to explain why corporate spending should be considered speech and whether corporations have speech rights similar to those of natural persons. The Court also shifted the focus from the speaker to the speech. This is consistent with an instrumentalist view of the First Amendment.<sup>253</sup> Under that view, the source of the money, meaning the nature of the “speaker,” is irrelevant, for it is the speech itself that promotes listeners’ interests.<sup>254</sup> As the Court stated, “The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source.”<sup>255</sup>

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248. *Id.* at 767–69.

249. *Id.* at 767–68 (citing MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)). In addition, the law stated that graduated income taxes could not be considered to materially affect the business of corporations. Ch. 55, § 8.

250. *Bellotti*, 435 U.S. at 771 (alteration in original) (citation omitted).

251. *Id.* at 776.

252. *Id.* at 778.

253. *See, e.g., Ortiz, supra* note 28, at 16 (“[*Bellotti*] definitively identifies the listener’s perspective as the appropriate one for First Amendment analysis . . .”).

254. *See supra* notes 25–27 and accompanying text.

255. *Bellotti*, 435 U.S. at 777. Later in the opinion, the Court similarly rejected the contention that “speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to

Indeed, what follows in the Court's opinion in *Bellotti* is a recitation of the instrumental view of the First Amendment. The Court began its analysis by stating that the freedom of speech includes "the liberty to discuss publicly and truthfully all matters of public concern," and that freedom of discussion must encompass "all issues about which information is needed or appropriate. . . ."<sup>256</sup> The Court next explained that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."<sup>257</sup> The Court concluded that the corporation's spending concerning ballot measures "is the type of speech indispensable to decision making in a democracy."<sup>258</sup>

Finding that the law burdened First Amendment rights without serving a compelling governmental interest, the Court struck it down.<sup>259</sup> The majority embraced a liberty notion of the marketplace of ideas under which government regulation is viewed with suspicion and disfavor.<sup>260</sup> The government, under this view, should step aside in order to allow the broadest possible dissemination of speech regardless of whether that speech was uttered by a natural person.

The Court's analysis was in error because of its flawed foundational decision in *Buckley*. Again, the restriction at issue limited spending which may *produce* speech, not speech itself.<sup>261</sup> Hence, restrictions on *spending* actually do promote a free discussion of governmental issues by allowing listeners to hear from a greater variety of speakers—whether or not they speak by spending money.

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the satisfaction of a court, a material effect on its business or property." *Id.* at 784.

256. *Id.* at 776 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940)).

257. *Id.* at 776–77 (alteration in original) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

258. *Id.* at 777, 795.

259. *See id.* at 784. The fact that the Court faced a content-based restriction likely contributed to the Court's decision to strike down the law. Unlike other campaign finance restrictions, the limitation applied to only certain corporations (those whose business was materially affected by a proposed ballot measure) on certain topics (ballot measures materially affecting a corporation's business). *Id.* Adding to the content-based nature of the restriction, the law also provided that corporations could not spend money on ballot measures dealing with individual taxation. *Id.*

260. *See Pinaire, supra* note 31, at 510.

261. *See Bellotti*, 435 U.S. at 772.

Justice White took issue with the Court's treatment of the First Amendment interests at play. Consistent with the thesis of this article, Justice White explained that under an instrumental view of the First Amendment, the restriction itself could promote First Amendment rights.<sup>262</sup> Justice White correctly described what is lost, at least with respect to restrictions on corporate expenditures, as being not ideas, but "volume."<sup>263</sup>

This article perhaps goes even further than Justice White by contending that not only is little speech lost when *both* corporations and individuals are limited in how much they can spend, but that listeners actually benefit from such an arrangement by being able to hear a greater diversity of voices. Again, while both the majority opinion and Justice White's dissent espoused an instrumentalist view of the First Amendment, each arrived at different conclusions.<sup>264</sup>

ii. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley* (1981)

Following *Bellotti*, the Court struck down a limit on contributions to ballot measure committees in *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*.<sup>265</sup> While not a corporate spending case, the restriction at issue limits money given to an artificial entity, and the decision relies on *Bellotti*, again showing the dichotomy between the Court's approach to campaign finance restrictions.<sup>266</sup> The majority arguably adhered to an instrumentalist view of the First Amendment and focused on "the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues."<sup>267</sup> The majority found that the restrictions did not serve a legitimate govern-

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262. *See id.* at 801–02, 807. (White, J., dissenting); *see also* Wright, *supra* note 45, at 1012 (arguing that limits on contributions and expenditures "may well generate deeper exploration of the issues raised").

263. *Bellotti*, 435 U.S. at 821; *see also* *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 303 (1981) (White, J., dissenting); Batchis, *supra* note 39, at 48 ("By restricting corporate communications, the government is not depriving anyone of anything; it is merely declining to extend to a particular affirmative legal benefit (the corporate form) all aspects of the individual civic membership.").

264. *Compare Bellotti*, 453 U.S. at 795 (majority opinion), *with id.* at 821–22, 828 (White, J., dissenting).

265. 454 U.S. at 300.

266. *See id.* at 297–99.

267. *Id.* at 295.

mental purpose because contributions to ballot measure committees, unlike candidate campaigns, could not give rise to corruption or the appearance of corruption.<sup>268</sup>

Justice White, in his dissent, similarly adhered to an instrumentalist view of the First Amendment but countered that the contribution limits actually bolstered speech rights.<sup>269</sup> Justice White concluded, “If the ordinance has an ultimate impact on speech, it will be to assure that a diversity of views will be presented to the voters. As such, it will facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.”<sup>270</sup> Here again, Justice White argues that restrictions on spending can promote a greater breadth and depth of political debate.

iii. *Federal Elections Commission v. Massachusetts Citizens for Life, Inc.* (1986)

Eight years after *Bellotti*, the Court first reviewed the constitutionality of a law preventing corporations from spending general treasury funds to advocate for the election or defeat of candidates.<sup>271</sup> In *Federal Elections Commission v. Massachusetts Citizens for Life, Inc.* (“*MCFL*”), the Court carved out an exception to the general prohibition for small, ideological, non-profit corporations meeting a three-pronged test.<sup>272</sup> *MCFL* fell within this exception as it (1) was formed for the purpose of promoting political ideas, (2) did not have shareholders who would have an economic disincentive for leaving the organization should they disagree with the corporation’s political activities, and (3) had a policy of not accepting contributions from business corporations.<sup>273</sup>

The *MCFL* Court adopted an instrumentalist view of the First Amendment and in dicta recognized that unrestricted corporate expenditures could harm the marketplace of ideas.<sup>274</sup> The Court acknowledged the “concern over the corrosive influence of concen-

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268. *See id.* at 297.

269. *Id.* at 308 (White, J., dissenting).

270. *Id.* at 308 (quoting *Buckley v. Valeo*, 424 U.S. 1, 92–93 (1976)) (internal quotation marks omitted).

271. *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 241 (1986).

272. *Id.* at 263–64.

273. *Id.* at 264.

274. *See id.* at 257.

trated corporate wealth [that] reflects the conviction that it is important to protect the integrity of the marketplace of political ideas.”<sup>275</sup> There the majority spoke explicitly about limiting spending in relation to the importance of “free trade in ideas” as well as the healthy functioning of the marketplace of ideas.<sup>276</sup> The majority openly worried about corporate spending harming the political marketplace when “resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace.”<sup>277</sup>

The Court’s dicta in *MCFL* logically extended from its 1982 decision in *Federal Elections Committee v. National Right to Work Committee* (“*NRWC*”).<sup>278</sup> There, the Court upheld a portion of the FECA that prohibited corporations and corporate PACs from soliciting political funds from anyone but stockholders, corporate personnel and their families, and “members” of the corporation.<sup>279</sup> The *NRWC* Court noted that one purpose of the restriction was “to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political ‘war chests’ which could be used to incur political debts from legislators who are aided by the contributions.”<sup>280</sup> The *NRWC* Court cited to *Buckley* for the proposition that large financial contributions could lead to “the eroding of public confidence in the electoral process through the appearance of corruption.”<sup>281</sup> Preventing corruption or its appearance, therefore, bolstered the “integrity of [the] electoral process.”<sup>282</sup>

While for the three reasons stated above the Court found that spending by *MCFL* posed no such harm to the integrity of the electoral process,<sup>283</sup> the Court’s concern about the corrosive effects

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275. *Id.*

276. *Id.* (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)) (internal quotation marks omitted).

277. *Id.*

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

279. *Id.* at 201–02, 210 (quoting 2 U.S.C. § 441b) (2006).

280. *Id.* at 207 (citation omitted). The Court relied on this rationale in *Federal Election Commission v. Beaumont*, where it upheld a restriction on corporate contributions to federal candidates. 539 U.S. 146, 149, 163 (2003).

281. *Nat’l Right to Work Comm.*, 459 U.S. at 208.

282. *Id.* (quoting *United States v. UAW-CIO*, 352 U.S. 567, 570 (1957)) (internal quotation marks omitted).

283. *See supra* note 273 and accompanying text. The dissent in *MCFL* concluded that

that corporate spending could have on the political marketplace can perhaps be framed as a concern over the effects of unrestricted political spending on political equality.<sup>284</sup> The Court could not openly use the word “equality” in its opinion because of the *Buckley* Court’s statement that equality has no place in a First Amendment analysis.<sup>285</sup> This new, broader definition of corruption—which appears to be code for concerns about political equality—can encompass a fear of harming listeners’ interests. Pursuant to this model,

for the market to *truly* afford citizens a free exchange of ideas, honestly promote diversity of thought, and preserve generally open access and opportunities for all, the government must assume an interventionist role—regulating the system of exchanges in order better to serve the essential interests and values of the market.<sup>286</sup>

The Court’s fears logically extend to spending not only by corporations, but also by individuals. The Court’s reasons for distinguishing corporate spending from individual spending have more to do with the Court’s need to follow its decision in *Buckley*—to invalidate expenditure limits on individuals but leave open the possibility of upholding expenditure limits on corporations—than it does with any meaningful distinction between the two types of spenders.<sup>287</sup>

For instance, with respect to spending by MCFL, the Court stated that its fears about the corrosive effects of corporate spending were tempered by its conclusion that the “[r]elative availability of funds is after all a rough barometer of public support.”<sup>288</sup> This is a straw man. The Court admitted that this is not true with respect to business corporations,<sup>289</sup> and the theory similarly fails to hold water with respect to virtually every spending-speaker, including individuals and artificial entities. There is little to indicate that wealthy individuals and well-funded ideological corporations have funds because their political ideas are popu-

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the special characteristics of corporations justified the restrictions. *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 267 (1986) (Rehnquist, C.J., concurring in part and dissenting in part).

284. See Pinaire, *supra* note 31, at 525.

285. See generally *Mass. Citizens for Life*, 479 U.S. at 257.

286. Pinaire, *supra* note 31, at 520–21.

287. *Mass. Citizens for Life*, 479 U.S. at 257–58.

288. *Id.* at 258.

289. *Id.*

lar.<sup>290</sup> Most individuals make money because they are successful in the economic marketplace, not the political one. It is arguable these are the same individuals who contribute to ideological groups and PACs. That an ideological group has money may indicate nothing more than that that group has at least one wealthy donor. That a PAC is well-funded similarly may show little more than that the committee's spending is popular among some wealthy individuals. It hardly follows that the ability and willingness to spend money in the political marketplace demonstrates a certain level of public support.

Hence, while acknowledging that corporate expenditures could threaten the marketplace of ideas, and by extension listeners' interests, the Court found that danger lacking with respect to spending by MCFL.<sup>291</sup> Specifically, although the majority voiced concern about "the potential for unfair deployment of wealth for political purposes," it found that MCFL did not pose such a danger to the marketplace because of the three characteristics described above.<sup>292</sup> The Court concluded that "[v]oluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form."<sup>293</sup>

The Court's acknowledgment, in dicta, that political spending could threaten the marketplace of ideas, and thus listeners' interests, would serve as the basis for the Court's next major decision in the area of campaign finance law, *Austin v. Michigan Chamber of Commerce*.<sup>294</sup>

iv. *Austin v. Chamber of Commerce* (1990) & *Federal Elections Commission v. McConnell* (2003)

The Court's decision in *Austin v. Michigan Chamber of Commerce* further demonstrates the Court's adherence to an instrumental view of the First Amendment.<sup>295</sup> The Court's decision relies on the rationale in *Federal Election Commission v. NRWC*

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290. *Id.*

291. *See id.* at 263–64.

292. *Id.* at 259, 263–64.

293. *Id.* at 263.

294. *See* 494 U.S. 652, 659 (1990).

295. *See* Ortiz, *supra* note 23, at 275–76.

and dicta in *MCFL*, where the Court acknowledged, without using the language of equality, that restrictions on spending could promote speech by fostering political equality.<sup>296</sup>

In *Austin*, the Court reviewed the constitutionality of a state law modeled after the federal restriction at issue in *MCFL*.<sup>297</sup> The Michigan Chamber of Commerce did not fall within the *MCFL* exception because it: (1) was formed for a variety of purposes, (2) had members who might have an economic disincentive for leaving the organization if they did not agree with its political message, and (3) accepted a large percentage of its funds from for-profit corporations.<sup>298</sup> In sum, because the Michigan Chamber of Commerce lacked the characteristics present in *MCFL*, spending by that non-profit organization could threaten the integrity of the electoral process.<sup>299</sup> The Court therefore upheld the constitutionality of the law restricting the chamber's use of general treasury funds on electoral spending concerning candidates.<sup>300</sup>

In *Federal Elections Commission v. McConnell*, the Court reviewed the constitutionality of Congress' second major piece of campaign finance legislation, the Bipartisan Campaign Reform Act (commonly known as the McCain-Feingold Act).<sup>301</sup> There, the Court relied heavily on the dicta in *MCFL* and logic of *Austin* to uphold the restriction on corporations' use of general treasury funds for electioneering communications.<sup>302</sup>

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296. *Austin*, 494 U.S. at 661–63 (citing *Mass. Citizens for Life*, 479 U.S. at 263–65); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209–10 (1982)). Hence, we see two lines of corporate speech cases. Under both lines of precedent, the Court takes an instrumental view of the First Amendment and focuses on the rights of listeners. However, the Court reaches different conclusions based on whether it espouses a liberty-based or an equality-based view of the freedom of speech. See Ortiz, *supra* note 24, at 275.

297. *Austin*, 494 U.S. at 654–55.

298. *Id.* at 661–64.

299. *See id.* at 664–65.

300. *See id.* at 666, 668.

301. 540 U.S. 93, 132–33 (2003) (citing 2 U.S.C. § 437(h)), *overruled in part by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

302. *See id.* at 205 (quoting *Austin*, 494 U.S. at 660). The McCain-Feingold Act defined a new class of communications known as “electioneering communications.” Those communications (1) refer to a clearly identified candidate for federal office, (2) are made within sixty days of a general or thirty days of a primary election, and (3) are targeted to the relevant electorate. 2 U.S.C. § 434(f)(3)(A)(i) (2006); *see also* Overton, *supra* note 125, at 84–85 (“Victors in economic markets need not enjoy unlimited advantages in the political sphere.”).

Perhaps the most famous (and now infamous) portion of the Court's decision in *Austin* (echoed by the Court in *McConnell*<sup>303</sup> and mentioned in *dicta* in *MCFL*)<sup>304</sup> was its finding that the law "aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."<sup>305</sup> These "corrosive and distorting effects" would harm the marketplace of ideas and hence infringe upon the right to hear. As I discuss below, the Court backed away from this position in *Citizens United*, arguing that listeners' interests were harmed by being "deprived" of corporate speech.<sup>306</sup>

The Court's desire to guard against this "different" type of corruption is likely code for the Court's willingness to consider political equality as a compelling governmental interest. While the Court explicitly states that its decision is not about promoting equality,<sup>307</sup> it certainly can be understood as validating a law which seeks to do just that. Though the Court stated it was limiting spending of those whose wealth may have nothing to do with the popularity of their political views,<sup>308</sup> all spenders—whether corporations or people—may have amassed wealth for this reason.<sup>309</sup> The Court's real fear must therefore be the ability of spenders to skew the political marketplace.<sup>310</sup> Specifically, in *Austin*, the Court, citing *MCFL*, worried that "state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'"<sup>311</sup> If the marketplace is skewed, then

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303. See *McConnell*, 540 U.S. at 205 (quoting *Austin*, 494 U.S. at 660).

304. See *Austin*, 494 U.S. at 702 (citing *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 259–60 (1986)).

305. *Id.* at 660.

306. *Citizens United*, 558 U.S. at \_\_\_, 130 S. Ct. at 907.

307. Hasen, *supra* note 188, at 995.

308. *Austin*, 494 U.S. at 659 (citing *Mass. Citizens for Life*, 479 U.S. at 258).

309. Sunstein, *supra* note 107, at 1393 ("The correlation between public enthusiasm and the capacity to attract money is crude.").

310. See *FEC v. McConnell*, 540 U.S. 93, 211 (2003) (quoting *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 264 (1986)); *Austin*, 494 U.S. at 659; Hasen, *supra* note 188, at 995 (quoting Transcript of Oral Argument, *Citizens United*, 558 U.S. \_\_\_, 130 S. Ct. 876 (No. 08-205), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-205\[Reargued\].pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205[Reargued].pdf)).

311. *Austin*, 494 U.S. at 659 (quoting *Mass. Citizens for Life*, 479 U.S. at 257).

under an instrumentalist perspective, First Amendment interests are not promoted. Hence *Austin* and *McConnell* move the Court away from a liberty conception and toward an equality conception of the marketplace model.<sup>312</sup>

Justice Scalia, in his dissent in *Austin*, similarly adhered to an instrumentalist view of the First Amendment but argued to strike down the restriction based on his decision to prize the ideal of liberty.<sup>313</sup> He argued that the government could not be trusted to regulate political spending,<sup>314</sup> and saw the restriction as impermissibly allowing the government to censor the political debate.<sup>315</sup> Justice Scalia concluded that the restriction infringed on the free flow of the marketplace of ideas, a place where voters receive vital information about candidates.<sup>316</sup> While the majority viewed the restriction as guarding against the corrosive and distorting effect of money, which would harm the public debate,<sup>317</sup> Scalia viewed the restriction as threatening to “impoverish the public debate.”<sup>318</sup>

Justice Scalia repeated the familiar refrain that “there is no such thing as too much speech [because] the people are not foolish but intelligent, and will separate the wheat from the chaff.”<sup>319</sup> When in the minority, Justice Scalia has argued that the Court’s decision to uphold restrictions on campaign expenditures is based on an unfounded belief “that a healthy democratic system can survive the legislative power to prescribe how much political speech is too much, who may speak, and who may not.”<sup>320</sup>

Justice Scalia’s argument misses the mark. He is correct that those in favor of upholding campaign finance restrictions do see legislative power as promoting a democratic system—a system in

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312. See Pinaire, *supra* note 31, at 525–26.

313. *Austin*, 494 U.S. at 692–93 (Scalia, J., dissenting); see Pinaire, *supra* note 31, at 547 (“Marshall did not value speech any less than Scalia did; rather, each justice envisioned the marketplace of ideas in a different way.”). While Justice Scalia argued, according to the liberty conception, that an unregulated market best supports speech rights, Justice Marshall contended, according to the equality conception, that a regulated market best fosters speech rights. Pinaire, *supra* note 31, at 547.

314. *Austin*, 494 U.S. at 692–93 (Scalia, J., dissenting); Pinaire, *supra* note 31, at 511.

315. *Austin*, 494 U.S. at 679–80 (Scalia, J., dissenting).

316. *See id.* at 694.

317. *Id.* at 659–60 (majority opinion).

318. *Id.* at 694 (Scalia, J., dissenting).

319. *Id.* at 695.

320. *Id.*

which the volume of speech is not based on one's success in the economic marketplace. However, because Justice Scalia equates money with speech he misses the drowning-out effect that occurs when money flows unregulated throughout the political marketplace. Justice Scalia, consistent with a libertarian view of the First Amendment, views restrictions as inherently counterproductive, but fails to recognize that restrictions on *money* (not on speech itself) may promote speech.

Similar to Justice Scalia's position, Justice Kennedy, who also dissented in *Austin*, embraced an instrumentalist view of the First Amendment and concluded that the restriction "operates to prohibit information essential to the ability of voters to evaluate candidates."<sup>321</sup> Echoing the classic words and phrases epitomizing the instrumentalist view of the First Amendment, Justice Kennedy argued that "[w]e confront here society's interest in free and informed discussion on political issues, a discourse vital to the capacity for self-government."<sup>322</sup> Justice Kennedy believed that "[t]he suggestion that the government has an interest in shaping the political debate by insulating the electorate from too much exposure to certain views is incompatible with the First Amendment."<sup>323</sup>

Yet what Justice Kennedy, like Justice Scalia, overlooks is that the government is not altering the views spoken in the marketplace. As Judge Skelly Wright explained, restrictions on campaign spending affect intensities, not ideas.<sup>324</sup> Thus Justice Kennedy, similar to Justice Scalia, espoused a liberty conception of the marketplace of ideas.<sup>325</sup> Both feared governmental intervention into the marketplace and prized a *laissez faire* approach to the First Amendment.

v. *Citizens United v. Federal Election Commission* (2010)

Finally, the Court's now-infamous decision in *Citizens United*<sup>326</sup> marked an abrupt change of course in the Court's campaign

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321. *Id.* at 698 (Kennedy, J., dissenting).

322. *Id.*

323. *Id.* at 706.

324. Wright, *supra* note 45, at 1019.

325. Pinaire, *supra* note 31, at 511–12.

326. *Citizens United v. FEC*, 558 U.S. \_\_\_, 130 S. Ct. 876 (2010).

finance jurisprudence. There, the Court struck down the same restriction at issue in *McConnell*.<sup>327</sup> Citizens United is a non-profit, ideological corporation that did not fit within the exception carved out in *MCFL* because it accepted some funds from for-profit corporations.<sup>328</sup> Citizens United wanted to use general treasury funds to run a feature length movie, and advertisements promoting it on Video-On-Demand.<sup>329</sup>

Writing for the majority, Justice Kennedy—consistent with his dissenting view in *Austin*—championed an instrumentalist view of the First Amendment under which liberty, not equality, is the prized ideal.<sup>330</sup> The Court focused on the importance of speech as “an essential mechanism for democracy.”<sup>331</sup> The opinion relied on *Buckley* to hold that listeners need to be able to hear unlimited corporate electioneering communications in order to bolster and protect self-government.<sup>332</sup> Consistent with an instrumentalist view of the First Amendment, Justice Kennedy also cited to *Bellotti* and proclaimed that the source of the speech, whether it be an individual or a corporation, was of no moment.<sup>333</sup>

The Court criticized *Austin* for, according to this libertarian perspective on the instrumentalist view, harming First Amendment values by interfering with the marketplace of ideas.<sup>334</sup> Justice Kennedy described the need for ideas to compete in the marketplace without government interference.<sup>335</sup>

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327. *Id.* at \_\_\_, 130 S. Ct. at 886.

328. *Id.* at \_\_\_, 130 S. Ct. at 891.

329. *Id.* at \_\_\_, 130 S. Ct. at 887–88.

330. *Id.* at \_\_\_, 130 S. Ct. at 889. Justice Kennedy stated, “The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day.” *Id.* at \_\_\_, 130 S. Ct. at 889. He also stated, “We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on [the] subject.” *Id.* at \_\_\_, 130 S. Ct. at 892.

331. *Id.* at \_\_\_, 130 S. Ct. at 898.

332. *Id.* at \_\_\_, 130 S. Ct. at 898.

333. *Id.* at \_\_\_, 130 S. Ct. at 904. The Court stated, “Political speech is ‘indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual,’” and that “the worth of speech ‘does not depend upon the identity of its source, whether corporation, association, union, or individual.’” *Id.* (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978)).

334. *Id.* at \_\_\_, 130 S. Ct. at 906 (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2009)).

335. *Id.*

The majority of the Court in *Citizens United* is no doubt correct that a functioning marketplace of ideas is vital to democratic self-government and greatly benefits listeners. However, ideas cannot compete freely in the marketplace unless the government limits the *manner* or *volume* of speech.<sup>336</sup>

### C. *The Court's Jurisprudence Leads to a Drowning-Out Effect*

As the forgoing analysis demonstrates, whether upholding or striking down campaign finance restrictions, the Court adheres to an instrumental view of the First Amendment. The differences in the outcomes of the Court's decisions is explained by whether the majority of the Court prizes the ideal of liberty or that of equality. The Court's rejection of the idea that promoting equality is properly within the purview of the government is based on its erroneous conclusion that the government restricts the speech of some to promote the speech of others.<sup>337</sup> It is not. Instead, the government in fact restricts the use of money, which may produce speech, in order to, among other things, protect the speech rights of others. Unfortunately in the few instances in which the Court gives credence to the idea of promoting political equality—such as in *NRWC*, *MCFL*, *Austin*, and *McConnell*—it could not be open about its rationale and masked its purpose in language which spoke about a new type of corruption.<sup>338</sup> The Court's error was two-fold. First, it equated money with speech and hence concluded that restrictions on spending could harm speech rights severely.<sup>339</sup> Second, having improperly defined the analytical framework, the Court failed to give due deference to political equality as an important governmental interest.<sup>340</sup>

Hence, while purporting to protect speech rights under an instrumentalist, listener-based view of the First Amendment, after

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336. See also Batchis, *supra* note 39, at 46 (“After *Citizens United* . . . individuals outside the corporation whose voices will be potentially . . . overwhelmed by the collective and concentrated power accrued as a result of legal grants by the state . . .”).

337. See *Citizens United*, 558 U.S. at \_\_\_, 130 S. Ct. at 898–99 (“By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice.”).

338. See Hasen, *supra* note 182, at 4 (discussing the Supreme Court’s willingness, by 1990, to recognize the effects of concentrations of wealth on American politics).

339. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

340. The Court, in fact, overruled *Austin* and a portion of *McConnell*. *Citizens United*, 558 U.S. at \_\_\_, 130 S. Ct. at 913.

its decision in *Citizens United* the Court's current campaign finance jurisprudence deprives listeners of vital electoral speech. Indeed, the Court's decisions often have "seemed to impoverish, rather than enrich public debate and thus threatened one of the essential preconditions for an effective democracy."<sup>341</sup> The result is that the public debate is dominated by spending-speakers.<sup>342</sup>

The so-called drowning out effect<sup>343</sup> is a real one, for "[w]hat is said determines what is not said."<sup>344</sup> Scarcity is the rule in politics and "[t]he opportunities for speech tend to be limited, either by the time or space available for communicating or by our capacity to digest or process information."<sup>345</sup> Members of the public do not have "infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere."<sup>346</sup>

This is true even though the Internet greatly decreases fears of physical scarcity.<sup>347</sup> Members of the electorate still get much of their campaign-related information from paid sources—television, radio, and slate mailers. In addition, those sources deliver campaign information in a different way than the Internet does, save

341. Fiss, *supra* note 24, at 1407.

342. *Id.* at 1412. Fiss further explained,

The market—even one that operates smoothly and efficiently—does not assure that all relevant views will be heard, but only those that are advocated by the rich, by those who can borrow from others, or by those who can put together a product that will attract sufficient advertisers or subscribers to sustain the enterprise.

*Id.* at 1412–13.

343. See, e.g., *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 809–12 (1978) (White, J., dissenting); see also *Citizens United*, 558 U.S. at \_\_\_, 130 S. Ct. at 974–76 (Stevens, J., concurring in part and dissenting in part); Wright, *supra* note 44, at 1013 ("[W]e would do well to focus our concern on the danger that certain individual candidates will find *their* speech drowned out by well-heeled opponents who can vastly outdistance them in the spending race—exactly the danger that the overall expenditure limits were meant to minimize.").

344. Fiss, *supra* note 24, at 1411.

345. *Id.* at 1412. Fiss later argues that "whenever the state adds to public debate it is also taking something away." *Id.* at 1420. I argue that all the state takes away when limiting expenditures is volume, but not speech itself. I therefore worry less about striking the correct balance when it comes to limiting campaign expenditures.

346. *Citizens United*, 558 U.S. at \_\_\_, 130 S. Ct. at 975 (Stevens, J., concurring in part and dissenting in part).

347. See Hasen, *supra* note 188, at 1003 ("[A]ntidistortion arguments are premised on the idea that voters respond to the sheer amount of advertising for a candidate in an election. It is not clear though whether the 'drowning out' idea is more about the wealthy buying up all the available advertising space on limited media such as television than it is about large spenders so inundating viewers with a message that viewers are persuaded to vote in a particular way, even if there is contrary advertising from others.").

pop-up advertisements. When people get campaign information over the television or radio, or through the mailbox, they do not request that information; they are passive participants in the receipt of that information. By contrast, when people obtain campaign information via the Internet, or even through a book, they likely do seek out that information; they are active participants in the receipt of that information.<sup>348</sup>

Hence, unregulated spending allows those with the most funds to have the biggest microphone. However, economic power should not be transformed automatically into political speech.<sup>349</sup> In this paradigm, those with the most money can drown out speech that otherwise would reach listeners and contribute to the marketplace of ideas and democratic self-government.<sup>350</sup> The ability of spending-speakers to disseminate their messages “loudly and repeatedly because of their economic power and influence effectively silences other, excluded and marginalized voices.”<sup>351</sup> This leads to “an unequal exposure of particular ideas, and the stifling and co-opting of more radical and imaginative ideas about politics and society.”<sup>352</sup>

## V. CONCLUSION

After falsely equating money with speech, the Court has embarked on a decades-long journey to demonstrate that its decisions promote speech rights. When analyzing campaign finance restrictions, the Court has adopted an instrumentalist view of free speech, under which it most often prizes a liberty or personal

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348. The majority of the Court in *Citizens United* seemed to reject the argument that the mode of communication should affect the Court’s analysis. 558 U.S. at \_\_\_, 130 S. Ct. at 891. The dissent vehemently disagreed. *Id.* at \_\_\_, 130 S. Ct. at 433–34 (Stevens, J., concurring in part and dissenting in part).

349. There is no doubt that when speakers spend large amounts of money to disseminate a message they often can reach a larger audience more frequently than they could if they were spending less money to disseminate their messages. This article does not advocate a ban on political expenditures. Instead this article advocates for a new doctrinal approach to campaign finance restrictions. Under that approach it is likely that the Court would uphold more carefully tailored restrictions than it currently does, and in doing so could promote First Amendment rights.

350. See, e.g., Overton, *supra* note 125, at 101 (“Widespread participation . . . exposes decision makers to a variety of ideas and viewpoints, which ensures fully informed decisions.”).

351. Balkin, *supra* note 47, at 378–79 (explaining one argument espoused by those who critique the *Buckley* Court’s decision to equate money with speech).

352. *Id.* at 379.

autonomy ideal over an equality ideal to strike down limits on campaign spending. The Court need not have taken this path. Instead, it could have—and should have—recognized that money is the antecedent to speech and that restrictions on political spending should be subject to a relatively relaxed standard of review.

By instead employing strict scrutiny to limits on campaign spending, the Court, in an effort to protect First Amendment rights, instead has often harmed them. The Court's analytical framework frequently prizes fear of government intrusion over the reality of private manipulations.<sup>353</sup> The Court's framework thus effectively prohibits the government from enacting legislation to protect freedom of expression in the political marketplace from unlimited spending that harms the rights of listeners and non- and low-spending speakers alike.<sup>354</sup>

While initially it may seem counterintuitive, in this unique setting, carefully tailored government regulation actually can promote the First Amendment interests of listeners.<sup>355</sup> Simply put, "expenditures of political actors might have to be curbed to make certain all views are heard."<sup>356</sup> This article has sought to show that through such measures the government would not be silencing the speech of some to promote the speech of others—but

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353. James A. Gardner, Comment, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 893 (1984) ("[T]he Court's traditional interpretation of the first amendment in election law cases merely substitutes for the evil of government abuse the evil of private abuse of the electoral system by individuals with the resources to exploit voter irrationality.").

354. *Id.* at 928–29 ("Unlimited speech through money threatens popular democracy and, in turn, the general availability of rights such as freedom of speech which popular democracy ensures.").

355. See Sunstein, *supra* note 183, at 292 ("Efforts to redress economic inequalities, or to ensure that they do not translate into political inequalities, should not be seen as impermissible redistribution, or as the introduction of government regulation where it did not exist before. Instead we should evaluate campaign finance laws pragmatically in terms of their consequences for the system of free expression."); Sunstein, *supra* note 107, at 1399 ("A system of unlimited campaign expenditures should be seen as a regulatory decision to allow disparities in resources to be turned into disparities in political influence."); Wright, *supra* note 45, at 1019 ("[F]ar from stifling First Amendment values [campaign reform laws] actually promote[] them.").

356. Fiss, *supra* note 24, at 1415. Fiss further argued, "We should learn to recognize the state not only as an enemy, but also as a friend of speech; like any social actor, it has the potential to act in both capacities, and, using the enrichment of public debate as the touchstone, we must begin to discriminate between them." *Id.* at 1416; see also Pinaire, *supra* note 31, at 491 ("[W]hile a 'free market' of ideas has traditionally implied the (near) absence of restrictions on speech, restrictions are now sanctioned—and even, in some cases, recommended—in the interest of a genuinely open, ordered, and accessible marketplace of ideas.").

would instead be limiting the *manner* of speech or the volume of speech in order to foster the rights of listeners.<sup>357</sup>

It is therefore incumbent upon the government to pass restrictions not on speech, but on the manner or volume of speech, which allow other speakers to be heard.<sup>358</sup> Professor Owen Fiss elucidated a useful analogy to this phenomenon, known as the “heckler’s veto.”<sup>359</sup> Under this doctrine, the government must step in and allow individuals the opportunity to speak when an angry mob otherwise would prevent others from speaking.<sup>360</sup> The same is true in the political marketplace when high-spenders prevent non- and low-spending speakers and listeners from meaningfully speaking and listening. Hence government regulation of the way campaigns are financed is needed to preserve speech rights.

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357. See, e.g., Fiss, *supra* note 24, at 1425. Fiss assumes that spending money is equivalent to speaking but nevertheless concludes that restrictions may be necessary to promote First Amendment interests. *Id.* at 1408, 1425. Fiss concludes that

to serve the ultimate purpose of the first amendment we may sometimes find it necessary to “restrict the speech of some element of our society in order to enhance the relative voice of others,” and that unless the Court allows, and sometimes even requires, the state to do so, we as a people will never truly be free.

*Id.* at 1425.

358. *Id.* at 1420 (“[Campaign finance laws] seek to enhance the public debate by allowing the full range of voices to be heard, by assuring that the ideas of the less wealthy are also heard.”).

359. *Id.* at 1416–17 (citation omitted); see also Pinaire, *supra* note 31, at 536–37 (explaining that under the civility conception of the marketplace, unregulated spending should be treated the same as an obnoxious attendee at a town hall who should be quieted in order to promote civil discourse).

360. Fiss, *supra* note 24, at 1416–17; see also Neuborne, *supra* note 104, at 4–5 (explaining that if one speaker drowns out the voice of another, then the first speaker has exercised his autonomy at the cost of the second speaker’s autonomy, and that “we seek to resolve conflicting claims of political autonomy by a compromise designed to give each claimant maximum freedom consistent with respect for the other’s freedom.”).