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# The Lonely Death of Public Campaign Financing

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# THE LONELY DEATH OF PUBLIC CAMPAIGN FINANCING

RICHARD M. ESENBERG\*

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## INTRODUCTION

It may be a cliché to observe that campaign finance reform has proved conclusively that the road to perdition is paved with good intentions and that unforeseen consequences plague the human condition.<sup>1</sup> Perhaps all areas of the law are, to a greater or lesser degree, evidence of these sad truths.<sup>2</sup> Nevertheless, our continuing quest for “clean” elections and cosmic justice in the realm of campaign finance brings to mind Albert Einstein’s reflections on insanity: “doing the same thing over and over again and expecting different results.” Remarking on the inability of years—actually decades—of reform to wring “excess” money out of the process, Chief Justice John Roberts declared that “[e]nough is enough.”<sup>3</sup> Perhaps he is right.

Much of the problem with reform arises from constitutional stumbling blocks. Although the Supreme Court’s guidance has been rather fluid,<sup>4</sup> the core of the problem has been the idea that there is a constitutional distinction between the regulation of expenditures and contributions.<sup>5</sup> Restrictions on the latter are often claimed to serve more directly the interest in avoiding the apparent or actual quid pro quo corruption that the Court has sometimes,<sup>6</sup> but not always,<sup>7</sup> claimed is the only justifica-

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1. See William P. Marshall, *The Last Best Chance For Campaign Finance Reform*, 94 NW. U. L. REV. 335, 342–45 (2000) (listing examples of unintended consequences of reform: a decline in grassroots campaigning, the rise of “soft money” for “party building,” issue ads, independent ads, and a substantial increase in the time that must be devoted to fundraising and bundling).

2. See, e.g., Margaret Howard, *The Law of Unintended Consequences*, 31 S. ILL. U. L.J. 451, 452 (2007) (in the context of amendments to bankruptcy law); see also Nat’l Paint & Coatings Ass’n v. City of Chicago, 45 F.3d 1124, 1132 (7th Cir. 1995) (“Time and again social science research teaches that laws fail to achieve their goals—that the laws provoke costly adjustments that make the majority worse off.”).

3. *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 551 U.S. 449, 478 (2007).

4. See Richard L. Hasen, *Justice Souter: Campaign Finance Law’s Emerging Egalitarian*, 1 ALB. GOV’T L. REV. 169, 172 (2008) (“[T]he Court’s jurisprudence has swung like a pendulum between periods of Court skepticism of campaign finance regulation and Court deference to congressional and state judgments about the need for such regulation.”).

5. *Davis v. FEC*, 128 S. Ct. 2759, 2771–72 (2008); *WRTL II*, 551 U.S. at 478–79; *Buckley v. Valeo*, 424 U.S. 1, 20–23 (1976).

6. See *Davis*, 128 S. Ct. at 2773 (leveling opportunities for candidates of different wealth is not a legitimate government objective); *WRTL II*, 551 U.S. at 479–80 (interest in combating “corrosive and distorting effects of immense aggregations of wealth” does not extend beyond campaign speech); *FEC v. Nat’l Conservative*

tion for regulation. The Court has said restriction of the former more substantially impairs First Amendment values because it directly limits the message chosen by the speaker and his ability to disseminate it.<sup>8</sup>

By permitting virtually no restrictions on expenditures by a candidate<sup>9</sup> and relatively robust regulation of contributions to a candidate,<sup>10</sup> the Court's interpretation of the First Amendment has created the modern phenomenon of the self-funded millionaire politician for whom public office is a prerogative of family wealth or a nice coda to a successful business career.<sup>11</sup> In 1972, General Motors heir Stewart Mott financed an experienced public servant, George McGovern.<sup>12</sup> In 1992, H. Ross Perot and Steve Forbes ran for public office themselves.

There has been more room for regulation of expenditures on behalf of a candidate,<sup>13</sup> but statutory interpretation,<sup>14</sup> regu-

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Political Action Comm., 470 U.S. 480, 496–97 (1985) (“[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”); *Buckley*, 424 U.S. at 48–49 (the interest in equalizing the financial resources of candidates does not justify restricting campaign expenditures).

7. *McConnell v. FEC*, 540 U.S. 93, 143 (2003); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 659 (1990).

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

9. *See Buckley*, 424 U.S. at 52 (striking down campaign and individual expenditure limits).

10. *See FEC v. Beaumont*, 539 U.S. 146, 159–60 (2003) (upholding restrictions on campaign contributions made by an advocacy corporation); *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 528 U.S. 377, 381–82 (2000) (upholding state campaign contribution limits); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209–10 (1982) (upholding restrictions on solicitations by a corporate Political Action Committee (PAC)); *Buckley*, 424 U.S. at 29 (upholding limitations on the amount of contributions). *But see Randall v. Sorrell*, 548 U.S. 230, 236–37 (2006) (contribution limits set too low are insufficiently tailored to satisfy the First Amendment).

11. *See Charles Krauthammer, The U.S. House Of Lords?*, WASH. POST, Dec. 19, 2008, at A35.

12. Douglas Martin, *Stewart R. Mott, Longtime Patron of Liberal and Offbeat Causes, Dies at 70*, N.Y. TIMES, June 14, 2008, at B6 (GM heir heavily bankrolled the campaigns of Eugene McCarthy and George McGovern). Mott later opposed efforts at campaign finance regulation. *Id.*

13. *See McConnell v. FEC*, 540 U.S. 93, 206–07 (2003) (upholding blackout period on independently financed ads that are the “functional equivalent” of express advocacy for a candidate); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 668–69 (1990) (upholding restriction on corporate expenditures supporting a candidate); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788–92 (1978) (striking down restriction on corporate expenditures on referendum campaign); *Buckley*, 424 U.S. at 38, 47 n.53 (upholding restriction on coordinated independent expenditures).

latory omissions,<sup>15</sup> and constitutional limitations<sup>16</sup> have left room for a brisk business in independent expenditures that, rather than promote a favored candidate, criticize the positions of his opponent. This structure has given us the current phenomenon of sepia-toned advertisements urging us to call Senator Foghorn and tell him to stop starving children<sup>17</sup> and destroying the Republic. Although negative campaigning is not a current phenomenon or the product of regulation,<sup>18</sup> the modern independent ad—attacking in the guise of attempting to persuade—is certainly encouraged by regulation and the desire to avoid its limitations.<sup>19</sup>

Regulatory responses have ensued, but money has proven to be difficult to tame. What cannot be done through contribution can be done with expenditure. Dollars that can no longer be given to a candidate are given to a political party. Money that cannot be contributed to a party is given to an independent or-

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14. See *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 249 (1986) (adopting same limiting construction for limitations on corporate and union expenditures); *Buckley*, 424 U.S. at 43–44 (interpreting limitation on independent expenditures to messages expressly advocating the election or defeat of a candidate).

15. One huge “loophole” has been the freedom of political organizations that qualify under 26 U.S.C. § 527, that do not qualify as political committees, to engage in substantial and lightly regulated independent expenditures.

16. See, e.g., *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 551 U.S. 449 (2007) (striking down application of “blackout period” on independent expenditures for “genuine issue ads”); *MCFL*, 479 U.S. at 263–64 (striking down restrictions on express advocacy by an incorporated advocacy organization that did not accept contributions from “for profit” corporations); *Bellotti*, 435 U.S. at 776–77 (striking down restriction on corporate expenditures on referendum campaign).

17. Although they were apparently run by regulated political action committees, during the 2008 presidential campaign, for example, Brave New PAC and Democracy for America ran black and white photographs of a post-operative John McCain spliced with interviews of doctors discussing the recurrence of melanoma. Brave New PAC, “John McCain is 72. He’s had cancer 4 times,” <http://www.youtube.com/watch?v=DHvJPGnkQxE> (last visited Oct. 14, 2009). A group called OurCountryDeservesBetter PAC ran an ad featuring mug shots of Weather Underground leader Bill Ayers and clips of Reverend Jeremiah Wright’s less temperate sermons calling on Senator Obama and “his friends” to “keep the change.” OurCountryDeservesBetter PAC, “Obama’s Ties to Ayers, Rev. Wright and Kilpatrick,” <http://www.youtube.com/watch?v=eDcQUcAjoel> (last visited Oct. 14, 2009).

18. See DAVID MARK, *GOING DIRTY: THE ART OF NEGATIVE CAMPAIGNING* (2006); KERWIN C. SWINT, *MUDSLINGERS: THE TOP 25 NEGATIVE POLITICAL CAMPAIGNS OF ALL TIME* (2006).

19. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 406–07 (2000) (Kennedy, J., dissenting) (asserting that *Buckley* “has ‘given’ us covert speech” that “mocks the First Amendment”).

ganization. What cannot be done by a political committee is done by a 527 or 501(c)(4) organization. Dollars that can no longer be spent in one way simply flow to a new use.<sup>20</sup> At least one commentator<sup>21</sup> has likened campaign finance reform to a game of “Whac-A-Mole.”<sup>22</sup>

For this reason, the white whale for many Captain Ahab's of the campaign finance reform movement has often been “effective public financing.”<sup>23</sup> The current system of public financing for presidential elections has become largely irrelevant,<sup>24</sup> as the fundraising prowess of George W. Bush and Barack Obama far outstripped the amount of public funds available. Given the effectiveness of bundling<sup>25</sup> and of “microdonations”<sup>26</sup> raised over the Internet, accepting public funding (and its attendant limitations on campaign expenditures) would leave any publicly funded presidential campaign at a marked financial disadvantage.<sup>27</sup>

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20. See Marshall, *supra* note 1, at 342–45; see also Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1713 (1999) (“Money, like water, will seek its own level.”).

21. Robert P. Beard, *Whacking the Political Money “Mole” Without Whacking Speech: Accounting for Congressional Self-Dealing in Campaign Finance Reform After Wisconsin Right to Life*, 2008 U. ILL. L. REV. 731, 731.

22. Whac-A-Mole is an arcade game developed in the early seventies in which a player accumulates points by striking moles—who periodically pop up from a number of holes—with a mallet. One can apparently order “themed” games providing players with an opportunity to strike emerging figures of the owner's choice. See, e.g., Bob's Space Racers, <http://www.bobsspacracers.com/frames/index/htm> (last visited Oct. 14, 2009). The Author is unaware of whether a campaign finance-themed game—populated with PACs, 527s, 501(c)(4)s, and famously self-financed presidential contender H. Ross Perot—has ever been made, but he would love to see one.

23. See, e.g., Public Campaign Action Fund, <http://www.publiccampaign.org>.

24. Richard L. Hasen, *More Supply, More Demand: The Changing Nature of Campaign Financing for Presidential Primary Candidates 1* (Dec. 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1267312>.

25. “Bundling” is a technique in which a candidate's supporters solicit and “bundle” contributions from friends and associates. See Marshall, *supra* note 1, at 344. The maximum individual contribution was increased from \$1,000 to \$2,000 in 2002 and indexed for inflation. 2 U.S.C. § 441(a). The current limit, according to the FEC's website, is \$2,400. Federal Election Commission, *Quick Answers—General Questions*, [http://www.fec.gov/ans/answers\\_general.shtml](http://www.fec.gov/ans/answers_general.shtml) (last visited Nov. 23, 2009). The higher limit has raised the effectiveness of bundling.

26. Microdonations are generally described as those below \$200, often raised in increments over the Internet. See Hasen, *supra* note 24, at 15–16.

27. *Id.* at 3–5. Even candidates who initially pledge to accept public funding have found it in their best interest to abandon the pledge. See Shailagh Murray &

But the dream persists. Prominent organizations call for reform of the presidential system<sup>28</sup> and extension of public financing to legislative races.<sup>29</sup> A number of states still employ—or are currently seeking to adopt or reform—public financing of elections.<sup>30</sup> Often promoted under the rubric of “clean” or “fair” elections, these systems generally involve the provision of public funds to candidates who have raised some minimum amount or aggregate number of private contributions.<sup>31</sup> In return for public funds, a candidate agrees to restrictions on further private contributions and expenditures. The idea is to reduce the role of “Big Money”—or, for that matter, money in general—in elections.

Recognizing the constitutional limitations on reform, state public funding laws frequently provide “relief”—referred to by names such as “reserve funds” and “fair fight funds”—to publicly financed candidates running against a self-financed or privately financed candidate<sup>32</sup> whose spending has exceeded a trigger amount and to candidates who face inde-

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Perry Bacon Jr., *Obama to Reject Public Funds for Election*, WASH. POST, June 20, 2008, at A1. John McCain also announced that he would accept public funds for the primaries, only to decline them later. Andy Sullivan, *McCain says doesn't need public campaign cash*, REUTERS, Feb. 12, 2008, <http://www.reuters.com/article/politicsNews/idUSN1118204820080212?pageNumber=1&virtualBrandChannel=0>.

28. For example, Common Cause is working with the Presidential Public Financing Reform Project, a coalition of reform groups including the League of Women Voters, Public Citizens, Public Campaign, U.S. PIRG, and Democracy 21 attempting to reboot the current system. See Common Cause, *Presidential Public Financing*, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4773833> (last visited Oct. 14, 2009).

29. A joint report of the Brennan Center for Justice, Common Cause, Democracy Matters, Public Citizen, Public Campaign, and U.S. PIRG calls for public financing joined with “fair fight” funds to aid publicly financed candidates facing non-public opposition spending in excess of certain levels. BRENNAN CENTER FOR JUSTICE ET AL., *BREAKING FREE WITH FAIR ELECTIONS: A NEW DECLARATION OF INDEPENDENCE FOR CONGRESS 6* (2007), available at [http://www.brennancenter.org/content/resource/breaking\\_free\\_with\\_fair\\_elections/](http://www.brennancenter.org/content/resource/breaking_free_with_fair_elections/).

30. A summary of state public financing systems can be found on Common Cause's website, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4773825> (last visited Oct. 14, 2009).

31. For example, North Carolina's statute providing for the public funding of judicial elections states that its purpose is “to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections . . .” N.C. GEN. STAT. § 163-278.61 (2008).

32. In other words, a candidate who opts out of public financing.

pendent expenditures directed against them.<sup>33</sup> This relief may include permitting the “disadvantaged” candidate to raise more money, providing matching state funds, or some combination of the two.

This Article argues that the game of reform, having been the victim of two major campaign finance decisions of the Roberts Court, is over. The Supreme Court’s decision in *Davis v. FEC*<sup>34</sup> will prove to be fatal to most, if not all, asymmetrical public financing schemes, and the Court’s treatment of expenditures for issue advocacy announced in *FEC v. Wisconsin Right to Life (WRTL II)*<sup>35</sup> will leave most forms of independent expenditures beyond effective limitation. The combination may render public financing systems—at least as a device to reduce substantially the influence of private money on elections—effectively futile.

Part I of this Article briefly reviews the evolution of the distinction between expenditures and contributions and the various rationales the Court has considered as potential justification for regulation. Part II considers the degree of constitutional protection now apparently enjoyed by independent expenditures for issue advocacy after the Court’s decision in *WRTL II*. Part III addresses the impact of *Davis* on the attempts to restrict or blunt the impact of independent expenditures through asymmetrical public financing systems. Most such systems cannot be reconciled with *Davis*’s suggestion that measures designed to “counter” the constitutionally protected speech of one side of a campaign are unconstitutional burdens upon that speech.

Part IV argues that this outcome is correct and suggests, in Chief Justice Roberts’s words, that “enough is enough.” Although regulation to avoid actual or potential corruption remains essential, the Court’s recent decisions quite properly reject the restriction of speech in pursuit of “barometric” equality, that is, the notion that contending candidates and interests ought not to be able to deploy financial resources that are not proportionate to their public support *ex ante*. Rather than trust elected officials to superintend the electoral process in pursuit of some “pure” manifestation of democracy, it is better to allow broad public participation. We should understand

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33. See, e.g., ARIZ. REV. STAT. ANN. § 16-901.01 (2008); N.C. GEN. STAT. § 163-278.67 (2008).

34. 128 S. Ct. 2759, 2775 (2008).

35. 551 U.S. 449, 457 (2007).

that contending factions enjoy different electoral advantages and that allowing them to engage in relatively unfettered competition is preferable to management of the political process in a futile—and unavoidably self-interested—effort to eliminate unfair advantages. Happily, technological advances may have weakened the need for reform and validated the Madisonian approach to the influence of “special” interests advocated here.

I. SPEND IT YOURSELF: THE DISTINCTION BETWEEN  
EXPENDITURES AND CONTRIBUTIONS

A. *Origin of the Distinction*

Our problem begins with the seminal case of *Buckley v. Valeo*,<sup>36</sup> which considered a constitutional challenge to certain aspects of comprehensive federal campaign finance reform passed in the wake of Watergate. *Buckley* considered the 1974 amendments to the Federal Election Campaign Act of 1971 (FECA).<sup>37</sup> FECA contained a number of provisions, including limitations on contributions to a candidate and expenditures by or on behalf of a campaign.

*Buckley* is a lengthy and complex decision addressing multiple statutory provisions. The judgment of the Court was expressed in a per curiam opinion, parts of which were joined by different groups of Justices. Full explication of the case is beyond the scope—and need—of this Article.<sup>38</sup> It is most important to note that the Court upheld certain limitations on contributions.<sup>39</sup> A limitation upon the amount that can be contributed to a candidate “entails only a marginal restriction” upon the contributor’s expressive rights because a contribution communicates only general support for a candidate and his views and

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36. 424 U.S. 1 (1976).

37. *Id.* at 6.

38. *Buckley* upheld public financing, disclosure requirements, and caps on individual contributions to campaigns. It struck down limits on expenditures by candidates on their own behalf, limits for total expenditures by a campaign, caps on independent expenditures, and certain provisions constituting the Federal Election Commission. *See id.* at 143.

39. FECA prohibited individuals from contributing more than \$25,000 in a single year or more than \$1,000 to a single candidate. *Id.* at 13.

not “the underlying basis of that support.”<sup>40</sup> Nor, the Court concluded in *Buckley*, does the quantity of communication “increase perceptibly with the size of the contribution.”<sup>41</sup> Contribution limits, moreover, more readily serve the state interest in limiting “the actuality and appearance of corruption resulting from large individual financial contributions.”<sup>42</sup>

FECA also placed limits on expenditures “relative to a clearly identified candidate.”<sup>43</sup> Before passing on their constitutional validity, the per curiam opinion, in an effort to avoid problems of vagueness and overbreadth, construed this language to apply only to “expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.”<sup>44</sup> The Court explained:

[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.<sup>45</sup>

In drawing this distinction, the Court said that determining what constitutes “express advocacy” would turn on a finding of what came to be called “magic” words such as “vote for,” “elect,” or “support.”<sup>46</sup>

The Court upheld FECA’s reporting and disclosure requirements with respect to its narrowed definition of “expenditures” — those expressly advocating the election or defeat of a clearly identified candidate. It struck down, however, a cap on the amount of such expenditures. In doing so, it argued that limitations on expenditures do restrict communication (spending money to disseminate a particular message of the speaker’s

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40. *Id.* at 20–21. A subsequent opinion of the Court characterizes contributions as “speech by proxy.” *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 196 (1981) (Marshall, J., plurality opinion).

41. *Buckley*, 424 U.S. at 21.

42. *Id.* at 26–27.

43. *Id.* at 1.

44. *Id.* at 44.

45. *Id.* at 42.

46. *Id.* at 44 n.52.

choosing *does* communicate more by spending more) in a way that contribution limits do not. The Court observed that “[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”<sup>47</sup>

Moreover, independent expenditures, in the Court’s view, did not “appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.”<sup>48</sup> This reduced interest in preventing actual or apparent corruption was insufficient to justify the more substantial burden on expression entailed in expenditure limits.<sup>49</sup> Any broader interest in equalizing the interests of competing interests was “wholly foreign to the First Amendment.”<sup>50</sup>

*Buckley’s* distinction between expenditures and contributions has been criticized by opponents and advocates of regulation alike. Justice Thomas, for example, has argued that it is based on a false distinction between actual and proxy speech.<sup>51</sup> Whether one chooses to participate by expenditure or contribution, there is “usually some go-between that facilitates the dissemination of the spender’s message—for instance, an advertising agency or a television station” such that calling a contribution “‘speech by proxy’ . . . does little to differentiate it from an expenditure.”<sup>52</sup> Nor is it correct in Justice Thomas’s view to state that a contribution to a candidate does not constitute communication by the donor who, in contributing, endorses and facilitates a message (that of his candidate) that he prefers.<sup>53</sup> A larger contribution communicates “more” in the same way as a larger expenditure.<sup>54</sup> *Buckley’s* distinction be-

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47. *Id.* at 19.

48. *Id.* at 46.

49. *Id.* at 44. Ironically, given the Court’s own limiting construction, the Court also noted that a limitation on independent expenditures would be underinclusive because expenditures for communications that avoided express advocacy were left unregulated. *See id.* at 45.

50. *Id.* at 48–49.

51. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 413 (2000) (Thomas, J., dissenting).

52. *Id.* (quoting *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 638–39 (1996) (Thomas, J., concurring in judgment and dissenting in part)).

53. *Id.* at 414–15.

54. *Id.* at 419.

tween expenditures and contributions, in his view, “ignores the distinct role of candidate organizations as a means of individual participation in the Nation’s civic dialogue.”<sup>55</sup>

Justice Thomas would leave little room for regulation. Justice Stevens, on the other hand, believes that expenditure limits should be allowed just as limits on contributions. Expenditure limits simply enable speech and should be analyzed as time, place, and manner restrictions.<sup>56</sup> In his view:

After all, orderly debate is always more enlightening than a shouting match that awards points on the basis of decibels rather than reasons. Quantity limitations are commonplace in any number of other contexts in which high-value speech occurs. Litigants in this Court pressing issues of the utmost importance to the Nation are allowed only a fixed time for oral debate and a maximum number of pages for written argument. As listeners and as readers, judges need time to reflect on the merits of an issue; repetitious arguments are disfavored and are usually especially unpersuasive. Indeed, experts in the art of advocacy agree that “lawyers go on for too long, and when they do it doesn’t help their case.”<sup>57</sup>

Justice Stevens continues, “Congress is entitled to make the judgment that voters deserve the same courtesy and the same opportunity to reflect as judges; flooding the airwaves with slogans and sound-bites may well do more to obscure the issues than to enlighten listeners.”<sup>58</sup> In his view, “the notion that rules limiting the quantity of speech are just as offensive to the First Amendment as rules limiting the content of speech is plainly incorrect.”<sup>59</sup>

#### B. Persistence of the Distinction

Nevertheless, the distinction between expenditures and contributions has proven relatively robust.<sup>60</sup> In *First National Bank*

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55. *Id.* at 417.

56. *Davis v. FEC*, 128 S. Ct. 2759, 2778 (2008).

57. *Id.* at 2779 (citation omitted).

58. *Id.*

59. *Id.*

60. Academic criticism has also been robust. See, e.g., David Schultz, *Revisiting Buckley v. Valeo: Eviscerating the Line Between Candidate Contributions and Independent Expenditures*, 14 J.L. & POL. 33, 35–36 (1998) (arguing for elimination of the distinction).

of *Boston v. Bellotti*,<sup>61</sup> for example, the Court struck down a Massachusetts statute prohibiting corporations from spending on communications relating to referenda other than those that “materially affect [the corporation’s] business, property, or assets.”<sup>62</sup> The Court found no support for the proposition that otherwise protected speech loses its protection because its source is a corporation.<sup>63</sup> Nonetheless, corporate restrictions on contributions could still be valid. The Court in *Bellotti* distinguished restrictions on corporate contributions as attempts to prevent apparent or actual corruption, an interest not presented by the referenda restriction.<sup>64</sup> And, as we will see, restrictions on corporate contributions have been upheld.<sup>65</sup>

In *FEC v. National Conservative Political Action Committee (NCPAC)*,<sup>66</sup> the Court struck down a restriction on expenditures by independent entities to further the election of a presidential candidate who had accepted public financing.<sup>67</sup> In *Colorado Republican Federal Campaign Committee v. FEC (Colorado I)*,<sup>68</sup> it struck down limits on political party expenditures for a general election campaign for Congress.<sup>69</sup>

The Court has, however, permitted restrictions on expenditures that constitute “express advocacy” in *Buckley*’s terms—at least when undertaken by a corporation. In *FEC v. Massachusetts Citizens for Life (MCFL)*,<sup>70</sup> the Court considered whether section 441b’s prohibition against corporate use of treasury funds “in connection” with a federal election<sup>71</sup> could be constitutionally applied to the activities of MCFL.<sup>72</sup> MCFL was a nonprofit corporation that did not accept donations from business corporations, but raised money from its individual members and its activities such as raffles, garage and bake sales,

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61. 435 U.S. 765 (1978).

62. *Id.* at 767.

63. *Id.* at 784.

64. *Id.* at 787–88 & n.26.

65. See *infra* text accompanying notes 86–95.

66. 470 U.S. 480 (1985).

67. *Id.* at 482–83.

68. 518 U.S. 604 (1996).

69. *Id.* at 608.

70. 479 U.S. 238 (1986).

71. 2 U.S.C. § 441b (2006).

72. *MCFL*, 479 U.S. at 241.

picnics, and dances.<sup>73</sup> The Court applied the same narrowing construction to section 441b as it had to the prohibitions of independent expenditures in *Buckley*, holding that it prohibited only those expenditures that constitute “express advocacy.”<sup>74</sup>

Although MCFL’s activities did constitute express advocacy,<sup>75</sup> a majority of the Court found that, as applied to MCFL, section 441b unconstitutionally burdened MCFL’s right of free expression.<sup>76</sup> Although section 441b could be justified as a limit on the capacity of corporate entities to use resources amassed in the economic marketplace to provide an unfair advantage in the political marketplace, application of the statute to MCFL did not serve that interest because MCFL was formed strictly to disseminate political ideas, not to amass capital.<sup>77</sup> Its available resources were not a function of its success in the economic marketplace, but its popularity in the political marketplace.<sup>78</sup>

In short, the Court concluded that “MCFL is not the type of ‘traditional corporatio[n] organized for economic gain’ . . . that has been the focus of regulation of corporate political activity”<sup>79</sup> and announced an exception for what are now known as MCFL corporations.<sup>80</sup>

The scope of MCFL’s constitutional limitation has not proven to be particularly robust. For example, in *Austin v. Michigan State Chamber of Commerce*,<sup>81</sup> the Court upheld a Michigan statute that prohibited corporate treasury funds from being used for independent expenditures in support of, or in opposition to,

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73. *Id.* at 242.

74. *Id.* at 249.

75. *Id.*

76. *Id.* at 261.

77. *Id.* at 264.

78. *Id.*

79. *Id.* at 259.

80. Such an exempted organization, in the Court’s view, has three attributes. First, “it was formed for the express purpose of promoting political ideas, and cannot engage in business activities.” *Id.* at 263–64. Because its funding is attracted for political purposes, “[t]his ensures that political resources reflect political support.” *Id.* at 264. Second, “it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings.” *Id.* Finally, it will not have been “established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities.” *Id.* This restriction, the Court reasoned, “prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.” *Id.*

81. 494 U.S. 652 (1990).

a candidate.<sup>82</sup> The prohibition, the Court concluded, was narrowly tailored to serve a compelling state interest.<sup>83</sup> Although the Chamber of Commerce was a nonprofit entity, it was not formed for the purpose of political advocacy.<sup>84</sup> Additionally, it did not consist entirely of members supporting its political purposes and accepted money from for-profit corporations.<sup>85</sup>

Nevertheless, the narrowing construction of section 441b contributed to the ability of interested parties to engage in independent issue advocacy as long as they carefully avoided the magic words of express advocacy. Thus, not only did expenditures by individuals and unincorporated associations fall within the safe harbor, but so did ads run by, or with the contributions of, corporations and unions.

Restrictions on contributions have fared better. In *FEC v. National Right to Work Committee*,<sup>86</sup> the Court upheld restrictions on contributions by corporate political action committees organized to make campaign contributions, relying on the special advantages of the corporate form and the differing nature of contributions both with respect to communicative impact and the potential for corruption.<sup>87</sup> In *Nixon v. Shrink Missouri Government Political Action Committee*,<sup>88</sup> it upheld state limitations on campaign contributions, notwithstanding that, in real terms, the state restrictions were substantially lower than those approved in *Buckley*.<sup>89</sup> In doing so, it made clear that contribution limits involving "'significant interference' with associational rights," need not survive strict scrutiny.<sup>90</sup> Instead, the government need only show that the restriction was "closely drawn" to match a "sufficiently important interest."<sup>91</sup> In *FEC v. Colorado Republican Federal Campaign Committee (Colorado II)*,<sup>92</sup> it rejected a facial challenge to limits on party expenditures coordinated with a campaign, continuing *Buckley's* view that coordinated expendi-

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82. *Id.* at 654–55.

83. *Id.* at 655.

84. *Id.* at 672 (Brennan, J., concurring).

85. *Id.* at 664 (majority opinion).

86. 459 U.S. 197 (1982).

87. *Id.* at 209–11.

88. 528 U.S. 377 (2000).

89. *Id.* at 396–98.

90. *Id.* at 387–88 (citation omitted).

91. *Id.* (citation omitted).

92. 533 U.S. 431 (2001).

tures are very much like contributions.<sup>93</sup> In *FEC v. Beaumont*,<sup>94</sup> the Court upheld prohibitions on corporate contributions, even from nonprofit advocacy corporations similar to MCFL.<sup>95</sup>

C. *The Nature of Corruption: Setting Expenditures and Contributions Apart*

This persistent distinction—with expenditures constituting express advocacy and contributions being subject to substantial regulation, and other expenditures being relatively free, has coexisted with substantial disagreements between the Court’s regulatory proponents and regulatory skeptics regarding the nature of the State’s interest in regulating campaign contributions and expenditures. One perspective has suggested that restrictions may only be based upon the interest in avoiding actual or apparent corruption, understood as the undue influence of individual donors upon individual candidates, that is, quid pro quo or “play for pay” corruption. This view has tended to prevail—or at least receive greater emphasis—in cases involving regulation of expenditures.

The per curiam opinion in *Buckley*, for example, stated that the only compelling interest supporting such regulations was the prevention of actual or apparent corruption.<sup>96</sup> It argued that the “concept that government may restrict the speech of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment.”<sup>97</sup> In *NCPAC*, the majority again claimed that “preventing corruption or the appearance of corruption are the only legitimate and compelling interests thus far identified for restricting campaign finances.”<sup>98</sup> It defined corruption as elected officials being “influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.”<sup>99</sup> Restrictions of independent expenditures do not serve that interest because “an exchange of political favors for uncoordinated expenditures remains a hypothetical

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93. *Id.* at 437.

94. 539 U.S. 146 (2003).

95. *Id.* at 149.

96. See *Buckley v. Valeo*, 424 U.S. 1, 25–26 (1976).

97. *Id.* at 48–49.

98. *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985).

99. *Id.* at 497.

possibility and nothing more.”<sup>100</sup> The majority, quoting *Buckley*, reasoned that “[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”<sup>101</sup>

That these communications might have an effect, the Court concluded, is a matter to be embraced and not lamented:

The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.<sup>102</sup>

At the same time—in cases upholding regulation, often involving contributions—the Court often has suggested an interest in combating an expanded form of corruption. In *MCFL*, for example, the Court recognized that restrictions on corporate contributions and express advocacy might be justified by:

[T]he need to restrict “the influence of political war chests funneled through the corporate form,” to “eliminate the effect of aggregated wealth on federal elections,” to curb the political influence of “those who exercise control over large aggregations of capital,” and to regulate the “substantial advantages which go with the corporate form of organization.”<sup>103</sup>

This interest in limiting what the majority called “the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas.”<sup>104</sup>

That rationale is, of course, broader than the type of quid pro quo corruption emphasized in *Buckley* and *NCPAC*, suggesting a legitimate state interest in counteracting the impact of unequal financial resources in political campaigns. In *Shrink Mis-*

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100. *Id.* at 498.

101. *Id.* at 497 (quoting *Buckley*, 424 U.S. at 47).

102. *Id.* at 498.

103. *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 257 (1986) (citations omitted).

104. *Id.*

*souri*, the Court again recognized a broader “corruption” concern:

In speaking of “improper influence” and “opportunities for abuse” in addition to “*quid pro quo* arrangements,” we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money “to influence governmental action” in ways less “blatant and specific” than bribery.<sup>105</sup>

This interest was expressly rooted not only in actual threats, but also in public perception.<sup>106</sup> It involved both corporate contributions and individual donations.

This more expansive view of corruption is only partially concerned with corruption as commonly understood, that is, the idea of improper influence. It suggests that money-bought access—or widespread belief in its existence—can justify regulation. Beyond that, it seeks to address the disproportionate influence of those with money to spend. As Justice Brennan put it in *MCFL*, the concern is that “[d]irect 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.”<sup>107</sup> The availability of funds is—or ought to be—a “rough barometer of public support,” but funds accumulated by a business corporation reflect success in the economic rather than the political marketplace.<sup>108</sup>

This theory, with its emphasis on insulation of the political marketplace from the disparities of wealth created in a market economy, rests uneasily on the distinction between expenditures and contributions. Even if contributions do not raise the same prospect of *quid pro quo* corruption, they permit the economic marketplace to influence the political process. They

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105. *Nixon v. Shrink Mo. Gov’t PAC.*, 528 U.S. 377, 389 (2000) (quoting *Buckley*, 424 U.S. at 28).

106. *Id.* at 388–89 (“Congress could legitimately conclude that the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.” (alteration in original) (quoting *Buckley*, 424 U.S. at 26–27) (internal quotation marks omitted)).

107. *MCFL*, 479 U.S. at 257.

108. *Id.* at 258.

permit those with more money to speak louder. If the state actually wishes to construct a more egalitarian system of campaign finance in the sense of divorcing—or at least distancing—it from the distribution of private wealth, then its objective is at war with the strong and robust constitutional protection of expenditures.

## II. WHACKING THE MOLE: EXPENDITURES SURVIVE

### A. *An Attempt to Limit Independent Expenditures*

The result of *Buckley's* distinction between contributions and expenditures and between express and issue advocacy has been a substantial movement of money to independent expenditures. During the 1998 election cycle, spending on issue ads doubled to between \$270 and \$340 million and exceeded \$500 million in 2000.<sup>109</sup> Independent expenditures related to 527 organizations exceeded \$240 million in 2008, \$198 million in 2006, and \$440 million in 2004.<sup>110</sup> During the 2008 election cycle, independent money shifted, to some extent, from 527 organizations to 501(c) organizations.<sup>111</sup> This move may have been promoted by more lenient disclosure requirements for the latter.<sup>112</sup>

Concern over the proliferation of these ads and the relative lack of restrictions on the way in which they are financed ultimately led to passage of the Bipartisan Campaign Reform Act of 2002 (BCRA), popularly known as the McCain-Feingold Act.<sup>113</sup> The pertinent part of BCRA prohibits electioneering communications paid for with corporate or union treasury funds within thirty days of a primary and sixty days of a general election for a federal office.<sup>114</sup> Electioneering communications are defined as any “broadcast, cable, or satellite commu-

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109. See *McConnell v. FEC*, 540 U.S. 93, 127 n.20 (2003).

110. OpenSecrets.org, 527s: Advocacy Group Spending in the 2010 Elections, <https://www.opensecrets.org/527s/index.php> (last visited Oct. 14, 2009).

111. The Campaign Finance Institute, Outside Soft Money Groups Approaching \$400 Million in Targeted 2008 Election, <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=214> (last visited Oct. 14, 2009).

112. See Jeffrey H. Birnbaum, *To Conceal Donors, Some Political Groups Look to the Tax Code*, WASH. POST, April 17, 2007, at A19.

113. 2 U.S.C. §§ 431–434 (2006).

114. See 2 U.S.C. § 434(f)(3)(A).

nication” that “refers to a clearly identified candidate for Federal office” and that is “targeted to the relevant electorate.”<sup>115</sup>

This aspect of BCRA was upheld against a facial challenge in *McConnell v. FEC*.<sup>116</sup> Writing for a 5-4 majority, Justices O’Connor and Stevens explained that *Buckley’s* distinction between express and issue advocacy was a matter of statutory interpretation, not constitutional command.<sup>117</sup> It was adopted to cure the potentially fatal vagueness of FECA’s definition of restricted expenditures “to include the use of money or other assets ‘for the purpose of . . . influencing’ a federal election.”<sup>118</sup> These vagueness concerns, in the view of the Court, are not present in the more specific definition of prohibited communications in BCRA.<sup>119</sup> All ads mentioning a candidate are prohibited during the blackout period.

Although the Court declined to abandon *Buckley’s* differing approaches to contributions and expenditures,<sup>120</sup> a majority rejected the idea that “the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy.”<sup>121</sup> The majority rejected the idea that the First Amendment erects a rigid barrier between restriction of express advocacy and of issue advocacy. Regulation of the former was necessary to serve Congress’s goal to combat real or apparent corruption. The distinction between the presence or absence of *Buckley’s* “magic words” was “functionally meaningless.”<sup>122</sup>

There is “[l]ittle difference,” the majority stated, “between an ad that urged viewers to ‘vote against Jane Doe’ and one that condemned Jane Doe’s record on a particular issue before exhorting viewers to ‘call Jane Doe and tell her what you think.’”<sup>123</sup> In fact, some campaign professionals claim that the most effective ads avoid the use of magic words.<sup>124</sup>

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115. *Id.*

116. 540 U.S. 93 (2003).

117. *Id.* at 190.

118. *Id.* at 191 (quoting *Buckley v. Valeo*, 424 U.S. 1, 77 (1976)).

119. *Id.* at 194.

120. *Id.* at 137–38.

121. *Id.* at 194.

122. *Id.* at 193.

123. *Id.* at 126–27. The Court noted that very few candidate ads contained words of express advocacy. *Id.* at 127 n.18.

124. *Id.* at 193 n.77.

The ads may have been functionally equivalent, but the methods by which they were financed were not:

Corporations and unions spent hundreds of millions of dollars of their general funds to pay for these ads, and those expenditures, like soft-money donations to the political parties, were unregulated under FECA. Indeed, the ads were attractive to organizations and candidates precisely because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money.<sup>125</sup>

The ads, moreover, are usually run by groups with bland and mysterious names, often falsely suggesting a grassroots provenance.<sup>126</sup> Voters may be unlikely to know who sponsored them.<sup>127</sup>

The Court observed that political candidates and parties would ask those who had donated their permitted quota of hard money to contribute additional funds for issue advocacy.<sup>128</sup> In the pre-BCRA world, such candidates and parties "knew who their friends were."<sup>129</sup> Requiring words of express advocacy, in the view of the majority, created a massive opportunity for evasion that Congress chose to address through the BCRA's blackout period for electioneering communication financed by corporate and union treasury funds.

Once again, the Court recognized a state interest in combating a broader form of corruption so as to diminish the political influence of wealth.<sup>130</sup> The prohibition against use of corporate and union treasury funds was justified by Congress's interest in restraining "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>131</sup>

This holding has—or, at least for a brief period of time, had—two implications for the future of issue advertising. The

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125. *Id.* at 127–28 (citations omitted).

126. *See id.* at 128.

127. *See id.* at 205.

128. *Id.* at 129.

129. *Id.*

130. *See id.* at 205.

131. *Id.* (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

interest in avoiding the fact or appearance of corruption justifies the restriction of communications that may have the effect of aiding a candidate even in the absence of any connection or coordination with the candidate, or words of express advocacy. Although a majority retained the distinction between expenditures and contributions, expenditures could be restricted in support of limitations on contributions.

In addition, as in *MCFL* and *Austin*, a majority once again held that restricting the advantages in amassing resources supposedly enjoyed by corporations justifies restriction on corporate speech. It suggested, moreover, a related interest in equalizing resources in political campaigns—in achieving what Rick Hasen, borrowing from Justice Brennan in *MCFL*, calls barometric equality—the notion that financial support should roughly reflect popular support.<sup>132</sup> Although raised in the context of corporations and unions, *McConnell* suggested again that the state has an interest in ensuring, at least, some relationship between financial and popular support.

*McConnell* itself did not end or even diminish issue advertisements. Regulatory gaps and legal ingenuity enabled continued growth in independent expenditures.<sup>133</sup> These could still be financed by individuals and certain groups, such as 527 organizations, which continued to be outside most federal statutory restrictions. Money found a way.

Yet the path to greater restriction seemed clear. The breadth of the *McConnell* rationale encompassed not only the capacity of corporations and unions to amass large amounts of wealth, but a broader notion of the anticorruption rationale. It suggested that many of the remaining legislative lacunae could be readily closed and issue advertising could be substantially restricted.

### B. *The Protection of Issue Advocacy*

But not for long. In *Wisconsin Right to Life*, a nonprofit pro-life organization sought to run ads during the blackout period addressing the filibuster of Bush administration judicial nomi-

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132. See Richard L. Hasen, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 111–12 (2003).

133. See *supra* text accompanying notes 20–22.

nees.<sup>134</sup> The ads in question were fairly standard representations of the genre. They called upon Wisconsin Senators Kohl and Feingold to support up or down votes on President Bush's judicial nominees.<sup>135</sup> Wisconsin Right to Life (WRTL) wished to run the ads during the blackout period preceding Senator Feingold's bid for reelection.<sup>136</sup> It wished to use general treasury funds to pay for the ads and admitted that these funds included some from corporate donors.

The matter came to the Court twice. In *FEC v. Wisconsin Right to Life (WRTL I)*,<sup>137</sup> the Court held that *McConnell* did not foreclose "as applied" challenges to BCRA.<sup>138</sup> One year later, in *WRTL II*, the Court upheld Wisconsin Right to Life's "as applied" challenge, splitting three ways.<sup>139</sup> Justices Scalia, Kennedy, and Thomas, who dissented in *McConnell*, reiterated their belief that the blackout provision was either unconstitutionally vague or facially unconstitutional.<sup>140</sup> Justices Souter, Stevens, Ginsburg, and Breyer, all of whom (with Justice O'Connor) were in the *McConnell* majority, would have upheld application of the blackout provision to the ads in question.<sup>141</sup>

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134. *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 551 U.S. 449, 458–59. One of the ads, called "Wedding," featured a bride and groom at the altar:

*Pastor*: And who gives this woman to be married to this man?

*Bride's Father*: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up . . .

*Voice-Over*: Sometimes it's just not fair to delay an important decision.

But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' vote. So qualified candidates don't get a chance to serve.

It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

*Id.* (internal quotation marks omitted). The text of the other two WRTL advertisements was similar. *See id.* at 459.

135. *Id.* at 459.

136. *Id.* at 460.

137. 546 U.S. 410 (2005).

138. *Id.* at 412.

139. *WRTL II*, 551 U.S. 449.

140. *Id.* at 483–84 (Scalia, J., concurring in part and concurring in the judgment).

141. *Id.* at 504 (Souter, J., dissenting).

The two new members of the Court, Chief Justice Roberts and Justice Alito, agreed in a “principal opinion” (written by Chief Justice Roberts) that WRTL and its corporate donors have a First Amendment right to communicate on issues of interest—even during the election and even if they name a candidate for federal office.<sup>142</sup> Restriction of this right cannot, in the absence of coordination with the candidate, be justified by the interest in avoiding actual or apparent impropriety. The principal opinion nevertheless purported to follow *McConnell*’s holding that the “functional equivalent” of express advocacy may be restricted,<sup>143</sup> but it adopted an extraordinarily generous definition of “genuine issue advocacy.”<sup>144</sup>

In order to protect “the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment,”<sup>145</sup> the principal opinion argued that the test for express advocacy or its functional equivalent “must be objective, focusing on the substance of the communication rather than on amorphous considerations of intent and effect.”<sup>146</sup> Therefore, neither the intent nor the effect (in the sense of examining whether an ad actually influences—or is likely to influence—votes) is relevant. Thus, the principal opinion held that BCRA’s blackout provisions can only be applied to ads that are “susceptible [to] no reasonable interpretation *other than* as an appeal to vote for or against a specific candidate.”<sup>147</sup> In other words, if a communication can reasonably be called an issue ad, then it is an issue ad.

Although one could imagine an inquiry into the nature of an ad that is highly contextualized and driven by the role played by that ad in the particular race, the principal opinion made clear that *WRTL II* was not that case.<sup>148</sup> Because the possibility of a lengthy, indeterminate, and necessarily subjective inquiry would chill speech, the inquiry into whether an ad cannot be construed as an issue ad must be objective and straight-

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142. *Id.* at 481–82.

143. *Id.* at 457.

144. *Id.* at 469–70.

145. *Id.* at 469 (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

146. *Id.* at 469.

147. *Id.* at 469–70 (emphasis added).

148. *See id.* at 469.

forward in a way that will minimize uncertainty and that will not deter protected speech.<sup>149</sup> Because the “benefit of the doubt” ought to go to “speech, not censorship,”<sup>150</sup> this inquiry must not be overly concerned with context, and the determination should involve little, if any, discovery.<sup>151</sup> Thus, the debate over whether something is a “phony” or “genuine” issue ad is reduced to whether it discusses . . . issues.

The Court agreed that “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.<sup>152</sup> But, unlike the Court in *McConnell*, the Court in *WRTL II* held that such a tendency “is not enough to establish that the ads can only reasonably be viewed as advocating or opposing a candidate in a federal election.”<sup>153</sup> “Discussion of issues,” it continued, “cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker.”<sup>154</sup>

The Court had little difficulty finding that WRTL ads were genuine issue advertising:

Under this test, WRTL’s three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office.<sup>155</sup>

That WRTL and its PAC opposed Senator Feingold’s reelection, in the Court’s view, went only to its subjective intent and was therefore irrelevant. Nor did it matter that the ad ran near

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149. *See id.* at 468–69.

150. *Id.* at 452.

151. *Id.* at 469.

152. *Id.* at 474 (quoting *Buckley v. Valeo*, 424 U.S. 1, 42 (1976)). The majority in *McConnell* thought them “functionally identical in important respects.” *McConnell v. FEC*, 540 U.S. 93, 126 (2003).

153. *WRTL II*, 551 U.S. at 474.

154. *Id.*

155. *Id.* at 470.

an election but after the Senate had recessed.<sup>156</sup> An issue ad might reasonably be run when a legislator is back home or “to coincide with public interest rather than a floor vote.”<sup>157</sup> The ad’s direction of viewers to a website that set forth the Senators’ positions on judicial filibusters and allowed visitors to sign up for “‘e-alerts,’ some of which contained exhortations to vote against Senator Feingold,”<sup>158</sup> also did not impress the Court.

Regulation of issue ads could not, in the view of the principal opinion, be justified by the state’s interest in preventing actual or apparent corruption or in promoting a more “egalitarian” system of campaign finance:

This Court has long recognized “the governmental interest in preventing corruption and the appearance of corruption” in election campaigns. This interest has been invoked as a reason for upholding *contribution* limits. As *Buckley* explained, “[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.” We have suggested that this interest might also justify limits on electioneering *expenditures* because it may be that, in some circumstances, “large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions.”<sup>159</sup>

The majority rejected the interest in combating a broader form of corruption and minimizing the influence of corporate wealth relied upon in *Austin* and *McConnell*.<sup>160</sup> Specifically, the corruption represented by “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form” was not enough to trump First Amendment rights.<sup>161</sup> This “different type of corruption,” he said, does not apply outside the scope of campaign speech and “genuine issue ads” (as *WRTL II* defines them) are not that.<sup>162</sup>

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156. *Id.* at 472.

157. *Id.* at 472–73.

158. *Id.* at 473.

159. *Id.* at 478 (citation omitted).

160. *Id.* at 479.

161. *Id.* (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

162. *Id.* at 480.

*McConnell* arguably applied this interest—which this Court had only assumed could justify regulation of express advocacy—to ads that were the “functional equivalent” of express advocacy. But to justify regulation of WRTL’s ads, this interest must be stretched yet another step to ads that are *not* the functional equivalent of express advocacy. Enough is enough.<sup>163</sup>

“Issue ads like WRTL’s,” according to Chief Justice Roberts, “are by no means equivalent to contributions, and the quid pro quo corruption interest cannot justify regulating them. To equate WRTL’s ads with contributions is to ignore their value as political speech.”<sup>164</sup>

Finally, the principal opinion declined to continue the game of “Whac-A-Mole.” It rejected the idea that “an expansive definition of ‘functional equivalent’ is needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions.”<sup>165</sup> This “prophylaxis upon prophylaxis” approach is inconsistent with strict scrutiny.<sup>166</sup> That WRTL had the option of forming a PAC could not justify the restriction of any speech other than express advocacy or its functional equivalent.<sup>167</sup>

The dissent raised again the theme of the need to counter the political impact of “concentrations of money in self-interested hands” that “threatens the capacity of this democracy to represent its constituents and the confidence of its citizens in their capacity to govern themselves.”<sup>168</sup> These interests, critical in *MCFL*, *Austin* and *McConnell*, justify, as opposed to a laissez faire approach to the electoral process, “clear and reasonable boundaries . . . to limit ‘the corrosive and distorting effects of immense aggregations of wealth.’”<sup>169</sup> The principal opinion, they argued, left little room for these boundaries:

[I]t is hard to imagine the Chief Justice would ever find an ad to be “susceptible of no reasonable interpretation other

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163. *Id.* at 478 (citation omitted).

164. *Id.* at 478–79.

165. *Id.* at 479.

166. *Id.*

167. *Id.* at 477 n.9.

168. *Id.* at 507 (Souter, J., dissenting).

169. *Id.* at 535 (citation omitted).

than as an appeal to vote for or against a specific candidate," unless it contained words of express advocacy. The Chief Justice thus effectively reinstates the same toothless "magic words" criterion of regulable electioneering that led Congress to enact BCRA in the first place.<sup>170</sup>

There was, in the view of the four dissenting justices, no way that the hypothetical "Jane Doe ad," regarded as the "functional equivalence" of express advocacy in *McConnell*, would not be considered genuine issue advocacy under the test adopted by the principal opinion in *WRTL II*.<sup>171</sup> The three concurring justices agreed.<sup>172</sup> To the dissent, *McConnell* had been "invert[ed]."<sup>173</sup> "[W]e meant," they said, "that an issue ad without campaign advocacy could escape the restriction."<sup>174</sup> The principal opinion, however, "wings the opposite conclusion" from *McConnell* stating that if there is any way to characterize an ad as issue advocacy, it is free from restriction.<sup>175</sup>

### 1. *The Continued Viability of Issue Ads*

*WRTL II* has two implications that are important here. It affirms the continued viability of the now over thirty-year-old distinction between expenditures and contributions. The latter can be restricted to avoid actual or apparent corruption, but the former—even if candidates are able to know who their friends are—cannot. And while the Court does not explicitly return to the regime of magic words, it should not be difficult for advertisers to frame election cycle communications as "genuine issue advocacy." As a consequence, the market for issue ads is likely to remain robust. As the *WRTL II* dissent<sup>176</sup> and a number of

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170. *Id.* at 531.

171. *Id.* at 525–27.

172. *Id.* at 498 n.7 (Scalia, J., concurring). One is tempted to observe that any proposition of law agreed upon by Justices Scalia, Thomas, Kennedy, Stevens, Souter, Breyer, and Ginsburg may well be taken as conclusively proven.

173. *Id.* at 526 (Souter, J., dissenting).

174. *Id.*

175. *Id.* Although it seems indisputable that the *WRTL II* principal opinion is inconsistent with *McConnell*, it is less clear that it "inverts" it. It does not suggest, for example, that only campaign ads without issue content are subject to restriction or even that any issue content will immunize an ad from restriction.

176. *Id.* at 536 ("After today, the ban on contributions by corporations and unions and the limitation on their corrosive spending when they enter the political arena are open to easy circumvention, and the possibilities for regulating corporate and union campaign money are unclear.").

commentators have noted,<sup>177</sup> *WRTL II* creates a rather large safe harbor for independent expenditures mentioning candidates but purporting to focus on issues.

FEC regulations seeking to implement *WRTL II* do not suggest otherwise. After setting forth the test from the principal opinion, that is, that corporations and labor organizations are prohibited from making electioneering communications only if “the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate,”<sup>178</sup> the rules provide for a safe harbor. In pertinent part, a communication will fall within the safe harbor if it:

[d]oes not mention any election, candidacy, political party, opposing candidate, or voting by the general public; [d]oes not take a position on any candidate’s or officeholder’s character, qualifications, or fitness for office [and] [f]ocuses on a legislative, executive or judicial matter or issue [while it] [u]rges a candidate to take a particular position or action with respect to the matter or issue, or [u]rges the public to adopt a particular position and to contact the candidate with respect to the matter or issue; or [p]roposes a commercial transaction, such as the purchase of . . . a product or service, or attendance (for a fee) at a film exhibition or other event.<sup>179</sup>

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177. See, e.g., Lillian R. BeVier, *First Amendment Basics Redux: Buckley v. Valeo to FEC v. Wisconsin Right to Life, 2006–2007 CATO SUP. CT. REV. 77, 99*; Richard L. Hasen, *Beyond Incoherence: The Roberts Court’s Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1089 (2008) (“Rather than most electioneering communications being subject to section 203, *WRTL II* mandates that most such communications be exempted from section 203.”); Frances R. Hill, *Exempt Organizations in the 2008 Election: Will Wisconsin Right to Life Bring Changes?*, 19 U. FLA. J.L. & PUB. POL’Y 271, 286 (2008); Matthew Modell, *Protecting Free Speech in Electioneering Communications: FEC v. Wisconsin Right to Life*, 9 N.C. J.L. & TECH. ON. 30, 44–45 (2007), (“The *WRTL* ruling essentially brings us back to a ‘magic words’ test.”); cf. Margaret G. Perl and Kimberly A. Demarchi, *Direct Democracy and Indirect Regulation: The Brewing Conflict Between Federal Campaign Finance Law and State Ballot Measure Campaigns*, 34 WM. MITCHELL L. REV. 591, 624 (2008) (“*WRTL* has arguably removed most of the restrictions that BCRA’s electioneering communications provisions placed on ballot measure committee advertisements featuring a federal candidate.”). But see Paul S. Ryan, *Wisconsin Right to Life and the Resurrection of Furgatch*, 19 STAN. L. & POL’Y REV. 130, 159 (2008) (arguing that *WRTL II* should not be read to require magic words, but to say that an ad is the functional equivalent of express advocacy “when read as a whole, and with limited reference to external events, [it is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate” (quoting *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987))).

178. 11 C.F.R. § 114.15(a) (2009).

179. 11 C.F.R. § 114.15(b).

But even an ad outside this relatively deep safe harbor must nevertheless be examined for “indicia of express advocacy” to determine whether it “has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.”<sup>180</sup> Drawing on Chief Justice Roberts’s controlling opinion,<sup>181</sup> it identifies such indicia as mention of “any election, candidacy, political party, opposing candidate, or voting by the general public” or expression of “a position on any candidate’s or officeholder’s character, qualifications, or fitness for office.”<sup>182</sup> Content that would support an interpretation other than as an appeal to vote for or against a candidate includes focusing on a public policy issue and calling for a candidate to take a position or for the public to contact the candidate. It may consist of an ad that “[i]ncludes a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against” a candidate.<sup>183</sup> Only “the communication itself and basic background information that may be necessary to put the communication in context and which can be established with minimal, if any, discovery” may be considered.<sup>184</sup>

The FEC “indicia” are easily avoidable—the WRTL ads avoided them all and so do most issue ads. In the event that the speaker has not happened upon a current legislative issue, there does remain room to argue over exactly what constitutes commentary on a candidate’s “character, fitness, or qualification for office,” but this limitation is not meaningless. The most straightforward understanding of this phrase would limit it to comments on a candidate unrelated to issues. But that line is far from clear. Ads raising the specters of Senator McCain’s cancer and President Obama’s radical associates may not be

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180. 11 C.F.R. § 114.15(c).

181. The principal opinion in *WRTL II* observed that the ads in question lacked “indicia of express advocacy.” They did not “mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office.” *WRTL II*, 551 U.S. at 470.

182. 11 C.F.R. § 114.15(b).

183. 11 C.F.R. § 114.15(c)(2)(iii).

184. 11 C.F.R. § 114.15(d). This information may include whether an individual is a candidate or whether the communication describes a public policy issue. *Id.* The rules provide that “any doubt will be resolved in favor of permitting the communication.” 11 C.F.R. § 114.15(c)(3).

genuine issue ads.<sup>185</sup> What of criticizing a candidate's relationship with lobbyists and calling for the reform of ethics standards? *WRTL II*'s protection of issue advocacy would seem to require some substantial room for discussion of a candidate's position on the issues, notwithstanding that objectionable positions on the issues could, in some sense, bear on his "fitness" for office.<sup>186</sup>

A person who wished to make a case for a more narrow construction of *WRTL II* might seize upon *WRTL*'s ad's failure to state Senator Feingold's position (although it featured the URL for a website on which that information could be found), as the principal opinion noted when distinguishing *WRTL*'s ad from the hypothetical "Jane Doe" ad discussed in *McConnell*.<sup>187</sup> Could it be argued that an ad that mentions and then criticizes a candidate's position is the functional equivalence of express advocacy?

But it would be an extraordinarily cramped view of an issue ad that limited it to calling for advocacy without setting forth the position of the officeholder to whom that advocacy is to be directed. It seems reasonable to suspect that citizens will be far more likely to contact an official who is thought to oppose the position that they prefer. Outside the context of an election, advocacy organizations, in attempting to rouse support for or against a particular piece of legislation, typically offer arguments for their position and identify the position of various legislators and officials.<sup>188</sup> Thus, the identification and criticism of an official's position does not distinguish "genuine" from "phony" ads.

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185. Although one could argue that the Obama ad calls on him to repudiate radical ideologies.

186. Responding to a request for an advisory opinion, the FEC deadlocked on whether proposed ads by the National Right to Life Committee discussing Barack Obama's actions with respect to an abortion bill while he was in the Illinois Senate constituted issue ads. Both ads questioned his honesty and one concluded with the phrase "Barack Obama: a candidate whose word you can't believe in." Alex Knott, *FEC Deadlocks Over Issue Ads*, CQ TODAY ONLINE NEWS, Oct. 23, 2008, <http://www.cqpolitics.com/wmspage.cfm?parm1=5&docID=news-000002978532>.

187. *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 551 U.S. 449, 470–71 n.6 (2007).

188. Advocacy organizations frequently communicate the positions of elected officials—"score cards"—on issues of interest. See, e.g., NARAL Pro Choice Am., 2008 Congressional Record on Choice, <http://www.prochoiceamerica.org/assets/files/2008-congressional-record-on-choice.pdf>; Nat'l Right to Life Comm., NRLC Vote Scorecard, <http://www.capwiz.com/nrlc/home/>.

More fundamentally, the philosophical orientation of *WRTL II*'s principal opinion, shared by the concurrence, does not suggest a narrow reading. Its insistence on the need to resolve all doubts in favor of speech makes such a reading unlikely.

Nor have post-*WRTL II* cases suggested a narrow construction. In *North Carolina Right to Life, Inc. v. Leake* (*NCRTL III*), the Fourth Circuit upheld a challenge to North Carolina's two-pronged test for express advocacy or its functional equivalent.<sup>189</sup> The court found a variety of infirmities, including language suggesting that speech may be regulated based on how a "reasonable person" would interpret its "essential nature" in light of four contextual factors.<sup>190</sup>

In *Center for Individual Freedom, Inc. v. Ireland*,<sup>191</sup> the United States District Court for the Southern District of West Virginia struck down a facial challenge to a statute that provided that a message may constitute express advocacy if it "'can only be interpreted by a reasonable person' as advocating the election or defeat of a candidate because 'the electoral portion' is clear and '[r]easonable minds could not differ' as to whether the message encourages electoral action."<sup>192</sup> This reliance on a posited "reasonable person," in the court's view, is inconsistent with *WRTL II*.<sup>193</sup> Although *Ireland*'s outcome may be better explained by the lack of interpretive guidelines in West Virginia's statutes,<sup>194</sup> *Ireland* and *NCRTL III*'s rejection of a standard based upon how a reasonable person would (as opposed to "could") interpret an ad seems consistent with *WRTL II*'s insistence that a "tie" go to the speaker.<sup>195</sup>

Other post-*WRTL II* cases provide little guidance. In *The Real Truth About Obama, Inc. v. FEC*, the Fourth Circuit rejected the plaintiff's claims that the FEC's regulations defining express advocacy were unconstitutional.<sup>196</sup> In *Human Life of Washington, Inc. v. Brumsickle*, a district court upheld disclosure require-

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189. 525 F.3d 274 (4th Cir. 2008).

190. *Id.* at 280–81.

191. 613 F. Supp. 2d 777 (S.D. W. Va. 2009).

192. *Id.* at 791.

193. *Id.*

194. *Id.*

195. *FEC v. Wis. Right to Life (WRTL II)*, 551 U.S. 449, 474 (2007).

196. 575 F.3d 342, 344–45 (4th Cir. 2009).

ments on issue advocacy that addressed an issue presented by a pending referendum.<sup>197</sup>

The Supreme Court may provide some guidance in *Citizens United v. FEC*.<sup>198</sup> *Citizens United* involves application of BCRA's restriction on electioneering communications to a film entitled *Hillary: The Movie*, produced by a 501(c)(4) organization called Citizens United.<sup>199</sup> The film focused on then-presidential candidate Senator Hillary Rodham Clinton's "'Senate record, her White House record during President Bill Clinton's presidency, . . . her presidential bid,' and include[d] 'express opinions on whether she would make a good president.'"<sup>200</sup> Although display of the film in theatres and distribution by DVD are outside the scope of BCRA, Citizens United also sought to make the film available on a "video on demand" cable channel, and the FEC took the position that the prohibition on broadcasting electioneering communications applies.

The district court denied Citizens United's motion for a preliminary injunction, finding that the film did not reference legislative issues, referenced the election and Senator Clinton's candidacy, and "[took] a position on her character, qualifications, and fitness for office."<sup>201</sup> In the court's view, the film was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her."<sup>202</sup> Citizens United appealed directly to the United States Supreme Court pursuant to section 403(a) of BCRA.<sup>203</sup>

The Court noted probable jurisdiction and oral argument was held on March 24, 2009. At oral argument, the government argued that Congress could, subject to a possible "media exception," constitutionally prohibit the use of corporate funds to publish or distribute a book containing express advocacy dur-

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197. No. C09-0590-JCC, 2009 WL 62144, at \*24 (W.D. Wash. Jan. 8, 2009).

198. 530 F. Supp. 2d 274 (D.D.C. 2008).

199. *Id.* at 275.

200. *Id.*

201. *Id.* at 279.

202. *Id.*

203. Jurisdictional statement at 3, *Citizens United v. FEC*, No. 07-953 (U.S. Jan. 22, 2008).

ing the relevant blackout period.<sup>204</sup> Although the current BCRA does not, by its terms, apply to publication of a book, the government did say that its prohibition could be applied to lengthy and detailed communications such as *Hillary: The Movie*, arguing that a corporation could not, for example, publish or distribute a book through satellite transmission to be read on a Kindle device.<sup>205</sup>

This argument seemed to trouble the Court. Following argument, the Court ordered rehearing and directed the parties to brief the question of whether *Austin's* approval of bans on the use of corporate treasury funds to support or oppose candidates and *McConnell's* approval of a ban on the use of corporate or union treasury funds for express advocacy during election season should be overruled or modified.<sup>206</sup> The case was reargued on September 9, 2009, and the Court will likely hand down a decision soon.<sup>207</sup>

Should the Court overrule *Austin* and the pertinent part of *McConnell*, the distinction between “express” and “genuine issue advocacy” would presumably become irrelevant. The safe harbor would then include not only issue advocacy but uncoordinated express advocacy. It is also possible that the Court will modify the earlier cases to limit their reach to for-profit corporations.

There are ways for the case to be decided, however, that will not shed further light on *WRTL II*. The Court might simply decide that the statute does not apply to video on demand. Even if the Court rules for the FEC, it seems likely to do so on the basis that *Hillary: The Movie* contains (indeed is apparently filled with) commentary on Hillary Clinton’s character, qualifications, and fitness for office.<sup>208</sup> But if the district court’s description is accurate, the conclusion that *Hillary: The Movie* constitutes the “functional equivalent” of express advocacy seems unexceptional under *McConnell* and *WRTL II*. Given what ap-

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204. Transcript of Oral Argument at 29–30, *Citizens United*, No. 07-953 (Mar. 24, 2009), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/08-205.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-205.pdf).

205. *Id.* at 28–29.

206. 129 S. Ct. 2893 (2009).

207. Adam Liptak, *Justices Are Pressed for a Broad Ruling in Campaign Case*, N.Y. TIMES, Sept. 10, 2009, at A28.

208. Transcript of Oral Argument, *supra* note 204, at 11, 20.

pears to be the discomfort of at least some of the Justices with application of BCRA's blackout restriction to things like books and movies, the Court might choose to expand on the definition of "genuine issue advocacy" in a way that makes clear that some express advocacy (which seems clearly to have been present in the film) cannot justify application of the blackout period to communications which also include substantial issue advocacy. It seems unlikely, however, that it will retreat from the broad protection that it announced only two years earlier.<sup>209</sup>

## 2. WRTL II Suggests a Narrow View of the Corruption Interest

*WRTL II*'s second implication is that the majority unambiguously dismissed the posited state interests that supported the outcome in *McConnell*. That an ad may have been intended to influence an election and had that effect is insufficient to restrict it on anticorruption grounds, notwithstanding that politicians will "know who their friends are." It roundly rejects the "egalitarian" justification for reform.

This part of the ruling has implications for the public financing of elections. A relatively free rein for independent expenditures makes public financing difficult. Even if some combination of campaign restrictions and enhanced funding makes opting into a system of public financing more attractive than reliance on private funds, the ability of private money to flow to independents threatens to swamp the publicly financed messages of the candidates. It is unlikely that any politically feasible amount of public financing will come close to matching the flow of independent money to critical races. As noted earlier, one response to relatively unconstrained independent expenditures, enacted in various states, is to provide favorable treatment to candidates facing independent expenditures (or candidates who abjure public funding and, by self financing or contributions, exceed certain spending levels). Most simply, states with public financing systems may provide additional funds to such candidates.

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209. There is also a case moving through the lower courts that raises the question of whether an organization that qualifies as a political committee under federal law (because, for example, its major purpose is the nomination and election of a candidate) can constitutionally be subjected to contribution limits upon its donors. A district court recently denied the plaintiff's motion for a preliminary injunction. *SpeechNow.org v. FEC*, 567 F. Supp. 2d 70 (D.D.C. 2008).

So far, these systems have fared well in the lower courts. In *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake (Leake III)*, the Fourth Circuit upheld a state scheme that provided additional funding to certain candidates facing well-financed, nonparticipating candidates.<sup>210</sup> Such a system, in the court's view, "furthers, not abridges, pertinent First Amendment values."<sup>211</sup> To the extent that nonparticipating candidates or independent groups are deterred from speech, it is a result of "a strategic, political choice, not from a threat of government censure or prosecution."<sup>212</sup>

In *Daggett v. Commission on Governmental Ethics and Election Practices*, the First Circuit upheld a similar system in Maine.<sup>213</sup> The court declined to "equat[e] responsive speech with an impairment to the initial speaker"<sup>214</sup> and observed that "the purpose of the First Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources."<sup>215</sup>

In *Gable v. Patton*, the Sixth Circuit upheld a Kentucky scheme that raised contribution limits for those facing nonparticipating candidates who have exceeded the public financing system limit on expenditures and matched the additional funds raised on a two for one basis until the expenditure limit was reached.<sup>216</sup> The system was so favorable to participating candidates that the court could conceive of only a narrow set of circumstances in which a candidate would choose not to participate (for example, where he intends to exceed the expenditures limit and believes that he can advance his opportunity by more than three to one).<sup>217</sup> Nevertheless, it upheld the system.<sup>218</sup>

Prior to last year, only one case had struck down such a system. In *Day v. Holahan*, the Eighth Circuit concluded that a Minnesota law that increased a candidate's expenditure limits and provided additional public funding in response to inde-

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210. 524 F.3d 427, 432 (4th Cir. 2008).

211. *Id.* at 436 (quoting *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976)).

212. *Id.* at 438.

213. 205 F.3d 445 (1st Cir. 2000).

214. *Id.* at 465.

215. *Id.* at 464 (internal quotation marks omitted).

216. 142 F.3d 940, 953 (6th Cir. 1998).

217. *Id.* at 948.

218. *Id.* at 953; *see also* *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995).

pendent expenditures burdened the speech of those making the independent expenditures.<sup>219</sup>

But *WRTL II* itself suggests a problem. These systems are explicitly designed to “equalize” resources (or, at least, to insulate campaigns from the private distribution of wealth) and to deter large donors or organized interests from spending money outside the regulated system in an effort to influence elections. *WRTL II* suggests that a majority of the current Court does not believe that such expenditures pose a threat of actual or apparent corruption. Nor does that majority appear to believe that regulation of expenditures should seek to “level the playing field” between candidates and contending political factions—to prevent, in the words of Cass Sunstein, “disparities in wealth [from being] translated into disparities in political power.”<sup>220</sup>

The Court’s attitude poses no threat to public financing itself, but it may endanger efforts to counter the constitutionally protected speech of independent organizations engaging in issue advocacy or candidates who have opted out of such a scheme and wish to self finance or to raise and spend larger sums of money obtained through lawful contributions. What if such efforts are seen as restrictions or penalties on protected speech? On what basis might they be justified if the desire to “even the playing field” is unavailable?

### III. THE PLAYING FIELD IS NOT FLAT: WILL PUBLIC FINANCING FADE AWAY?

#### A. *Davis v. FEC: Helping One Side Burdens the Other*

Sure enough, yet another mole has sprung up. In *Davis v. FEC*, the Supreme Court considered a challenge to BCRA’s “Millionaire’s Amendment”—a provision that both raised contribution limits and lifted caps on coordinated party expenditures for candidates facing a self-financed candidate with a fi-

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219. 34 F.3d 1356, 1363–66 (8th Cir. 1994). But the Eighth Circuit has upheld a law that permitted publicly financed candidates to exceed an expenditure ceiling if their nonparticipating opponents raised funds in excess of a trigger amount. See *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996). However, unlike the system under review in *Day*, the *Rosenstiel* scheme provided no additional public funds.

220. Cass Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1390 (1994).

nancial advantage exceeding a trigger amount.<sup>221</sup> These liberalized limits were to remain in place until the self-financed advantage had been eliminated.<sup>222</sup>

The Supreme Court, once again by a 5-4 vote, held that the amendment impermissibly burdened the right of a self-financing candidate to aggressively advocate his election.<sup>223</sup> A candidate who chooses to exercise that right must “endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits.”<sup>224</sup> This burden could not, in the view of the majority, be justified by an interest in avoiding real or apparent corruption.<sup>225</sup> Self-financed candidates, it reasoned, cannot “corrupt” themselves.<sup>226</sup>

And that ended the matter. The majority, once again, flatly rejected the notion that restrictions on speech could be justified by a desire to “level electoral opportunities for candidates of different personal wealth.”<sup>227</sup> As in *WRTL II*, this “broader” definition of corruption or interest in creating a more egalitarian system of campaign finance was deemed insufficient to support the abridgment of speech stemming from asymmetrical contribution limits. In the view of the majority, only the interest in the prevention of actual or apparent corruption is compelling:

On the contrary, in *Buckley*, we held that “[t]he interest in equalizing the financial resources of candidates” did not provide a “justification for restricting” candidates’ overall campaign expenditures, particularly where equalization “might serve . . . to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.” We have similarly held that the interest “in equalizing the relative ability of individuals and groups to influence the outcome of elections” cannot support a cap on expenditures for “express advocacy of the elec-

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221. *Davis v. FEC*, 128 S. Ct. 2759, 2766 (2008).

222. Essentially the law called for calculation of a number referred to as the “opposition personal funds amount” (OPFA) obtained by adding each candidate’s expenditure of personal funds to 50% of the funds raised from contributors. If one candidate enjoyed an advantage in excess of \$350,000, the asymmetrical limits would apply to the disadvantaged candidate until the OPFA advantage was eliminated. *Id.* at 2766 n.5.

223. *Id.* at 2774.

224. *Id.* at 2772.

225. *Id.* at 2773.

226. *Id.*

227. *Id.*

tion or defeat of candidates," as "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."<sup>228</sup>

Such an objective, according to Justice Alito, would have "ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office."<sup>229</sup> He continued:

Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, and it is a dangerous business for Congress to use the election laws to influence the voters' choices.<sup>230</sup>

Finally, the asymmetrical limitations at issue in *Davis* could not be justified to remedy the disadvantage that restrictions on campaign contributions and coordinated expenditures impose upon candidates who are not wealthy.<sup>231</sup> As in *WRTL II*, the Court held that restrictions on protected speech cannot be justified by a desire to "mitigate the untoward consequences of Congress's own handiwork."<sup>232</sup>

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, concurred in part and dissented in part.<sup>233</sup> Though only Justice Stevens would have abandoned *Buckley's* distinction of contributions and expenditures,<sup>234</sup> the four dissenters did not see the asymmetrical limits as a burden on the self-financing candidate:

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228. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 48–49, 56–57 (1976)).

229. *Davis*, 128 S. Ct. at 2773.

230. *Id.* at 2774 (citations omitted); accord *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.31 (1978).

231. *Id.* at 2773–74.

232. *Id.* at 2774.

233. *Id.* at 2777 (Stevens, J., concurring in part and dissenting in part).

234. *Id.* at 2777–79.

The Millionaire's Amendment quiets no speech at all. On the contrary, it 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. Enhancing the speech of the millionaire's opponent, far from contravening the First Amendment, actually advances its core principles. If only one candidate can make himself heard, the voter's ability to make an informed choice is impaired. And the self-funding candidate's ability to engage meaningfully in the political process is in no way undermined by this provision.<sup>235</sup>

The dissenters challenged the majority's assertion that only the government's interest in preventing actual or apparent corruption could justify such a regulation.

Indeed, we have long recognized the strength of an independent governmental interest in reducing both the influence of wealth on the outcomes of elections, and the appearance that wealth alone dictates those results. In case after case, we have held that statutes designed to protect against the undue influence of aggregations of wealth on the political process—where such statutes are responsive to the identified evil—do not contravene the First Amendment.<sup>236</sup>

"Although," the dissent continued, "the focus of our cases has been on aggregations of corporate rather than individual wealth, there is no reason that their logic—specifically, their concerns about the corrosive and distorting effects of wealth on our political process—is not equally applicable in the context of individual wealth."<sup>237</sup>

#### B. *The Implications of Davis and WRTL II*

If *WRTL II* ensures the continued vitality of independent expenditures, *Davis* seems to limit the potential for regulatory response. It suggests that aiding the opposition is a burden on protected speech that cannot be justified by a desire to reduce the influence of money and to level the playing field. If that is so, asymmetrical schemes of public financing that provide ad-

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235. *Id.* at 2780. (citation omitted).

236. *Id.* at 2781.

237. *Id.*

ditional funding or raise contribution limits in response to independent expenditures are presumably unconstitutional.

In response to a blog post in which I initially set forth the argument developed here,<sup>238</sup> a case comment in the *Harvard Law Review* argues that asymmetrical funding can be saved by the distinction between government subsidies and penalties.<sup>239</sup> At least under certain circumstances, the government can fund speech without also funding analogous speech. It can, for example, fund only family planning clinics that do not counsel patients about abortion.<sup>240</sup> It can consider “general standards of decency” in making grants to artists<sup>241</sup> and forbid nonprofits that engage in lobbying from receiving tax deductible contributions.<sup>242</sup>

In the view of the Harvard author, the government can also choose to provide additional funding to those candidates who face substantial independent expenditures.<sup>243</sup> *Davis*, according to the author, involves a government restriction on speech, that is, the lower (actually unchanged) campaign contribution limits applicable to candidates choosing to self-finance above a certain level.<sup>244</sup> Asymmetrical financing, the comment argues, is not a restriction, but a subsidy that enhances the “speech power” of a candidate who must contend with a self-financing opponent.<sup>245</sup> The Harvard author argues that Justice Alito, given his self-professed judicial modesty, could not have meant to discard, *sub silentio*, the distinction between subsidies and penalties and its “clear doctrinal line” between asymmetrical restrictions and asymmetrical funding.<sup>246</sup>

It certainly is the case that, subject to certain limitations and under certain circumstances, the government can pick and

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238. Shark and Shepherd, <http://sharkandshepherd.blogspot.com> (June 26, 2008, 13:22 EDT). The same argument was suggested on the same day (several hours earlier) by Rick Hasen at the Election Law Blog. Election Law Blog, <http://electionlawblog.org/> (June 26, 2008, 7:55 EDT).

239. *The Supreme Court, 2007 Term—Leading Cases*, 122 HARV. L. REV. 276, 375–76 (2008).

240. *Rust v. Sullivan*, 500 U.S. 173 (1991).

241. *Nat'l. Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

242. *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

243. *The Supreme Court, 2007 Term—Leading Cases*, *supra* note 239, at 381.

244. *Id.* at 383–84.

245. *Id.* at 384.

246. *Id.*

choose what speech it will subsidize. It is also the case that courts have upheld the decision not to fund the expression of certain points of view. The Supreme Court has, from time to time, used the language of penalty and subsidy to characterize prohibited and permitted government responses to private speech. It is not the case that the distinction between penalties and subsidies—a branch of the law of unconstitutional conditions<sup>247</sup>—is readily discerned or consistently applied.<sup>248</sup> It is, in fact, one of the most confusing areas of First Amendment law<sup>249</sup> and certainly cannot be navigated by the application of labels.<sup>250</sup>

The language of penalty and subsidy is not itself very helpful here. Both were present in *Davis* and are present in a system of asymmetrical public financing. In *Davis*, one could, with the majority, characterize the Millionaire's Amendment as a penalty on those who exercise their constitutionally protected right to self finance. Relaxing contribution restrictions for one's opponent will certainly be perceived as a penalty and it is well within our customary uses of language to call it such.<sup>251</sup>

But one might also, with the minority, characterize it as an attempt to promote (if not exactly subsidize) the speech of those faced by self-financed candidates. Indeed, Justice Stevens's position in dissent was that *Davis* did no more than empower responsive speech, that is, enable "speech power."<sup>252</sup>

Similarly, while one can see the government subsidy cases as selective "empowerment" of only certain types of speech, that

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247. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1420 (1989) ("Neither the Court nor the commentary . . . has developed a satisfying theory of what is coercive about unconstitutional conditions.").

248. See Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990) (citing cases in which the Court inexplicitly opted not to employ the unconstitutional conditions doctrine).

249. Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 546 (1996) (proposing a complicated framework that distinguishes negative and positive subsidies; positive subsidies that are "policy" and "auxiliary;" auxiliary subsidies that are "categorical," "viewpoint-based," or subsidies of "judgmental necessity").

250. Cass R. Sunstein, *Half Truths of the First Amendment*, 1993 U. CHI. LEGAL F. 25, 39–40 (arguing that the distinction between penalties and subsidies "forces us to chase ghosts" and is irrelevant).

251. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1420 (1989) ("Conclusory labels often take the place of analysis.").

252. *Davis v. FEC*, 128 S. Ct. 2759, 2780 (2008) (Stevens, J., concurring in part and dissenting in part).

is, as a subsidy, it is just as easy to call it a penalty. The family planning clinic that wishes to provide information about abortion must forego government funding as a condition of doing so. A nonprofit loses its tax exemption for exercising its right to lobby its elected representatives. Referring to something as a “penalty” or a “subsidy” is an interpretive choice that is not guided by the terms themselves.

Although this distinction could be made to turn on whether government cuts a check, that seems overly formalistic and, in any event, inconsistent with the precedent. Loss of a tax deductible contribution because of lobbying is not the receipt of funds but, as in *Davis*, the imposition of a more onerous set of rules impacting the solicitation of funds.

The language of penalty and subsidy is a way of characterizing the impact of a selective subsidy or a different set of rules on the disfavored party. Thus, although a speaker has no right to government largesse (subsidy), he does have the right to be free from undue interference (penalty). Whether one calls a regulatory scheme a more attractive set of limitations or a direct subsidy is not the critical question. What is important is a judgment about the way in which a government action impacts protected speech, and that judgment must now be understood in light of *Davis*.

The problem in *Davis*—and it is also present in an asymmetrical financing system—is that an election is, in the words of Justice Stevens, a “zero-sum” game.<sup>253</sup> This characterization is not true—at least not in the same way—in the government subsidy cases. The loss of a tax exemption for lobbying applies equally to, say, Wisconsin Right to Life and Planned Parenthood. Although one might argue that funding family planning clinics that do not provide information about abortion or subsidizing art that is not transgressive “burdens” those who wish to provide abortion information or lay bare the horror of conventional values, the harm is quite indirect. In an election, what helps one side directly and immediately harms the other. The subsidy to an opponent necessarily burdens the speaker.

Thus, *Davis* regarded the benefit (higher contribution limits and unlimited coordinated expenditures) as “an unprecedented penalty on any candidate who robustly exercises [his or

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253. *Id.*

her] First Amendment right”<sup>254</sup> because increased contribution limits for one’s opponent constitutes a “special and potentially significant burden.”<sup>255</sup> Significantly, the Court cited *Day v. Holahan*, the only case striking down asymmetrical public financing and expenditure limits, in support of that position.<sup>256</sup> The burden, it explained, was that “the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics.”<sup>257</sup> Rather than justifying the burden, the effort to “level the playing field” by assisting a candidate who opposed the speaker’s position is the burden.

It is triggered, moreover, by the decision to speak. It is not the decision to provide information on abortion that causes a subsidy to be provided to another clinic that does not wish to do so. Although the loss of the tax deduction subsidy for an organization’s donors does turn on the choice to speak (that is, to lobby), it does not do so in a way that impairs the “speech power” of the speaker relative to opposing points of view (although it does make it more difficult to raise money for other purposes, some of which might include speech). Particularly in the context of an election, the effect and intent of such a scheme is to dissuade constitutionally protected speech and to do so in a way that the *Davis* majority regarded with extreme skepticism.

The latter point is also critical. After *WRTL II* and *Davis*, the Court is unlikely to apply a linguistic distinction between subsidies and penalties apart from consideration of their impact on the election context and a distrust of the ability of incumbent politicians to neutrally regulate the political process. The “subsidy” that is provided (or the “penalty” that is imposed) does so in a context that is ripe for mischief and self-dealing. The rules that silence election speech are drawn by the incumbents who will then get to play by them to win reelection. As the *Davis* court noted, it is “dangerous business” to allow elected officials to act to minimize some electoral advantages and not others.<sup>258</sup>

A better argument might distinguish *Davis* by arguing that the constitutionally protected right is to speak on issues and

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254. *Id.* at 2771 (Alito, J., majority opinion).

255. *Id.* at 2772.

256. *Id.*; see *supra* note 219.

257. *Davis*, 128 S. Ct. at 2772.

258. *Id.* at 2774.

that the additional subsidy would be provided to a targeted candidate and not to some individual or organization seeking to present the opposing view on the pertinent issue. One could argue that the burden on the speaker is an “indirect” burden in a way that the burden imposed by the Millionaire’s Amendment is not. Asymmetrical public financing or “rescue” funding does not necessarily pay for a message advocating the opposing position on the pertinent issue (although it might) but only for a message supporting the candidate who the issue advocacy is seeking to persuade.

But that would seem to exalt form over substance. The protected interest does not simply involve communication directed to the targeted candidate but to the public at large as well. The burden on the constitutionally protected right of the advocacy organization is clear. If it chooses to speak, the government will give money to a candidate who opposes what it supports. Whether one characterizes this as “direct” or “indirect” seems wholly beside the point. The burden is real and substantial. As the Eighth Circuit noted in *Day*:

[T]he knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech.<sup>259</sup>

One might also argue that the state interest in regulating the impact of independent expenditures is stronger than its interest in limiting the advantages of a self-financed candidate. Presumably, a candidate will not be beholden to himself for parting with some of his own fortune in seeking public office (although he may be partial to those interests and policies that he perceived to have helped him accumulate and maintain it), but it is hardly unreasonable to think that a candidate will perceive a need to remain on friendly terms with those who supported his election and who may attempt to wield similar influence in future campaigns.

There is much that could be asked about whether this is, in fact, the way in which the political world really works. It is unclear, for example, that interested parties support candidates

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259. *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994).

whose views are *tabula rasa*, up for auction to whoever offers the most support. Interested parties may well prefer to invest in candidates who hold views that they feel are conducive to their interests.<sup>260</sup>

It is unclear, moreover, whether the provision of additional funding materially reduces the threat of actual or apparent corruption. Providing funds to one's opponent does not, after all, change whatever dependence the candidate benefitting from independent expenditures has upon those who financed them. The potentially corrupting influence of these expenditures will be eliminated only if the provision of matching funds or asymmetrical contribution limits dissuades them from being made, and that is precisely the effect that *Davis* found to be constitutionally problematic.

More fundamentally, this argument rests precisely on the interest that was rejected in *WRTL II*. The possibility of gratitude, as opposed to a *quid pro quo*, was not enough to justify the restriction of speech. For the five Justices concurring in the result in *WRTL II*, uncoordinated independent expenditures—at least as long as they can be interpreted to be issue advocacy—do not create a threat of actual or apparent corruption sufficiently strong to warrant BCRA's restrictions on constitutionally restricted speech.<sup>261</sup>

Asymmetrical financing schemes have also been upheld as efforts to encourage candidates to participate in systems of public financing.<sup>262</sup> On this view, a state might offer additional help (or relaxed restrictions) to candidates who agree to abide by whatever limitations opting into the system of public financing entails. If public financing is seen as a response to actual or apparent corruption, then protecting candidates who opt in from being swamped by independent expenditures might further that end. But that interest—that is, avoiding actual or apparent corruption—is apparently not enough to justify the restriction of genuine issue ads. If that is so, it is difficult to see why the

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260. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 394–95 (2000) (citing conflicting studies).

261. *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 551 U.S. 449, 457 (2007).

262. See, e.g., *Gable v. Patton*, 142 F.3d 940, 953 (6th Cir. 1998); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1546 (8th Cir. 1996).

encouragement of public financing—which is only a means rather than the end—adds anything to the state’s interest.<sup>263</sup>

#### IV. LETTING THE MOLES GO: *WRTL II* AND *DAVIS* AS CAUSE FOR RELIEF

Given the sharp division on the Court and the possibility for changes in its composition, it may be that we will see the Court abandon *WRTL II*’s rejection (repeated in *Davis*) of an egalitarian rationale for reform and its expansive protection for individual expenditures. Perhaps it will retreat from *Davis*’s treatment of efforts to achieve equality by providing financial benefits to a candidate who faces an opponent who has obtained a disfavored form of financial advantage. But *Davis* and *WRTL II* suggest that it may be time to abandon our generation-long game of Whac-A-Mole.

Certainly, reasonable regulation of campaign finance is appropriate, but the more ambitious manifestations of reform seek to improve participatory democracy in a way suggested by Justice Breyer in his recent book, *Active Liberty*. Justice Breyer argues for an interpretive hermeneutic that is informed by what he believes to be the Constitution’s democratic nature<sup>264</sup> and rooted in what he calls the “liberty of the ancients,” that is, the participatory self-government evoked by the citizens of ancient Athens.<sup>265</sup> In the context of campaign finance reform, the idea is to act in a way that removes the presumed improper interference of wealth and to “facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process.”<sup>266</sup> Limiting the influence of money is presumed to build public confidence in the process, broaden the base of a candidate’s financial support, and encourage “greater public participation.”<sup>267</sup> It will,

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263. Shortly before the fall 2008 election, a district judge in Arizona found that a challenge to Arizona’s asymmetrical public financing scheme had a substantial likelihood of success on the merits but declined to enjoin its enforcement due to the short period of time before the election. *McComish v. Brewer*, No. CV-08-1550-PHX-ROS, 2008 WL 4629337 (D. Ariz. Oct. 17, 2008).

264. STEPHEN BREYER, *ACTIVE LIBERTY* 46 (2005).

265. *Id.* at 5.

266. *Id.* at 46.

267. *Id.* at 47.

the argument continues, help to ensure that a candidate's financial support more closely reflects his popular support.

A full consideration of this objective is beyond the scope of this Article. But there are, I think, three fatal problems with the project of campaign finance egalitarianism and the search for "barometric" equality. The first is the improbability, if not impossibility, of success. It is hardly surprising that the collective public body is willing to spend hundreds of millions of dollars to influence a government that spends trillions. In fact, the money spent on political advertising remains a fraction of what is spent on advertising movies, automobiles, and beer along with other products and services.<sup>268</sup> Given the stakes, it seems unlikely that regulators will be able to stop money, like water, from seeking its own level. Even if, for example, reform effectively prevented donors from purchasing paid media, it could not prevent them from purchasing the media outlets themselves. Although current doctrine arguably permits regulation of broadcast outlets,<sup>269</sup> emerging technologies have multiplied the ways in which messages can be delivered.

Even if the flow of money could be stemmed, it is unlikely that it will be done in a way that furthers the objectives of some presumably pure form of participatory democracy. There are at least two stumbling blocks. As the Court in *Davis* observed,<sup>270</sup> different candidates have a variety of different advantages. Many are wholly unrelated to the participation of the citizenry in an open public conversation and exchange of ideas. Eliminating some and not others will benefit certain candidates at the expense of others. Removing the advantage of those who can attract wealthy donors benefits incumbents whose advantage lies not only in their existing name recognition, but also in their ability to use the resources of the state and the guise of

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268. The size of the advertising industry in the United States was estimated to be over \$150 billion in 2007. Press Release, TNS Media Intelligence, TNS Media Intelligence Forecasts 2.6 Percent Increase in U.S. Advertising Spending for 2007 (Jan. 8, 2007), available at <http://www.tns-mi.com/news/01082007.htm>. Spending on political advertising in 2008 has been estimated at \$2.6 billion. Posting of Katharine Q. Seelye to The Caucus, <http://thecaucus.blogs.nytimes.com> (Dec. 2, 2008, 16:15 EST).

269. See *Red Lion Broad. v. FCC*, 395 U.S. 367, 389 (1969).

270. *Davis v. FEC*, 128 S. Ct. 2759, 2774 (2008).

“communicating” with constituents<sup>271</sup> to enhance their own electoral prospects and shape public opinion.

Reduction of the influence of those who wish to financially support candidates will benefit celebrities and those who already have access to the public. It will enhance the power of the media and what John McGinnis calls the “scribal class.”<sup>272</sup> It may enhance the prospects of candidates further to the left or the right who can attract larger numbers of small donors if, as seems plausible, it turns out that the ideologically committed are more likely to contribute. It may help those in a position to attract the endorsement of large membership organizations—such as unions—whose members are likely to follow the cue of their leadership.

We cannot eliminate all of these advantages to attain a public conversation unsullied by confounding elements unrelated to the collective deliberation regarding candidates’ ideas and qualifications. There is, in fact, no public conversation and no prior distribution of support apart from these confounding elements.

Of course, wishing for the perfect should not be the enemy of achieving the good. But there is another stumbling block on the way to Athenian democracy. As the majority in *Davis* emphasized, campaign finance rules are not set by disinterested persons.<sup>273</sup> It is incumbents, acting on an arcane and technical topic, who fashion the rules that will govern the process by which they will seek to retain their offices. It takes a rather sunny view of human nature to remain sanguine about the manner in which they will undertake that task.<sup>274</sup>

Finally, it is not clear that restricting the speech of groups thought to be spending “too much” money is consistent with

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271. Although we frequently hear reference to “phony” or “sham” issue ads, we less often hear of “sham newsletters” distributed through the congressional franking privilege.

272. John O. McGinnis, *Against the Scribes: Campaign Finance Reform Revisited*, 24 HARV. J.L. & PUB. POL’Y 25, 27–28 (2000) (referring to the press, academia, and the entertainment industry).

273. *Davis*, 128 S. Ct. at 2774.

274. In fact, one commenter has suggested that Justice Breyer’s position represents a Pelagian view of our Augustinian Constitution. William E. Thro, *A Pelagian Vision For Our Augustinian Constitution: A Review of Justice Breyer’s Active Liberty*, 12 J.C. & U.L. 491, 491–92 (2006). Pelagius was a fifth-century British monk who taught that humanity was inherently virtuous and that individuals could achieve their own salvation. Augustine taught that individuals are fallen and can achieve salvation only through the grace of God. *Id.* at 491.

democratic principles. One of the purposes of efforts to reduce the role of money in politics is to bolster populism. But, of course, the most successful populists are those who can use the coercive authority of the state to deliver benefits to a working majority. It is not clear why tipping the balance toward the majority is more legitimate than the *ex ante* allocation of resources.

There is a great danger to democracy from the majority's temptation to serve their self interest at the expense of the minority. In the absence of robust constitutional protection for property rights and economic liberty, the ability of the prosperous minorities to be heard (as opposed to buying politicians through contributions) may be one way in which populism is prevented from descending into demagoguery.<sup>275</sup>

The wealthy, as Judge Richard Posner argues, are "not a monolith" and, in any event, "lack the votes."<sup>276</sup> Wealthy donors must craft messages that appeal to the masses and, if those messages provoke or call for a populist response, other candidates will seek to raise money from the much larger pool of nonwealthy small donors.<sup>277</sup>

Another way to achieve the good and not the perfect is the Madisonian notion of allowing factions to check each other. As explained in *Federalist* No. 10, the triumph of the private interest over the public good—of partiality over justice—might well include the tyranny of the majority: "The apportionment of taxes on the various descriptions of property" provides the "opportunity and temptation . . . [for] a predominant party[] to trample on the rules of justice" because "[e]very shilling with which they over-burden the inferior number, is a shilling saved to their own pockets."<sup>278</sup> The "*causes of faction*,"—defined as contending parties often driven by self interest—"cannot be removed; and [so] relief is only to be sought in the means of controlling its *effects*."<sup>279</sup>

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275. Cf. McGinnis, *supra* note 272, at 29–30 (citing MANCUR OLSON, POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS 15–16 (2000)) (suggesting that "societies grow faster and have less conflict when the political power is diffused throughout . . . those involved in producing the social surplus of society").

276. RICHARD A. POSNER, HOW JUDGES THINK 331 (2008).

277. *Id.*

278. THE FEDERALIST NO. 10, at 51 (James Madison) (J.R. Pole ed., 2005).

279. *Id.* (emphasis in original).

Madison despaired of the notion that “enlightened statesmen” would choose the public over the private interest.<sup>280</sup> For Madison, if factions could not be eliminated, the contending interests, through competition, may come to check one another. Applied here, the idea is that candidates may benefit from a variety of advantages that we may regard as more or less legitimate. Rather than trusting interested parties to choose among them, we are better served by regulation with a lighter hand.

The Internet has made the latter approach far more effective, as demonstrated by the fundraising success of President Barack Obama.<sup>281</sup> Given the success of Internet fundraising, it may increasingly be the case that small money counters big money.<sup>282</sup> Although allowing competition between initially unequal parties seems unlikely to result in a world where the distribution of contributions and expenditures reflects some presumed distribution of public opinion or one in which the wealthy will not give more than the nonwealthy, the “distorting” impact of wealth may turn out to be less than feared.

#### CONCLUSION

The Court’s campaign finance jurisprudence may be a bit like the weather in my home state of Delaware. If you do not like it, the saying goes, just wait. But the principles underlying *WRTL II* and *Davis* have a longstanding pedigree in that jurisprudence. Expenditures differ from contributions. It is not the role of the state to level the political playing field. Recognizing the implication of these principles may remind us that democracy may be better served by competition than by control.

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280. *Id.*

281. *But see* CAMPAIGN FIN. INST., REALITY CHECK: OBAMA RECEIVED ABOUT THE SAME PERCENTAGE FROM SMALL DONORS IN 2008 AS BUSH IN 2004 (2008), <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=216> (finding that, although 49% of Obama’s contributions were \$200 or less, only 26% came from donors who gave less than \$200 in the aggregate).

282. Richard L. Hasen, *Political Equality, the Internet, and Campaign Finance Regulation*, 6(1) THE FORUM art. 7 (2008), available at <http://www.bepress.com/forum/vol6/iss1/art7/>.