

# Death by a Thousand Cuts: How the Supreme Court Has Effectively Killed Campaign Finance Regulation by Its Limited Recognition of Compelling State Interests<sup>1</sup>

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*This Article examines the current campaign finance jurisprudence in the United States, with a particular emphasis on the Court's recognition of compelling state interests. Given the limited recognition of compelling state interests, this Article seeks to question the seemingly arbitrary rationale behind recognition and explore the implications of minimal acceptance of compelling state interests. Because the evolution of compelling state interest recognition has varied greatly, the Court's recent insistence — that the state has merely one compelling interest — is troublesome. This Article provides a comprehensive review of the campaign finance jurisprudence, then reviews the decisions that created or argued for additional compelling state interests. Interests that were considered compelling prior to Citizens United, such as the*

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<sup>1</sup> During oral arguments in the case of *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806 (2011), Justice Breyer characterized the state of campaign finance regulation as nearly dead. He said, "It is better to say [campaign finance regulation is] all illegal than to subject these things to death by a thousand cuts, because we don't know what will happen when we start tinkering with one provision rather than another." See Adam Liptak, *Justices Review Arizona Law on Campaign Financing*, N.Y. TIMES (Mar. 28, 2011), [http://www.nytimes.com/2011/03/29/us/politics/29scotus.html?\\_r=0](http://www.nytimes.com/2011/03/29/us/politics/29scotus.html?_r=0).

*anti-distortion interest, remain compelling and hold an important place in the US campaign finance landscape. This Article attempts to respond to the current Court's trend and shed light on the history of compelling state interest recognition.*

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## INTRODUCTION

As a child, most evenings I sat on the couch with my parents to watch the news. At best, nightly news in Chicago can be described as depressing. However, the most unnerving news segments were those displaying elected officials as they marched into court to stand trial for some form of corruption.<sup>2</sup>

In Illinois, more than 1,800 individuals were convicted for public corruption from 1976 to 2012.<sup>3</sup> This bleak reality breeds a sense of skepticism and distrust among the electorate,<sup>4</sup> especially for those

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<sup>2</sup> In the interest of space, this will be only a partial listing of the group: George Ryan and Rod Blagojevich (Governors); Medrano Ambrosio, Allan Streeter, Jesse Evans, and Virgil Jones (Alderman). *See, e.g.*, DICK SIMPSON ET AL., UNIV. OF ILL. AT CHI. DEP'T OF POLITICAL SCI. & ILL. INTEGRITY INITIATIVE OF THE UNIV. OF ILL. INST. FOR GOV'T AND PUB. AFFAIRS, CHICAGO AND ILLINOIS, LEADING THE PACK IN CORRUPTION: ANTI-CORRUPTION REPORT NUMBER 5 4 (2012), [http://pols.uic.edu/docs/default-source/chicago\\_politics/anti-corruption\\_reports/leadingthepack.pdf?sfvrsn=2](http://pols.uic.edu/docs/default-source/chicago_politics/anti-corruption_reports/leadingthepack.pdf?sfvrsn=2) [hereinafter ANTI-CORRUPTION REPORT NUMBER 5].

<sup>3</sup> *Id.*

<sup>4</sup> A recent poll found that nearly ninety percent of registered Illinois voters believed that political corruption by state government employees was at least “somewhat common.” PAUL SIMON PUB. POLICY INST. AT S. ILL. UNIV. CARBONDALE, THE SIMON POLL, SPRING 2014: ILLINOIS STATEWIDE 20 (2014),

individuals—such as myself—who grew up watching these criminals plunder the state coffers. Generally, Illinois corruption takes the form of bribery, extortion, conspiracy, or fraud;<sup>5</sup> however, other forms of corruption such as patronage, nepotism, and clout have plagued Illinois throughout the years.<sup>6</sup> The difficulty in fighting corruption is the fact that it is a by-product of Illinois' political culture, and the only effective remedy that voters have is through the ballot box. However, the current trend of campaign finance deregulation—along with the reality that higher campaign spending correlates to successful results<sup>7</sup>—ensures that the people of Illinois are doomed to endure the exploitation perpetuated upon them for over 150 years.<sup>8</sup>

Problems of political corruption in Illinois are merely an example of larger issues nationwide. Perhaps the issues described above have imprinted upon voters a Hobbesian perception of human nature,<sup>9</sup> which is misplaced. However, it is difficult to deny that the real implications of the Supreme Court's campaign finance jurisprudence have fostered an environment where elected officials are more responsive to money than they are to their constituents. The unwillingness of the Court to examine the realities of the campaign finance landscape—in the name of First Amendment protection—calls into question the efficacy of the social contract<sup>10</sup> entered into through the

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[http://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1000&context=ppi\\_statepolls](http://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1000&context=ppi_statepolls). Over half of all interviewed respondents believed that corruption by state government employees was “very common.” *Id.*

<sup>5</sup> ANTI-CORRUPTION REPORT NUMBER 5, *supra* note 2, at 3.

<sup>6</sup> UNIV. OF ILL. AT CHI. DEP'T OF POLITICAL SCI., PATRONAGE, CRONYISM AND CRIMINALITY IN CHICAGO GOVERNMENT AGENCIES: ANTI-CORRUPTION REPORT NUMBER 4 2 (2011), [http://pols.uic.edu/docs/default-source/chicago\\_politics/anti-corruption\\_reports/anticorruptionreport\\_4.pdf?sfvrsn=2](http://pols.uic.edu/docs/default-source/chicago_politics/anti-corruption_reports/anticorruptionreport_4.pdf?sfvrsn=2).

<sup>7</sup> Domenico Montanaro et al., *Money Is Pretty Good Predictor of Who Will Win Elections*, PBS THE MORNING LINE (Nov. 11, 2014, 9:17 AM), <http://www.pbs.org/newshour/updates/money-pretty-good-predictor-will-win-elections/>.

<sup>8</sup> ANTI-CORRUPTION REPORT NUMBER 5, *supra* note 2, at 2.

<sup>9</sup> “I put for a generall [sic] inclination of all mankind a perpetuall [sic] and restlesse [sic] desire of Power after power, that ceaseth [sic] onely [sic] in Death.” THOMAS HOBBS, *LEVIATHAN* 49 (J.M. Dent & Sons Ltd. 1914).

<sup>10</sup> “[T]hat a man be willing, when others are so too . . . to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe.” *Id.* at 67.

Constitution. Because of the significant protections for political spending, the right of the people to debate and elect the most qualified representatives is infringed.<sup>11</sup> When the people are not effectively represented and lose interest in political participation, then the advantages of government disappear and the social contract is no longer sensible.

This Comment will review the Court's campaign finance jurisprudence with a particular emphasis on the recognition of legitimate compelling state interests. Because a restriction on political speech is an infringement upon the First Amendment, the Court must find a compelling state interest for the restriction to be constitutional.<sup>12</sup> Part I provides the background of campaign finance law and how it evolved throughout the years. Part II includes a discussion about the only compelling state interest recognized by the Court, which is prevention of *quid pro quo* corruption and its appearance.<sup>13</sup> In Part III, the focus will shift to the anti-distortion compelling state interest, which was recognized in *Austin*<sup>14</sup> and subsequently overruled in *Citizens United*.<sup>15</sup> Part IV suggests a new way forward in the campaign finance jurisprudence, including a manner in which these decisions can be integrated. Finally, the article will conclude and some final thoughts.

### I. AND QUITE SUDDENLY, WORDS BEGIN TO LOSE THEIR MEANING<sup>16</sup>

The story of federal campaign finance regulation began—as all good stories do—in an earlier time. In the first federal attempt to

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<sup>11</sup> This statement is premised on the assumption that a functional democracy requires an intense vetting process of political candidates, and the vetting process—campaigning—is interfered with when a miniscule percentage of the population can control the forum for political speech.

<sup>12</sup> See *infra* notes 40–41 and accompanying text.

<sup>13</sup> See *infra* Part II.

<sup>14</sup> See *infra* note 49 and accompanying text.

<sup>15</sup> See *infra* note 92 and accompanying text.

<sup>16</sup> This is a rather unclever adaptation of Confucius's wise words: "When words lose their meaning, people lose their freedom." See Barry Lynn, *When Words Lose Their Meanings: The Bishops, Religious Liberty and Dubious Definitions*, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE (May 2012), <https://www.au.org/church-state/may-2012-church-state/perspective/when-words-lose-their-meanings>.

limit the influence of money in campaigns, Congress passed the Tillman Act in 1907 with the intention of preventing corporations from directly contributing to federal campaigns.<sup>17</sup> This legislation reflected the American people's desire to hold elections that were "free from the power of money."<sup>18</sup> Born during an age of expanding protections granted to corporations by the Supreme Court, Congress passed the Tillman Act to curb realistic fears that corporations could simply buy politicians to do their bidding.<sup>19</sup> However, the Tillman Act alone was insufficient and, in the subsequent decades, the amount of money in politics increased exponentially.<sup>20</sup> In response, Congress enacted three additional laws in order to fight the influence of money in politics.<sup>21</sup>

In the wake of the Watergate scandals,<sup>22</sup> Americans clamored for increased campaign finance regulation, and in 1974 Congress passed the Federal Election Campaign Act (FECA) Amendments

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<sup>17</sup> See Colin Cox, Comment, *Protecting Free Speech After Citizens United: Why Overruling Austin v. Mich. Chamber of Commerce Violates the First Amendment and Encourages Corruption in Campaigns*, 55 S. TEX. L. REV. 339, 343 n.24 (2013) ("The resulting 1907 statute completely banned corporate contributions of 'money . . . in connection with' any federal election.") (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 115 (2003)).

<sup>18</sup> Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts Orchestrated the Citizens United Decision*, THE NEW YORKER, May 21, 2012, <http://www.newyorker.com/magazine/2012/05/21/money-unlimited>.

<sup>19</sup> See *id.* Henry Clay Frick, a steel baron, once glibly described President Theodore Roosevelt's shameless appeal for campaign contributions prior to Roosevelt's work in passing the Tillman Act. Frick said, "He got down on his knees to us. We bought the son-of-a-bitch and then he did not stay bought." *Id.*

<sup>20</sup> See *id.*

<sup>21</sup> The legislation enacted was the Federal Corrupt Practices Act of 1925, the Hatch Act of 1939, and the Taft-Hartley Act. Jonathan E. Skrabacz, Note, "*Leveling the Playing Field*": *Reconsidering Campaign Finance Reform in the Wake of Arizona Free Enterprise*, 32 ST. LOUIS U. PUB. L. REV. 487, 490-91 (2013).

<sup>22</sup> The seemingly endless number of "Whatever-gates" suggest that Watergate still impacts the American people over forty years later. This phenomena is unsurprising when one considers that the original scandal was "a brazen and daring assault, led by Nixon himself, against the heart of American democracy: the Constitution, our system of free elections, the rule of law." Carl Bernstein & Bob Woodward, *Woodward and Bernstein: 40 Years After Watergate, Nixon was Far Worse than We Thought*, WASH. POST, June 8, 2012, [http://www.washingtonpost.com/opinions/woodward-and-bernstein-40-years-after-watergate-nixon-was-far-worse-than-we-thought/2012/06/08/gJQAlsi0NV\\_story.html](http://www.washingtonpost.com/opinions/woodward-and-bernstein-40-years-after-watergate-nixon-was-far-worse-than-we-thought/2012/06/08/gJQAlsi0NV_story.html).

were passed.<sup>23</sup> While FECA established much of the existing regulatory structure of campaign finance legislation, its constitutionality was challenged shortly after its passage in *Buckley v. Valeo*.<sup>24</sup>

Below is a detailed background of the campaign finance jurisprudence. This jurisprudence begins with *Buckley*, as does much of the contemporary discussion regarding campaign finance. The discussion of the jurisprudence will proceed on a case-by-case basis because, while campaign finance is a coherent area of law, most of the cases considered discreet issues that are better suited for individual examination.

A. *Buckley v. Valeo Begins the Court's Current Campaign Finance Jurisprudence: "If You Start Me Up, If You Start Me Up I'll Never Stop"*<sup>25</sup>

In *Buckley v. Valeo*, a group of individual politicians challenged FECA on First Amendment grounds, arguing that “limiting the use of money for political purposes constitutes a restriction on communication violative of the First Amendment.”<sup>26</sup> In a long and somewhat confusing opinion,<sup>27</sup> the Court attempted to “balance an individual’s First Amendment right to give campaign donations with the need to prevent corruption of elected officials.”<sup>28</sup> *Buckley* provided the foundation for the subsequent campaign finance decisions, and its legacy continues to influence the Court today.<sup>29</sup>

The FECA statute at issue in *Buckley* were 18 U.S.C. § 608.<sup>30</sup> The Court drew a distinction between contribution and expenditure

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<sup>23</sup> Toobin, *supra* note 18.

<sup>24</sup> *Id.* (“The law imposed unprecedented limits on campaign contributions and spending; created the Federal Election Commission to enforce the act; established an optional system of public financing for Presidential elections; and required extensive disclosure of campaign contributions and expenditures.”).

<sup>25</sup> Generally, *Buckley* is the starting point for a discussion about campaign finance. A tribute to the Rolling Stones’ 1981 song seemed as good a way as any to begin this discussion. ROLLING STONES, START ME UP (Rolling Stones Records) (1981).

<sup>26</sup> *Buckley v. Valeo*, 424 U.S. 1, 11 (1976) (per curiam).

<sup>27</sup> See Toobin, *supra* note 18; Cox, *supra* note 17, at 344.

<sup>28</sup> Cox, *supra* note 17, at 344.

<sup>29</sup> See, e.g., Marc E. Elias & Jonathan S. Berkon, *After McCutcheon*, 127 HARV. L. REV. F. 373 (2014).

<sup>30</sup> *Buckley*, 424 U.S. at 13 nn.13–16.

limitations in campaign finance regulations.<sup>31</sup> Contribution limits were held as a permissible restriction of First Amendment rights,<sup>32</sup> while the expenditure limits were struck down.<sup>33</sup> One expenditure limitation that the *Buckley* Court rejected was 18 U.S.C. § 608(a)(1), which limited the amount of personal or family money that a candidate could spend on their election.<sup>34</sup> The contribution limits were upheld because the Court held that it was “unnecessary to look beyond the Act’s primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification . . . .”<sup>35</sup>

Perhaps one of *Buckley*’s most significant propositions is that money is a form of speech for the purposes of campaign finance regulations.<sup>36</sup> If money is speech, then any type of restriction on campaign finance, particularly expenditure restrictions, implicates the First Amendment.<sup>37</sup> The Court explained that a “restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression . . . .”<sup>38</sup>

Also, in *Buckley*, the Court made clear that Congress has the constitutional authority to regulate federal elections—an issue that was not in question.<sup>39</sup> Instead, the Court determined that the issue in campaign finance regulation cases is “whether the specific legislation that Congress has enacted interferes with First Amendment freedoms or invidiously discriminates against nonincumbent candidates and minor parties in contravention of the Fifth Amendment.”<sup>40</sup> If there is an interference with First Amendment rights, then the re-

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<sup>31</sup> *See id.* at 19–21.

<sup>32</sup> *See id.* at 29.

<sup>33</sup> *See id.* at 45.

<sup>34</sup> *See id.* at 51–54; *id.* at 54 (noting that the “ancillary interest in equalizing the relative financial resources of candidates . . . [was] clearly not sufficient to justify the provision’s infringement of fundamental First Amendment rights”).

<sup>35</sup> *Id.* at 26.

<sup>36</sup> *See id.* at 19–21.

<sup>37</sup> *See id.* at 11.

<sup>38</sup> *Id.* at 19.

<sup>39</sup> *Id.* at 13 (citing U.S. CONST. art. I, § 4).

<sup>40</sup> *Id.* at 14.

striction must be narrowly tailored to serve a compelling state interest in order to pass constitutional muster.<sup>41</sup> The only recognized compelling state interest was the prevention of corruption or its appearance.<sup>42</sup> The *Buckley* Court ruled that even “under the rigorous standard of review . . . the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms . . . .”<sup>43</sup>

B. *Austin v. Michigan Chamber of Commerce and the Court’s Recognition of Anti-Distortion as a Compelling State Interest: “Oh, You’re My Best Friend”*<sup>44</sup>

*Austin* was the first instance<sup>45</sup> where the Court opined on a restriction of independent expenditures.<sup>46</sup> In that case, a corporation challenged a Michigan law, which prevented corporations from using their general treasury funds for “independent expenditures in support of, or in opposition to, any candidate in elections for state office.”<sup>47</sup> Under that statute, corporations were allowed to make independent expenditures to candidates for office; however, those expenditures could only be made from a segregated fund, or a political action committee (“PAC”), used “solely for political purposes.”<sup>48</sup>

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<sup>41</sup> *Id.* at 43–45.

<sup>42</sup> *Id.* at 26–29.

<sup>43</sup> *Id.* at 29. The decision in *Buckley* ruled on the constitutionality of expenditure and contribution limits. Expenditure limits were found unconstitutional in *Buckley*, and this article does not question the efficacy of that ruling. Instead, this article will focus primarily on the recognition of compelling state interests as they apply to contribution and independent expenditure limitations.

<sup>44</sup> The importance of the *Austin* decision to the campaign finance landscape will be detailed further. However, because of the recognition of anti-distortion as a compelling state interest, an apt characterization of *Austin*’s relationship to campaign finance could be that described in the Queen song, QUEEN, YOU’RE MY BEST FRIEND (Elektra) (1975).

<sup>45</sup> Cox, *supra* note 17, at 347.

<sup>46</sup> An independent expenditure is an expenditure “not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee.” *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654–55 (1990) (quoting MICH. COMP. LAWS § 169.206(1) (1979)).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

The Court upheld the constitutionality of the Michigan law recognized—for the first time—the anti-distortion rationale as a compelling state interest.<sup>49</sup>

The anti-distortion rationale falls within the ambit of preventing corruption or the appearance of corruption because the “regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>50</sup> This compelling state interest “does not attempt ‘to equalize the relative influence of speakers on elections,’ . . . rather, it ensures that expenditures reflect actual public support for political ideas espoused by corporations.”<sup>51</sup>

While it may seem that this type of compelling state interest is penalizing corporations for amassing large amounts of money, it is not. The anti-distortion rationale is simply an attempt to prevent corporations from dominating the forum for political speech with the assistance of wealth partially attained through state-conferred benefits.<sup>52</sup> Corporations are granted special benefits by state laws, including “limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital . . . .”<sup>53</sup> Because of these advantages, corporations were not allowed to use their general treasury funds to influence the outcome of a candidate election.<sup>54</sup> Instead, under the Michigan statute, corporations were allowed to make independent expenditures through separate segregated funds.<sup>55</sup> The distinction drawn by the Court was that contributions to segregated funds were made with an understanding that the money would “be used solely for political purposes, [so] the speech generated accurately reflects contributors’ support for the corporation’s political views.”<sup>56</sup>

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<sup>49</sup> *See id.* at 658–62.

<sup>50</sup> *Id.* at 659–60.

<sup>51</sup> *Id.* at 658–62 (citations omitted).

<sup>52</sup> *See id.* at 660.

<sup>53</sup> *Id.* at 658–59.

<sup>54</sup> *See id.*

<sup>55</sup> *See id.* at 660–62.

<sup>56</sup> *Id.* at 660–61.

C. First Nat'l Bank of Bos. v. Bellotti *Otherwise Known as the First Case Regarding a Taxable Entity: "And the Court Keeps Runnin', Runnin'"*<sup>57</sup>

In *First Nat'l Bank of Bos. v. Bellotti*, the Court heard a challenge to a statute which prevented any corporation from making contributions or expenditures for referendum issues unrelated to that corporation's "property, business or assets . . . ."<sup>58</sup> While finding that the statute was unconstitutional, the Court held that the First Amendment does not allow the government to restrict speech based on the corporate identity of a speaker.<sup>59</sup> The Court was particularly disturbed by the statute in question<sup>60</sup> because, in effect, it enabled the state to "regulate the subjects about which persons may speak and speakers who may address an issue of public concern."<sup>61</sup> Although this case ostensibly stands for the proposition that the state cannot differentiate between speakers based on identity—which *Bellotti* stated<sup>62</sup>—one consequential portion of *Bellotti* was a limiting footnote from the opinion. Footnote 26 stated, "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to *influence candidate elections*."<sup>63</sup>

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<sup>57</sup> The Court's movement onward without overturning any campaign finance precedent, regardless of the different restrictions or entities concerned, may have been the inspiration for the Black Eyed Peas song. BLACK EYED PEAS, LET'S GET IT STARTED (Interscope) (2004).

<sup>58</sup> See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 768 (1978).

<sup>59</sup> See *id.* at 784.

<sup>60</sup> See *id.* at 784–85.

<sup>61</sup> Cox, *supra* note 17, at 346.

<sup>62</sup> *Bellotti*, 435 U.S. at 784.

<sup>63</sup> *Id.* at 788 n.26 (emphasis added).

D. *McConnell v. Fed. Election Comm'n and the Short-Lived Implications for Campaign Finance: "Like a Sunset Dying with the Rising of the Moon, Gone too Soon"*<sup>64</sup>

After the turn of the century, Congress attempted to strengthen campaign finance laws by closing existing "loopholes."<sup>65</sup> Most significantly, Congress sought to curb the explosion of soft money and electioneering communications, which followed the *Buckley* decision, by passing the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA").<sup>66</sup> BCRA was later challenged in *McConnell v. Fed. Election Comm'n*.<sup>67</sup>

The *McConnell* Court considered Title I of BCRA, which restricted soft money.<sup>68</sup> Soft money was unrestricted before BCRA and "permitted corporations and unions, as well as individuals who had already made the maximum permissible contributions to federal candidates, to contribute 'nonfederal money'—also known as 'soft money'—to political parties for activities intended to influence state or local elections."<sup>69</sup> Also, the Court examined electioneering communications,<sup>70</sup> which were permitted because *Buckley* held that FECA should only be interpreted to include "election-related activity containing 'express advocacy[]' . . . ."<sup>71</sup> Express advocacy is limited to television or radio ads that specifically say to vote for or against an individual.<sup>72</sup> Whereas electioneering communications are broadcasts, which are aired within a specific period of time before an election and target at least 50,000 individuals, that clearly identify a candidate for federal office.<sup>73</sup> The Court held that the state

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<sup>64</sup> Although the *McConnell* decision could not have motivated the 1993 song by Michael Jackson, its short-lived life certainly fits the song. MICHAEL JACKSON, *GONE TOO SOON* (Epic Records) (1993).

<sup>65</sup> See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 588–89 (2011).

<sup>66</sup> See, e.g., *id.*; Cox, *supra* note 17, at 349.

<sup>67</sup> See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

<sup>68</sup> *Id.* at 132.

<sup>69</sup> See *id.* at 123.

<sup>70</sup> *Id.* at 189–90.

<sup>71</sup> See Hasen, *supra* note 65, at 589.

<sup>72</sup> See, e.g., *id.*

<sup>73</sup> Electioneering communications are those that meet the criteria and do not expressly say to vote for or against a candidate. See *McConnell*, 549 U.S. at 194.

interest was compelling<sup>74</sup> and reaffirmed *Austin*.<sup>75</sup> However, in their separate opinions, Justices Thomas and Kennedy planted the seeds for what would become the *Citizens United* decision.<sup>76</sup>

The *McConnell* decision had significant implications on the campaign finance jurisprudence because it “set forth a democratic framework and a public participation agenda which addressed the threat arising from corruption and the appearance of corruption.”<sup>77</sup> The underlying justification for the *McConnell* decision’s impact was that Congress had authority to oversee the campaign finance landscape and “to legislate in this area to curtail abuses and thereby protect the integrity of the democratic system.”<sup>78</sup> Although the majority decision in *Wisconsin Right to Life* (“*WRTL I*”) would later reject this democratic integrity framework,<sup>79</sup> the *McConnell* majority and the *WRTL II* dissent fiercely defended the framework and the role that Congress plays in regulating campaign finance.<sup>80</sup> The essence of the democratic integrity framework is to “identif[y] the activity as financing political speech and the issue as enhancing public participation and government responsiveness by preventing corruption or the appearance of corruption.”<sup>81</sup> Whereas the political speech framework, which was set forth in *WRTL II*, “defines the activity as political speech and the issue as burdening, banning or prohibiting political speech.”<sup>82</sup>

One important inconsistency, which the Court had yet to decide definitively, was whether the state could restrict speech based on a speaker’s identity.<sup>83</sup> Before *Austin*, the Court “forbade restrictions on political speech based on the speaker’s corporate identity . . . .”<sup>84</sup>

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<sup>74</sup> See Cox, *supra* note 17, at 350.

<sup>75</sup> Hasen, *supra* note 65, at 589.

<sup>76</sup> See Cox, *supra* note 17, at 351–52.

<sup>77</sup> Frances R. Hill, *Corporate Political Speech and the Balance of Powers: A New Framework for Campaign Finance Jurisprudence in Wisconsin Right to Life*, 27 ST. LOUIS U. PUB. L. REV., 267, 269 (2008) (citing *McConnell*, 540 U.S. at 205).

<sup>78</sup> *Id.* (citing *McConnell*, 540 U.S. at 115–22).

<sup>79</sup> *Id.*; *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2686 (2007).

<sup>80</sup> See Hill, *supra* note 77, at 269.

<sup>81</sup> *Id.* at 272.

<sup>82</sup> *Id.*

<sup>83</sup> See *id.* at 353.

<sup>84</sup> *Id.*

However, after the *Austin* decision, the Court appeared to allow such distinctions.<sup>85</sup>

E. *Citizens United v. Fed. Election Comm’n and the Court’s Somewhat Surprising Decision to Overturn Decades-Long Precedent: “To Everything: Turn, Turn, Turn”*<sup>86</sup>

Between the decisions in *Buckley* and *Citizens United*, the Court’s campaign finance jurisprudence “swung like a pendulum toward and away from deference[.]” for the compelling state interests.<sup>87</sup> However, it was not until *Citizens United* that the Court was prepared to overturn any of its campaign finance precedent.<sup>88</sup>

*Citizens United*<sup>89</sup> marked a distinct shift in the Court’s campaign finance jurisprudence.<sup>90</sup> This decision was polarizing, and many Americans had an opinion about the consequences of the case.<sup>91</sup> The holding overturned *Austin* and partly overruled *McConnell*.<sup>92</sup> Much of the uproar among Americans focused on the implications that this decision had on corporate campaign spending;<sup>93</sup> however, the more far-reaching consequence of the decision was the narrowing of the definition of corruption—the only accepted compelling state interest—to the “risk of quid pro quo transactions involving campaign contributions directly to candidates for office.”<sup>94</sup> “[T]he immediate

<sup>85</sup> *See id.*

<sup>86</sup> Such a marked change like *Citizens United* brings to mind the classic song by The Byrds. THE BYRDS, TURN! TURN! TURN! (Columbia Records) (1965).

<sup>87</sup> Hasen, *supra* note 65, at 586.

<sup>88</sup> *See id.*

<sup>89</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

<sup>90</sup> Although his comments were applied in a different context, almost certainly Justice Breyer would agree that his words apply to *Citizens United*: “It is not often in the law that so few have so quickly changed so much.” Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, <http://www.nytimes.com/2007/07/01/washington/01scotus.html?page-wanted=all>.

<sup>91</sup> This decision was so divisive that protests about the decision were held at courthouses around the United States, including on the steps of the Supreme Court, to mark *Citizens United*’s second anniversary. *See, e.g.*, Jeffrey Rosen, *Citizens United v. FEC Decision Proves Justice is Blind—Politically*, POLITICO (Jan. 25, 2012, 9:32 PM), <http://www.politico.com/news/stories/0112/71961.html>.

<sup>92</sup> *Citizens United*, 558 U.S. at 365–66.

<sup>93</sup> Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 14 (2012).

<sup>94</sup> *Id.* at 3–4.

and dramatic policy consequence of *Citizens United* was that federal prohibitions on corporate sponsorship of campaign speech in the form of electioneering communications and independent expenditures, as well as similar prohibitions modeled after federal law in roughly half the states, were suddenly unconstitutional.<sup>95</sup> As the Court reversed the decades-long expansion of its definition of corruption,<sup>96</sup> the Court also rejected *Austin* and part of the *McConnell* decision, both of which rested upon the anti-distortion rationale.<sup>97</sup>

The federal law at issue in *Citizens United* was BCRA, which “prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an ‘electioneering communication.’”<sup>98</sup> The Court characterized this prohibition as “a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak.”<sup>99</sup> PACs are separate organizations established for the purpose of raising and spending money in candidate elections.<sup>100</sup> The Court explained its statement by saying that “the PAC exemption . . . does not allow corporations to speak” because “PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations.”<sup>101</sup> Granted, there are additional requirements placed on a PAC in reporting and administering the organization; however,

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<sup>95</sup> *See id.* at 11.

<sup>96</sup> *Id.*

<sup>97</sup> *See Citizens United*, 558 U.S. at 319.

<sup>98</sup> *Cox*, *supra* note 17, at 354 (quoting *Citizens United*, 558 U.S. at 320–21); *see also* 2 U.S.C. § 434(f)(3)(A) (2012).

<sup>99</sup> *Citizens United*, 558 U.S. at 337.

<sup>100</sup> PACs are different than Super PACs. Super PACs wonly make independent expenditures in federal elections rather than contributions to candidates or parties. *See What is a PAC?*, OPENSECRETS, <https://www.opensecrets.org/pacs/pacfaq.php> (last visited July 26, 2015).

<sup>101</sup> *Citizens United*, 558 U.S. at 337. The problem with this explanation is that it is wrong. If PACs were overly burdensome, then a second-year law student would have trouble determining how to form a PAC. However, one second-year law student—who is not particularly intelligent—found the requisite form for establishing a PAC in one Google search, while sitting on his couch watching a college football game. Had he intended to create a PAC, he could have done so by filling out the form in an additional fifteen to twenty minutes, which is enough time to watch two sustained scoring drives and a set of commercials. Surely, the argument that creating a PAC is burdensome cannot be sustained.

these are hardly burdensome enough to justify the Court's holding.<sup>102</sup> Also, the majority in *Citizens United* defined corruption very narrowly.<sup>103</sup> The Court said that the compelling state interest of preventing corruption and its appearance, set forth in *Buckley*, was "limited to *quid pro quo* corruption."<sup>104</sup>

The *Citizens United* Court upheld the disclaimer and disclosure requirements of BCRA; the Court explained that these requirements burden speech, but "impose no ceiling on campaign-related activities . . ."<sup>105</sup> Further, the disclaimer and disclosure requirements satisfy a "governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending."<sup>106</sup>

In a spirited dissent, Justice Stevens attacked the majority's characterization that BCRA banned corporate speech.<sup>107</sup> Stevens made clear that the PAC requirement is not a ban on corporate speech, but rather a regulation that provides corporations with "a constitutionally sufficient opportunity to engage in express advocacy."<sup>108</sup> Also, while acknowledging that there is some administrative burden on corporations that establish PACs, Justice Stevens recognized that the burden is not severe and is similar to the disclaimer and disclosure requirements, which the Court upheld.<sup>109</sup>

The dissent also disputed the majority's insistence that identity-based restrictions are not permitted by the First Amendment.<sup>110</sup> In fact, "[t]he Government routinely places special restrictions on the

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<sup>102</sup> The FEC provides guides and forms on its website and none of these documents require a *juris doctor* to interpret them. Additionally, many of these requirements—such as recording disbursements of funds, maintaining a record of a donor's name, address, date, and amount of contribution, and quarterly or semi-annual filing depending on whether it is an election year—would likely already be satisfied because most corporations employ some type of bookkeeping system. See *Quick Answers to PAC Questions*, FEDERAL ELECTION COMMISSION, [http://www.fec.gov/ans/answers\\_pac.shtml](http://www.fec.gov/ans/answers_pac.shtml) (last visited July 26, 2015).

<sup>103</sup> See Hasen, *supra* note 65, at 596 (citing *Citizens United*, 558 U.S. at 359).

<sup>104</sup> *Citizens United*, 558 U.S. at 359.

<sup>105</sup> *Id.* at 366 (citation omitted).

<sup>106</sup> *Id.* at 367 (alteration in original) (citation omitted).

<sup>107</sup> See *id.* at 415 (Stevens, J., concurring in part and dissenting in part).

<sup>108</sup> See *id.*

<sup>109</sup> See *id.* at 416.

<sup>110</sup> See *id.* at 420.

speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees.”<sup>111</sup>

Finally, the dissent addressed the compelling state interests at issue in *Citizens United*. Stevens rejected the narrow definition of corruption applied by the majority because “the difference between selling a vote and selling access is a matter of degree, not kind.”<sup>112</sup> The dissent defended the anti-distortion rationale.<sup>113</sup> Although “*Austin* can bear an egalitarian reading,”<sup>114</sup> Justice Stevens rejected the majority’s claim that it is “an ‘equalizing’ ideal in disguise.”<sup>115</sup> Instead, the dissent contended that the anti-distortion rationale is “simply a variant on the classic governmental interest in protecting against improper influences on officeholders that debilitate the democratic process.”<sup>116</sup>

F. *The Progeny of Citizens United: “Yesterday, All My Troubles Seemed So Far Away”*<sup>117</sup>

The rationale underlying the *Citizens United* decision has been applied to campaign finance cases since the ruling. One such case was *McCutcheon v. Fed. Election Comm’n*, which challenged aggregate contribution limits.<sup>118</sup> The statute at issue in *McCutcheon* provided two separate sets of limits on individual contributions to candidates or committees.<sup>119</sup> The first was base limits, which “restrict[] how much money a donor may contribute to a particular candidate or committee.”<sup>120</sup> The second—which was at issue in this case—were aggregate limits that “restrict[] how much money a donor may contribute in total to all candidates or committees.”<sup>121</sup> The

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<sup>111</sup> *Id.* (citations omitted).

<sup>112</sup> *Id.* at 447.

<sup>113</sup> See Hasen, *supra* note 65, at 602.

<sup>114</sup> *Citizens United*, 558 U.S. at 464 n.69.

<sup>115</sup> *Id.* at 464 (citation omitted).

<sup>116</sup> *Id.*

<sup>117</sup> The Beatles wrote these words in their 1965 song. One cannot help but notice the application of these lyrics to the campaign finance jurisprudence following *Citizens United*, especially because the quartet’s ballad continued with “Now it looks as though they’re here to stay, Oh, I believe in yesterday.” THE BEATLES, *YESTERDAY* (Capitol Records) (1965).

<sup>118</sup> *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1442 (2014).

<sup>119</sup> See *id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

base limits were not challenged because the Court “previously upheld [them] as serving the permissible objective of combatting corruption.”<sup>122</sup> The rationale behind the aggregate limits was to prevent circumvention of the base limits; however, the Court rejected this because the aggregate limits “do little, if anything” to prevent corruption and held the aggregate limits a violation of the First Amendment.<sup>123</sup>

Before rejecting the aggregate limits, the Court identified the purported state interest to determine if it was compelling.<sup>124</sup> The *McCutcheon* plurality defines corruption narrowly as limited to *quid pro quo* corruption or its appearance.<sup>125</sup> The plurality cites *Buckley*, along with *Citizens United*,<sup>126</sup> as standing for this proposition<sup>127</sup> even though, in reality, *Buckley* did not define corruption.<sup>128</sup> Because the Court applied the narrow definition of corruption, the government needed to prove that the aggregate limits were narrowly tailored to prevent circumvention of the base limits. Aggregate limits had been accepted since *Buckley*, when the Court identified them as “no more than a corollary” of base limits.<sup>129</sup>

The Court identified the necessity of aggregate limits in *Buckley* because they prevented a person from “contribut[ing] massive amounts of money to a particular candidate through the use of un-earmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate’s political party.”<sup>130</sup> However, the *McCutcheon* Court rejected the idea that the aggregate limits prevented circumvention and dismissed the hypothetical circumvention measures of the dissent<sup>131</sup> as impossible given the current statutory regime.<sup>132</sup>

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<sup>122</sup> *See id.*

<sup>123</sup> *See id.*

<sup>124</sup> *See id.* at 1450.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 1451.

<sup>127</sup> *Id.*

<sup>128</sup> *See Elias & Berkon, supra* note 29, at 375.

<sup>129</sup> *Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (per curiam).

<sup>130</sup> *Id.*

<sup>131</sup> *See McCutcheon*, 134 S. Ct. at 1472 (Breyer, J., dissenting).

<sup>132</sup> *See id.* at 1472.

After *Citizens United*, the narrow definition of corruption has opened the door for challenges to the few remaining campaign finance measures.<sup>133</sup> This state of campaign finance jurisprudence leaves Americans with only one relatively rare protection of catching a politician or contributor with their hand in the proverbial cookie jar.

## II. PREVENTION OF CORRUPTION: “ONE IS THE LONELIEST NUMBER THAT YOU’LL EVER DO”<sup>134</sup>

Since *Buckley*, the only compelling state interest accepted by the Court regarding campaign finance regulations has been preventing corruption or the appearance of corruption.<sup>135</sup> Over the years, under the Rehnquist Court,<sup>136</sup> the definition expanded to permit a wider range of regulations, including contribution limits,<sup>137</sup> restrictions on corporate and union spending,<sup>138</sup> prohibitions on soft money,<sup>139</sup> and anti-distortion.<sup>140</sup> This definition was turned on its head by the *Citizens United* decision, which greatly narrowed the expanded definition.<sup>141</sup>

The *Citizens United* decision limited corruption as a compelling state interest only to *quid pro quo* corruption.<sup>142</sup> In support of this definition, Justice Kennedy—author of the *Citizens United* majority opinion—cited his own dissent in *McConnell*.<sup>143</sup> Justice Kennedy wrote that elected officials who are under the influence of or providing access to certain speakers have not committed corruption.<sup>144</sup> He further explained, “[f]avoritism and influence are not . . . avoidable

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<sup>133</sup> See Kang, *supra* note 93, at 3–4.

<sup>134</sup> As the only recognized compelling state interest, the anti-corruption interest must understand how Three Dog Night felt in their 1968 song. THREE DOG NIGHT, ONE (MCA Records) (1968).

<sup>135</sup> Kang, *supra* note 93, at 3.

<sup>136</sup> See *id.* at 4.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

<sup>139</sup> *Id.*

<sup>140</sup> See *supra* note 49 and accompanying text.

<sup>141</sup> See, e.g., Kang, *supra* note 93, at 4.

<sup>142</sup> See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 357–60 (2010).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 359.

in representative politics.”<sup>145</sup> The Court’s narrowing of the definition of corruption has put the efficacy of campaign finance regulations in jeopardy.

### III. ANTI-DISTORTION: “TWO CAN BE AS BAD AS ONE, IT’S THE LONELIEST NUMBER SINCE THE NUMBER ONE”<sup>146</sup>

The anti-distortion interest was recognized as a compelling state interest in *Austin* and later rejected in *Citizens United*.<sup>147</sup> As discussed above, the only recognized compelling state interest in the post-*Citizens United* campaign finance landscape is *quid pro quo* corruption or the appearance of such corruption.

#### A. Which Way Does Buckley Actually Cut?

The anti-distortion interest has been assailed by the Court recently as a concept that has long been rejected by the First Amendment.<sup>148</sup> The *Citizens United*<sup>149</sup> and *McCutcheon*<sup>150</sup> opinions quoted *Buckley* as standing for this rejection proposition. It is true that the Court in *Buckley* spoke critically of “equalizing the relative ability of individuals and groups to influence the outcome of elections . . . .”<sup>151</sup> The Court said “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .”<sup>152</sup>

However, the *Citizens United* and *McCutcheon* decisions crucially fail to mention that this statement about equalizing speech was made during *Buckley*’s discussion of expenditures.<sup>153</sup> This discussion about the lack of an interest was not discussed in the section of

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<sup>145</sup> *Id.* (citation omitted).

<sup>146</sup> The anti-distortion interest was only recognized for a short time until the *Citizens United* decision and, along with anti-corruption, these interests stood alone in protecting the legitimacy of elections. *See supra* note 134 and accompanying text.

<sup>147</sup> *See supra* notes 14–15 and accompanying text.

<sup>148</sup> *See Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam).

<sup>149</sup> *See supra* note 104 and accompanying text.

<sup>150</sup> *See supra* note 126 and accompanying text.

<sup>151</sup> *Buckley*, 424 U.S. at 48.

<sup>152</sup> *Id.* at 48–49.

<sup>153</sup> *See id.*

the *Buckley* decision dedicated to contribution limits.<sup>154</sup> In fact, the Court easily accepted the contribution limits as a constitutionally permissible restriction of the First Amendment.<sup>155</sup> Further, the Court explained that this equalizing interest is unconstitutional because the First Amendment was designed “to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>156</sup> The anti-distortion interest is not at odds with the purpose of the First Amendment. In fact, it encourages a wider variety of speech by preventing a small number of entities or individuals from dominating the forum for speech.

### B. *An Argument for Anti-Distortion*

In the interest of transparency—although it may already be clear—this author supports the recognition of anti-distortion as a compelling state interest. Also, in the interest of further transparency, the difficulties in recognizing this interest are readily apparent. Since the decision in *Buckley*, the Court has been clear that infringements on a person’s First Amendment rights in order to equalize the ability of another to speak are “wholly foreign to the First Amendment . . . .”<sup>157</sup> Thus, the first element to consider is whether there is a difference between anti-distortion and equalizing the ability to speak.<sup>158</sup> Next, there is legitimate debate regarding whether or not the anti-distortion rationale is truly an interest proceeding from the anti-corruption state interest.<sup>159</sup> Finally, there are issues relating to the different treatment of corporations and individuals.<sup>160</sup> Admittedly, these are hard distinctions to draw. Perhaps that is the reason

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<sup>154</sup> *See id.*

<sup>155</sup> *Id.* at 29.

<sup>156</sup> *Id.* at 49 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

<sup>157</sup> *Id.* at 48–49.

<sup>158</sup> Equalizing the ability of speakers is also referred to as leveling the playing field, so these terms will be used interchangeably. *See, e.g.,* Skrabacz, *supra* note 21, at 487–88.

<sup>159</sup> *See* Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 997 (2011).

<sup>160</sup> *See id.*

the government essentially abandoned its defense of the anti-distortion interest during oral argument in *Citizens United*.<sup>161</sup> However, regardless of this difficulty, distinctions do exist and this article will attempt to draw them below.<sup>162</sup>

### 1. IS ANTI-DISTORTION ACTUALLY LEVELING THE PLAYING FIELD?

Although equalizing speech and anti-distortion ostensibly appear to be different concepts, the lines blur when one begins to think about these distinctions. The majority in *Citizens United* seemed to think that the anti-distortion rationale is simply a disguised version<sup>163</sup> of the equalizing interest rejected in *Buckley*.<sup>164</sup> However, the dissent defends anti-distortion as “simply a variant on the classic governmental interest in protecting against improper influences on officeholders . . . .”<sup>165</sup> With these two different viewpoints, it appears to be a matter of interpretation as to what *Austin* really means by “corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form . . . .”<sup>166</sup>

Because the equalizing interest was rejected in *Buckley*,<sup>167</sup> any attempt to expand the definition of corruption had to avoid any implication of an attempt to equalize the ability to speak. The *Austin* Court was careful to avoid any implications that the anti-distortion interest “rel[ied] on a speech-equalization rationale . . . .”<sup>168</sup> However, following the *Citizens United* decision, the Court refused to accept the anti-distortion rationale because it “ban[s] political speech simply because the speaker is an association that has taken

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<sup>161</sup> See, e.g., *id.* at 992–96.

<sup>162</sup> Justice Stevens’s dissent in *Citizens United* attempted and failed to coherently defend the anti-distortion rationale. This section in some ways attempts to succeed where he failed; however, this author is under no illusions that his legal analysis can surpass that of the brilliant former Justice.

<sup>163</sup> See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 350 (2010).

<sup>164</sup> See *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam).

<sup>165</sup> *Citizens United*, 558 U.S. at 464 (Stevens, J., concurring in part and dissenting in part).

<sup>166</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

<sup>167</sup> See *supra* note 164 and accompanying text.

<sup>168</sup> See *Citizens United*, 558 U.S. at 464 n.69.

on the corporate form.”<sup>169</sup> Regardless of the fact that corporations could still speak through PACs,<sup>170</sup> the Court reiterated that the government does not have an interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections.”<sup>171</sup>

One definition of “distort” is “twist[ing] out of the true meaning or proportion.”<sup>172</sup> So, for the purposes of campaign finance, anti-distortion effectively means to bring things into proportion. The definition of “equalize” is “to make equal” or “to compensate for.”<sup>173</sup> Thus, by definition, by putting two things into proportion, someone is equalizing those things to some extent.

Leaving aside the similarities between anti-distortion and equalizing, there are important differences between the two. Most notably, the anti-distortion interest is not attempting to make the voices of speakers equal.<sup>174</sup> Rather, in *Austin*, the anti-distortion interest was said to prevent corporations from dominating the forum for political speech with the assistance of the benefits that those corporations receive through the corporate form.<sup>175</sup> Anti-distortion falls in line with the democratic integrity framework laid down in *McConnell*, which was grounded in the idea that campaign finance regulation was necessary for the integrity of both elections and the public policy process.<sup>176</sup> The integrity framework targets campaign finance laws on those selling or buying votes and influence; however, the objective of the framework is to “ensure opportunities for participation by ordinary individuals, including the right of individuals to form organizations to amplify their voices in public policy debates and in election campaigns.”<sup>177</sup> Anti-distortion is simply a prevention measure, not an equalization measure.<sup>178</sup> It does not suggest that any certain number of people need to speak at the same

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<sup>169</sup> *Id.* at 349.

<sup>170</sup> *See id.* at 415 (Stevens, J., concurring in part and dissenting in part).

<sup>171</sup> *Id.* at 350 (citing *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (per curiam)).

<sup>172</sup> *Distort*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/distort> (last visited Jan. 3, 2015).

<sup>173</sup> *Equalize*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/equalize?show=0&t=1420434132> (last visited Jan. 3, 2015).

<sup>174</sup> *See supra* note 51 and accompanying text.

<sup>175</sup> *See supra* notes 50–51 and accompanying text.

<sup>176</sup> Hill, *supra* note 77, at 273.

<sup>177</sup> *Id.*

<sup>178</sup> *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

volume; instead, the anti-distortion rationale prevents one person or group from shouting so loud that nobody else can be heard.

Also, the anti-distortion rationale—as held in *Austin*—is limited to corporations, and therefore has no effect on actual speakers.<sup>179</sup> There is no risk of the government attempting to equalize the ability of individuals to speak.<sup>180</sup> This state interest is strictly limited to artificial entities that can distort the political discourse for their own gain.<sup>181</sup> Corporations are created for the purpose of making money.<sup>182</sup> A corporation’s management would be acting *ultra vires* if political spending was not conducted in furtherance of making profits.<sup>183</sup> While individual Americans will generally—and unfortunately—vote with their pocketbooks,<sup>184</sup> an individual has the ability to vote for social issues or the good of the nation if he or she pleases,<sup>185</sup> whereas a corporation cannot. In effect, the anti-distortion interest is merely a preventative measure against artificial *persons* serving their own interests to the detriment of society as a whole.

Finally, although equalizing may not be in line with the purpose of the First Amendment, anti-distortion fulfills its intent. One of the reasons that the freedom of speech clause was included in the First Amendment was “to foster democratic self-government . . . .”<sup>186</sup> In *Buckley*, the Court recognized a “societal aspect of the First Amendment by prescribing an ‘electorate-centered’ analytical approach

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<sup>179</sup> See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 394 (2010) (Stevens, J., concurring in part and dissenting in part) (“[C]orporations are not actually members of [society].”).

<sup>180</sup> See *Austin*, 494 U.S. at 658–62.

<sup>181</sup> A company is defined as “[a] corporation . . . that carries on a commercial or industrial enterprise.” *Company*, BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>182</sup> See *id.*

<sup>183</sup> The term *ultra vires* is defined as “[u]nauthorized; beyond the scope of power allowed or granted by a corporate charter or by law.” *Ultra Vires*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>184</sup> Walter Hamilton, *Americans Will Vote with Their Pocketbooks, Poll Shows*, LA TIMES, June 18, 2012, <http://articles.latimes.com/2012/jun/18/business/la-fi-mo-vote-pocketbooks-20120618>.

<sup>185</sup> See U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state . . . .”).

<sup>186</sup> Roya Rahmanpour, Comment, *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett: Money Talks, Matching Funds Provision Walks*, 45 LOY. L.A. L. REV. 657, 670 (2012).

whereby ‘the relationship between First Amendment rights and campaign finance should be structured in a way that best serves the electorate.’<sup>187</sup> By rejecting this traditional society-centered approach, the Court “prioritized individual speech over societal interests.”<sup>188</sup> While critics note the difficulty for a court to draw the line between societal interests and individual speech,<sup>189</sup> consideration of the “countervailing societal interests in a First Amendment analysis” is essential.<sup>190</sup>

The rights of every individual to speak should be respected, as guaranteed by the First Amendment.<sup>191</sup> However, the legal fiction that money equals speech should not preclude the Court from considering the harm that deregulation of campaign finance may have on society as a whole.

The First Amendment was put in place to allow and encourage individuals to speak their minds.<sup>192</sup> In order to further protect the First Amendment, the anti-distortion rationale was recognized by the Court to ensure that certain favored *persons* did not dominate the forum for speech.<sup>193</sup> Although this rationale has been rejected in recent years, it cannot be rejected as an equalizing principle because the two are actually quite different.<sup>194</sup>

## 2. IS THE ANTI-DISTORTION INTEREST A COMPONENT OF THE ANTI-CORRUPTION INTEREST?

Because the only legitimate compelling state interest can be the prevention of corruption or its appearance,<sup>195</sup> the Court needed to fit the anti-distortion rationale into the anti-corruption interest.<sup>196</sup> In

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<sup>187</sup> *Id.* (citations omitted).

<sup>188</sup> *Id.*

<sup>189</sup> *See* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 349–50 (2010).

<sup>190</sup> Rahmanpour, *supra* note 186, at 670–72.

<sup>191</sup> *See* William O. Douglas, Speech to the Authors Guild Council of New York: The One Un-American Act (Dec. 3, 1951) (transcript available at <http://www.ala.org/advocacy/banned/aboutbannedbooks/oneunamerican>) (“Restriction of free thought and free speech is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us.”).

<sup>192</sup> *See supra* note 156 and accompanying text.

<sup>193</sup> *See supra* note 50 and accompanying text.

<sup>194</sup> *See supra* notes 50–51 and accompanying text.

<sup>195</sup> *Buckley v. Valeo*, 424 U.S. 1, 28 (1976) (per curiam).

<sup>196</sup> *See supra* note 50 and accompanying text.

*Citizens United*, the Court rejected the anti-distortion rationale as an impermissible corollary to the anti-corruption interest.<sup>197</sup> The Court maintained that the anti-distortion interest was really an equalization rationale in disguise.<sup>198</sup> However, the *Citizens United* dissent maintained that the “antidistortion rationale is itself an anticorruption rationale, tied to the special concerns raised by corporations.”<sup>199</sup> A firm decision on this issue would go a long way in determining the validity of the anti-distortion interest.

The debate surrounding the acceptance of the anti-distortion rationale as an anti-corruption interest has grown since the decision in *Austin*.<sup>200</sup> This is partly because the *Buckley* Court gave no firm definition of corruption.<sup>201</sup> This section will include a brief discussion of Justice Stevens’s defense of the anti-distortion interest in *Citizens United*, the reasons why anti-distortion is not part of the anti-corruption interest, and why that should not matter.

In his *Citizens United* dissent, Justice Stevens attempted to make the anti-distortion and anti-corruption interests coherent; however, he was unable to do so.<sup>202</sup> From the beginning of the dissent, he denied that there is any difference between anti-corruption and anti-distortion—as applied to corporate spending—because both are based on preventing improper influence on public officials.<sup>203</sup> Then, Justice Stevens began to make arguments that are unrelated to *quid pro quo* corruption or undue influence, which suggests that “his equation of anticorruption and antidistortion was incorrect . . . .”<sup>204</sup> Justice Stevens’s dissent went on to argue “that corporations deserve less First Amendment protection than humans, that corporate spending can ‘drown out’ the voices of non-corporate interests, that corporate spending can undermine voter confidence in our democracy,

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<sup>197</sup> See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 349–51 (2010).

<sup>198</sup> See *id.*

<sup>199</sup> *Id.* at 464 (Stevens, J., concurring in part and dissenting in part) (internal citations omitted).

<sup>200</sup> See, e.g., *Id.* at 347–49.

<sup>201</sup> While the *Buckley* Court did discuss *quid pro quo* corruption, it did not limit the definition solely to a *quid pro quo* arrangement. See *Buckley v. Valeo*, 424 U.S. 1, 26–28 (1976) (per curiam).

<sup>202</sup> See Hasen, *supra* note 159, at 999.

<sup>203</sup> See *id.*

<sup>204</sup> *Id.*

and that corporations can act in ways that undermine the efficiency of government.”<sup>205</sup> Upon closer inspection, only one of these arguments—the second—has anything to do with the anti-distortion interest; also, only the third argument even begins to implicate the anti-corruption interest.

Justice Stevens, along with other justices and legal commentators,<sup>206</sup> has struggled to fit the anti-distortion rationale within the anti-corruption interest. As evidenced above, it is difficult to make these two rationales, which the *Austin* Court held to be intertwined, cohere.

The *Austin* Court maintained that the anti-distortion interest “aim[ed] at a different type of corruption in the political arena” than anti-corruption.<sup>207</sup> According to *Austin*, anti-distortion was concerned with the “corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>208</sup> The Court was most concerned with political speech “reflect[ing] actual public support for the political ideas espoused . . . .”<sup>209</sup>

The problem with reconciling the anti-distortion rationale and the anti-corruption interest is the initial characterization of anti-distortion in *Austin*. After parsing the language of the opinion, the anti-distortion rationale is not a component of the anti-corruption interest; rather, anti-distortion is a separate, freestanding interest.<sup>210</sup> Regardless of the explanation or support that a proponent of the anti-distortion interest may provide, it is truly a stretch of the imagination to argue that anti-distortion is simply an anti-corruption measure. Distortion of political discourse does not present the danger of corrupting public officials, at least not to the extent that justifies infringement on the First Amendment. Therefore, this article comes to the same conclusion as the *Citizens United* and *McCutcheon* Courts: anti-distortion is not a legitimate component of the anti-corruption compelling state interest.

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<sup>205</sup> *Id.*

<sup>206</sup> *See, e.g.,* Kang, *supra* note 93, at 21–22.

<sup>207</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *See* Skrabacz, *supra* note 21, at 515–17.

However, should any of the discussion included in this section actually matter? In short, no. Regardless of all the paragraphs above, all the opinions and dissents, and all of the law review articles, none of this discussion about whether anti-distortion is a legitimate rationale for the anti-corruption interest should matter. Because after thinking through the issues surrounding campaign finance, it is apparent that there is more than one compelling interest that a state has in its elections.<sup>211</sup>

The current compelling state interest definition is limited solely to preventing *quid pro quo* corruption or its appearance, which completely neglects access and undue influence on public officials.<sup>212</sup> But does the state have any other interest in elections? Is a state's desire to have widespread voter participation and engagement inappropriate? Can a state attempt to foster an environment where a broader percentage of the population can be heard without receiving the title "Big Brother"? These are legitimate questions to ask when the future of the American Republic rests upon elections, which are protected by a single interest recognized nearly forty years ago in *Buckley*.<sup>213</sup>

States have many interests in their elections, and the prevention of public-official corruption—along with its appearance—is but a single interest.<sup>214</sup> Anti-distortion is another. Anti-distortion is an interest for the reasons discussed by the *Austin* Court,<sup>215</sup> but not because this interest prevents corruption. This interest is compelling because it fulfills the purpose of the First Amendment, which is to encourage and allow a wide variety of people to speak.<sup>216</sup> The anti-distortion interest achieves this goal by requiring corporations to go through the proper channels in order to speak.<sup>217</sup> Those channels, i.e., establishing a PAC,<sup>218</sup> do not even require the state to decide whether or not the speech can be heard. A corporation can speak as

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<sup>211</sup> See *id.* at 512–15.

<sup>212</sup> See *supra* notes 129–30 and accompanying text.

<sup>213</sup> See Kang, *supra* note 93, at 2–4.

<sup>214</sup> See *supra* notes 208–09 and accompanying text.

<sup>215</sup> See *supra* notes 49–50 and accompanying text.

<sup>216</sup> See *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam).

<sup>217</sup> See *supra* note 48–49 and accompanying text.

<sup>218</sup> See *supra* note 50–51 and accompanying text.

freely as it would like, so long as the money that it is using to fund the speech is obtained for the purpose of speaking.<sup>219</sup>

The campaign finance landscape has changed dramatically over the years,<sup>220</sup> and the laws regulating this arena need to change as well. Perhaps Justice Holmes said it best in the first expression of a living constitution<sup>221</sup> when he wrote:

When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.<sup>222</sup>

The meaning of the First Amendment, like the rest of the Constitution, has changed over the centuries. While there may have been no anti-distortion compelling state interest in 1915, one hundred years later, America is a different place. Many corporations hold vast assets, which—if unchecked—could control the outcome of elections.<sup>223</sup> The anti-distortion interest is a partial recognition of the change in the American landscape and an attempt to protect the authenticity of the electoral process. The anti-distortion interest is not a corollary to the anti-corruption interest.<sup>224</sup> It is simply another interest that the state legitimately has in its political discourse.

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<sup>219</sup> See *supra* note 56 and accompanying text.

<sup>220</sup> See *infra* note 238 and accompanying text.

<sup>221</sup> See *Missouri v. Holland*, 252 U.S. 416 (1920), *quoted in* Justice William H. Rehnquist, *The Notion of a Living Constitution*, Address at the University of Texas School of Law Annual Will E. Orgain Lecture (Mar. 12, 1976), *in* 29 HARV. J.L. & PUB. POL'Y 401, 402.

<sup>222</sup> *Id.*

<sup>223</sup> See *Super PACs*, OPENSECRETS, <http://www.opensecrets.org/pacs/super-pacs.php> (last visited July 26, 2015).

<sup>224</sup> See *supra* Part III.B.2.

### 3. SHOULD CORPORATIONS AND INDIVIDUALS BE TREATED DIFFERENTLY?

Because of the structure of the legal system in the United States and the comprehensive nature of campaign finance jurisprudence, the rationale for one decision could have a major outcome on a seemingly unrelated matter. For instance, the narrow definition of corruption set forth in *Citizens United* helped craft the decision in *McCutcheon*.<sup>225</sup> Therefore, the rationale for restricting the speech of a corporation could be applied to a different situation: limiting an individual's political speech. This section will first discuss the easier issue of how the anti-distortion interest applies to corporations. Then, this section will examine the more difficult matter of how this could apply to individuals.

The majority in *Citizens United* was particularly concerned with chilling the speech of a corporation based solely on the speaker's identity.<sup>226</sup> The Court worried that individuals could make extensive independent expenditures while "certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech."<sup>227</sup> Here, the Court failed to recognize that campaign finance regulations on corporations are not restrictions on the individuals who comprise those corporations.<sup>228</sup> Every employee of a corporation, from the CEO to the janitor, could individually speak with no restrictions. Further, the corporation itself could speak, so long as its speech was voiced at a reasonable volume and through PACs.<sup>229</sup> The only restrictions that campaign finance regulations impose are on the corporate person. The idea that a corporation is a person is a legal fiction.<sup>230</sup> Instead

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<sup>225</sup> *Citizens United* was a case regarding corporate independent expenditures, whereas *McCutcheon* dealt with aggregate contribution limits for individuals. See *supra* notes 98, 121 and accompanying text.

<sup>226</sup> See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 351 (2010).

<sup>227</sup> *Id.* at 356.

<sup>228</sup> See *supra* note 179 and accompanying text.

<sup>229</sup> See *supra* note 108 and accompanying text.

<sup>230</sup> See Eric Posner, *Stop Fussing Over Personhood: Laws Treat Corporations (and Chimpanzees) as Persons Because It's a Useful—and Often Essential—Legal Fiction*, SLATE MAG. (Dec. 11, 2013, 10:09 AM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2013/12/personhood\\_for\\_corporations\\_and\\_chimpanzees\\_is\\_an\\_essential\\_legal\\_fiction.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/12/personhood_for_corporations_and_chimpanzees_is_an_essential_legal_fiction.html) ("The legal fiction

of blindly protecting the rights of artificial entities, the Court should focus on protecting the First Amendment rights of individuals as the Amendment originally intended.

Also, the *Citizens United* dissent suggests that “large corporate spending could ‘marginalize[]’ the opinions of ‘real people’ by ‘drowning out . . . non-corporate voices.’”<sup>231</sup> Another problem with the distortion of permitting unfettered corporate speech is that it “‘can generate the impression that corporations dominate our democracy’ and give corporations ‘special advantages in the market for legislation.’”<sup>232</sup> Admittedly, support for the anti-distortion rationale is more difficult to make when realizing that it could be applied to individuals as well. This difficulty could be avoided completely if, upon recognizing anti-distortion as a compelling state interest, the Court explicitly stated that it did not apply to actual people. However, it may not be altogether unwise to apply the anti-distortion interest to individuals as well.

The First Amendment is perhaps the most sacred sentence<sup>233</sup> recorded in American history because of the governmental tyranny it stands against.<sup>234</sup> The *Citizens United* Court recognized this and said, “[p]remised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. . . . Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.”<sup>235</sup> This article will not attempt, nor would its author ever suggest, that these words do not ring true for pure speech; however, when considering the legal fiction that individuals are as free to fill

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that corporations are persons helps courts prevent people from evading, or losing opportunities from, laws that are too narrowly written.”).

<sup>231</sup> Hasen, *supra* note 65, at 603 (alterations in original) (citations omitted).

<sup>232</sup> *Citizens United*, 558 U.S. at 470–71, *quoted in* Hasen, *supra* note 65, at 603.

<sup>233</sup> “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. CONST. amend. I.

<sup>234</sup> See Letter from Thomas Jefferson to Marquis de Lafayette (Nov. 4, 1823), <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=FGEA-chron-1820-1823-11-04-1> (“[T]he only security of all is in a free press. [T]he force of public opinion cannot be resisted, when permitted freely to be expressed. [T]he agitation it produces must be submitted to. [I]t is necessary, to keep the waters pure.”).

<sup>235</sup> *Citizens United*, 558 U.S. at 340 (citation omitted).

politicians' pockets as they are to speak their thoughts, a divergence of opinion occurs. It must be constantly reiterated that campaign finance regulations concern currency and not the ability of an individual to speak his or her mind.<sup>236</sup> For example, regulations on campaign finance do not prevent an individual from speaking in support of or opposition to a candidate at a social gathering, political rally, or even in a publication. These regulations are solely concerned with the amount of money that the individual may dole out to support that candidate or any other.

A democracy cannot effectively function when the chain of communication between the people and their elected representatives is broken.<sup>237</sup> The Court's recent jurisprudence on campaign finance has obliterated that chain of communication by allowing a small number of wealthy individuals and groups to hijack the forum for speech.<sup>238</sup> For example, Sheldon Adelson—a name familiar to observers of campaign finance and the Forbes list of the 400 Richest Americans—contributed nearly \$100 million during the 2012 election cycle.<sup>239</sup> In advance of the 2016 Presidential Election, at least four presidential hopefuls beseeched Adelson for contributions in what political commentators have dubbed the “Sheldon Primary.”<sup>240</sup> Further, in Florida's recent unsuccessful referendum issue regarding medical marijuana legalization, Adelson contributed eighty-five percent of the funding to the leading anti-legalization organization.<sup>241</sup> These facts are not intended to single out Mr. Adelson or

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<sup>236</sup> See *supra* note 179 and accompanying text.

<sup>237</sup> “Where enough money calls the tune, the general public will not be heard.” *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting). The First Amendment provides protection for the chain of communication to remain intact, which allows the electorate and representatives to communicate between elections. *Id.* at 1467–68. Thus, representatives can remain responsive to the people whom they are elected to represent. *Id.*

<sup>238</sup> Elizabeth M. Iglesias, Professor of Law, University of Miami School of Law, Lecture During a Constitutional Law Class (Spring 2014).

<sup>239</sup> See Matea Gold & Philip Rucker, *Billionaire Mogul Sheldon Adelson Looks for Mainstream Republican Who Can Win in 2016*, WASH. POST, Mar. 25, 2014, [http://www.washingtonpost.com/politics/billionaire-mogul-sheldon-adelson-looks-for-mainstream-republican-who-can-win-in-2016/2014/03/25/e2f47bb0-b3c2-11e3-8cb6-284052554d74\\_story.html](http://www.washingtonpost.com/politics/billionaire-mogul-sheldon-adelson-looks-for-mainstream-republican-who-can-win-in-2016/2014/03/25/e2f47bb0-b3c2-11e3-8cb6-284052554d74_story.html).

<sup>240</sup> See *id.*

<sup>241</sup> Only fifteen percent of the anti-legalization campaign funding came from the State of Florida, and that funding came from around eighty individuals in all.

imply that his opinion is any less important than another American's; however, these points illustrate that our political process has been subverted by a small percentage of the electorate.

Why should presidential candidates fawn over an individual donor? Why should a referendum issue in Florida be so heavily influenced by a single person in Nevada? In the face of such a bleak reality, the Court's position that it is simply protecting First Amendment rights loses credence. The rationale behind the anti-distortion interest is that no single individual should dominate the forum for political speech.<sup>242</sup> Not every American's voice will ever be equal or relatively equal, and perhaps that is not an inherent harm. But, at the same time, a few individuals should not be allowed to control the American political discourse solely because they have money.<sup>243</sup> Justice Scalia would likely rebut these arguments with his simple phrase, "the more speech, the better."<sup>244</sup> However, that would only be true if the forum for political speech were infinite; in reality, the forum for speech is finite and limited to the weeks and months before an election.<sup>245</sup> Further, an increase in the amount of speech is only beneficial if that speech comes from different sources and viewpoints.<sup>246</sup>

Finally, an individual does not need money to speak. None of this discussion has anything to do with pure speech or speech that does not involve the spending of money.<sup>247</sup> There are alternate forms of political speech that do not require campaign contributions or independent expenditures. One such obvious example is pure speech in a public forum, which is reminiscent of the United States Revolutionary Period, but there are others. For example, social media

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See Niraj Chokshi, *Casino Billionaire Sheldon Adelson is Behind 85 Percent of Florida's Anti-Pot Campaign*, WASH. POST, Oct. 28, 2014, <http://www.washingtonpost.com/blogs/govbeat/wp/2014/10/28/casino-billionaire-sheldon-adelson-is-behind-85-percent-of-floridas-anti-pot-campaign/>.

<sup>242</sup> See *supra* note 50 and accompanying text.

<sup>243</sup> See *supra* note 51 and accompanying text.

<sup>244</sup> Matt Vasilogambros & Sarah Mimms, *Scalia Defends Citizens United Decision, Reflects on Term in Rare TV Appearance*, NAT'L J., July 18, 2012, <http://www.nationaljournal.com/politics/scalia-defends-citizens-united-decision-reflects-on-term-in-rare-tv-appearance-20120718>.

<sup>245</sup> Iglesias, *supra* note 238.

<sup>246</sup> See *supra* note 156 and accompanying text.

<sup>247</sup> See *supra* note 179 and accompanying text.

does not require money and, in today's interconnected society, it is effective for political speech.<sup>248</sup> While the likes of Kim Kardashian may pay private firms in an attempt to break the internet, a vast majority of social media users may express their opinions free of charge to influence massive social dialogue and change.

In order to ensure that the purpose of the First Amendment is realized—to secure ‘the widest possible dissemination of information from diverse and antagonistic sources[.]’<sup>249</sup>—perhaps it is necessary to curtail the spending of a few wealthy individuals.

#### IV. A “NEW” WAY FORWARD

Like most other quasi-geeky law students, an appreciation of legal history and the evolution of law is not lost on the author of this Comment. Further, this article does not suggest that *stare decisis*<sup>250</sup> should be abandoned. However, the reality is that Americans live in a brave new world,<sup>251</sup> where devices carried in one's pocket have more computing power than the computers that landed astronauts on the moon.<sup>252</sup> Elections have also changed. The total spending for all major party House candidates in the 1976 election was \$60 million; in the 2012 election, the total spending for all major party House

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<sup>248</sup> Any skeptic about the effectiveness of social media on political discourse ignores the Arab Spring and recent politicized police killings in the United States. See, e.g., Catherine O'Donnell, *New Study Quantifies Use of Social Media in Arab Spring*, UW TODAY, Sept. 12, 2011, <http://www.washington.edu/news/2011/09/12/new-study-quantifies-use-of-social-media-in-arab-spring/>; Emanuella Grinberg, *What #Ferguson Stands for Besides Michael Brown and Darren Wilson*, CNN, Nov. 19, 2014, 10:36 AM, <http://www.cnn.com/2014/11/19/us/ferguson-social-media-injustice/>.

<sup>249</sup> *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam) (citations omitted).

<sup>250</sup> *Stare decisis* is Latin for “to stand by things decided.” *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014). It is the “doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.” *Id.*

<sup>251</sup> Perhaps a comparison between the United States and Aldous Huxley's ‘World State’ is inappropriate, but that is a discussion for another time. However, it cannot be denied that the world today is a far different place than the one that existed when *Buckley* was decided in 1976. See ALDOUS HUXLEY, BRAVE NEW WORLD (HarperCollins Publishers 2006).

<sup>252</sup> NASA, DO-IT-YOURSELF PODCAST: ROCKET EVOLUTION (2009), <http://www.nasa.gov/audience/foreducators/diypodcast/rocket-evolution-index-diy.html>.

candidates was \$923 million.<sup>253</sup> The point is that with the extreme changes that have occurred in the election landscape perhaps a reexamination of the campaign finance jurisprudence is warranted—particularly certain premises unexamined since they were put forth in *Buckley*. Also, a recommitment to the robust enforcement and passage of laws could solve many issues that face the campaign finance jurisprudence.

### A. Reexamination of Campaign Finance Jurisprudence

#### 1. DOES MONEY EQUAL SPEECH?

One of the widely accepted progeny of *Buckley* that should be reexamined is the idea that money is speech.<sup>254</sup> This is a largely rejected concept by supporters of campaign finance regulation.<sup>255</sup> The rationale behind First Amendment protection for political spending is reasonable. In *Buckley*, the Court recognized that a restriction on political spending *de facto* reduces the quantity, depth, and size of any desired expression.<sup>256</sup> Therefore, campaign finance restrictions must pass constitutional muster in order to stand because they are an infringement on First Amendment rights.

However, within this discussion it must not be forgotten that the restrictions, which campaign finance regulations target, are on spending.<sup>257</sup> Although money is speech, it is a special category of speech different from the pure speech<sup>258</sup> that the First Amendment

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<sup>253</sup> Also, the average amount spent per candidate increased from \$73,316 in 1976 to \$1,178,004 in 2012. CAMPAIGN FIN. INST., HOUSE CAMPAIGN EXPENDITURES: MAJOR PARTY GENERAL ELECTION CANDIDATES, 1974–2014 (2012), [http://www.cfinst.org/pdf/vital/VitalStats\\_t2.pdf](http://www.cfinst.org/pdf/vital/VitalStats_t2.pdf).

<sup>254</sup> See *supra* note 36 and accompanying text.

<sup>255</sup> See, e.g., Samuel Issacharoff, ON POLITICAL CORRUPTION, 124 HARV. L. REV. 118, 118 n.2 (2010) (citing *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (“Money is property; it is not speech.”)).

<sup>256</sup> Further, the Court recognized that “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.” *Buckley v. Valeo*, 424 U.S. 1, 17–20 (1976) (per curiam).

<sup>257</sup> See *supra* note 179 and accompanying text.

<sup>258</sup> Although even *Buckley*’s justification for money as a protected form of expression was premised on the fact that “virtually every means” of mass communication in 1976 required the expenditure of money, perhaps this has changed in the forty years since the decision. See *Buckley*, 424 U.S. at 17–20.

was originally designed to protect.<sup>259</sup> The idea that money equals speech—while valid—is a legal fiction.<sup>260</sup> The current trend of campaign finance decisions since *Citizens United* grants more protection to this legal fiction than to pure speech. This fact is particularly troubling as applied to corporations—whose ability to speak is also a legal fiction—because it stacks legal fiction upon legal fiction to the detriment of society as a whole.<sup>261</sup>

Contrary to the Court’s current First Amendment interpretation, there are numerous instances where the government is allowed to restrict the First Amendment rights of a speaker.<sup>262</sup> Further, all of these instances limit pure or symbolic speech. So, if a principal can regulate her students’ off-campus support of “BONG HiTS 4 JESUS,”<sup>263</sup> then why is Congress prevented from regulating the billions of dollars paid to candidates for public office?

An interesting aside, which cannot be resolved by the current commitment to an absolute interpretation of the money-equals-speech fiction, concerns those who do not have money. If money equals speech, then can those without money speak?<sup>264</sup> The *Buckley* Court noted that “[t]he First Amendment’s protection against governmental abridgement of free expression cannot properly be made

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<sup>259</sup> See, e.g., *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978).

<sup>260</sup> “Legal fiction” is defined as “[a]n assumption that something is true even though it may be untrue, made esp. in judicial reasoning to alter how a legal rule operates . . . .” *Legal Fiction*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>261</sup> Iglesias, *supra* note 238.

<sup>262</sup> See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919) (determining that “[t]he question in every case is whether the words used are used in such circumstances . . . to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent”); *Miller v. California*, 413 U.S. 15 (1973) (reiterating that First Amendment rights are not absolute and do not protect obscene material); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 687 (1986) (holding that a “[s]chool [d]istrict acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (finding that “the right of free speech is not absolute at all times and under all circumstances”).

<sup>263</sup> *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

<sup>264</sup> Iglesias, *supra* note 238.

to depend on a person's financial ability to engage in public discussion."<sup>265</sup> Thus, how can First Amendment protection unquestioningly extend to a category that is completely dependent on an individual's financial ability to speak?

In reality, the concept that money equals speech is logical. However, an absolute acceptance of this concept without consideration that it is a legal fiction, which recent Court decisions seem to indicate, is troublesome.

## 2. DOES THE STATE HAVE AN INTEREST IN EQUALIZING SPEECH?

Another unexamined premise from the *Buckley* decision was that the state does not have an interest in equalizing the political sphere.<sup>266</sup> The Court's statement, which attempts to equalize the ability of speakers to influence elections are "wholly foreign to the First Amendment," was dicta.<sup>267</sup> Further, the cases that were discussed as support for this concept dealt with statutes, which required or prevented newspapers from supporting or opposing candidates for election.<sup>268</sup>

Admittedly, it does seem foreign to the First Amendment to limit the ability of one speaker to enhance the ability of others to speak. However, given the current campaign finance landscape, perhaps that is what the First Amendment requires. As discussed above,<sup>269</sup> the anti-distortion interest is similar to leveling the playing field. However, one key difference is that the anti-distortion interest is concerned with preventing an individual or group from dominating the forum for political speech, which is not necessarily attempting to make all speakers equal.<sup>270</sup> Therefore, it seems to fulfill the purposes of the First Amendment, which the *Buckley* Court described as "secur[ing] 'the widest possible dissemination of information from diverse and antagonistic sources . . .'"<sup>271</sup>

It is possible that the *Buckley* Court's statement about leveling the playing field is as true today as it was in 1976. However, the

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<sup>265</sup> *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam).

<sup>266</sup> *See id.* at 48–49.

<sup>267</sup> *See id.*

<sup>268</sup> *See id.* at 50–51.

<sup>269</sup> *See supra* Part III.B.1.

<sup>270</sup> *See supra* notes 50–51 and accompanying text.

<sup>271</sup> *Buckley*, 424 U.S. at 49 (citations omitted).

anti-distortion interest is a middle ground between the two approaches. This interest maintains the principle from *Buckley* that the state is prohibited from equalizing the voices of all speakers. At the same time, the anti-distortion interest recognizes the real shortcomings of campaign finance law and seeks to correct them.

American voters have become disillusioned with the electoral process.<sup>272</sup> There could be many different explanations for this phenomenon; however, one point of agreement on this issue should be that the government—and society as a whole—has an interest in voter participation. One way that voters become engaged in the process is by having candidates who engage the electorate. The democratic integrity framework recognized this reality. Thus, Justice Souter—in his *WRTL II* dissent—noted that “[d]evoting concentrations of money in self-interested hands to the support of political campaigning therefore threatens the capacity of this democracy to represent its constituents and the confidence of its citizens in their capacity to govern themselves.”<sup>273</sup> The anti-distortion interest is a way to resurrect the lofty ideals of the democratic integrity framework and support Justice Souter’s opinion that “political integrity . . . [has] a value second to none in a free society.”<sup>274</sup> But if candidates and elected officials are more concerned with fundraising, and massive fundraising becomes a prerequisite for a successful campaign, then the quality of candidates will change. Instead of elections composed of candidates with popular political philosophies, ideas, and good merit, American elections will continually become a race to build massive war chests for campaign funds and flooding the airwaves with unceasing advertisements. American voter disillusionment can be seen everywhere, from low voter turnout numbers to popular culture,<sup>275</sup> and until the Court recognizes a

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<sup>272</sup> Dylan Stableford, *Voter Turnout for 2014 Midterms Worst in 72 Years*, YAHOO! NEWS, Nov. 12, 2014, 9:34 AM, <http://news.yahoo.com/voter-turnout-2014-midterms-worst-in-72-years-143406756.html> (noting that only 36.3 percent of eligible voters voted in the 2014 midterm elections, which was the worst turnout since the 1942 election).

<sup>273</sup> *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2689 (2007) (Souter, J., dissenting).

<sup>274</sup> *Id.*

<sup>275</sup> Even the popular television show *South Park* has waded into this discussion. During one episode, *South Park* satirically portrayed all American elections,

state interest—like the anti-distortion interest—that allows Congress to regulate campaign finance, then quality political candidates will continue to elude the American public.

Although this Comment may seem critical of politicians, which is certainly deserved in some instances, there is not a lack of appreciation for their difficult position. Because of the current structure of the campaign finance jurisprudence, politicians are allowed to engage in massive fundraising efforts, and it is only reasonable for them to do so. However, this reality places a burden on politicians to actually raise the money and in that pursuit promises may need to be made to donors. To further complicate matters, any savvy politician fresh off an electoral victory should immediately begin thinking about the next election. Given the fact that he or she will need to raise money again, that politician cannot forget the people who put him or her in office or the fact that those people can give their money to someone else.

While the state does not have a legitimate interest in equalizing the speech of all people, it does have an interest in making sure that everyone has the opportunity to speak. The anti-distortion interest accomplishes this goal by preventing the domination of the forum for speech by a relatively small group.

### B. *Recommitment to Legislation*

One question, which looms large over the discussion of campaign finance reform, is how can reform be accomplished?<sup>276</sup> Many people claim that the current trend of deregulating campaign finance laws has left what remains ineffective, which provides a bleak outlook for campaign finance reform.<sup>277</sup> Some interesting approaches have been suggested to deal with the problems introduced by the Court's decisions, which will be discussed below. However, the most apt approach would be to give teeth to the laws that are already in place and recognize anti-distortion as its own compelling state interest.

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from grade-school mascot elections to presidential elections, as a choice between—in the interest of civility what I will describe as—Scylla and Charybdis. *South Park: Douche and Turd* (Comedy Central television broadcast Oct. 27, 2004).

<sup>276</sup> See Kang, *supra* note 93.

<sup>277</sup> See *id.* at 51.

Generally, the history of campaign finance regulations has been concerned with *ex ante* approaches.<sup>278</sup> However, an *ex ante* approach raises constitutional problems because such a regulation “restricts political speech.”<sup>279</sup> One way to avoid this difficulty is to focus instead on *ex post* regulations, which target the influence of campaign contributions and expenditures after the fact.<sup>280</sup> This approach is attractive because it avoids the constitutional difficulty, while at the same time targeting the actual corruption that the anti-corruption interest attempts to prohibit.<sup>281</sup> Further, the Court has been sympathetic to this approach in recent cases.<sup>282</sup> In *Caperton v. Massey*, a judge was recused because a “campaign supporter’s case arrived before the elected candidate.”<sup>283</sup> Similar to *Caperton*, an *ex post* approach would focus on regulating the actions of public officials once they are in office. Thus, the *ex post* approach would reduce the incentive of the official or others to resort to corrupting measures.

The *ex post* approach is logical and has many attractive components. However, one major flaw with this approach, which it could not take into account, is the exclusion of a separate anti-distortion interest. The allure of this approach is, in part, due to the fact that it could realistically be employed within the current campaign finance jurisprudence, without overturning any precedent. Given the unlikelihood that the current Court would reverse its trend of narrowing the scope of campaign finance regulation, perhaps this is the most reasonable way forward. But that which is reasonable is not always that which is necessary.

Republican theory<sup>284</sup> views public deliberation as an inherent good in a political system.<sup>285</sup> Deliberation is a process of cultivating civic virtue through political participation and is an end in and of

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<sup>278</sup> *See id.* at 56.

<sup>279</sup> *Id.* at 57.

<sup>280</sup> *See id.* at 55–58.

<sup>281</sup> *See id.*

<sup>282</sup> *Id.* (citations omitted).

<sup>283</sup> *See Id.* at 57.

<sup>284</sup> This phrase and the term “republicanism” will be used interchangeably. It should be noted that these terms refer to the political philosophy and not to the American political party.

<sup>285</sup> *See, e.g., Republicanism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Apr. 15, 2014, <http://plato.stanford.edu/entries/republicanism/>.

itself, not a means to improve public policy.<sup>286</sup> Republican theorists view political preferences as endogenous, meaning they are only formed after public deliberation.<sup>287</sup> Without an approach to campaign finance that takes into account the anti-distortion interest, these republican ideals—to which founding fathers Jefferson and Madison subscribed<sup>288</sup>—are lost. The *ex post* approach is valid and should be pursued to reinvest in the battle against public official corruption. However, *ex ante* approaches, such as the anti-distortion interest, are necessary because of their importance to the political process.

As discussed above, the most important new way forward in the area of campaign finance is a recognition of anti-distortion as a compelling state interest. Recognition of this interest would revitalize many existing statutes such as FECA and BCRA. This would enable them to combat corruption and ensure that American elections are representative of the issues and interests of the American people. While this recognition would be difficult to achieve, it would be extremely beneficial.

Political discourse was once an ideal aspired to in the United States. The anti-distortion interest is simply a way of recommitting to that ideal by allowing Congress to curb the influence that money has on the outcome of elections. The FECA and BCRA statutes were attempts by Congress to restrict monetary influence, but the Court somehow saw this as a way to suppress speech. The Court's usurpation of the legislature's role in campaign finance regulation and its claim of authority for "judicial pre-clearance" is troublesome.<sup>289</sup> Further, it flies in the face of Justice Breyer's words in his *Shrink Mo. Gov't PAC* concurrence that "the legislature understands the problem—the threat to electoral integrity, the need for democratization—better than do we."<sup>290</sup> Voices can be heard by elected officials from behind the marble columns of the Supreme Court building, but for the ordinary American voter, the Court's rejection of the anti-

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<sup>286</sup> See, e.g., *id.*

<sup>287</sup> See, e.g., *id.*

<sup>288</sup> See, e.g., *id.*

<sup>289</sup> See Hill, *supra* note 77, at 301.

<sup>290</sup> *Id.* (citing *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring)).

distortion interest is just another erosion of the chain of communication so vital to a functioning democracy.

Elections are essential to a functional democracy, and in order for elections to capture the will of the people, different viewpoints must be heard. This is one of the reasons that the First Amendment was drafted and, in defense of the Amendment's spirit, it is also one of the many reasons that the anti-distortion interest should be recognized.

#### CONCLUSION

Campaign finance is a controversial area of law. It seems that many people have an opinion on the matter, although few know the necessary language required to make any sophisticated legal arguments. This fact is evidence that there is a lot at stake and that this issue is larger than editorials or law review articles. Campaign finance law goes to the heart of how the American people view and perceive their government. If those people lose faith in their government, then they will not participate in it. Without citizen participation, we risk losing Thomas Jefferson's dream of the Great American Republic and his words would fall upon deaf ears: "Where every man is a sharer in the direction of his ward-republic . . . and feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day . . ." <sup>291</sup>

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<sup>291</sup> Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), <http://press-pubs.uchicago.edu/founders/documents/v1ch4s34.html>.