V. évfolyam
2011/3. szám

De iurisprudentia et iure publico
JOG- ÉS POLITIKATUDOMÁNYI FOLYÓIRAT
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Tanulmány

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Campaign Finance Law and Corporate Political Speech in the United States in Light of Citizens United v. FEC

1. Introduction

2010 started with a bang. The foggy, chilly days of early January brought with them a 5-4 majority decision by the U.S. Supreme Court in Citizens United v. Federal Election Commission[2]. It was a decision that took no time in shaking the country up from its holiday spirits by once again revealing the deep divide setting apart Americans with regards to corporate speech and campaign finance legislation. The decision, written by Justice Kennedy, showing none of the alleged restraint of constitutional avoidance, overruled two precedents[3] and essentially left the Bipartisan Campaign Reform Act of 2002[4] ('BCRA') meaningless.

The ruling, called a "doctrinal earthquake" -as well as a political and practical one - by the New York Times[5] and marked as "a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans" by President Barack Obama[6], while at the same time evoking cries of joy and celebration in those on the other side of the

[1] E-mail: oliradics@hotmail.com. *Author's note*: the present article would not have been possible without the generous support of the Rosztoczy Foundation. The author would also like to thank the help and support of Dean Phillip J. Closius (University of Baltimore School of Law) and Dr. Tamás Nagy (SZTE-ÁJTK).

[2] Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010).

[3] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), upholding restrictions on corporate spending to support or oppose political candidates; McConnell v. Federal Election Commission, 540 U.S. 93 (2003), upholding part of the Bipartisan Campaign Reform Act of 2002 (restricting campaign spending by corporations and unions).

[4] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002). Also known as the McCain-Feingold law after the sponsors of the legislation, it was signed into law by President George W. Bush on March 27, 2002.

[5] *See*: http://topics.nytimes.com/top/reference/timestopics/subjects/c/campaign_finance/index.html (last visited June 28, 2011).

[6] *See*: http://www.whitehouse.gov/the-press-office/statement-president-todays-supreme-court-decision-0 (last visited June 28, 2011).

debate, ruled that government cannot ban political spending by corporations in candidate elections.

In January 2008, Citizens United, a nonprofit corporation, released a documentary ('Hillary'), critical of then-Senator Hillary Clinton, a candidate for the Democratic Party's Presidential nomination. Anticipating that it would make Hillary available on cable television through video-on-demand within 30 days of primary elections, Citizens United produced several television ads to run on broadcast and cable television. These plans potentially conflicted with several provisions of Section 203 of the BCRA that regulates the purchase of electioneering communications made within 60 days of a general election or 30 days of a primary election. Section 203 does not allow corporations or labor unions to fund electioneering communications from their general treasury funds (with certain exceptions), and even permissible electioneering communications are subject to the disclosure and disclaimer requirements of the Act[7]. Citizens United, in anticipation of possible penalties, sought an injunction to block the Federal Election Commission from enforcing these sections on the grounds that they violated the First Amendment to the United States Constitution[8]. The United States District Court for the District of Columbia[9] did not grant the request, noting that the Supreme Court of the United States upheld Section 203 of the BCRA in McConnell. The Supreme Court, however, reversed the judgment of the court below, overruling Austin and McConnell. In the immediate aftermath of the decision, debate about campaign finance and corporate speech has once again flamed up and is not likely to subdue for the foreseeable future, as both Congress and the President have reaffirmed their support for meaningful campaign finance legislation.

The controversy surrounding Citizens United is by no means newly born. Ever since the rise of large corporations and the increase in their role in American political life, their influence in politics has been widely contested and often openly attacked by the public, legal scholarship and the legislature itself. Efforts at curtailing the role of money in politics in

[7] Section 201 of BCRA contains a donor disclosure provision for electioneering communications. Persons who disburse an aggregate of USD 10,000 or more a year for the production and airing of electioneering communications are required to file a statement with the FEC. The statement has to include the names and addresses of persons who have contributed in excess of USD 1,000 to the funding of the communication. Section 311 of the BCRA contains a disclaimer provision for electioneering communications. The entity responsible for the communication, if not authorized by the candidate or the candidate`s political committee, must contain a statement that the organization is responsible for the content of this advertising.

[8] U.S. CONST. amend. I.

[9] As set by Section 403 of the BCRA, constitutional challenges to the Act are to be adjudicated by a three-judge panel of the U.S. District Court for the District of Columbia.

general, and more specifically to limit the political influence corporations have gained since the turn of the 20th century, have been numerous. Unfortunately, success has been elusive in this respect and recent decades have seen an unparalleled rise in campaign funding costs, a tendency with seemingly no end in sight. It seems that "money, like water, will always find an outlet"[10], as the Supreme Court put it rather prophetically in McConnell. Citizens United became just another way to tear down the dam and let the flood in.

2. A History of Campaign Finance Legislation in the United States

2.1. Federal Legislative Efforts at Campaign Finance Reform

2.1.1. Campaign Finance Legislation Prior to 1971

Campaign finance regulation is by no means a new phenomenon. Concerns about the growing role of money and corporations in election finance made the question of campaign finance reform part of the political debate as early as the beginning of the twentieth century, when large corporations started to make a more pronounced, and as such, rather more noticeable impact on the political sphere[11]. Professor Hager thus describes the process:

> "(C)oncern with corporate power over democratic processes in America grew sharply toward the close of the nineteenth century as concentrations of private capital, in the form of corporations and trusts, reached unprecedented size and power. These huge pools of capital raised the frightening prospect that candidates and elections might actually be bought in a systematic fashion."[12]

As corporations grew more powerful, and gained a larger role in politics by providing funds for campaigns, concerns over the corporate takeover of politics simultaneously increased and reached a tipping point with the New York life insurance scandal - otherwise

[10] McConnell v. FEC, 540 U.S. at 226.

[11] Bradley A. Smith distinguishes among three historical stages of campaign finance regulation. The first stage, which he calls the era of "De Jure Laissez Faire", lasted from the founding of the country until the late 19th century. During this period, campaign finance regulation was virtually non-existent. The second phase, which he calls "De Facto Laissez Faire", lasted from the late 19th century until 1974, marking a period of slow regulation and little enforcement. The third and final stage started in 1974, and lasts up to this day and it is characterized by heavy regulation. See Bradley A. Smith, The *John Roberts Salvage Company: After McConnell, A New Court Looks to Repair the Constitution*, 68 OHIO ST. L.J. 891, 901-902.

[12] Mark M. Hager, *Bodies Politic: The Progressive History of Organizational 'Real Entity' Theory*, 50 U. PITT. L. REV. 575, at 639.

known as the "Great Wall Street Scandal" - of 1905[13], when the discovery of large campaign contributions made by insurance company management from the company assets prompted public outrage and the first thorough investigation, which eventually led to the first federal ban on corporate campaign contributions[14] in the form of the Tillman Act of 1907[15], forbidding any national bank or corporation to make a contribution in connection with an election to any political office. The Tillman Act was soon followed by the Publicity Act of 1910[16], providing for the publicity of contributions made for the purpose of influencing elections for the U.S. Congress, and then the Federal Corrupt Practices Act of 1925 ('FCPA')[17], which essentially incorporated the disclosure rules of its 1910 predecessor[18]. The FCPA served as the primary campaign finance law until its eventual (and timely) repeal with the Federal Campaign Act of 1971 ('FECA')[19]. Inherent loopholes largely undermined the FCPA's force. Meaningful disclosure never followed suit, as the enforcement mechanisms needed for that were on the most part non-existent. Reports were to be filed in various forms and reporting was rarely done on a regular basis. Access to the reports was inconvenient and the spending limits put in place by the FCPA went largely unenforced as well. Due to these problems, the FCPA never reached its goal.

[13] For a detailed history behind the purposes of the Tillman Act and the Great Wall Street Scandal, *see* Adam Winkler, *„Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L. J. 871. Professor Winkler argues that the Tillman Act was prompted not only by a concern for corruption in the political process, but also by an urgent call to protect the interests of the shareholders. *Id*. at 873-874, 918-926.

[14] On the history of federal campaign finance legislation, *see* Anthony Corrado, Money and Politics: A History of Federal Campaign Finance Law, in THE NEW CAMPAIGN FINANCE SOURCEBOOK (Anthony Corrado et als. eds., Brookings Institute 2005), at 7-48.

[15] 34. Stat. 864 (1907). For a detailed description of the purposes of the Tillman Act, see FEC v. Beaumont, 539 U.S. 146 (2003). *See also:* Adam Winkler, *supra* note 13, at 877-881, 918-927.

[16] 36 Stat. 822 (1910).

[17] 43 Stat. 1053 (1925).

[18] The FCPA required all multistate political committees, as well as Senate and House candidates, to file quarterly reports listing all contributions of $100 and above in nonelection as well as election years.

[19] Federal Election Campaign Act, Pub. L. 92-225, 86 Stat.3 (1972). The FECA was complimented by the Hatch Act, otherwise known as the Clean Politics Act, of 1940, which regulated political activity by certain federal workers and solicitation of contributions from federal public works program payroll workers, and the Taft-Hartley Act, also known as the Labor Management Relations Act, of 1947, which revived certain elements of the 1943 Smith-Connally Act (War Labor Disputes Act), which prohibited labor unions, who had by then become an important source of campaign contributions, from using general treasury funds to make political contributions to federal candidates. The Smith-Connally Act, originally adopted as a wartime measure, expired six months after the end of World War II. The Taft-Hartley Act revived the prohibition on union contributions from general treasury funds to federal campaigns. It also prohibited expenditures by labor unions and corporations in connection with federal elections. The unions responded by establishing 'political action committees' (PACs) in order to circumvent the contribution and expenditure regulations. PACs collected contributions from members and used the funds to make contributions to candidates and campaigns.

2.1.2. The Federal Election Campaign Act

The 1970s brought with it a breath of fresh air, however short-lived, with regards to campaign finance reform. The FECA, dispensing with the mostly lifeless body of the FCPA, imposed several limits on contributions and media expenditures of the candidate himself[20], strengthening the prohibitions on corporate and union contributions and introducing mandatory disclosure requirements for campaign contributions. The original FECA's constitutionality was never tested in courts, despite concerns raised following its enactment. This, however, was not due to the Act's constitutionally impeccable nature (*truly, even if theoretically possible, when does that ever really matter?*), but rather to a little affair better known publicly as *Watergate*. The Watergate investigations revealed serious financial abuses during the 1972 federal elections, and that, together with a disillusioned public opinion more wary than ever of Washington D.C., led Congress to introduce a new string of campaign finance regulations in 1974 under the Federal Election Campaign Act Amendments[21], which fundamentally changed the original law.

The newly FECA imposed stringent limits on political contributions[22], replaced the spending limits on media expenditures with aggregate spending limits for federal election campaigns[23], and restricted the amount a party can contribute to a candidate`s campaign[24]. The disclosure provisions enacted by the 1971 law were also strengthened and the amendments set up the *Federal Election Commission*, an independent, bipartisan agency, to administer and enforce the law. As one of the most innovative steps of the new law, the FECA also established a new, optional, full public funding scheme for presidential general election

[20] The ceilings imposed on media expenditures were motivated by the concern that media costs were the main cause of the constant, seemingly unstoppable rise of campaign costs.

[21] 88 Stat. 1263 (1974).

[22] Both the FECA and its amendments set the limit for personal contributions by candidates and immediate family members at $50,000 for presidential and vice presidential candidates, $35,000 for Senate candidates, and $25,000 for House candidates. Additional restrictions were also provided for, such as individual contributions were limited to $1,000 per candidate in any primary or general election and no more than $25,000 in annual aggregate contributions to all federal candidates or political committees. Political committees could donate $5,000 per election for each candidate, with no aggregate limit. Independent expenditures by individuals or groups on behalf of a candidate were limited to $1,000 per year.

[23] Under the amended FECA, Senate candidates could spend no more than $100,000 or $0.08 multiplied by the voting-age population of the state in a primary election, and no more than $150,000 or $0.12 multiplied by the state`s voting-age population in a general election. House candidates in multidistrict states could spend no more than $70,000 in each primary and general election. Presidential candidates could spend no more than $10 million in a nomination campaign and no more than $20 million in a general election.

[24] National party committees could spend no more than $10,000 per candidate in House general elections; $20,000 or $0.02 multiplied by the voting-age population for each candidate in a Senate general election and $0.02 times the voting-age population in presidential elections. The major parties could spend no more than $2 million in national nominating conventions, whereas minor parties were limited to lesser amounts.

campaigns[25] and public matching subsidies for presidential primary campaigns[26], which have proved to be a working solution.

Sounds like a fairy tale. Alas, as it often is with campaign finance legislation, *it did not last long*. The newly amended FECA was seriously gutted by the U.S. Supreme Court's 1976 decision in Buckley v. Valeo[27] and the law once again had to undergo a number of major changes, enacted by the 1976 FECA Amendments[28]. The Buckley decision, discussed in detail in the following section, has essentially set the course for campaign finance reform for a long time to come. Buckley is important for a number of reasons, some of which need to be discussed before proceeding any further.

First, Buckley essentially held that money is a form of political speech, and as such, it is entitled to First Amendment protection. This is something that will come back to haunt us later on in Citizens United.

Second, the Court decided to treat campaign *contributions* and *independent expenditures* differently, since a "restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached"[29] and therefore limits on independent expenditures "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech"[30]. By contrast, the Court found that a limit on political contributions to a candidate or campaign organization does not represent a direct restraint on political speech, instead it "entails only a marginal restriction upon the contributor`s ability to engage in free communication"[31] and such restriction could be justified by the government`s interest in

[25] The program established that presidential general election candidates from major parties could receive the full amount authorized by the spending limit, if they agreed to forego raising additional private money. Qualified minor party and independent candidates were to receive a share of the subsidy based on the proportion of the vote received in the prior election. Postelection funds were also available on a proportionate basis for new and minor parties, if the percentage of the vote in the current election entitled them to a larger subsidy than they had received.

[26] In primary election campaigns, the public matching funds would be available based upon the fulfillments of certain fundraising requirements, such as raising $5,000 in contributions of $250 or less in at least twenty states. Eligible candidates were to receive public monies on a dollar-for-dollar basis for the first $250 contributed by an individual. The maximum amount for a candidate to receive under the program was half of the spending limit. The program was funded by a voluntary tax check-off established (established by the Revenue Act of 1971), which enabled individuals to designate $1 of their tax payment for the Presidential Election Campaign Fund.

[27] Buckley v. Valeo, 424 U.S. 1 (1976).

[28] 90 Stat. 475 (1976).

[29] Buckley, 424 U.S. at 19.

[30] *Id*.

[31] *Id*. at 20-21.

preventing corruption and the appearance of corruption[32]. In accordance with these statements, the Court decided to strike down the limits the FECA and its amendments set on independent expenditures, while the limits on contributions set forth by the Act were upheld against the First Amendment challenge.

Under the newly amended FECA, contributions to federal elections were subject to limitation in both source and size, and were to be fully disclosed. Unions and corporations were not allowed to make such contributions at all. Contributions made solely for the purpose of influencing state or local elections did not have to adhere to the Act`s above mentioned limitations and disclosure requirements; this development lead to the increased use of '*soft money*'[33], money donated by individuals, unions and corporations to political parties for party-building and grass-roots activities, which provided an ample loophole to circumvent the FECA`s provisions. Soft money made its way to the federal elections in alarming amounts in the 1980`s and 1990`s, and became a cause for major concern.

Besides the treatment of money as a form of political speech and thus making it worthy of the highest form of First Amendment protection, the distinction between contributions and independent expenditures and the eventual rise of soft money, another major consequence of the Buckley decision was the distinction between '*express advocacy*' and '*issue advocacy*'. The Buckley court, to avoid constitutional vagueness, construed the FECA`s disclosure requirements and expenditure limitations narrowly "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office"[34]. From this developed the '*magic words*' test, as a sort of boundary separating express advocacy and issue advocacy. Express advocacy, that is advertising using words such as " Elect John Doe" or "Defeat Jane Doe", was to be funded only through hard money, which of course was subject to the FECA`s limitations[35]. Issue advertising, that is political advertising that avoided the use of such words, could be funded by soft money contributions as well, which also played a part in the enormous increase in the use of soft money in federal elections.

[32] Buckley, 424 U.S. at 26-28.
[33] As opposed to hard money, which means direct contributions to candidates, and as such, subject to the FECA rules, soft money is given to the political parties, and up until the enactment of the BCRA, was unregulated under federal law.
[34] Buckley, 424 U.S. at 44.
[35] Expenditures that expressly advocate the election or defeat of a clearly identified candidate are to be treated as contribution, if the entity that is making the expenditure coordinates with the candidate.

2.1.3. The Bipartisan Campaign Reform Act

As public concern grew over the strength and effectiveness of the FECA, especially in light of the large role of soft money donations and the increased use of issue advocacy, Congress considered several campaign finance reform proposals throughout the 1980s and the 1990s, but it was not until 2002 that major legislation followed suit in the form of the Bipartisan Campaign Reform Act - also called the McCain-Feingold Act -, which amended the FECA, the Communications Act of 1934 and other parts of federal law. The Act, which represents the most major change in campaign finance legislation since the 1970s, held as its primary purpose to address the exponentially growing problems posed by soft money and issue advocacy advertising.

The law prohibits national party committees, federal officeholders and candidates from soliciting, receiving, spending, transferring, or directing soft money (funds that are not subject to federal contribution limits and disclosure requirements)[36]. The issue advocacy problem was targeted in a way that would move beyond the "magic words" test put forward by Buckley by establishing a new regulatory standard for express advocacy, defining "electioneering communications" as any broadcast, cable or satellite communications referring to a clearly identified candidate made within sixty days of a general election or thirty days of a primary election and targeting the electorate of the candidate[37]. The law employs an alternative standard as well for any broadcast, cable, or satellite communication that promotes, supports, attacks or opposes a federal candidate and suggests no plausible interpretation other than as an exhortation to vote for or against a candidate. Communications that qualify as electioneering communications could not be funded by corporate or union funds[38]. This aspect of the law came under close scrutiny in McConnell and then once again in Citizens United, and the consequent Supreme Court decision has largely reshaped this part of the legislation[39].

[36] Bipartisan Campaign Reform Act of 2002, 116. Stat. 81 (2002). Recognizing that such an extensive ban on soft money will dramatically reduce the revenues of national party committees, the legislation increased some contribution limits and indexed them for inflation. The aggregate amount of hard money that an individual could contribute to candidates, parties and PACs, was raised to $95,000 per election cycle (indexed for inflation), and it doubled the aggregate ceiling to $50,000 (from $25,000) per election year. The annual limit on contributions to a national party committee was raised to $25,000 and individual contributions to candidates were raised to $2,000 (from $1,000).

[37] *Id*. at §203.

[38] *Id*. at §101.

[39] Besides the above, the BCRA also adopted a 'millionaire provision', raising the limits on individual and political party contributions for a Senate candidate whose opponent exceeds a threshold amount based on the

The major provisions of the BRCA were upheld by the Supreme Court in McConnell v. Federal Election Commission in 2003[40], and have been subjected to review once again in Citizens United v. FEC. While McConnell was a favorable decision to BCRA, Citizens United served a serious blow to the Act, which will largely affect its efficacy in terms of regulating corporate political spending, one of the main objectives of the law.

2.2. The Supreme Court and Campaign Finance Legislation

The Supreme Court`s treatment of campaign finance reform has been less than unequivocal in the past forty years. Starting with its much-contested decision in Buckley v. Valeo, the campaign finance jurisdiction of the Court has resulted in a campaign finance regulatory system that – no doubt already flawed by inherent loopholes – could by no means be called effective. The major cases leading up to Citizens United continuously shaped and reshaped the legal landscape of campaign finance, until - using Professor Daniel Lowenstein`s apt expression – it reminds more of a "patternless mosaic" than anything else[41].

2.2.1. Buckley v. Valeo

Some of the important consequences of Buckley have already been discussed above. The distinction made between contributions and independent expenditures, based on the assumption that "a contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support", became a lasting one[42]. Capping contributions thus is less problematic than capping independent expenditures, which - more than simple gestures of support-, aim to communicate a person's own ideas. Placing a cap on independent expenditures and thus limiting how much a person

number of eligible voters within the state. Other important provisions of the Act included a ban on contribution to candidates and political parties by individuals seventeen years of age and younger, a ban on contribution from foreign nationals, and regulation concerning television advertisement rates.

[40] Immediately after the Act went into effect in March 2002, eleven lawsuits were filed in the U.S. District Court for the District of Columbia.

[41] *See*: Daniel Hays Lowenstein, A *Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAP. U. L. REV. 381, at 382.

[42] As a contribution is more symbolic in nature than an expenditure, its expressive content does not have a direct relation to its quantity or „the quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing"; therefore a cap on contributions does not affect the nature of the act and as such, does not pose a direct threat to free political speech. Buckley, 424 U.S. at 21.

can spend independently on a political campaign would necessarily reduce the quantity of expression. This would mean a substantial limitation of political speech[43], not allowed by the First Amendment according to the Court's reasoning. The Court did not find the danger of corruption, either actual or apparent, present in the case of independent expenditures, as these are not coordinated with the candidate and can even be counter-effective[44]. The Court also found that the equalizing or level-setting ambition of the legislation apparent in the independent expenditure caps is contrary to the ideas encompassed by the First Amendment: "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"[45] and the "First Amendment`s protection against governmental abridgement of free expression cannot properly be made to depend on a person`s financial ability to engage in public discussion"[46]. These thoughts, as often is the case with Supreme Court decisions, would come back to haunt America for decades more. Both the anticorruption rationale (with regards to independent expenditures) and the equality or antidistortion doctrine had been squarely refuted here by the Court.

The Buckley decision has received both praise and criticism over the years and has served as a dividing line between campaign reform advocates and opponents, making neither party content with the decision in its entirety. Perhaps the most ambivalent part of the decision was the above-detailed distinction between expenditures and contributions. Opponents of campaign finance reform have argued ever since Buckley that contribution limits should be subject to the same treatment and afforded the same level of protection as independent expenditures and thus, should have been and should be struck down. On the other side of the debate, those in favor of limiting the role of money in politics argue that expenditures should not be equated with political speech, and as such, limits on independent expenditures should be upheld.

The dualism that Buckley established in terms of regulating contributions and independent expenditures went on to dominate the case law of campaign finance, and still does so today. As David Cole aptly argues: "Buckley foreshadowed the Court`s subsequent

[43] Buckley, 424 U.S. at 30.
[44] It is worth mentioning, however, that as often is the case, candidates do know rather well (as is expected of them) who makes an independent expenditure on their behalf, even if the expenditure was not directly coordinated with them. In theory and in practice, however, it is quite possible that an independent expenditure could affect adversely a political campaign.
[45] Buckley, 424 U.S. at 49.
[46] *Id*.

fluctuations; it simultaneously applied both deferential and exacting scrutiny in a single case, upholding all contribution limits while striking down all expenditure limits"[47].

2.2.2. From Bellotti to Beaumont

First National Bank of Boston v. Bellotti[48] is important because this is one of the precedents that the Supreme Court prominently reached back to in Citizens United. In Bellotti, the Court ruled on the constitutionality of a Massachusetts criminal statute that prohibited corporations from making contributions or expenditures in referendums[49], deciding whether the protection afforded to expenditures by the Buckley decision was also applicable to corporations. The Court held that "the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source"[50], and concentrated on the question from the perspective of the audience, the listeners, treating the rights of the speakers and the rights or interests of the audience as two distinct issues, affording First Amendment protection to speech itself even when it does not directly concern individual expressive rights[51]. Looking at it from this perspective, the Court found that speech that otherwise would be under First Amendment protection cannot lose this protection simply because the speaker is a corporation[52]. Holding that legislatures are "constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue"[53], it dismissed the state`s concerns about sustaining the active role of the individual citizen in the electoral process and preventing the diminution of the citizen`s confidence in government[54], which according to the state`s reasoning, could be undermined by the undue influence of

[47] David Cole, *First Amendment Antitrust: The End of Laissez-faire in Campaign Finance*, 9 Yale L. & POL`Y REV. 236, 272-273.
[48] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).
[49] Mass. Gen Laws Ann., ch. 55, § 8. The statute prohibited corporations from making contributions or expenditures "for the purpose of ...influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation". The First National Bank of Boston intended to run an ad opposing a referendum on a graduated tax income. As the statute prohibited such expenditures by a corporation, stating that "no question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporations", the Bank thought declaratory judgment to invalidate the statute on First Amendment grounds.
[50] Bellotti, 435 U.S. at 777.
[51] Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L. Q. 1, at 21.
[52] Bellotti, 435 U.S. at 784.
[53] *Id*. at 784-785.
[54] *Id*. at 787-788.

corporations whose wealth and power may "drown out other points of view"[55]. Thus, the Court reiterated its holding in Buckley[56], and expanded it, in effect granting corporations the same First Amendment rights as to citizens[57]. The Court found the interest in the protection of minority shareholders - whose views may differ from that expressed by the corporation - compelling, but held that minority shareholders are adequately protected by "the procedures of corporate democracy"[58]. The Court therefore decided to strike down the Massachusetts law. The holding was limited by the facts of the case and to referendums, thus the question as to whether the same would apply in candidate elections was not decided.

Massachusetts Citizens for Life, Inc. v. FEC[59], a 1986 case involving expenditure in candidate elections, discussed the use of general treasury funds to endorse candidates. Massachusetts Citizens for Life, Inc. ('MCFL'), a pro-life advocacy group[60] published a special edition of its newsletter endorsing particular candidates in the Massachusetts primary elections. This, according to the FEC, violated the expenditure provisions of the FECA[61]. The main question for the Court to decide was whether MCFL could use its general treasury funds in endorsing the candidates or whether it has to revert to the use of separate segregated funds. The Court`s answer was that the burden of establishing separate segregated funds was significant in curtailing the corporation`s First Amendment rights and that there is no compelling governmental interest to justify such restriction on the freedom of speech. The prohibition on corporate and union treasury funds on political expenditures therefore could

[55] *Id*. at 789.
[56] Buckley, 424 U.S. at 49.
[57] In a footnote, Justice Powell, writing for the majority, reached back to a statement by Chief Justice Waite at the beginning of the oral argument in Santa Clara County v. Southern Pacific R. Co., 118 U.S. 394, 396 (1886): „The court does not wish to hear arguments on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does." *See* Bellotti, 435 U.S. at 780, footnote 15: „It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment."
For more on Bellotti and the expansion of corporate political power, see: Robert A. G. Monks and Peter Murray, Is the Supreme Court Determined to Expand Corporate Power?, The Harvard Law School Forum on Corporate Governance and Financial Regulation, August 25, 2009, at http://blogs.law.harvard.edu/corpgov/2009/08/25/is-the-supreme-court-determined-to-expand-corporate-power/ (last visited June 29, 2011).
[58] Bellotti, 435 U.S. at 794.
[59] Massachusetts Citizens for Life, Inc. v. FEC, 479 U.S. 238 (1986).
[60] MCFL was incorporated in 1973 as a nonprofit, nonstock corporation under Massachusetts law. Its primary purpose is to foster the respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political and other forms of activities, as stated in the articles of its incorporation. MCFL did not accept contributions from business corporations or unions, its resources coming solely from voluntary member donations and from fund-raising activities.
[61] 2. U.S.C. § 441b.

only apply to express advocacy, and issue advocacy could still be paid for from the corporation's general treasury.

The Government`s main argument, that "direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace"[62] was acknowledged by the Court, adding, however, that "political "free trade" does not necessarily require that all who participate in the political marketplace do so with exactly equal resources"[63]. The Court added that "the resources in the treasury of the business corporation are not an indication of the popular support for the corporation`s political ideas. They reflect instead the economically motivated decision of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas"[64]. With this, the Court, besides in some part acknowledging the potentially corruptive force of corporate wealth, raised another concern into the forefront of the discussion: that a corporation`s political stance in reality might not mean the unanimous support of all shareholders.

The reasoning that the Court uses is intriguing, for while it partly acknowledges Congress` concern with the unfair deployment of wealth in the political marketplace of ideas[65], and how corporate spending might not reflect actual support from the shareholders, it also notes that MCFL is not the type of corporation against which such concerns should be directed. In particular, the Court distinguished three features of MCFL that set it apart from other corporations, and which are essential to the holding that MCFL may not constitutionally be bound by § 441b. First, MCFL was formed for "the express purpose of promoting political ideas, and cannot engage in business activities", thus ensuring that the financial resources reflect true political support[66]. Second, it has no shareholders or other persons affiliated, which means that persons connected with the organization would have no economic disincentive for disassociating with it, upon disagreeing with its political activity[67] and third, MCFL was not established by a business corporation or labor unions, and had a policy not to

[62] Massachusetts Citizens for Life, 479 U.S. at 257.
[63] *Id*.
[64] *Id*. at 258.
[65] "We acknowledge the legitimacy of Congress` concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace". *Id* at 263.
[66] *Id*. at 264.
[67] *Id*.

accept contributions from such entities[68]. It is clear from the above discussion, that the Court`s main concern was not the corruptive force that corporate financial support might bring into the electoral process, but rather the protection of those shareholders whose political ideas are not reflected by the corporation`s spending. This danger not being present in the case of MCFL, the Court decided to uphold the law. This way, ideological nonprofit corporations became exempt from the ban. It remained unclear, however, whether more traditional business organizations would be similarly treated in relation to expenditures in federal elections[69]. It also remained unsettled as to whether besides the corruption rationale there would appear to be two other governmental interests that might deserve similar protection, namely the political equality doctrine or anti-distortion interest[70] and the shareholder protection interest. Both of these arguments would resurface in later cases and are of particular interest to us, as possibly providing another avenue to tackle corporate political spending.

In *Austin v. Michigan State Chamber of Commerce*[71], a traditional business organization raised a similar issue as in Massachusetts Citizens for Life. Michigan law prohibited corporations from making independent expenditures in state elections, except from separate segregated funds, similarly to federal law[72]. The Michigan State Chamber of Commerce, a nonprofit organization[73], unsuccessfully challenged the constitutionality of the provision. In its holding, the Court noted that "corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures"[74] and emphasized that "the mere fact that corporations may accumulate large amounts of wealth is not the

[68] *Id*.
[69] Daniel R. Ortiz, *The First Amendment and the Limits of Campaign Finance Reform* in THE NEW CAMPAIGN FINANCE SOURCEBOOK, supra note 14, at 99.
[70] Throughout the present paper, I shall use the political equality doctrine and the anti-distortion interest expressions interchangeably.
[71] Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990).
[72] Mich. Comp. Laws § 169. 54(1) 1979.
[73] The Michigan State Chamber of Commerce was a nonprofit organization, comprising at the time of the lawsuit more than 8,000 members, three-quarters of whom were for-profit organizations. The general treasury of the Chamber was funded through annual dues paid by all members. The Chamber`s purposes included, among others, the promotion of economic conditions favorable to private enterprise, the dissemination of information about laws of interest to the business community, the training and education of its members, date collection and investigation of matters of social, civic and economic importance to the State, and making expenditures and contributions for political purposes and the performance of other, lawful political activity. See Austin, 494 U.S. at 656.
[74] *Id*. at 660.

justification for §54; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures"[75][76].

Starting with MCFL, and following suit in Austin, the Supreme Court made a slow, but significant departure from Buckley, as it chose to raise two other concerns - besides the traditionally acknowledged corruption or quid pro corruption doctrine – into the forefront of the discussion: a concern for the corruptive force of large treasuries amassed with the help of the corporate form and then used in the political process (antidistortion rationale or political equality doctrine) and the shareholder-protection interest[77].

In *Nixon v. Shrink Missouri Government PAC*[78], a case concerning a Missouri statute imposing contribution limits, the Court once again upheld campaign finance restrictions (in this case, lower contribution limits set by a Missouri statute) as constitutional. The reason why Shrink Missouri is important is not so much the decision itself, but what the Court had laid down about the future of campaign finance reform. The Court essentially lowered the constitutional bar[79] and applied a more relaxed evidentiary standard[80], but what is even more significant, it reinforced Austin's expansion beyond the anti-corruption rationale to encompass - however fleetingly - the concern regarding the influence of wealthy corporate donors on the campaign platform[81], coming close to an equality rationale that had been entirely missing in Buckley.

Shrink Missouri also showed how divided the Court was on this issue, and how all six justices in concurrence and dissent believed, for different reasons and in different ways, that Buckley should be overruled. Justice Stevens` concurrence starts with the following

[75] *Id.*

[76] In essence, the Court partly reiterated its holding in MCFL, then went on to distinguish the Michigan State Chamber of Commerce from MCFL, stating that the Chamber did not share those three essential characteristics of MCFL that set it apart from other business organizations, therefore the protection afforded there does not apply in this case. See Austin, 494 U.S. at 663-664.

[77] This broader view of corruption was based on the grant theory. The "unique state-conferred corporate structure that facilitates the amassing of large treasuries", which then can be used to "unfairly influence the elections" served as the justification point for upholding the legislation. Austin, 494 U.S. at 660. *See also*: Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949, at 978-979.

[78] Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000).

[79] The Court applied a standard that, although not clearly defined, was definitely less than strict scrutiny, by requiring that the justification need only be sufficiently important.

[80] Professor Richard L. Hasen argues that the evidentiary burden the Court required in Shrink Missouri was „pretty flimsy", consisting mostly of newspaper accounts, an affidavit by a Missouri legislator, and the showing of overwhelming voter support for a Missouri campaign finance initiative. *See*:Richard L. Hasen, *Shrink Missouri, Campaign Finance, and „The Thing That Wouldn't Leave"*, 17 CONST. COMMENT. 483 (2000), at 493-497.

[81] Shrink Missouri, 528 U.S. at 492.

statement: "Money is property; it is not speech"[82] and as such, campaign finance does not touch on the First Amendment in such a way as pure speech does[83] and therefore the protection to be afforded to it is significantly less. Justice Breyer in his concurrence also emphasizes the distinction between speech and campaign money, stating: "…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"[84]. Justice Breyer also acknowledged the equalizing force behind campaign finance restrictions as coming close to valid, saying: "by limiting the size of the large contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process"[85], a train of thought that has already appeared in the prior case of Austin v. Michigan State Chamber of Commerce, but had not gained official acceptance in the Court.

Among the dissenters, Justices Scalia, Kennedy and Thomas all thought that the time was ripe to overrule Buckley, which created more confusion and unwanted results than acceptable, but for very different reasons than for the concurring Justices. Justice Kennedy stated that he "would overrule Buckley and then free Congress or state legislatures to attempt some new reform, if, based upon their own considered view of the First Amendment, it is possible to do so. Until any reexamination takes place, however, the existing distortion of speech caused by the halfway house we created in Buckley ought to be eliminated"[86], leaving open the option that he might support a new system that imposes limits on both expenditures and contributions[87]. Justice Thomas, with whom Justice Scalia joined, would also overrule Buckley, stating that "the analytic foundation of Buckley (…) was tenuous from the very beginning and has only continued to erode in the intervening years"[88], and therefore is no longer (and maybe never was) able to provide the necessary constitutional protection to political speech. In Justice Thomas` view, not only expenditure limits are unconstitutional, but the same should be said (and should have been said long ago) about contribution limits as

[82] *Id*. at 398.
[83] "The right to use one`s own money to hire gladiators, or to fund "speech by proxy", certainly merits significant constitutional protection. These property rights, however, are not entitled to the same protection as the right to say what one pleases". *Id*. at 399.
[84] Shrink Missouri, 528 U.S. at 400.
[85] *Id*. at 401.
[86] *Id*. at 410.
[87] *Id*.
[88] *Id*. at 412.

well, because both kind of restrictions, no matter how Buckley distinguished between the two, lead to the same thing: the suppression of political speech[89].

The heated discussion of Nixon v. Shrink Missouri was one that foretold the future. With the enactment of the Bipartisan Campaign Reform Act of 2002, a new set of challenges were bound to follow, especially against the much contested regulation aiming to push back the role of issue advocacy and soft money in national elections[90]. In the form of *McConnell v. Federal Election Commission*, these challenges were taken up and addressed by the Supreme Court.

The Court, in judging the constitutionality of new FECA §323, decided to use the less rigorous standard of review applicable to campaign contributions limits under Buckley, subjecting the limits in question to "closely drawn" scrutiny[91], as opposed to strict scrutiny[92]. Under this more relaxed, but nevertheless stringent standard, the Court held that the restrictions imposed by §323 were constitutional as contributions, in accordance with the holding in Buckley, had "only a marginal impact on the ability of contributors, candidates, officeholders and parties to engage in effective political speech".

The McConnell decision represented another step on the path of Shrink Missouri and Austin, with the Court using a more expanded, more far-reaching view of the corruption rationale[93], and also giving room for the equalizing force behind campaign finance legislation. Although the McConnell Court claimed to base its decision on Buckley, it is clear that the Court in fact came a very long way from what it held there. This was part of a process that started most notably with Austin, and gained an even stronger foothold in Shrink Missouri. McConnell also ruled on the constitutionality of issue advocacy provisions[94], and upheld both

[89] *Id*. at 417-418.

[90] FECA §323 (a), prohibiting national party committees and their agents from soliciting, receiving, directing, or spending soft money; and FECA §323(b), preventing the shift of soft money from national to state party committees by prohibiting state and local party committees from using such funds for activities influencing federal elections; FECA §323(d), prohibiting political parties from soliciting and donating funds to tax-exempt organizations that engage in electioneering activities; FECA §323 (e) restricting federal candidates and officeholders from receiving, spending, or soliciting soft money in connection with federal elections and FECA §323 (f) prohibiting state and local candidates from raising and spending soft money to fund advertisements and other public communications that promote the election or defeat of a candidate for federal office.

[91] Buckley, 424 U.S. at 25.

[92] The Court, once again, reiterates the holding in Buckley, that contribution limits, unlike limits on expenditures, "entail only a marginal restriction upon the contributor`s ability to engage in free communication". Buckley, 424 U.S. at 20.

[93] Scot J. Zentner, *Revisiting McConnell: Campaign Finance and the Problem of Democracy*, 23 J. L. & POL. 475, at 481 -482.

[94] BCRA §202 amended FECA §315 (a)(7)(C) to provide that disbursements for "electioneering communications" that are coordinated with a party or a candidate will be treated as contributions to, and

the disclosure requirements of BCRA and the corporate and labor ban on electioneering communications.

The disclosure requirements set by BCRA § 201 were upheld by the McConnell Court, as well as §203 that treated *coordinated* expenditures as contributions to, or expenditures by a party or candidate. More importantly for us, BCRA §203 also established a prohibition on corporate and labor disbursements for electioneering communications from general treasury funds (previously FECA had a similar ban on express advocacy), that according to the challengers was both overbroad and underinclusive[95]. The Court refuted both counts and upheld the prohibition on corporate and labor disbursements for electioneering communications (even with disclosure), stating that the prohibition did not mean a total ban for these entities, as they are allowed to spend for such advocacy from their PACs[96]. The overbreadth count was refuted on the grounds that the speech in question was the functional equivalent of express advocacy[97], but despite holding the restriction facially valid, the question remained open whether true issue ads would fall under the regulation as well[98].

In FEC v. Beaumont[99], another 2003 case, the Court expanded McConnell, stating that even political nonprofit organizations may be barred from making campaign contributions: "(c)orporations' First Amendment speech and association interests are derived largely from those of their members, and of the public in receiving information. A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information"[100].

expenditures by, that party or candidate. BCRA §201 required the disclosure of disbursements for electioneering communications above $10,000 by an individual in a calendar year. BCRA §203 amended FECA §316 (b)(2) and extended the ban on corporations and labor unions to use their general treasury funds to make a contribution or expenditure in connection with certain federal elections (and thus express advocacy of a federal candidate), to include "any applicable electioneering communication". Codified as 2 U.S.C. 441b (b)(2).

[95] Overbroad, because the limit on all electioneering communications by labor unions and corporations might apply to otherwise constitutionally protected speech, such as issue advocacy, that mentions a candidate for federal office, and underinclusive, because the ban does not apply to advertising in print media or on the internet, and because it unconstitutionally discriminates in favor of media companies. McConnell, 540 U.S. at 204-209.

[96] McConnell, 540 U.S. at 205-206.

[97] *Id.* at 204-205, 206.

[98] *Id*. at 206.

[99] FEC v. Beaumont, 539 U.S. 146 (2003).

[100] *Id*. at 161.

2.2.3. The Second Coming of Buckley[101]

All is well if it ends well…but not so fast. With a quick U-turn of the mind, the Court backed off on McConnell in Federal Election Comm'n v. Wisconsing Right to Life[102][103]. The issue in Federal Election Comm`n v. Wisconsing Right to Life was once again Section 203 of the BCRA[104], and the case involved just the type of as-applied challenge that the Court in McConnell foresaw[105]. Wisconsin Right to Life, Inc. ('WRTL'), a nonprofit advocacy organization ran three broadcast ads urging voters to "call Senator Feingold" and protest against the Senate`s filibuster of judicial nominees. The ads were financed from the general treasury of the corporation and were to be broadcast 30 days within the Wisconsin primary, thus falling under the prohibition imposed by BCRA Section 203, prompting the organization to seek declaratory judgment. The main question to decide was whether the ads proposed by WRTL constituted express advocacy or its equivalent, in which case McConnell applies, or whether they can be considered true issue ads, in which case the government has to prove that banning such ads in the time period stated is narrowly tailored to serve a compelling governmental interest[106].

The Court, contrary to the government's contention, determined that the Court in McConnell dealt only with a facial challenge, and therefore as-applied challenges were permitted[107], and that McConnell adopted no constitutional test that could serve as a standard for future as-applied challenges[108]. Indeed, the Court found that an ad is the functional equivalent of express advocacy "only if the ad is susceptible of no reasonable interpretation

[101] Hasen, *supra* note 80, at 868.
[102] The deferential decade actually ended a year before Wisconsin Right to Life, with Randall v. Sorrell, 548 U.S. 230 (2006), in which the Court returned to its pre-McConnell line of jurisprudence. *See*: Bradley Smith, *supra* note 11, at 891. *See also*: Richard Briffault, *WRTL and Randall: The Roberts Court and the Unsettling of Campaing Finance Law*, 68 OHIO ST. L. J. 807, 807, and Richard L. Hasen: *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After Randall v. Sorrell*, 68 OHIO ST. L. J. 849, 852.
[103] Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007).
[104] Section 203 of the BCRA, making it a federal crime for any corporation to broadcast, shortly before an election, any communication that names a federal candidate for elected office and is targeted for the electorate.
[105] Wisconsin Right to Life, 551 U.S. at 456.
[106] Wisconsin Right to Life, 551 U.S. at 464-465.
[107] See: Richard Briffault, *supra* note 102, at 807.
[108] The FEC contended that, according to McConnell, the determination as to whether an ad is the functional equivalent of express advocacy depends on whether the ad is intended to influence elections and has such an effect. The Court refused this argument, stating that „an intent-based test would chill core political speech by opening a door to a trial on every ad within the terms of § 203". Wisconsin Right to Life, 551 U.S. at 466-467, also at 468.

other than as an appeal to vote for or against a specific candidate"[109], and the WRTL ads did not fall under this description, therefore BCRA § 203 could only be applied to them if the government were able to show that the regulation was narrowly tailored to further a compelling interest[110]. The Court held that the government failed in this task[111], as neither the quid-pro-quo corruption rationale[112], nor the "different type of corruption" argument[113] could apply in this case[114]. As Professor Richard Briffault commented, the decisions in Randall and WRTL marked the end of a decade-long stride of pro-regulatory decisions by the Court[115]. Although Chief Justice Roberts put an emphasis on distinguishing Wisconsin from McConnell, rather than overruling the prior case, this stance failed to convince the other justices. The concurring justices, Justice Alito and Justice Scalia both alluded to the necessity of overruling McConnell[116], which was a departure from the course set by Buckley, while the dissenting justices, Justices Souter, Stevens, Ginsburg, and Breyer interpreted Wisconsin as having essentially overruled McConnell[117].

Austin, Shrink and McConnell completed the cycle of confusion that followed in the steps of Buckley with the main question becoming: when was the Court true to Buckley, prior to these cases, or with them? Those keen on campaign finance reform celebrated Austin and McConnell, whereas those opposing regulation in this area deemed them a constitutional mistake, a detour from the once (or still?) sacred course set by Buckley; a course that by now

[109] *Id*. at 469-470.
[110] *Id.* at 476.
[111] „This Court has never recognized a compelling interest in regulating ads, like WTLR's, that are neither express advocacy nor its functional equivalent". *Id*.
[112] The Court refused to find the WRTL ads the equivalent of express advocacy, and as such, contributions, holding that „(T)o equate WRTL`s ads with contributions is to ignore their value as political speech". *Id.* at 479.
[113] This would mean the anti-distortion or political equality doctrine. But equality being a dirty, dirty – if not blasphemous actually - word in campaign finance case law, the Court preferred instead to use the "different kind of corruption" expression, so as to lessen the suggestion. Anything with the word corruption (strictly quid pro quo though! – in other words: outright bribery) gets a free pass. Anything with the word equality: you shall not pass.
[114] The Court here alludes to the corrosive and distorting effects of immense aggregations of wealth accumulated with the help of the corporate form, invoked by Austin, and McConnell, which argument does not hold its ground in this case, as this interest does not reach beyond campaign speech; if it did, it would go against the holding in Bellotti, that stated that the corporate identity of the speaker does not strip corporations of all free speech rights. Wisconsin Right to Life, 551 U.S. at 479.
[115] The last case in which the anti-regulatory side prevailed being Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996). See Briffault, *supra* note 102, 808. Nixon v. Shrink Missouri (2000), FEC v. Colorado Republican Federal Campaign Committee (2001), FEC v. Beaumont (2003) and McConnell v. FEC (2003), or the "New Deference Quartet", all represented a victory for the pro-regulatory side. *See*: Richard L. Hasen, *Rethinking the Constitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, at 886 (2005).
[116] Wisconsin Right to Life, 551U.S. at 483, Justice Alito concurring. Justice Scalia, with whom Justice Kennedy and Justice Thomas join in concurrence, at 484, 499-500.
[117] Wisconsin Right to Life, 551 U.S. at 504.

has become so meddled and unclear that in all fairness the only thing both sides seemed to agree on was that the time was ripe for Buckley to be cast away, if for distinct reasons.

3. Citizens United: A(n Old) New Era Begins?

In January 2008, Citizens United, a non-profit corporation produced a film entitled Hillary: The Movie, a 90-minute documentary about then-Senator Hillary Clinton, a candidate in the Democratic Party`s 2008 Presidential primary elections. Hillary presents a critical view of the candidate, mentioning her by name, and using interviews with political commentators, and others. The movie was released both in theaters and on DVD, and Citizens United planned to release it through video-on-demand too[118]. To promote the on-demand viewing of Hillary, Citizens United also produced two 10-second ads, and one 30-second ad for the documentary. The ads include a short statement about the candidate, followed by the name of the movie and its website address.

Citizens United anticipated that the film and the ads would fall under BCRA §441b`s ban on corporate–funded independent expenditures, and thus the corporation would face civil and criminal penalties. Therefore in December 2007, Citizens United sought declaratory and injunctive relief against the FEC, arguing that §441b is unconstitutional as applied to Hillary as well as the disclosure and disclaimer provisions of the BCRA[119].

Before the Supreme Court, Citizens United argued that the decision could be decided on narrower grounds, contending that §441b does not apply to Hillary, as the film does not qualify as electioneering communication[120]. The Court refuted this argument, as well as the argument that Hillary may not fall under §441b because it is not the functional equivalent of express advocacy[121]. Citizens United further argued that §441b should be invalidated as

[118] Video-on-demand enables digital cable subscribers to select programs from various menus. Some programs require the viewer to pay a small fee, but Hillary was to be available free of charge to the viewers. Selected programs can be saved and viewed, paused and restarted at any time.

[119] BCRA §§201 and 311.

[120] BCRA §441b(b)(2). Citizens United contended that §441b does not cover Hillary as the film doesn`t qualify as electioneering communication, because as a video-on-demand release, and as such, a cable communication, it would not qualify as „publicly distributed", as in most cases, it would be seen only by a single household as opposed to the required 50,000 or more (11C.F.R. §100.20 (a)(2). C.F.R. §100.29 (b)(3)(ii) and §§ 100.29 (b)(7)(i)(G) and (ii) state, however, that the number of people who can receive a cable transmission shall be determined by the number of cable subscribers in the relevant area. The cable video-on-demand system in question had 34.5 million subscribers nationwide.

[121] McConnell stated that §441b(b)(2)'s definition of an electioneering communication was facially constitutional as long as it restricted speech that was the functional equivalent of express advocacy. *See* McConnell, 540 U.S. at 206.

applied to movies shown through video-on-demand, as that type of delivery system has a lower risk of distorting the political process than do television ads. The Court found this line of argument inapplicable, stating that it would fall outside the Court`s authority to decide which means of communication should be preferred or disfavored[122]. Citizens United also contended that the Court should carve out an exception to §441b exception ban for nonprofit corporate political speech funded mostly by individuals[123]. This contention, once again, found no acceptance by the Court, as Citizens United received some of its donations from corporate entities[124].

Thus, the Court came to the conclusion that Citizens United v. FEC cannot be decided on a narrower ground "without chilling political speech"[125], a motif that stretches along the entire case. The question of reconsidering - and eventually overruling - Austin and the relevant part of McConnell – was roused by the fact that Citizens United stipulated to dismiss count 5 of its complaint which raised a facial challenge to §441b. This was also decided in the affirmative by the Court, for similar reasons[126].

"More speech, not less, is the governing rule"[127]. This quotation sums up neatly the majority`s approach to the case at hand. The Court found §441b`s ban on political speech funded by corporate general treasuries as an outright ban on speech itself[128], despite the PAC exception[129], stating that "speech restrictions based on the identity of the speaker are all too often simply a means to control content"[130]. Citing Buckley and Bellotti[131], the Court stated that the corporate identity of the speaker should not warrant a lesser First Amendment protection[132]. Treating §441b as an outright ban on speech – and not a source, or a time, place

WRTL found that a communication is the functional equivalent of express advocacy only if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. *See* WTRL, 551 U.S. at 469-470. Applying this standard, the Court found Hillary to be the equivalent of express advocacy, stating that the documentary is essentially "a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President". *See* Citizens United v. FEC, 130 S.Ct. at 890.

[122] *Id*. at 890-891.

[123] This alternative was also supported by the Government, as a means to avoid reconsidering Austin.

[124] Citizens United, 130 S. Ct. at 891-892.

[125] *Id*. at 892.

[126] Citizens United, 130 S. Ct. at 892-896.

[127] *Id*. at 911.

[128] *Id*. at 897.

[129] *Id*. at 897-898. The Court found the Pac exemption not satisfying enough to protect First Amendment speech, stating that the creation and administration of PACs for corporation is burdensome and expensive, thus the exemption does not alleviate the burden placed on corporate speech by the statute.

[130] *Id*. at 899.

[131] Buckley did not consider expressly §610`s separate ban on corporate and labor union independent expenditures. *See id*. at 901-902.

[132] *Id*. at 902-903.

and manner restriction as the dissent would suggest[133] paved the way to overruling Austin and the relevant part of McConnell, and served as one of the major pillars of the decision, together with a heavy reliance on Buckley and even more so on Bellotti, to find support for affording corporations the same treatment in terms of First Amendment speech rights as individuals[134].

Austin came under heavy criticism from the majority for upholding a direct restriction on corporate speech and thus affording different treatment to corporations and individuals in terms of political speech, and for introducing a new governmental interest, the antidistortion rationale (the distortive effects of wealth amassed in the economic marketplace entering the political marketplace)[135] as a compelling interest to justify the restrictions. The Court referred to Buckley`s famous stance against equalizing the voices in the political sphere[136], stating that "Austin interferes with the "open marketplace" of ideas protected by the First Amendment"[137]. The other arguments introduced by the Government were found equally troublesome by the Court, namely the anticorruption interest and the shareholder-protection interest[138]. Referring to Buckley, the Court stated that placing a ban on independent expenditures could not be justified by an interest in preventing corruption and the appearance of corruption[139]. The scope of corruption was also interpreted in the limited sense, meaning only quid pro quo corruption, and not the appearance of influence, or access, which according to the Court "will not cause the electorate to lose faith in our democracy"[140]. In other words., anything other than outright bribery would not matter. Setting aside the Bellotti footnote that left open the possibility for Congress to demonstrate that there is a danger of real or apparent corruption in corporate independent expenditures[141], the Court concluded that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption"[142]. The shareholder-protection concern raised by the Government was also quickly rebuffed, and with little concern. The Court found "little evidence of abuse

[133] *Id*. at 943.
[134] *Id*. at 899-902.
[135] Austin, 494 U.S. at 660.
[136] Buckley, 424 U.S. at 48-49.
[137] Citizens United, 130 S. Ct. at 906.
[138] *Id*. at 904-905.
[139] Citizens United, 130 S. Ct. at 908-909.
[140] *Id*. at 910.
[141] Bellotti, 435 U.S. at 788.
[142] Citizens United, 130 S. Ct. at 909 . The Court, among others, made mention of the McConnell record, which despite its length, failed to contain any direct evidence of votes being exchanged for expenditures, and used this lack of evidence in support of its ruling. *See id.* at 910-911.

that cannot be corrected by shareholders "through the procedures of corporate democracy"'[143].

Thus Austin and the relevant parts of the McConnell decision were overruled by the Court`s majority, finding Austin "undermined by experience since its announcement"[144], and reaffirming the principle established by Buckley and Bellotti that "(G)overnment may not suppress political speech on the basis of the speaker`s corporate identity"[145]. A small consolation, if any at all, but the disclosure, and disclaimer provisions of BCRA were upheld by the Court, as applied to Hillary the movie and its ads[146].

Citizens United served a crushing blow to campaign finance reform, the future of which, following a rocky past, does not seem altogether promising. The majority`s decision in Citizens United flies in the face of three major interests that have supported campaign finance legislation in the past: the anticorruption interest, the antidistortion rationale, and the shareholder protection interest. All of these three rationales have in essence been refuted by the Court in Citizens United (although frankly, if ever one rationale would have stood a chance out of these three, it would have been the anticorruption one). The basic premise of the majority opinion was that the First Amendment does not permit distinctions based on the identity of the speaker, in this case: corporations.

There are several flaws with the majority's reasoning in terms of these three interests. Treating §441b as an outright ban on speech is not correct, as the ban operates more as a time, place and manner or source restriction[147]. Citizens United could have financed Hillary through its PAC, and could have spent unrestricted amounts of money to broadcast the movie prior to the 30 days before the last primary election. These exceptions go contrary to the claim that §441b is a total ban on corporate speech. Setting up and administering a separate PAC may indeed be costly and inconvenient, but if there is a sufficiently compelling governmental interest to justify a restriction such as §441b, as indeed it was found in McConnell, then this burden has to borne, and the price of maintaining a PAC might be a price worthy of paying in a democracy[148]. At the same time, it is true that such a restriction might place an unreasonable

[143] *Id*. at 911, Bellotti, 435 U.S. at 794.
[144] Citizens United, 130 S. Ct. at 911.
[145] *Id*. at 913.
[146] *Id*. 913-916.
[147] *See supra* note 133. As a matter of source, Citizens United could have used the funds in its PAC to finance the movie and the ads. As a matter of time, place and manner restriction, Citizens United could have run the movie at any time prior to the 30 days preceding the primary elections.
[148] As the dissent points it out, several corporations have expressed a commitment to support exactly the type of legislation that is now being erased by Citizens United, mainly for fear of having to spend increasing

burden on closely-held, or one-person corporations, but as Justice Stevens suggests, such corporations may in fact place an ad in their own name, instead of that of the corporation.

4. Beyond Citizens United

It is clear that the clash that characterized the post-Buckley campaign finance decisions lives on, as the concurring and dissenting opinions testify[149], the Court being markedly divided on all issues, and in fact leaving very little common ground for the justices on the two sides of the debate. The Court left little footing for future campaign finance legislation with Citizens United, since the antidistortion rationale, and even to a certain extent the quid pro quo corruption or the appearance of corruption interest, as well as the shareholder-protection rationale have been deemed unfit to justify such restriction. In terms of corporate speech, the distinction between individuals and corporations has been practically erased, despite previously allowed distinctions between the two. Corporations are now allowed to finance political speech through their general treasury funds, without the need to resort to establishing segregated funds.

For a long time to come, there will be much debate on whether Citizens United was rightly decided or not. The author of this Article would argue, as many others have and will, that it was not. The Court's selective treatment of campaign finance jurisprudence disregards decades of settled law, basing its decision mostly on Buckley and Bellotti and applying a laissez-faire approach with regards to regulating the political marketplace that fails to take account of the realities of both the corporate world and American politics. Its "more speech, not less" rule, paired with a narrow view of quid pro quo corruption, and a blatant disregard for other time-honored rationales in campaign finance jurisprudence such as the antidistortion interest and the shareholder-protection interest, will result in speech that might indeed be more for the few who can afford access to it. Whether this fits in with the vision the Founding Fathers and consequent generations – including the present one – have formed of a community of citizens working together and participating on equal grounds in the political process is a question that needs to be settled and with urgency.

amounts of money on elections to gain access to office holders, whereby independent expenditures, or contributions would serve as a type of implicit tax. *See id*. at 973.

[149] Chief Justice Roberts, with whom Justice Alito joins, wrote separately to address the issue of stare decisis, and judicial restraint. Justice Scalia wrote in concurrence to address Justice Stevens` dissent. Justice Stevens, with whom Justice Ginsburg, Justice Breyer and Justice Sotomayor join, concurred in part, and dissented in part with the Court`s decision.

What it eventually comes down to is what role corporations may occupy in the political process: should they be afforded the same rights in terms of the First Amendment as natural persons? How can their role in the political process be reconciled with the anticorruption rationale, the political equality doctrine and the shareholder-protection interest? How can the open marketplace of ideas, this long-cherished doctrine of First Amendment jurisprudence be reconciled with the distorting effect of corporate wealth on political campaign on the one hand, or restricting corporate entities' free speech rights on the other? These questions merit further examination and shall form the subject of a separate paper.