

WHAT CHANGES DO RECENT SUPREME COURT DECISIONS REQUIRE FOR FEDERAL CAMPAIGN FINANCE STATUTES AND REGULATIONS?

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INTRODUCTION

United States campaign finance law is riding a wave of constitutionally driven statutory change. After almost two decades of relative deference to Congress's judgment, the Supreme Court has revitalized its scrutiny of campaign regulations. While the *Citizens United v. FEC*¹ opinion is the most prominent and controversial evidence of this shift, it does not stand alone.

The Court's decisions have extended broad First Amendment protection to campaign activity. But the practice of campaign finance is one not of broad sweeping statements but of excruciating detail. Looking forward, academics and practitioners need to sift through statutes and begin the task of separating the defensible rules from the obsolete ones.² It is hard to appreciate how much the rules of campaign finance must change to accommodate recent Court decisions, especially if the law is to aspire to be coherent.

This essay is a first step in that process. It surveys the statutory provisions of the Federal Election Campaign Act (FECA) and selected state laws and identifies those that are constitutionally suspect in light of recent decisions. It follows a litany familiar to campaign practitioners by first considering what may have changed in the doctrine of campaign finance limits. It then moves on to evaluate the prohibitions in federal campaign finance law, including the second order restrictions on corporations and labor union "facilitation."³ Finally, it addresses reporting requirements and other disclosures mandated in the statute.

I. LIMITS

Campaign finance limits come in two basic forms. The first, spending limits, have been constitutionally restricted to "voluntary" programs since *Buckley v. Valeo*.⁴ The second, contribution limits to candidates and political committees, have generally passed constitutional scrutiny,⁵ although present appellate court decisions, if upheld, may change the landscape in interesting ways.⁶ A hybrid of these limits, the aggregate limit on an individual's contributions to federal

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1. 130 S. Ct. 876 (2010).

2. Federal campaign finance law is codified at 2 U.S.C. §§ 431-57 (2006 & Supp. 2009).

3. See 11 C.F.R. § 114.2(f)(1) (2010).

4. 424 U.S. 1, 18-21 (1976).

5. See discussion *infra* Part I.B.

6. See *Buckley*, 424 U.S. at 24; *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

candidates and committees, may have an uncertain future.⁷

A. Spending Limits

At present, federal campaign finance law limits the total expenditures of presidential campaigns that opt into the voluntary general election campaign finance subsidy or the matching funds available for presidential primary candidates.⁸ This program complies with the Court's *Buckley v. Valeo* holding that mandatory spending limits are unconstitutional, but voluntary spending limits coupled with incentives are constitutional.⁹ The recent *Randall v. Sorrell* case gave the Court an opportunity to reconsider this position, but the Court held firm.¹⁰ These incentives cannot be so generous as to make the "choice" between self-funding and tax funding elusive and the program an involuntary one in reality.

In 2008, the Supreme Court brought into play another factor to consider in challenging these programs in *Davis v. FEC*.¹¹ The Court rejected a federal rule that would have allowed candidates facing wealthy opponents to raise money at higher contribution rates.¹² While this decision did not implicate federal subsidies of campaigns, many state programs provided additional resources to candidates in similar situations.¹³

The Court in *Davis* rejected any claim that there was a permissible governmental interest in "leveling" up campaign funds.¹⁴ It observed that no precedent supported a scheme that gave candidates running for the same office in the same election different contribution limits.¹⁵ The effect of this law was to repress the speech of the self-funding candidate because it would "impos[e] different contribution and coordinated party expenditure limits on candidates vying for the same seat."¹⁶ As a result, tax financing programs that provide additional tax funding for candidates running against wealthy self-funders may be vulnerable to a similar challenge.¹⁷

7. See, e.g., 2 U.S.C. § 441a(a)(3) (2006), *invalidated in part by SpeechNow.org*, 599 F.3d at 696.

8. See 26 U.S.C. § 9004 (2006 & Supp. 2008).

9. *Buckley*, 424 U.S. at 19-21.

10. 548 U.S. 230, 243-44 (2006) (finding neither of respondents' arguments to overturn or limit *Buckley*'s scope persuasive).

11. 128 S. Ct. 2759 (2008).

12. *Id.* at 2773-74 (holding unconstitutional the so-called "Millionaire's Amendment" codified at 2 U.S.C. § 441a-1(a)(1)).

13. See *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 432 (4th Cir. 2008); *Day v. Holahan*, 34 F.3d 1356, 1359 (8th Cir. 1994).

14. *Davis*, 128 S. Ct. at 2773-74.

15. *Id.* at 2774.

16. *Id.*

17. See *McComish v. Brewer*, No. 08-1550, 2010 WL 2292213 (D. Ariz. Jan. 20, 2010), *rev'd*, *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010). As of this writing, the Supreme Court

B. Contribution Limits

The *Davis v. FEC* decision, while presenting potential implications for certain tax funding programs, is at bottom a contribution limit case. It stands for the intuitively appealing proposition that the government's restrictions on contributions must be evenhanded among candidates for the same office. The Court entered new constitutional territory in 2006 when it analyzed a state government's power to limit the size of campaign contributions in *Randall v. Sorrell*.¹⁸

In *Randall*, the Court evaluated Vermont's expenditure and contribution limit laws. As noted before, mandatory expenditure limits fail under modern constitutional doctrine. Contribution limits, however, have generally passed constitutional scrutiny because a contribution can resemble a gift or gratuity to a candidate (or his party) that might be a bribe, extortion payment, or might at least appear corruptive.¹⁹

In earlier challenges to contribution limits, the Court had been unwilling to evaluate the level of the limit, leaving that task to the discretion of Congress or state legislatures. But in *Randall*, Justice Breyer's plurality opinion entered this uncharted territory and concluded that the Vermont scheme was unconstitutionally restrictive.²⁰ Breyer observed that the law was quite a bit more restrictive than similar laws found in any other jurisdiction.²¹ His method for drawing that conclusion involved a number of steps and may not be readily applicable to other regulatory cases.²² Moreover, a majority of the Court expressed readiness to abandon *Buckley*'s contribution-expenditure dichotomy, but they were divided on whether that would mean treating contributions more generously or treating expenditures more restrictively.²³ Therefore, while *Randall* demonstrates that the Court will rule against contribution limits in extreme cases, it may not mean much more than that.²⁴

has stayed the appellate court's decision pending writ review. See Lyle Denniston, *Elections Subsidies Blocked*, SCOTUSBLOG (June 8, 2010, 10:26 AM), <http://www.scotusblog.com/2010/06/election-subsidies-blocked/>.

18. 548 U.S. 230 (2006).

19. *Id.* at 246-48.

20. *Id.* at 261-63.

21. *Id.* at 250-51.

22. See *id.* at 250-52.

23. Justice Alito wrote separately in *Randall*, suggesting a future re-thinking of *Buckley*. *Id.* at 263-64. Justice Kennedy, concerned about the direction of the Court in campaign finance, concurred in the judgment only. *Id.* at 264-65. Justices Thomas and Scalia attacked the *Buckley* dichotomy outright. *Id.* at 266. Finally, Justice Stevens advocated overruling *Buckley*'s protection of expenditures. *Id.* at 274.

24. As of this writing, two appellate decisions yet to reach the Court could further clarify the Court's contribution limit doctrine. See *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (rejecting limits on committees that make only independent expenditures); *RNC v. FEC*, No. 08-

Given the Court's recent decisions related to contribution and expenditure limits, it appears safe to conclude that expenditure limit requirements remain unconstitutional. It would be difficult to imagine an expenditure limit that would survive strict scrutiny after *Randall*. But where does this leave the Court's modest deference since *Buckley* toward legislative judgments regarding contribution limits? Will the Court extend the close examination of limits in *Randall* to more "typical" state laws? If a majority of the Court moved beyond the "typicality" aspects of Justice Breyer's test, would it find an "important interest" sustaining the federal \$2400 per candidate per election individual contribution limit?²⁵ What would this "important interest" be? Would the Court be willing to revisit its precedent affirming these limits and demand a more specific showing that limits were calibrated to address real corruption?²⁶ Would the Court be willing to revise constitutional doctrine, subject these limits to strict scrutiny, and find them unconstitutional?²⁷

More likely would be a challenge to the \$5000 annual contribution limit to federal political committees.²⁸ Two characteristics make this limit more vulnerable. First, unlike other federal limits, it is not adjusted for inflation.²⁹ As a consequence, although the political action committee (PAC) limit was originally meant to be more generous to committees than to candidates, the indexed candidate limit will in fairly short time overtake the committee limit.³⁰

Second, not only is the \$5000 limit not indexed, but it was first set by Congress in 1940.³¹ According to the Bureau of Labor Statistics, \$5000 in 1940 had the purchasing power of over \$77,000 in 2010.³² This limit is not calibrated to any current threat or notion of corruption. Even if \$5000 was not arbitrary in

1953, 2010 WL 1140721 (D.D.C. Mar. 26, 2010) (applying limits to party committees).

25. See 2 U.S.C. § 441a(a)(1)(A) (2006); *id.* § 441a(c).

26. *Contra* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387-88 (2000).

27. See, e.g., *Nixon*, 161 F.3d 519, 521-22 (8th Cir. 1998), *rev'd*, 528 U.S. 377 (2000).

28. Groups with federal and nonfederal accounts can raise unlimited sums into their soft money accounts, and an FEC attempt to thwart their spending through allocation requirements has been found unconstitutional by an appellate court. See *Emily's List v. FEC*, 581 F.3d 1, 18 (D.C. Cir. 2009).

29. Vermont's failure to adjust certain limits for inflation was one of the many factors catching Justice Breyer's attention in his opinion in *Randall*. See *Randall v. Sorrell*, 548 U.S. 230, 238-40 (2006).

30. This is especially true when, as recent appellate decisions observe, such committees are not closely aligned with members, as contrasted with political parties. See *Emily's List*, 581 F.3d at 13.

31. See Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. ON LEGIS. 421, 443-47 (2008). Legislative history indicates that the \$5000 contribution limit was meant as a "poison pill" to defeat the bill. *Id.* at 444.

32. *Overview of BLS Statistics on Inflation and Prices*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/bls/inflation.htm> (follow "CPI Inflation calculator" hyperlink, input "5000" and year "1940," and press "calculate") (last modified June 4, 2010).

1940, it is impossible today to make that argument.³³

As an aside, reexamining these contribution limits would be difficult politically. Even if the Court found the candidate and committee limits unacceptable, members of Congress would be in a position of advocating higher limits for themselves, for the PACs that in large measure give to incumbents, and for the PACs they control, colloquially known as “leadership PACs.”

Leadership PACs occupy a puzzling place in the law. The 1974 statute did not provide for them; instead, subsequent regulatory interpretations permitted them to develop.³⁴ Notwithstanding the fact that both the member’s campaign committee and his leadership PAC are under his control, the two committees are not deemed legally affiliated and thus can raise money from the same donors.³⁵ There would not seem to be any constitutional impediment preventing Congress from limiting a candidate or officeholder to one committee. Accordingly, Congress could respond by raising committee limits, but abolishing leadership PACs.

Another limit that may be vulnerable to a constitutional challenge is the hybrid contribution-expenditure limit imposed on donors. Federal law has imposed an aggregate limit on contributions since the 1974 FECA amendments.³⁶ That \$25,000 limit was upheld in *Buckley*, and the Court noted there that it had “not been separately addressed at length by the parties.”³⁷ The Court also reasoned that this limit prevented circumvention of the contribution limits, which might otherwise occur when donors give to PACs or parties likely to support their candidate.³⁸

In the Bipartisan Campaign Reform Act of 2002 (BCRA), Congress raised the aggregate limit and indexed it for inflation.³⁹ Presently, the overall limit is \$115,500, out of which up to \$45,600 can be contributions to candidate committees. The remaining \$69,900 can be contributions to any other committees, out of which no more than \$45,600 may be given to committees that are not national party committees.⁴⁰

33. The D.C. Circuit in *Emily’s List* recently found the FEC allocation requirement onerous precisely because of the low \$5000 limit. *Emily’s List*, 581 F.3d at 21.

34. See Leadership PACs, 68 Fed. Reg. 67,013 (Dec. 1, 2003) (addressing leadership PAC rulemaking with summary of legal development); MARIAN CURRINDER, MONEY IN THE HOUSE 24-31 (2009) (discussing background of leadership PACs).

35. This relationship was clarified and made explicit in 2003 rulemaking. See 68 Fed. Reg. 67,013, 67,017-18.

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

37. *Id.* at 38.

38. *Id.* The Court added, unhelpfully, “[t]he limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.” *Id.*

39. See 2 U.S.C. § 441a(a)(3) (2006); 11 C.F.R. § 110.5 (2010).

40. FED. ELECTION COMM’N, CONTRIBUTION LIMITS FOR 2009-10, at 1, <http://www.fec.gov/info/contriblimits0910.pdf> (last visited Oct. 7, 2010) (stating FEC limits for 2009-10); see also 2 U.S.C. § 441a(a)(3) (base levels); *id.* § 441a(c) (indexing).

This restriction is both a contribution limit, in that it limits “contributions,” and an overall expenditure limit restricting the amount of federal “hard” money an individual can give. The anticircumvention rationale in *Buckley* does not make much sense, especially because the FEC can deem committees affiliated and thus address the circumvention that might follow from committee proliferation.⁴¹ Also, contributions to committees earmarked to a candidate are deemed contributions to that candidate.⁴² Donors who want to give more in politics may still contribute unlimited sums to non-committee political organizations (colloquially known as “527s”⁴³), social welfare organizations exempt under Section 501(c)(4) of the Internal Revenue Code, and charities.⁴⁴ These vehicles are less direct, transparent, and accountable than political committees. It seems to be bad policy to drive political financial activity there.

Moreover, it is hard to justify the governmental interest in capping the overall amount of money an individual donor may contribute without similarly restricting PACs or other entities, such as Native American tribes. In short, the restriction has always made little sense, but in an era where the Court seems more willing to take a close look at campaign restrictions, the biennial limit’s days may be numbered.

To summarize, the federal statute’s present limits are not directly contradicted in any Court decisions. But it would not take much of a stretch to change that. The Court’s attitude toward constitutional doctrine may mean that the PAC limit and the biennial individual limit would not withstand a challenge.

II. PROHIBITIONS

The FECA’s prohibitions include corporate and labor contribution and expenditure bans,⁴⁵ foreign national contribution and expenditure bans,⁴⁶ and similar bans on government contractors.⁴⁷ *Citizens United* held the corporate expenditure ban (and by implicit extension, the labor ban) unconstitutional. The Court specifically stated that this holding would not threaten the contribution prohibitions or the foreign national expenditure and contribution ban.⁴⁸

Citizens United, and the *FEC v. Wisconsin Right to Life* decision that preceded it, also articulated a relatively clear content requirement for spending to be treated as an “expenditure” or an “electioneering communication.” An “expenditure” must contain express advocacy of the election or defeat of a clearly

41. 2 U.S.C. § 441a(a)(5).

42. *Id.* § 441a(a)(8); 11 C.F.R. § 110.6 (2010).

43. Lauren Daniel, Note and Comment, *527s in a Post-Swift Boat Era: The Current and Future Role of Issue Advocacy Groups in Presidential Elections*, 5 NW. J.L. & SOC. POL’Y 149, 150 (2010).

44. *Id.* at 158 n.72.

45. 2 U.S.C. § 441b.

46. *Id.* § 441e.

47. *Id.* § 441c.

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

identified candidate, and an “electioneering communication” must be the “functional equivalent” of express advocacy.⁴⁹

Although *Citizens United* held unconstitutional the ban on corporate expenditures and electioneering communications, these definitions remain important. A “coordinated” expenditure or electioneering communication remains subject to the same limits, prohibitions, and reporting requirements as contributions.⁵⁰ In short, a corporation or union that coordinates an expenditure of express advocacy or its functional equivalent with a candidate will violate federal law.

Thus, the definition of “coordination” is extremely important, and it remains hotly debated.⁵¹ The Court’s recent precedents do not address coordination specifically, but one can predict that a coordination rule that represses corporate or labor expenditures will be scrutinized closely to determine whether Congress or the FEC has unduly burdened constitutionally protected speech.

In other ways, the regulatory regime goes far beyond the statutory expenditure ban. Part 114 of Title 11 of the Code of Federal Regulations is devoted entirely to restrictions on corporate and labor activity, deriving its authority in part on the expenditure ban found unconstitutional in *Citizens United*.⁵² These regulations, for instance, dictate to whom a corporation may communicate about politics within the corporation, or for a union, within its membership. After *Citizens United*, these restrictions are obsolete and will require considerable administrative reworking.⁵³

A. Solicitations

Less clear is the constitutional status of the restrictions which donor

49. *Id.* at 889; *FEC v. Wis. Right to Life*, 551 U.S. 449, 456-57 (2007).

50. *See* 2 U.S.C. § 441a(a)(7)(B) (treating expenditures that are coordinated with a candidate as contributions to the candidate’s campaign and thus subject to FECA’s limits on such contributions); 11 C.F.R. § 109.21 (2010) (defining coordinated communication).

51. *See* *Shays v. FEC*, 528 F.3d 914, 919-24 (D.C. Cir. 2008) (rejecting the FEC’s coordination rule for the second time); *Shays v. FEC*, 414 F.3d 76, 112 (D.C. Cir. 2005) (rejecting the FEC’s coordination rule for the first time); *Coordinated Communications*, 71 Fed. Reg. 33,190, 33,193 (June 8, 2006) (discussing “coordinated” activities).

52. *See, e.g.*, 11 C.F.R. § 114.2 (2010) (prohibiting contributions, expenditures, and electioneering communications); *id.* § 114.3 (disbursing communications to restricted class in connection with a federal election); *id.* § 114.9 (using corporate or labor organization facilities.); *id.* § 114.14 (restricting the use of corporate and labor organization funds for electioneering communications).

53. As of this writing, the FEC has received a petition for rulemaking along these lines from the James Madison Center for Free Speech and has published a Supplemental Notice of Proposed Rulemaking (NPRM) on Coordinated Communications to have commenters address the impact of *Citizens United* on that rulemaking. Myles Martin, *Supplemental NPRM on Coordinated Communications*, 36 FEC RECORD 7 (Mar. 2010), available at <http://www.fec.gov/pdf/record/2010/mar10.pdf>.

corporations can solicit for contributions, either for a political committee or for a candidate. Presently, a corporation using its general treasury may solicit its executive and administrative personnel, shareholders, and the families of these individuals for PAC contributions.⁵⁴ This is in contrast to a nonconnected political committee, which may solicit any potential donor but must pay solicitation costs from PAC funds. In its 1982 *FEC v. National Right to Work Committee* decision, the Court upheld solicitation restrictions against a claim by the National Right to Work Committee that it could solicit a broad array of potential donors for its PAC by deeming the donors “members.”⁵⁵

Still, solicitation is a form of political speech. If corporate independent expenditures cannot be limited, it is hard to justify limiting corporate independent solicitations. Some corporate PACs might welcome contributions and participation from a wider array of employees, vendors, subcontractors, investors who are not shareholders, and other people who may share the views and concerns of the company but who presently cannot be solicited.

Importantly, these regulations also exempt coordinated communications to the restricted class from being treated as contributions.⁵⁶ Because the Court in *Citizens United* reaffirmed the coordinated contribution ban, the restriction will likely carry forward. Thus, if a PAC were to win the argument that *Citizens United* protected its corporate-funded solicitation of any donor, it would not be able to coordinate those activities with a candidate. If the corporation solicited only its restricted class, than as under current regulations, it could coordinate with a candidate or a party committee.

B. Facilitation

Corporations and unions are also subject to restrictions on how they raise money for federal candidates and other federal political committees. Often, this type of activity takes the form of a group of executives seeking to bundle contributions from colleagues. The “facilitation” regulations governing workplace fundraising are detailed and complex.⁵⁷ In general, they prohibit executives from directing staff to assist them in fundraising, require reimbursement of any corporate expenses incurred in the fundraising process (even in advance in certain situations), and forbid coercing contributions from employees. If the facilitation regulations are followed, the executives may coordinate their fundraising with a candidate without any expenses being deemed corporate contributions.

But after *Citizens United*, it is unclear whether these restrictions would be constitutional in the absence of coordination. “Facilitation” without coordination may seem unlikely and has not been a fundraising factor in the past. But this was because there was no different legal consequence between an impermissible

54. 2 U.S.C. § 441b(b)(4).

55. *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 211 (1982).

56. 11 C.F.R. § 114.3(a)(1) (2010).

57. *See id.* §§ 114.2, 114.9.

contribution and expenditure. Both actions were prohibited. If expenditures are now protected and coordination is the touchstone for determining when spending can be regulated as a “contribution,” independent facilitation of political activity appears beyond the authority of the FEC or Congress to regulate.

C. Using Money Collected for Non-Political Purposes

In *Citizens United*, the Court endorsed the use of corporate general treasury funds for political speech.⁵⁸ Yet in the context of labor organizations, the Court held in *Communications Workers of America v. Beck* that in closed-shop jurisdictions (where unions can collect fees from nonunion workers), mandatory fees may not be used for purposes outside the core functions of labor collective bargaining.⁵⁹ Thus, unions may not use mandatory fees for politics; instead, money used for purposes other than collective bargaining should be raised separately.

Yet in *Citizens United*, the Court’s majority showed little interest in a parallel argument in the corporate context—that corporations could not use funds invested by shareholders for politics.⁶⁰ Admittedly, it is hard to think of a context in which an individual is compelled to invest in a firm in a manner analogous to the closed-shop dues context. Accordingly, the *Citizens United* decision may not necessarily call into question the *Beck* decision and related precedents. But the argument is not frivolous, either.

Finally, before *Citizens United*, certain nonprofit corporations could make expenditures. To comply with the Court’s decision in *FEC v. Massachusetts Citizens for Life*,⁶¹ the FEC promulgated regulations setting forth the requirements for a “qualified nonprofit” to make expenditures.⁶² These regulations are now obsolete because this right is now recognized for all corporations.

D. Other Prohibited Sources

1. *Foreign Nationals*.—President Obama, a critic of the *Citizens United* decision, raised the specter of foreign participation in United States elections in his 2010 State of the Union address.⁶³ As noted before, the Court’s opinion declaims any effect on the laws prohibiting expenditures by foreign nationals.⁶⁴ Yet the Court also declared that independent expenditures are not corrupting. What other reasons would justify the foreign national ban?

Congress has more discretion to regulate foreign nationals in the authority it has over immigration, national security, and foreign affairs. However, in the First

58. *Citizens United v. FEC*, 130 S. Ct. 876, 929 (2010).

59. *Comm’ns Workers of Am. v. Beck*, 487 U.S. 735, 762-63 (1988).

60. *Citizens United*, 130 S. Ct. at 911.

61. 479 U.S. 238 (1986).

62. 11 C.F.R. § 114.10.

63. Barack Obama, President, United States of Am., State of the Union Address (Jan. 27, 2010), available at <http://www.c-span.org/executive/state-of-the-union.aspx> (2010).

64. *Citizens United*, 130 S. Ct. at 911.

Amendment context, the Court has held that First Amendment protections apply equally to citizens and noncitizens—both are “people” entitled to constitutional protection.⁶⁵ As legal scholar David Cole observed (albeit before *Citizens United*), “[i]f protecting corporate speech is essential to preserving a robust public debate, so too is protecting noncitizens’ speech.”⁶⁶ Yet when a foreign individual wanted to volunteer for a political campaign, it took an FEC advisory opinion to confirm that it would be legal for him to do so.⁶⁷

Especially outside the immigration context, if we sincerely embrace the notion that the solution to false or dangerous speech is more speech, not enforced silence, it is very difficult to justify an independent expenditure ban on individuals legally present in the United States as professionals, students, or visitors.⁶⁸ These people who happen to be foreign nationals also pay taxes, depend upon infrastructure, education, and social services and should have no less a role in the community’s debate about paying for and providing public goods and services.⁶⁹

However, does this tolerance necessarily extend to foreign corporations? Would the Court instead recognize that the federal government has greater discretion to regulate in this area, given the diplomatic, national security, and foreign affairs issues that accompany restrictions on foreign interests? Would it consider such restrictions analogous to other special regulatory regimes applied to foreign businesses?⁷⁰ The answer should be that it would recognize such discretion, provided the law bore some relationship to national security or diplomacy. Even here, if the Court saw that Congress was using fractional foreign ownership as a pretext to extend a speech ban to corporations, it might conclude that Congress had acted unconstitutionally. The mere fact that some foreign interest was involved might be insufficient to survive scrutiny, especially since the ban would silence Americans also involved in the enterprise.

In the concern over the influence of aliens in American elections, we should be reflective enough to consider how other nations may view American

65. DAVID COLE, *ENEMY ALIENS* 211-13 (2003).

66. *Id.* at 217.

67. FED. ELECTION COMM’N, FEC ADVISORY OPINION NO. 1987-25 (Sept. 17, 1987), <http://herndon3.sdrdc.com/ao/no/870025.html> (last visited July 31, 2010).

68.

If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.

Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

69. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding unconstitutional a city’s redistricting plan which excluded blacks from participating in municipal elections).

70. *See, e.g.*, Foreign Investment and National Security Act of 2007 (FINSA), Pub. L. No. 110-49, 121 Stat. 246 (2007); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-608, SOVEREIGN WEALTH FUNDS: LAWS LIMITING FOREIGN INVESTMENT AFFECT CERTAIN U.S. ASSETS AND AGENCIES HAVE VARIOUS ENFORCEMENT PROCESSES (2009).

participation in their elections. Americans with dual citizenship are important voting blocs for a number of other nations' politicians. American political consultants have shaped campaigns globally.⁷¹ A Carnegie Endowment op-ed described U.S. involvement in Ukraine elections:

Did Americans meddle in the internal affairs of Ukraine? Yes. The American agents of influence would prefer different language to describe their activities—democratic assistance, democracy promotion, civil society support, etc.—but their work, however labeled, seeks to influence political change in Ukraine. The U.S. Agency for International Development, the National Endowment for Democracy and a few other foundations sponsored certain U.S. organizations, including Freedom House, the International Republican Institute, the National Democratic Institute, the Solidarity Center, the Eurasia Foundation, Internews and several others to provide small grants and technical assistance to Ukrainian civil society. The European Union, individual European countries and the Soros-funded International Renaissance Foundation did the same.⁷²

Understandably, many Americans view U.S.-sponsored electoral activity favorably, yet remain suspicious about the motives and sincerity of foreign nationals who want to instruct Americans about their political leadership.

Caution may be prudent when considering the involvement of foreign governments, state-sponsored corporations, unions, parties, and the like, in American politics. Even so, it made little sense even before *Citizens United* to abridge the activities of foreign individuals legally in the United States and subject to our laws. Given the Court's attitude toward closer scrutiny, a challenge to the scope of this law might be successful.

2. *Government Contractors and Congressionally Chartered Corporations.*—Federal campaign finance statutes presently forbid government contractors and congressionally chartered corporations from making expenditures.⁷³ Those restrictions have not had much impact because these entities are often also ordinary corporations. Thus, the expenditure ban that has been applicable to corporations has also prevented them from making expenditures. It is unclear how the Court would apply its *Citizens United* reasoning to these contexts. Read broadly, the holding that independent expenditures are “not corrupt[ing]”⁷⁴ would suggest that these entities should also be able to make expenditures.

As with the rights of foreign nationals, the answer in the contractor and

71. Fritz Plasser, *American Campaign Techniques Worldwide*, 5 HARV. INT'L J. PRESS/POL. 33, 54 (2000); Roman Olearchyk, *U.S. Political Advisers Add Polish to Ukraine Election Candidates*, FIN. TIMES, Jan. 28, 2010.

72. Michael McFaul, 'Meddling' In Ukraine; Democracy Is Not an American Plot, WASH. POST, Dec. 21, 2004, at A25.

73. See 2 U.S.C. § 441b (2006); see also *id.* § 441c; 11 C.F.R. § 115.2 (2010) (describing federal contractor ban).

74. See *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010).

congressionally chartered corporations contexts may not be so simple. The Court rejected the expenditure ban in *Citizens United* in part because it was broad and undifferentiated.⁷⁵ The ban did not respond to any evident threat to politics from corporations as such.⁷⁶ Thus, part of the defect with that section of the statute was its lack of tailoring and the flawed notion that all corporations of whatever size and structure are equally dangerous to democracy.⁷⁷

These may, however, be special cases. With government contractors and congressionally chartered corporations, as with foreign corporations, Congress may be permitted greater discretion to craft expenditure restrictions that respond to a genuine identifiable threat of corruption. Congress and executive branch agencies have latitude to set prerequisites for the companies that contract with the government.⁷⁸ Thus, Congress could identify a greater risk of corruption from companies that receive no-bid federal government contracts because the competitive bidding process is not able to buffer the potential for undue influence between the contractor and governmental actors. Alternatively, Congress might structure such a regulation as an anti-“pay to play” law by disqualifying corporations and unions that make expenditures from receiving no-bid contracts. Congressionally chartered corporations, for their part, are discrete entities created by Congress, and unlike regular corporations they are imbued with a “public” purpose. Congress has a distinctive ability to set their mission and power with this small set of entities.⁷⁹

Similarly, post-*Citizens United*, state and local jurisdictions may remain able to restrict the political expenditures of certain kinds of businesses if, in that jurisdiction’s experience, the field has posed special problems of corruption in politics.⁸⁰ At present, various jurisdictions have imposed additional restrictions on political activities by alcoholic beverage licensees,⁸¹ gaming licensees,⁸²

75. *Id.* at 911.

76. *Id.*

77. *See id.*

78. Federal procurement is governed by the fifty-three part Federal Acquisition Regulation. *See* 48 C.F.R. pts. 1-53 (2010). For example, the federal government can demand that federal contractors observe additional hiring and recruitment policies beyond that demanded of ordinary business. *See About OFCCP*, U.S. DEP’T OF LABOR, <http://www.dol.gov/ofccp/aboutof.html> (last visited Oct. 10, 2010) (summarizing the necessary requirements).

79. An example of a congressionally chartered corporation would be Freddie Mac. *See* Federal Home Loan Mortgage Corporation Act of 1970, Pub. L. No. 91-351, § 301, 84 Stat. 450 (prior to 2009 amendment).

80. An interesting, if dated, description of political practices of certain “special sources” is in chapter 6 of ALEXANDER HEARD, *THE COSTS OF DEMOCRACY* 142-68 (1960).

81. *See, e.g.,* VILLAGE OF DOWNERS GROVE, ILL., CODE § 3.22SEC (Conduct of Licences/Prohibited Campaign Contributions); *Schiller Park Colonial Inn v. Berz*, 349 N.E.2d 61 (Ill. 1976).

82. *See, e.g.,* N.J. STAT. ANN. § 5:12-138 (West 2010), *upheld in* *Soto v. New Jersey*, 565 A.2d 1088 (N.J. Super. App. Div. 1989); *see also* IOWA CODE ANN. § 99F.6 (West, Westlaw through 2010 Reg. Sess.); IND. CODE § 4-33-10-2.1 (2010); MICH. COMP. LAWS ANN. § 432.207b

racetrack operations,⁸³ contractors,⁸⁴ and public utilities.⁸⁵ Again, however, the Court would probably look behind the bare assertion of corruption and find the restriction unconstitutional if it is presented with a pretext unsupported by history or experience. After *Citizens United*, strict scrutiny means exactly that.

III. REPORTING REQUIREMENTS AND DISCLAIMERS

The “transparency” provisions of federal election law emerged from *Citizens United* with a ringing endorsement.⁸⁶ Seemingly channeling Perry Belmont and the National Publicity Law movement of the early twentieth century,⁸⁷ the Court endorsed disclaimers and disclosure as an appropriate means to thwart corruption and inform voters of the interests behind candidates.⁸⁸ The handful of situations where the Court has found disclaimers and disclosure unlawful have remained restricted to interpersonal political exchange, as in *McIntyre v. Ohio Elections Commission*⁸⁹ and radical minor political movements, as in *Brown v. Socialists Workers '74 Campaign Committee*.⁹⁰

However, both the disclosure requirements in *Citizens United* and the exceptions in these more specific cases involved disclosure and disclaimer requirements that were attached to discrete electoral activities. In *Citizens United*, the Court upheld the BCRA requirement that anyone making electioneering communication expenditures over \$10,000 must file a statement listing the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors.⁹¹ In *McIntyre*, the Court found unconstitutional the requirement that an individual put her name on anti-

(West, Westlaw through 2010 Reg. Sess.); see generally Donna B. More et al., *Access Denied: Casinos, Campaign Contributions and the Constitution*, 2 GAMING L. REV. 425 (1998).

83. See, e.g., VA. CODE ANN. § 59.1-375 (LEXIS through 2010 Reg. Sess.).

84. See IND. CODE § 4-30-3-19.5 (2010); KY REV. STAT. ANN. § 121.056 (West, Westlaw through 2010 leg.); OHIO REV. CODE ANN. § 3517.13(J) (West, Westlaw through 2010 File 54 of the 128th GA); S.C. CODE ANN. § 8-13-1342 (Supp. 2009); W. VA. CODE ANN. § 3-8-12(d) (West, Westlaw through 2d Extraordinary Sess.); Blount v. SEC, 61 F.3d 938 (D.C. Cir. 1995); Green Party of Conn. v. Garfield, 537 F. Supp. 2d 359 (D. Conn. 2008), *aff'd in part and rev'd in part*, 616 F.3d 189, 616 F. 3d 213 (2d Cir. 2010).

85. The Public Utility Holding Act of 1935 prohibited public utilities from making contributions and expenditures in federal races but was repealed in 2006. See Public Utility Holding Act of 1935, ch. 687, 49 Stat. 803m, *repealed by* Public Utility Holding Company Act of 2005, Pub. L. No. 109-58, § 1263, 119 Stat. 594; see also GA. CODE § 21-5-30(f) (2010).

86. *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010).

87. See, e.g., PERRY BELMONT, RETURN TO SECRET PARTY FUNDS (photo. reprint 1974) (1927).

88. *Citizens United*, 130 S. Ct. at 913-15.

89. 514 U.S. 334 (1995).

90. 459 U.S. 87 (1982).

91. *Citizens United*, 130 S. Ct. at 914-15.

school bond flyers.⁹² In *Brown*, a record of official and unofficial harassment permitted the Socialist Workers Party committee to be exempt from campaign finance disclosure requirements.⁹³

Ordinarily, these disclaimers and disclosure requirements are justified and constitutional. In the context of corporate and labor expenditures, however, it is less clear how the Court would view reporting requirements that go beyond disclosing what other entities directly give to support an expenditure, to encompass donors who give with no strings attached. In such cases, the connection between the donation and political activities is much more remote. Similarly, it is less clear how much more information Congress could require on a disclaimer. Because disclaimer and disclosure requirements do not ban speech, as the contribution ban did, the Court may give Congress relatively freer reign to craft requirements. As the Court stated in *Citizens United*, “[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.”⁹⁴

At some point, however, disclaimer and disclosure requirements intrude on free association interests, such as those the Court found compelling in *NAACP v. Alabama*.⁹⁵ There, the State of Alabama insisted that the NAACP produce membership lists, which it argued could show whether the NAACP should be required to file state corporate paperwork as an out-of-state enterprise.⁹⁶ The Court protected these membership lists under the First Amendment because their production would burden members simply because they had chosen to associate with the NAACP.⁹⁷ Similarly, if Congress moves beyond disclosure that is connected to political activity, and requires unreasonable or unduly burdensome disclosure (e.g., of all donors or all dues-paying members) as an indirect means of chilling protected speech, the Court could revisit its deferential treatment of disclaimer and disclosure requirements.

IV. POLITICAL COMMITTEE STATUS

Limits, prohibitions, and reporting requirements all come together when a group becomes a political committee. The statute itself is quite strict. A group that takes \$1000 in contributions or makes \$1000 in expenditures for the purpose of influencing an election for federal office must register with the Federal Election Commission, follow the \$5000 contribution limit, follow prohibitions on contributions from corporations, unions, and other prohibited sources, and file regular reports of its financing and disbursements.⁹⁸ If that were the law alone, then *Citizens United* would mean little. Once a corporation made \$1000 in

92. *McIntyre*, 514 U.S. at 356-57.

93. *Brown*, 459 U.S. at 101-02.

94. *Citizens United*, 130 S. Ct. at 916.

95. 357 U.S. 449 (1958).

96. *Id.* at 452-54.

97. *Id.* at 461-63.

98. See 2 U.S.C. § 431(4) (2006); *id.* §§ 432, 433.

expenditures, it would need to spend every dollar thereafter out of a PAC.

But in *Buckley*, the Court interpreted the committee threshold to apply only if the group was itself under the control of a candidate or political party or had as its major purpose “the nomination or election of a candidate.”⁹⁹ Subsequent judicial interpretation of the so-called “major purpose” test, and various FEC regulatory initiatives, has rendered a mixed bag.¹⁰⁰ Some situations are clear-cut. At one extreme, a “shell” corporation formed solely to make expenditures in elections would be required to follow the political committee rules, including the limits and prohibitions on contributions to it.¹⁰¹ At another extreme, a multifaceted multimillion-dollar corporation that used general treasury funds to make \$1500 in expenditures would not be required to follow these rules.¹⁰²

But future challenges will arise as corporate spenders and FEC regulators tussle over the line in the middle. Does “major purpose” mean expenditures of over fifty percent of the corporation’s total spending? In what time period? What if the group has numerous purposes, but making political expenditures is the largest of its expenses.¹⁰³ What role should statements about the group’s “purpose” play in its formative documents, literature, and fundraising in this determination?

CONCLUSION

The statute governing federal campaign finance requires an overhaul in the wake of the Court’s development of constitutional doctrine. The Court has not only endorsed political expression by incorporated groups and unions, but has also taken a close look at areas where Congress and state legislatures impose burdensome or unwarranted restrictions. The Court stands ready to offer robust protection for political speech and association by groups—unless the group is a political party or a candidate’s campaign committee.

That dichotomy troubles many observers.¹⁰⁴ Parties and candidate campaign

99. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

100. *See, e.g.*, Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007).

101. *See Buckley*, 424 U.S. at 79; Political Committee Status, 72 Fed. Reg. 5595.

102. *See Buckley*, 424 U.S. at 79; Political Committee Status, 72 Fed. Reg. 5595.

103. As of this writing, another appellate court decision could potentially limit “major purpose” drastically. *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010). The court held that a committee formed to ultimately support a ticket chosen in the future via Internet convention would not need to register and report until it had chosen a specific candidate to support. *Id.* at 869. In contrast, the FEC had advised the group that it would become a political committee once it spent \$1000 to obtain ballot access. *Id.* at 863. The court read literally *Buckley*’s rule that a committee would only be formed to support “a candidate.” *Id.* at 867 (quoting *Buckley*, 424 U.S. at 79). Yet another case challenging “major purpose,” *Real Truth About Obama, Inc. v. FEC*, was also working its way through the federal courts before the Supreme Court vacated the judgment and remanded the case back to the Fourth Circuit. 575 F.3d 342 (4th Cir. 2009), *vacated*, 130 S. Ct. 2371 (2010) (mem.)

104. *See, e.g.*, *Defining the Future of Campaign Finance in an Age of Supreme Court*

committees are designed to participate in politics, yet they are relatively disadvantaged at present. To resolve this situation today, Congress should rework restrictions on parties rather than attempt to indirectly burden outside groups.¹⁰⁵

Congress should embrace the opportunity to revise the campaign finance restrictions to make them clearer, simpler, and less burdensome. Perhaps members believe political regulation is shrewd politics or even good government. But in an era of increasing dissatisfaction with the performance of the federal government, one can wonder whether embracing the changing tide might be the shrewder alternative. That approach, of course, would have the additional benefit of being better aligned with the Constitution and its respect for and protection of political speech.

Activism: Hearing Before the Comm. on House Admin., 111th Cong. 15-27 (2010) (statement of Robert D. Lenhard, Former Chairman, Fed. Election Comm'n).

105. *Id.*