RECOVERING THE INDIVIDUAL IN POLITICS

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INTRODUCTION

The First Amendment dictates the extent to which government can regulate politics. The Free Speech Clause and the unenumerated right of association, for example, largely govern the rules of campaign finance.[1] Questions of whether or not "money is speech"[2] and whether the use of money in politics can be restricted nearly always raise free speech issues. Do particular forms of regulation, such as bans on corporate expenditures for candidate advertising within certain timeframes or limitations on contributions that individuals may make directly to candidates, impermissibly burden the right to free speech?

Relying so heavily on the Free Speech Clause and the right of association to answer these questions leads to doctrinal and theoretical difficulties. First, the Court developed much of the doctrine it applies to these issues in contexts other than politics, and this "borrowed" doctrine is arguably insensitive to the different interests at stake in politics. Second, the theory of the Free Speech Clause, like that of the Expression Clauses generally, has been conflicted, if not chaotic, and the current Court's attempt to develop a more coherent theory has largely overlooked an important political interest: that of individual participation. Both problems are important, but this brief essay explores only the second.

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1. *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011); Citizens United v. FEC, 130 S. Ct. 876 (2010); McConnell v. FEC, 540 U.S. 93 (2003); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001) (*Colorado Republican II*); Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) (*Colorado Republican I*); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

2. *Buckley*, 424 U.S. at 262 (White, J., concurring in part and dissenting in part).

This essay begins by laying out the problem. It shows how First Amendment expression doctrine has largely forsaken an individualist for a structural perspective. Under this view, the doctrine aims not to protect individual speakers, but social processes. This essay continues by tracing this move and its implications in some of the Court's leading election law cases. In particular, the Court's recent overruling of *Austin v. Michigan Chamber of Commerce*[3] in *Citizens United v. FEC*[4] and protection of business corporations' right to make unlimited independent expenditures in candidate elections rest on this change and show the great effects it has on the structure and practice of our politics. The essay concludes by calling for recovery of the participation interest the Court has subordinated. Only by revivifying it can we hope to reconstruct a truly democratic politics.

The Conflict Between Individualist and Structural Views of the First Amendment

Much of First Amendment theory—at least of the Expression Clauses[5]—has stood at war with itself. On the one hand, we say that these clauses exist to protect the individual. They protect the right to express what you think, who you are, and what you believe. The Supreme Court has celebrated this view[6] and many First Amendment theorists have long championed it.[7] In this view, the Expression

3. 494 U.S. 652 (1990).

4. 130 S. Ct. 876 (2010).

5. I use the term "Expression Clauses" loosely in this piece to refer not only to the Free Speech and Press Clauses, but to the Petition and Assembly Clauses as well. They both embody forms of expression, although ones with the particular aim of seeking redress of grievances, in the former case, and ones with a particular structure, group expression, in the latter. The term also covers constitutional protections, like the right of association, implied by those guarantees.

6. The *locus classicus* appears in Justice Brandeis's concurrence in *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the state was to make men free to develop their faculties . . . .").

7. *See, e.g.*, C. Edwin Baker, Human Liberty and Freedom of Speech 51 (1989) (arguing that "individual self-fulfillment and participation in change are fundamental purposes of the first amendment"); Thomas Emerson, The System of Freedom of Expression (1971); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 966 (1978) (The author champions the "liberty model[, which] holds that the free speech clause protects . . . an arena of individual liberty . . . because of the way the protected conduct fosters individual self-realization and self-determination without improperly interfering with the legitimate claims of others."); Jonathan Gilmore, *Expression as Realization: Speakers' Interests in Freedom of Speech*, 30 L. & Phil. 517 (2011) (arguing for "recognition of . . . an interest served by expressive activity in forming and discovering one's own beliefs, desires, and commitments"); Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 593 (1982) (arguing "that the constitutional guarantee of free speech ultimately

Clauses are the primary bulwarks of personal autonomy. Freedom of speech, for example, protects the speaker in order to allow her to realize her self-identity through her expression.[8] It is a right that belongs to the speaker, not to others.[9] In particular, it aims to promote the development of the individual, not the marketplace of ideas, democratic self-governance, or some other social process.

This view has sat uneasily alongside a very different one. From this other perspective, the Expression Clauses do not exist to protect individual autonomy; they exist instead to ensure the proper functioning of some of our most important social processes, particularly democratic self-governance.[10] The Supreme Court has also celebrated this view,[11] as have many theorists.[12] From this perspective, however, free speech does not aim to protect the individual speaker's interests, but instead those of the listener. We protect someone's right to speak, in other words, not because we care about that person's individual expression or his ability to explore and develop his own self-identity, but rather because we care deeply about the listener's ability to hear different ideas and points of view,[13] particularly those concerning elections and government.[14] This is, if you will, a "speakerless" view of

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serves only one true value, . . . 'individual self-realization' "). *See generally* Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443 (surveying first amendment scholarship taking this approach).

8. *See* Gilmore, *supra* note 7, at 518 ("Expressing ourselves is one way in which we come to form and know our own minds.").

9. *See id.* at 517 ("[A] family of theories of freedom of expression that find its justification in the interests that individuals have *qua* speakers, to be distinguished from whatever interests they may also have as audiences or third-parties for speech.").

10. *See id.* at 519–25 (discussing aims of "consequentialist" and "self-government" accounts of free speech).

11. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–71 (1964) (tracing development of this idea in prior Supreme Court case law).

12. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26–27 (1948) ("The principle of the freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) ("Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic.").

13. *See, e.g.*, MEIKLEJOHN, *supra* note 12, at 25 ("[T]he point of ultimate interest is not the words of the speakers, but the minds of the hearers.").

14. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 145 (1983) ("The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. Speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.")

the First Amendment in which the Expression Clauses exist to protect central social arrangements rather than individual expression.[15] When these Clauses protect individual expression, they do so only because they value it instrumentally, not intrinsically. Protecting it sometimes represents an effective way of protecting the social mechanisms that this view centrally values. In this view, the Expression Clauses protect structural—not individual—rights.

Over time, the structural view has largely triumphed over the individualist one. As discussed in this part, the evolution of a wide range of jurisprudence involving the Expression Clauses exposes the near complete dominance of the structural theory: cases applying the Free Speech Clause, Press Clause, and Petition Clause have increasingly been decided on structural rather than individualist rationales, while only cases involving the right to free association have consistently been decided on individualist grounds.

The holdings in two recent Supreme Court free speech "blockbusters"—*Snyder v. Phelps*,[16] the funeral heckling case, and *Brown v. Entertainment Merchants Ass'n*,[17] the violent video game case—rest exclusively on the structural rationale.[18] In both cases the Court protected arguably disfavored forms of speech—heckling at the funeral of a United States marine and graphic depictions of video game vio-

(internal quotation marks and citations omitted); Mills v. Alabama, 384 U.S. 214, 218–19 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.").

15. *See* Gilmore, *supra* note 7, at 519–25, 526–36 (describing both the audience-based and speaker-based theories of free expression).

16. Snyder v. Phelps, 131 S. Ct. 1207, 1217–19 (2011) (holding Free Speech Clause shields protesters near funeral from tort liability because protest implicated matters of public concern).

17. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734–38 (2011) (holding Free Speech Clause protects violent video games from regulation based on their message or content).

18. *See Snyder*, 131 S. Ct. at 1215–17 ("Speech on matters of public concern . . . is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government.") (internal citations and quotation marks omitted); *Brown*, 131 S. Ct. at 2733 ("Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.").

lence—because they contributed to some degree to public debate or the transmission of ideas.

The Press Clause has followed a similar path. It was first viewed through an individualist lens, as evidenced by Justice Story's description of it as "import[ing] no more[ ] than that every man shall have a right to . . . print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person . . . [or] disturb the public peace . . . or attempt to subvert the government."[19] More recently, however, the Court has viewed the Press Clause as a tool for protecting the marketplace of ideas and robust public discourse rather than the rights of individual speakers.[20] In the process, the conception of journalistic speech has evolved from one of mere personal expression into one of a broader public good.[21] From this perspective, the media assumes the role of the metaphorical "Fourth Estate" to serve as a forum for the public discussion of diverse ideas and as a check upon the three branches of government.[22] Within the context of this checking function, speech is valuable primarily because it creates government accountability, not because journal-

19. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 262 (New York, Harper & Bros. 1883).

20. *See, e.g.*, FCC v. League of Women Voters of Cal., 468 U.S. 364, 377–78 (1984) ("[B]ecause '[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, . . . the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences [through the medium of broadcasting] is crucial here [and it] may not constitutionally be abridged either by Congress or by the FCC.' ") (alterations in original) (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973) ("Although the broadcaster is not without protection under the First Amendment, . . . [i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.") (internal citations and quotation marks omitted); N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell."); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 387–90 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.").

21. Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 439 (1983).

22. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

ists derive subjective value from exercising their autonomy.[23] Given their shared jurisprudential development, it is difficult these days to clearly distinguish freedom of the press from freedom of speech, assuming that such distinctions still exist.[24] The Press Clause has become an institutional appendage of the Free Speech Clause and some may wonder what, if any, independent work it does. The Free Speech Clause—and its theory—has largely swallowed it up.

Even the long-neglected Petition Clause, which guarantees "the right of the people . . . to petition the Government for a redress of grievances,"[25] has been interpreted in an increasingly structural rather than individualist manner. In its first appearances in Supreme Court jurisprudence—largely cameos in which the Court brought it to bear incidentally on other legal issues[26]—the Court viewed it in largely individualist terms.[27] In *McDonald* v. *Smith*, however, the Court adopted the structural view and largely assimilated the Petition Clause to the Free Speech Clause.[28] That created backlash among historians

23. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 546–48.

24. *See* David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 82–88 (1975) (discussing conflation and confusion of free speech and press doctrine).

25. U.S. CONST. amend. I.

26. *See* Thomas v. Collins, 323 U.S. 516, 530 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, and therefore are united in the First Article's assurance."); *see also* United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 223 (1967) (citing *Thomas*, 323 U.S. at 531) (invoking petition right in aid of claims sounding largely in free speech and assembly).

27. *See Thomas*, 323 U.S. at 531 ("Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured . . . are not solely religious or political ones."); *United Mine Workers*, 389 U.S. at 223 (quoting *Thomas*, 323 U.S. at 531) (same).

28. The Court wrote:

> The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression. In *United States v. Cruikshank*, the Court declared that this right is implicit in "[t]he very idea of government, republican in form." And James Madison made clear in the congressional debate on the proposed amendment that people "may communicate their will" through direct petitions to the legislature and government officials. . . . [T]he values in the right of petition as an important aspect of self-government are beyond question . . . . The Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.

and theorists[29] and led some to attempt to reinvigorate the Petition Clause as a central protection of the individual.[30] Last term in *Borough of Duryea v. Guarnieri*,[31] however, the Supreme Court put that battle to rest. The Court held that public employees who believe they have been fired in retaliation for speech may sue their employers only when the speech at issue implicates a matter of "public concern,"[32] regardless of whether the employees press their claims under the Free Speech Clause or Petition Clause.[33] Although in reaching this result the Court stated that Petition Clause doctrine was not necessarily identical to that of free speech,[34] it adopted without reservation the same structural lens through which to interpret the Petition Clause's reach.[35]

Only the right of association has resisted this course of development. It is somewhat paradoxical among First Amendment freedoms. Although, as its name suggests, it protects group rather than individual activity, it now stands as the most individualistic of expression rights. It has two forms. The first form protects the right of intimate associations, such as traditional family, coupleship, and groupings of more

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472 U.S. 479, 482–85 (1985) (citations omitted).

29. *See, e.g.*, Eric Schnapper, *"Libelous" Petitions for Redress of Grievances—Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303, 345–47 (1989) (attacking the Supreme Court's view that First Amendment rights should "afford comparable degrees of protection" to each clause).

30. One writer, for example, went so far as to argue that the Petition Clause overcame all sovereign immunity to suit and thus, alone among constitutional provisions and laws, permitted the individual to recover damages against the government absent its consent. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 899, 904 (1997).

31. Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011).

32. *Id*. The Court extrapolated on the "public concern" requirement in an earlier case:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

Connick v. Myers, 461 U.S. 138, 146–47 (1983).

33. *Guarnieri*, 131 S. Ct. at 2491–92.

34. *Id.* at 2495 ("Courts should not presume there is always an essential equivalence in the two Clauses or that Speech Clause precedents necessarily and in every case resolve Petition Clause claims.").

35. Thus, for example, the Court noted that "[p]etitions to the government assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole." *Id*. at 2498.

extended relatives.[36] Because "[p]rotecting these relationships from unwarranted state interference . . . safeguards the ability independently to define one's identity . . . . [F]reedom of association [is] an intrinsic element of personal liberty."[37] It protects the autonomy of the group, in other words, to ensure that those individuals within it can define who they are. Seen this way, the right of association, despite its name, operates as an individualist, not a structural, right.

The second form of the right of association protects so-called "expressive associations," groups like the Boy Scouts[38] and the group that organizes Boston's Saint Patrick's Day parades.[39] It allows individuals to organize collectively, viewing such associations "as an indispensable means of preserving other individual liberties."[40] The right protects groups in order to allow individuals to amplify their voices to better achieve their individual ends. Like the rights protected by the other Expression Clauses, it is "instrumental"[41] but its instrumentalism runs in the opposite direction. It does not protect speakers so that the marketplace of ideas or democratic self-governance can better function. Rather, this right of association protects group activity so that individuals may better develop their own capacities and attain their own ends. What is a means to the other Expression Clauses becomes its end. Increasingly, the right of association appears the last refuge for the individualist perspective in the First Amendment's Expression Clauses.

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36. The Court described the first way that the right of free association protects individual rights as follows:

> The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . . The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives.

Roberts v. United States Jaycees, 468 U.S. 609, 618–19 (1984) (citations omitted).

37. *Id.* at 619–20.

38. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 649–50 (2000) (holding that Boy Scouts are an expressive association because they seek to transmit a "system of values").

39. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 568–70 (1995) (holding that the Boston St. Patrick's Day parade constitutes an expressive association because selection of parade contingents expresses message).

40. *Roberts*, 468 U.S. at 618.

41. *Id.*

The Battle Lines in Constitutional Campaign Finance Doctrine

The conflict between the individualist and structural views of the First Amendment—along with the structural view's steady triumph—reveals itself in the history of constitutional campaign finance doctrine. Three cases—*Buckley v. Valeo*,[42] *Austin v. Michigan Chamber of Commerce*,[43] and *FEC v. Massachusetts Citizens for Life*[44]—demonstrate the Court's commitment to drawing theoretical distinctions and deciding cases according to structural principles, even though in each case an individualist theory of the First Amendment would have offered a more sound basis upon which to rest the Court's ultimate holding. The Court's attempts to arrive at individualist outcomes using structural theories of the First Amendment produce notable inconsistencies in the legal and logical reasoning of each opinion, and these inconsistencies illustrate the ideological battle lines. Yet despite the structural theory's uneasy victories in these cases, other aspects of election law—such as statutory exemptions to limits on the value of personal services that can be donated to a campaign, and the Court's decision to protect the anonymity of political pamphleteers—demonstrate that the individualist theory of the First Amendment has, perhaps, not been driven from the field entirely.

One clear example of this ideological push and pull can be found in the reasoning the Court used to justify the enduring, if controversial, distinction between campaign contributions and independent expenditures. In *Buckley v. Valeo*, the Supreme Court considered challenges to the post-Watergate amendments to the Federal Election Campaign Act (FECA).[45] While upholding most of the amendments—including the contribution limitations (except when a candidate is contributing to herself), the disclosure provisions, and the public financing scheme for presidential elections—it struck down one of the major features of the revised act: the limitation on so-called "independent" expenditures, which consist of money spent by an individual or entity without coordination with any political campaign.[46]

Upholding contribution limitations while invalidating expenditure limitations seems odd. After all, both types of spending aim to

42. 424 U.S. 1 (1976) (per curiam).

43. 494 U.S. 652 (1990).

44. 479 U.S. 238 (1986).

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

46. *Buckley* also struck down limits on overall spending by a candidate's campaign. 424 U.S. at 54–58.

promote a particular candidate or set of views. The Court nonetheless distinguished these forms of spending on two grounds. First, the Court argued, contributions pose a threat of political corruption that independent expenditures do not.[47] Simply put, the Court believed that a candidate can become beholden to a contributor but not to someone who expends moneys on the candidate's behalf. If independent expenditures are not likely to indebt a candidate to the spender, according to the *Buckley* view, they do not give rise to even the appearance of corruption. Thus, regulating such expenditures would not serve to protect the integrity of the political process.[48]

Second, the Court saw contributions and expenditures as involving two quite different kinds of speech. Contributions, according to the Court, send only a coarse signal.[49] They indicate to the candidate, and perhaps to others, only that the contributor supports the candidate's views; they have no further communicative impact. As the Court put it, "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."[50] Because a contribution simply signals the presence of a bond between contributor and candidate, its expressive content does not vary with its size. A small contribution signals this bond just as effectively as a large one does. If, as the Court argued, "the quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing,"[51] then limiting contributions to any amount above the threshold at which this signal can be perceived does not impair speech. An individual, in other words, could send the same message of support regardless of whether the amount contributed was above or below the limit imposed by FECA. Expenditure limitations, by contrast, do significantly affect speech.[52] Because independent expenditures serve to communicate the donor's own ideas rather than the mere fact of support for the views of another, limiting expenditures poses more serious

47. *Compare id*. at 26–27 (holding that contributions pose danger of quid pro quo corruption and of creating appearance of such corruption), *with id*. at 47–48 ("[T]he independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process . . . .").

48. *Id.* at 46–48.

49. *Id.* at 20–21.

50. *Id.* at 21.

51. *Id.*

52. *Id.* at 19 ("The expenditure limitations . . . represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.").

First Amendment problems. Such limitations would affect both the quantity and content of political discourse.[53]

Both grounds for the Court's distinction between contributions and independent expenditures are troubling.[54] First, there is no reason to believe that a candidate would feel much less beholden to someone who has expended sums on her behalf than to someone who has given her money directly. Contributions arguably may produce a somewhat greater degree of indebtedness, but expenditures can create at least the appearance of a quid pro quo. Second, contributions communicate much more than the mere fact of an individual's political bonding with a particular candidate. If that were all contributions expressed, then candidates presumably would spend less time and effort garnering them and contributors would seldom give more than symbolic amounts. After all, anything above the signaling threshold would be wasted. The importance of contributions to contributors and candidates alike lies rather in their ability to magnify the voice of the candidates themselves. Few people contribute just to express their own ideas directly. Many contribute, however, to enable candidates to promote their own views more effectively and to convince other voters of the wisdom of their platform.[55] To be sure, contributions are, as the Court has characterized them in another case, "speech by proxy,"[56] but speaking by proxy can often make a communication more effective. To discount the speech value of contributions because they allow the candidate but not the contributor herself to speak simply misses the point of political contributions. Contributors give money to a candidate because they believe that they are more likely to realize their own goals by supporting a political candidate who shares those goals than by spending the same money to advocate for their goals directly. Most contributors would be surprised to learn that, according to the Court, they contribute only in order to express a bond between themselves and candidates rather than to propagate and implement their own ideas through the candidate's agenda.

By insulating expenditures but not contributions from limitation, the Court saw the former as more valuable than the latter. The differ-

53. *Id.* at 19–20.

54. *See generally* DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS 707–13 (4th ed. 2008) (describing controversy since *Buckley* over the contribution-expenditure distinction).

55. *See* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 261 (1986) ("[I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction.").

56. Cal. Med. Ass'n. v. FEC, 453 U.S. 182, 196 (1981).

ence, however, cannot lie in their relative expressive richness. Contributions, just like expenditures, can effectively voice the spender's ideas and one form of money can be used to say exactly the same things as the other. In fact, if one form is ultimately more expressive than the other, it is contributions, not expenditures. Candidate spending of contributions is, after all, coordinated by those who know most about the campaign and can therefore be expected to furnish speech better designed to advance the candidate's prospects.[57] Independent expenditures, by definition, are not. Rather, the only practical difference between expenditures and contributions lies in the quality of each form of spending as political participation. From this perspective, contributions can be viewed as of lower quality than expenditures. Unlike expenditures, they do not require the exercise of the spender's judgment beyond the initial choice of whether and to whom to donate. Expenditures, by contrast, require deciding what message to send, how to send it, and when to send it; they require fine judgments and political engagement by people unconnected to a candidate's campaign (although in practice, of course, nothing prevents the initial spender from hiring such people rather than making the judgments herself).

If the Court's distinction has any merit, then, it must lie in how much each form of spending requires active engagement and participation by the individual spender, not in how expressively rich the ultimate audience will perceive expression funded in these two different ways. *Buckley*'s central, controversial distinction dissatisfies, then, because the structural theory the Court feels it must use to justify the decision cannot support the individualist result it reaches. The structural view had not completely triumphed at this point, of course. Although the Court did recognize the difference made by individual participation and engagement, it chose not to rest its holding on that distinction and so left its result notoriously vulnerable to criticism.[58]

57. *See Buckley*, 424 U.S. at 47 ("Unlike contributions, . . . independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate . . . .").

58. *See, e.g.*, Nixon v. Shrink Mo. Gov't Political Action Comm., 528 U.S. 377, 413–18 (2000) (Thomas, J., dissenting) (arguing that the contribution-independent expenditure distinction rests on mistaken assumptions); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 518–21 (1985) (Marshall, J., dissenting) (arguing that the distinction has no constitutional significance); *Buckley*, 424 U.S. at 241 (Burger, C.J., concurring in part and dissenting in part) (arguing that "contributions and expenditures are two sides of the same First Amendment coin").

Consider next *Austin v. Michigan Chamber of Commerce*.[59] It reveals a similar gap between an official structural theory and an individualist result. The Michigan law at issue, like federal law at the time, prohibited corporations from making expenditures directly, but allowed corporations to make expenditures from separate segregated funds created solely for political purposes.[60] The Michigan State Chamber of Commerce, a nonprofit Michigan corporation, sued to enjoin enforcement of the expenditure limitation. It wanted to make expenditures directly from its general treasury, which was funded in large part by its membership comprised of business corporations. The Court held that the state could bar for-profit corporations and nonprofit corporations that are funded by for-profit corporations from making independent expenditures in candidate elections.[61] It identified the evil Michigan sought to correct as "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."[62] "The Act," the Court wrote, "does not attempt 'to equalize the relative influence of speakers on elections'. . . ; rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations."[63] Seeking to avoid any conflict with *Buckley*, which had protected independent expenditures from most government regulation,[64] the Court added that the problem was not that corporations could have great amounts of money—after all, individuals could too—but that the state gives corporations special structural advantages: "[w]e emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for [the expenditure prohibition]; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit . . . ."[65] In other words, the Court was not concerned with adjudicating the right of certain types of individuals (in this case corporations) to engage in political speech, or the manner in which certain classes of individuals could participate in political dialog. Rather, the Court was concerned with preserving structural integrity: certain cor-

59. 494 U.S. 652 (1990).

60. MICH. COMP. LAWS ANN. §§ 169.254(1), 169.255(1) (West 2005).

61. *Austin*, 494 U.S. at 657–66.

62. *Id.* at 660.

63. *Id.* (citation omitted) (quoting *Austin*, 494 U.S. at 705 (Kennedy, J., dissenting)).

64. *See* Buckley v. Valeo, 424 U.S. 1, 39–51 (1976) (per curiam) (striking down limitations on independent expenditures by individuals and groups).

65. *Austin*, 494 U.S. at 660.

porations could not participate directly in political speech because they had been granted a "unique state-conferred corporate structure" which might allow them to flood the marketplace for ideas with speech that did not reflect "actual political support."

Justice Scalia, writing in dissent, revealed two problems with the Court's reasoning. "The Court's opinion," he wrote, "says that political speech of corporations can be regulated because '[s]tate law grants [them] special advantages' and because this 'unique state-conferred corporate structure . . . facilitates the amassing of large treasuries.' This analysis seeks to create one good argument by combining two bad ones."[66] First, he pointed out, the state gives many other associations and even private individuals "special advantages . . . ranging from tax breaks to contract awards to public employment to outright cash subsidies,"[67] all of which help them amass wealth, and which cannot be conditioned on the forfeiture of constitutional rights.[68] Second, he argued the fact "[t]hat corporations 'amass large treasuries' is . . . not sufficient justification for the suppression of political speech, unless one thinks it would be lawful to prohibit men and women whose net worth is above a certain figure from endorsing political candidates."[69] If corporate expenditures trouble us because they do not reflect public support of the ideas of the corporation, then individual expenditures should trouble us as well. The Court's singling out of corporations was arbitrary:

> [The Court] does not endorse the proposition that government may ensure that expenditures "reflect actual public support for the political ideas espoused," but only the more limited proposition that government may ensure that expenditures "reflect actual public support for the political ideas espoused by corporations." The limitation is of course entirely irrational. Why is it perfectly all right if advocacy by an individual billionaire is out of proportion with "actual public support" for his positions?[70]

As Justice Scalia notes, the structural free speech framework the Court purported to apply supports the result opposite to the one the Court actually reached. As in *Buckley*, the individualist, speaker-centered view actually supports the Court's result. In deciding the issue the Court is actually working out a theory of who has the right to

66. *Id.* at 680 (Scalia, J., dissenting) (quoting *Austin*, 494 U.S. at 660 (majority opinion)) (internal citations omitted).
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 685 (Scalia, J., dissenting) (quoting *Austin*, 494 U.S. at 660 (majority opinion)) (internal citation omitted).

participate in politics, not whether particular forms of regulation will impair others' right to hear. That latter inquiry, a structural one, ultimately bears on whether barring corporate spending on candidate elections burdens the marketplace of ideas. Once again, the First Amendment theory that the Court seemed to feel constrained to apply left little room for the central value at stake: protecting individual participation.

Austin's distinction, following "the current of a century of congressional efforts to curb corporations' potentially 'deleterious influences on federal elections,'" marked a simple line.[71] People, rich and poor alike, have a right to spend whatever they want in politics so long as they themselves make the decisions about how the money is ultimately spent; corporations (and impliedly unions) do not. This distinction analogizes election spending more to voting—the individual's central act in politics—than to ordinary speech. Natural people must be able to participate in politics this way; non-natural entities, like corporations and unions, have no such right—and no one has a problem with such a distinction. The official theory, however, was extremely hostile to that underlying justification and left the Court's holding extremely vulnerable.

To those who see giving money in great amounts more as influence than as legitimate participation, this line is, of course, drawn in the wrong place. It should exclude corporations and unions, to be sure, but also limit how much natural people can spend to the level that represents legitimate participation rather than influence. On the other hand, to those who see expenditures as ordinary speech aimed to persuade intelligent voters rather than as spending to aid and so influence politicians, drawing any line is inappropriate. Everyone—natural people, corporations, and unions alike—should be able to make independent expenditures. As Justice Scalia put it in his *Austin* dissent, "The advocacy of . . . entities that have 'amassed great wealth' will be effective only to the extent that it brings to the people's attention *ideas* which—despite the invariably self-interested and probably uncongenial source—strike them as true."[72] "The premise of our system," he argued, "is that there is no such thing as too much speech—that the people are not foolish but intelligent, and will separate the wheat from the chaff."[73] In other words, from the perspective of the audience, the

71. FEC v. Beaumont, 539 U.S. 146, 152 (2003) (quoting United States v. Auto. Workers, 352 U.S. 567, 585 (1957)).

72. *Austin*, 494 U.S. at 684 (1990) (Scalia, J., dissenting) (emphasis in original).

73. *Id.* at 695 (Scalia, J., dissenting).

perspective which structural speech analysis makes critical,[74] the source of the speech cannot matter. Both corporate and individual speech are equally valuable.

This same tension appears in *FEC v. Massachusetts Citizens for Life*,[75] which effectively carved out an exception to the *Austin* rule for "ideological" corporations before *Austin* was even decided. In this case, the Court held that the First Amendment required the government to allow ideological corporations, defined as corporations existing for the purpose of promoting their members' views on particular issues, to make independent expenditures.[76] Massachusetts Citizens for Life (MCFL), an anti-abortion advocacy group incorporated under Massachusetts law, published a special edition of its newsletter endorsing particular candidates in Massachusetts primary elections.[77] The FEC claimed that this expenditure violated section 441b of FECA,[78] the federal analog of the Michigan statute at issue in *Austin*, which prohibited corporations from expending funds from the corporate treasury for candidate elections.[79] If a corporation wanted to engage in such political activity, FECA allowed it do so only through the use of a "separate segregated fund."[80] Under this scheme, the corporation could pay for the establishment and administration of the fund but could not contribute directly to its resources.[81] Money for its political activities had to come from "members" of the corporation,[82] who were generally its board members, officers, shareholders, and employees.[83]

The question was whether MCFL could use its general corporate funds to endorse particular candidates or was limited to administering a separate, segregated fund. In deciding that ideological corporations could not be forced to spend through the separate segregated fund mechanism,[84] the Court rested heavily on the value of individual participation in politics but relied yet again on its official structural the-

74. *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 775–76 (1978) (protecting right of corporations to speak in initiative elections not because of speaker's interest but because of audience's interest in expression).

75. 479 U.S. 238 (1986).

76. *Id.* at 263.

77. *Id.* at 243.

78. *Id.* at 244.

79. 2 U.S.C. § 441b(a) (2006).

80. § 441b(b)(2)(C).

81. §§ 441b(a), (b)(2)(C).

82. § 441b(b)(4)(C).

83. § 441b(b)(4)(A)(i).

84. *See* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 256 (1986) (finding that requiring ideological non-profits to make expenditures through a separate segregated fund "make[s] engaging in protected speech a severely demanding task"); *id*. at 256–65 (finding no compelling state interest to overcome such burden).

ory. First, the Court held that because FECA limited the amount of money MCFL could expend, and because running a separate segregated fund would have entailed many significant recordkeeping, reporting, and personnel requirements,[85] FECA's direct expenditure prohibition imposed a significant burden on the corporation's First Amendment interests.[86] This conclusion was unsurprising given *Buckley*'s holding that "the expenditure limitations contained in [FECA] represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech."[87] The expenditure prohibition penalized speech by forcing an organization that wanted to promote a particular candidate to forgo the advantages of the corporate form. But the Court's reasoning went far beyond this general insight. The Court focused on particular types of activity it thought FECA would discourage:

> [A]n incorporated group of like-minded persons might seek donations to support the dissemination of their political ideas and their occasional endorsement of political candidates, by means of garage sales, bake sales, and raffles. Such persons might well be turned away by the prospect of complying with all the requirements imposed by the Act. Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, and to monitor garage sales lest nonmembers take a fancy to the merchandise on display, it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.[88]

The Court's focus on "garage sales, bake sales, and raffles" along with its fear that groups would have "to monitor garage sales lest nonmembers take a fancy to the merchandise on display" reveals its motivating concern: that grass-roots, individual participation in politics would greatly suffer. It saw a burden not so much on structures like the marketplace of ideas but on small, individual players in politics. It therefore required the government to show a compelling interest that would justify the restriction.[89]

The Court's "compelling interest" analysis at this second stage reveals how far the justices were willing to stretch the structural theory to support an individualist result. The FEC argued that the "im-

85. *See id.* at 252–55 (comparing requirements placed on incorporated and unincorporated entities).

86. *Id.* at 255.

87. Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam).

88. *Mass. Citizens*, 479 U.S. at 254–55.

89. *Id.* at 256 ("When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest.").

portan[ce of] protecting the integrity of the marketplace of political ideas" justified any burden on the organization's First Amendment interests.[90] As the Court restated this argument, "[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."[91] To the Court, the basic question in the case was whether the state's interest in preventing the transformation of economic power into political power was strong enough to outweigh the burden on the corporation's First Amendment rights.

The Court answered this question in a surprising way. It distinguished between spending from the general treasuries of businesses and spending from ideological corporations.[92] Spending from business treasuries allowed businesses to speak more loudly than the power of their ideas justified:

> Political "free trade" does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. Relative availability of funds is after all a rough barometer of public support. The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.[93]

But allowing businesses to spend from separate segregated funds did not let them punch above the weight of their ideas. "The resources available to *this* fund, as opposed to the corporate treasury, in fact, reflect popular support for the political positions of the committee."[94] Viewed in this light, spending by ideological corporations was more like spending by separate segregated funds than like spending by the corporation itself:

> MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace. While MCFL may derive some advantages from its cor-

90. *Id.* at 256–57.
91. *Id.* at 257.
92. *Id.* at 263–64.
93. *Id.* at 257–58 (citations omitted).
94. *Id.* at 258 (emphasis in original).

> porate form, those are advantages that redound to its benefit as a political organization, not as a profit-making enterprise.[95]

Since its treasury resources reflected popular support for its ideas, it could make independent expenditures in politics.

This so-called "barometer rationale,"[96] however, does not quite work. An ideological corporation's resources reflect not just the number of people who support it but also their wealth. Two organizations with the same number of contributors with the same intensity of interest will command different resources if one appeals to the rich and the other to the poor. Moreover, this rationale undermines one of the central assumptions of the structural view it purports to refine: that more speech is better because the audience will know its own interests and carefully evaluate what it hears.[97] The barometer view admits that the power of political speech does not necessarily reflect the power of its ideas but rather the amount of money behind it. Yet it denies that ideological corporations distort the marketplace of ideas only by assuming the untrue: that the number of dollars contributed to a cause tracks the number of people who support it.

MCFL's real distinction between ideological and ordinary business corporations rests instead on whether the Court believes each type of corporation is an expressive association. According to the Court, ideological corporations are expressive associations; business corporations are not. In language that flatly contradicts the reasoning in *Buckley* that supported the contribution/expenditure distinction, the Court recognizes that "individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction."[98] Accordingly, allowing grassroots political organizations to spend from their general treasuries fosters individual political participation that allowing business corporations to spend does not. *MCFL*'s exception to *Austin*, then, actually rests not on a structural view of free speech but on an individualist view of expressive association. Again, however, the Court felt it could not publically justify the decision under the theory that actually drove it.

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95. *Id.* at 259.

96. *See* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 112–13 (2003) (discussing "barometer equality rationale" in campaign finance cases).

97. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 695 (1990) (Scalia, J., dissenting) ("The premise of our system is that there is no such thing as too much speech—that the people are not foolish but intelligent, and will separate the wheat from the chaff.").

98. *Mass. Citizens*, 479 U.S. at 261.

Individualist distinctions between the value of different forms of political participation is, of course, controversial. Many will reject it or, at least, fail to accept it as a constitutional distinction.[99] Why should some forms of individual political participation be privileged over others? But individualist distinctions do provide the theoretical support for other aspects of election law. FECA distinguishes, for example, between the treatment of money and personal services. Although it defines "contribution" broadly to include "any gift . . . of money or anything of value made by any person for the purpose of influencing any election for Federal office . . . [and] the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose,"[100] it specifically excludes "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee . . . ."[101] In other words, an individual can neither pay someone else unlimited amounts to provide personal services to a campaign nor make unlimited contributions to the campaign for it to hire others, but that same individual can donate an unlimited amount of her own personal services. This difference in treatment cannot be justified in terms of either equality between those who would contribute personal services and those who would contribute cash or structural views of free speech. Some people can more easily provide services or provide more valuable services than others, and whatever speech the provision of particular personal services enables could similarly be enabled by the contribution of money to hire someone else to provide the same services. The distinction is only defensible in terms of the quality of personal political participation. Providing personal services often directly involves the provider in the campaign and more fully engages him politically. Providing money or hiring others to do the same thing creates less direct involvement and

99. For example, Lillian R. BeVier argues that those promoting equality in campaign finance regulation need to explain

> such troublesome queries as why it is more legitimate to contribute time rather than money to political candidates[,] . . . why the influence of political activists, who by inclination or commitment invest their energy in the pursuit of power and influence in the public sector, is more legitimate than the influence of financial contributors who invest their energy and productive activity in the private sector[, and why they] confer[ ] legitimacy on the political influence of Barbra Streisand[, who contributes time rather than money,] while declining to confer it on an anonymous millionaire.

Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1268 (1994).

100. 2 U.S.C. §§ 431(8)(A)(i), (8)(A)(ii) (2006).

101. § 431(8)(B)(i).

shallower engagement. The design of this subconstitutional rule reflects deep concern with encouraging individuals personally to participate in politics, rather than any concern with how the marketplace of ideas or democratic self-governance structurally operates.

The Court has also granted strong anonymity rights to direct forms of individual political participation while denying those rights to most forms of election spending. In *McIntyre v. Ohio Elections Commission*,[102] for example, the Court held that an individual had a right to distribute anonymous leaflets she had herself prepared in opposition to a proposed school tax levy.[103] While it admitted that in *Buckley* it had upheld disclosure not only of contributions but of individual expenditures, the Court thought the kind of direct activity that McIntyre was engaged in—distribution of a personally prepared leaflet—was different.[104] As the Court put it: "A written election-related document—particularly a leaflet—is often a personally crafted statement of a political viewpoint . . . . As such, identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue."[105] Direct political leafleting, in other words, is of a deeper participatory character than donating money and, accordingly, this kind of direct, personal advocacy is worthy of more protection.[106]

Decisively Repudiating the Individualist View

Citizens United v. FEC,[107] the Court's most recent major intervention in the area, repudiates the individualist, participatory view of the First Amendment almost entirely. The case centrally concerned a challenge to the Bipartisan Campaign Reform Act (BCRA), which banned corporations and unions from spending from their general treasury funds to make independent expenditures on so-called "electioneering communications."[108] An electioneering communication was defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" made within

102. 514 U.S. 334 (1995).

103. *Id.* at 356–57.

104. *See id.* at 353–56.

105. *Id.* at 355.

106. Justice Stevens has advocated this view most forcefully. In his concurrence in *Nixon v. Shrink Missouri Government PAC*, he states: "The right to use one's own money to hire gladiators, or to fund 'speech by proxy,' certainly merits constitutional protection. These property rights, however, are not entitled to the same protection as the right to say what one pleases." 528 U.S. 377, 399 (2000) (Stevens, J., concurring).

107. 130 S. Ct. 876 (2010).

108. 2 U.S.C. § 441b (2006).

thirty days of a primary or within sixty days of a general election[109] that is "publicly distributed."[110] In "the case of a candidate for nomination for President" public distribution meant that the communication could "be received by 50,000 or more persons in a State where a primary election . . . is being held within 30 days."[111] Corporations and unions could spend on electioneering communications only through a separate segregated fund to which their members, but not the corporation or union itself, had contributed beyond the cost of administration.[112] The Court had previously upheld this provision against facial challenge (after holding it inapplicable to ideological corporations in *MCFL*) in *McConnell v. FEC*,[113] relying in large part on *Austin v. Michigan Chamber of Commerce*.[114]

Citizens United, a non-profit corporation, released a film called *Hillary: The Movie*, a ninety-minute documentary about then-Senator Hillary Clinton, a candidate in the Democratic Party's 2008 presidential primary elections.[115] Citizens United made the film available both in theaters and on DVD, but in order to increase viewership it wanted to buy access on cable television through video-on-demand within thirty days of particular primary elections.[116] Because Citizens United received money from for-profit corporations[117] it did not fit within *MCFL*'s exception for ideological corporations,[118] and therefore sued for injunctive and declaratory relief seeking, among other things, to have the electioneering communications restrictions struck down as applied to the movie.[119] The district court upheld the law as applied to Citizens United because the movie 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 Presi-

109. 2 U.S.C. § 434(f)(3)(A)(i).

110. 11 C.F.R. § 100.29(a)(2) (2011).

111. § 100.29(b)(3)(ii).

112. 2 U.S.C. § 441b(b)(2)(C) (excluding money spent for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock" from statutory definition of "contribution or expenditure").

113. McConnell v. FEC, 540 U.S. 93, 203–09 (2003).

114. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658, 660 (1990).

115. Citizens United v. FEC, 130 S. Ct. 876, 887 (2010).

116. *Id.* at 887, 888.

117. *Id.* at 887 (noting that Citizens United "accept[ed] a small portion of its funds from for-profit corporations").

118. *Id.* at 891–92 (holding that the statute did not contain an exception for non-profit corporations that receive only a small portion of their overall funds from for-profits).

119. *Id.* at 888.

dent Hillary Clinton world, and that viewers should vote against her."[120]

On appeal, the Supreme Court struck down the provision, overruling both *Austin* and large parts of *McConnell* in the process.[121] In doing so, the Court vindicated the structural view over the individualist view in two distinct ways. First, it almost uniformly viewed the free speech injury from the listener's perspective. "[I]t is inherent in the nature of the political process," it stated, "that voters must be free to obtain information from diverse sources in order to determine how to cast their votes."[122] Similarly, it noted, "[c]orporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster."[123] In fact, the Court turned *Austin* on its head. Whereas political speech by business corporations was once considered dangerous because the power and volume of the message might have little to do with the power of the ideas espoused, corporate political speech is now considered particularly necessary for democratic self-governance because it uniquely contributes to the marketplace of ideas. In the Court's view, denying the corporate voice to listeners was, in fact, particularly harmful:

> The censorship we now confront is vast in its reach. The Government has muffle[d] the voices that best represent the most significant segments of the economy. And the electorate [has been] deprived of information, knowledge and opinion vital to its function. By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.[124]

Without corporations freely speaking, in other words, the electorate would be largely deprived of information and argument about the national economy, presumably a concern of importance to most voters. So great was the danger that the Court invoked a chilling and damningly evocative description of this type of government regulation. By controlling the audience's access to ideas and information, it stated, the government was engaging in thought control:

> When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information

120. Citizens United v. FEC, 530 F. Supp. 2d. 274, 279 (D.D.C. 2008) (per curiam).
121. *Citizens United*, 130 S. Ct. at 913.
122. *Id.* at 899.
123. *Id.* at 900 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978)) (internal quotation marks omitted).
124. *Id.* at 907 (internal quotation marks and citations omitted).

> or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.[125]

The Court, to be sure, did mention in passing the harm to speakers. But these few invocations represent a minor and instrumental theme. Even in its most stirring discussion of the speaker's interest, the Court makes clear that it is the public's interest in hearing that is paramount:

> By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.[126]

Both of the Court's two moves in this passage are surprising. First, it recognizes a novel dignitary harm that applies not just to individuals, but also to corporations. *Austin*, it turns out, not only discriminated against some entities but also insulted business corporations' dignity by denying them the right "to strive to establish worth, standing, and respect for the [corporate] voice."[127] The Court then grounds that dignitary harm not where one would expect—in an individualist view of the First Amendment—but instead in the structural concern that viewers and listeners have all ideas available for their "consideration."[128] Individual corporate dignity thus instrumentally protects the marketplace of ideas.

The Court next subordinated the individualist view to the structural view while paradoxically appearing to vindicate it. Several times in its opinion, the Court evokes the right of association, the most deeply individualist of First Amendment rights.[129] Each time, however, the Court invokes the right not to protect traditional expressive associations of individuals, like the Boy Scouts and St. Patrick Day's parades, but rather to protect business corporations. Far from being a mere nexus of contract[130] a corporation in this view is an "associatio[n] of citizens . . . that has taken on the corporate form."[131] From that inference it was just a short step for the Court to conclude that

125. *Id.* at 908.
126. *Id.* at 899.
127. *Id.*
128. *Id.*
129. *See supra* notes 36–41 and accompanying text.
130. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).
131. *Citizens United*, 130 S. Ct. at 904.

Austin did not protect individual participation in politics but actually "disfavored [some] associations of citizens"[132]—a highly suspect constitutional arrangement. The Court underscored the danger of the holding in *Austin* by pointing out that it "permits the Government to ban the political speech of millions of associations of citizens"[133]—that is, corporations. The Court might have added that many of these "millions of associations of citizens" brought together, in turn, millions of citizens as shareholders, employees, and members of retirement plans invested in the corporations' stock. Few "associations of citizens" touch so many or, under the Court's view, could be said to speak for so many. It is no surprise, then, that *Austin* had to be overruled.[134]

By making expressive association so capacious that it covers for-profit business corporations, and by suggesting that they, in fact, lie closer to the heart of the right of association's protections than to its margins, the Court largely emptied the concept—and the right—of association of any real meaning. If this view holds, the right of association will no longer meaningfully protect the individual but stand instead as yet another, perhaps superfluous, structural right protecting a particular and intensely contested vision of democratic self-governance and of how the marketplace of ideas does and should operate. It would squeeze the individualist view completely out of the First Amendment.

One can wonder, of course, whether the Court in *Citizens United* meant to adopt such a capacious and empty view in general or whether it was merely adopting it opportunistically to reach a particular result. I hope the Court intended the latter. Although that would mean that the Court was acting illegitimately, it would preserve for future use an important view of the First Amendment that otherwise threatens to disappear entirely. If we are to protect individual participation in politics, it is important to recover this individualist perspective in First Amendment theory. I hope that future Courts will return to it and revive it and that it will provide resources for overturning precedents, like *Citizens United*, that give too little protection to the individual in politics. But that hope may be in vain. Although I mean this essay to be forward-looking, perhaps it will ultimately serve as nothing more than a piece of legal history documenting the death of a theory along with the doctrine it once supported.

132. *Id.* at 908.
133. *Id.* at 906–07 (citing the number of tax returns filed by for-profit corporations).
134. *Id.* at 913 ("Due consideration leads to this conclusion: *Austin* should be and now is overruled.") (internal citation omitted).