First Amendment Fault Lines and the *Citizens United* Decision

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INTRODUCTION

As the dust settles from the 2010 midterm elections, it is clear that the current Supreme Court majority has transformed the landscape of federal politics, and has done so in service to a reified conception of corporate speech rights under the First Amendment.[1] How much of the widely reported flood of stealth corporate spending in this election cycle[2] was directly attributable to the Court's decision in *Citizens United v. FEC*[3] may never be known, due to the lack of comprehensive federal campaign finance disclosure laws, but the majority's sweeping endorsement of the First Amendment status of corporate political expenditures certainly issued an open invitation for such a spending blitz.

But although *Citizens United* has provoked a firestorm of criticism, relatively few have engaged Justice Kennedy's majority opinion on the terms of First Amendment *value*—that is, the degree to which a particular corporate spending decision should be deemed to warrant First Amendment protection.[4] Instead, most constitutional scholars criticizing the opinion have fo-

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[1] For a history of the corporate free speech movement, see generally ROBERT L. KERR, THE CORPORATE FREE SPEECH MOVEMENT: COGNITIVE FEUDALISM AND THE ENDANGERED MARKETPLACE OF IDEAS (2008); *see also* Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949 (2007).

[2] *See*, *e.g.*, Dan Eggen & T.W. Farnam, *New 'Super Pacs' Bringing Millions Into Campaigns*, WASH. POST, Sept. 28, 2010, at A01; Editorial, *The Secret Election*, N.Y. TIMES, Sept. 18, 2010, at WK8; Michael Luo, *G.O.P. Allies Outspending Their Rivals*, N.Y. TIMES, Sept. 14, 2010, at A1.

[3] 130 S. Ct. 876 (2010).

[4] Geoffrey Stone has described low value speech as speech that "might not sufficiently further the values and purposes of the First Amendment" to warrant strict-scrutiny protection against content-based regulation of speech. Geoffrey R. Stone, *Free Speech in the Twenty-First Century*, 36 PEPP. L. REV. 273, 283–85 (2009) (providing overview of doctrine of low value speech). Although Prof. Stone does not include campaign spending among his listed categories of low-value speech, the campaign finance case law has long treated contributions to candidates and parties as low-value speech. *See* McConnell v. FEC, 540 U.S. 93, 135 (2003) (noting that "the communicative value of large contributions inheres mainly in their ability to facilitate the speech of their recipients"); Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 638 (1996) (Thomas, J., concurring in the judgment and dissenting in part) ("[C]ontributions have less First Amendment value than expenditures because they do not involve speech by the donor.").

cused on the non-First Amendment interests and other constitutional principles that the Court failed to accord adequate weight.[5]

But one overlooked aspect of campaign finance doctrine is the degree to which the constitutional case law in this area has been shaped by competing accounts of the source of First Amendment value—that is, what imbues particular uses of money with First Amendment significance. After all, it may be settled law that political spending is, under some circumstances, entitled to First Amendment protection, but few would argue that money is always speech. No First Amendment value attaches to a stack of dollar bills stuffed under a mattress. Most uses of money—paying taxes, purchasing consumer goods, financing a corporate takeover—are treated as inert for First Amendment purposes so that regulation of such forms of spending does not ordinarily raise First Amendment concerns. Meanwhile, other forms of spending, including campaign expenditures, are treated as having the highest degree of First Amendment significance. And even within campaign finance doctrine, a hierarchy of First Amendment value obtains so that campaign expenditures are deemed to be of high First Amendment value, while contributions to a candidate or party are considered to be relatively low-value speech[6]—a framework initially established in *Buckley v. Valeo*[7] and applied by generations of courts. Accordingly, First Amendment value is deemed to attach to some uses of money in campaigns but not others, and to attach in varying degrees depending upon the type of spending at issue.

This Article argues that in answering the recurring central question of campaign finance doctrine—the question of whether political spending can be treated as speech and, if so, when and to what degree—the Court has employed two competing accounts of First Amendment value. Under the first of these theories, which I call the *volitional account*, the source of First Amendment value is the volitional impulse of the spender: the spender voluntarily dedicates an expenditure to a particular expressive purpose, thus generating First Amendment value in that particular expenditure. Under the

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[5] *See, e.g.*, Richard L. Hasen, Citizens United *and the Illusion of Coherence* (Loyola-L.A. Legal Studies Paper No. 2010-26, 2010) (on file with the Harvard Law School Library), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1620576 (arguing that the Court's jurisprudence is governed by political considerations); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118 (2010) (arguing for a reorientation of concept of corruption to focus on avoidance of "clientelist" relation between elected officials and interested parties); Richard Briffault, *On Dejudicializing American Campaign Finance Law*, 34 N.Y.U. REV. L. & SOC. CHANGE (forthcoming Apr. 2011) (discussing the incoherence of campaign finance decisions and asserting that such decisions are constitutionally and judicially unnecessary); Zephyr Teachout, *A Wholesome Rule of Law: Corruption and Contract Law in the 19th Century*, 34 N.Y.U. REV. L. & SOC. CHANGE (forthcoming Apr. 2011) (focusing on concerns about corruption). *But see* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV 143 (2010) (analyzing *Citizens United* as interplay between two competing visions of First Amendment: freedom of speech as equality and freedom of speech as liberty).

[6] Justice Thomas has usefully summarized the contributions/expenditures distinction as follows: "[C]ontributions have less First Amendment value than expenditures because they do not involve speech by the donor." Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 638 (1996) (Thomas, J., concurring in the judgment and dissenting in part).

[7] 424 U.S. 1 (1976).

second theory, which I call the *commodity account*, the market is the source of First Amendment value, which is quantified externally through market measures, such as dollar value, rather than through such individualistic and subjective measures as volition or intensity. Part I of this Article explains that the *Buckley* Court's differential treatment of contributions and expenditures is partially grounded on differing accounts of the source of First Amendment value. *Buckley*'s so-called proxy speech rationale, justifying the marginal First Amendment value accorded to contributions,[8] is predicated on the assumption that the source of First Amendment value is the volition of the spender. By contrast, the elevated First Amendment status accorded to campaign expenditures is based on a commodity account of First Amendment value.

The problem, of course, is that the two theories coexisting in the *Buckley* decision are in considerable tension: the volitional theory creates a hierarchy of value among different categories of spending based on how directly such spending advances the expressive intention of the spender, while the commodity theory treats each dollar of political spending as of presumptively equivalent value to any other dollar of political spending, regardless of any nexus with expressive intention. This constitutional fault line between the volitional and commodity accounts of First Amendment value would become increasingly unstable as the various permutations and innovations of modern campaign financing were tested in the courts. Part II of this Article traces this constitutional fault line through the subsequent campaign finance case law as these two competing accounts of First Amendment value are embodied in various elements of campaign finance doctrine. Although the commodity rationale occasionally emerges, the volitional account appears to be the more prevalent in the Court's analysis of First Amendment campaign finance doctrine, until this year's *Citizens United* decision.

Citizens United marks a new high point for the commodity account and, moreover, presents a major extension of that theory by setting forth a "source-blind" approach to the regulation of money in politics that forbids the state from differentiating among different sources of political spending.[9] Under this theory, the First Amendment value of spending is assessed purely by reference to its commodity value. Under a fully commodified conception of speech, speakers drop out of the picture—the only constitutionally relevant interest is that of speech "consumers" to consume as large a quantity of speech as can be made available. The source-blind approach adopted in *Cit-*

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[8] *See id.* at 100 (stating that the size of political contributions provide only a rough measure of support, and therefore restrictions on contributions provide little restraint on political communication); Cal. Med. Ass'n v. FEC, 453 U.S. 182, 196 (1981) (stating contributions are not entitled to full First Amendment protection).

[9] *See Citizens United*, 130 S.Ct. at 898 ("Premised 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.") (citation omitted); *id.* at 884 ("It is irrelevant for First Amendment purposes that corporate funds may 'have little or no correlation to the public's support for the corporation's political ideas.'") (citation omitted).

izens United appears to be profoundly at odds with the volitional account of First Amendment value underlying much campaign finance doctrine—the volitional approach requires an inquiry into the degree to which a funding source can be deemed to advance the volitional impulse of the spender; the source-blind approach would seem to forbid such inquiry. Part III outlines some of the destabilizing ramifications of this source-blind approach as a First Amendment theory that excludes any volitional considerations. In the Conclusion, I argue that this fully-commodified conception of speech fails, since the economic marketplace cannot be considered an adequate proxy for the marketplace of ideas that is the First Amendment's ultimate ideal.

I. *Buckley v. Buckley*: The Volitional Approach and the Commodity Approach

A. Contributions: The Volitional Approach

The Supreme Court's decision in *Buckley v. Valeo* is widely despised, and central to its unpopularity is its core holding that the First Amendment confers differential status upon contributions and expenditures. Even at the time the decision was reached, three of the eight justices who joined the *per curiam* opinion disagreed with the proposition that the First Amendment should treat contributions and expenditures differently,[10] and another member of the Court later decided that the distinction was not tenable.[11] This distinction has been criticized with equal vehemence by both sides—those who argue that to treat the expenditure of funds as a speech issue distorts the First Amendment beyond recognition and those who argue that denying full First Amendment protection to contributions impermissibly restricts speech. The product of compromise, the contribution/expenditure distinction has survived less as settled doctrine than as détente: the demarcation line where both sides lay down their arms out of exhaustion, rather than as a result of negotiated surrender.

Much case law and criticism has focused on the Supreme Court's assumption that the differential treatment of contributions and expenditures is justified because expenditures pose less of a threat of corruption than do direct contributions to candidates and parties. Less explored is the Court's holding that contributions, unlike expenditures, possess only "marginal" First Amendment value. As explained below, the differential treatment of contributions and expenditures in this regard can best be understood as the result of the Court's application of two different theories of First Amendment value. The Court takes a volitional approach in its analysis of contributions,

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[10] *See Buckley*, 424 U.S. at 257 (White, J., concurring in part and dissenting in part); *id.* at 286 (Marshall, J., concurring in part and dissenting in part); *id.* at 290 (Blackmun, J., concurring in part and dissenting in part).

[11] *See* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 520 (1985) (Marshall, J., dissenting).

adopting a theory that treats individual volition as the source and requirement of the First Amendment value of political spending, while applying a commodity rationale for expenditures, which treats First Amendment value as externally quantifiable.

In approaching the campaign finance question, the *Buckley* Court begins by noting that both "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities," and explains that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system . . . ."[12] Here, consistent with what are sometimes called the deliberative purposes of the First Amendment,[13] the Court treats the First Amendment more as an instrumental good—a prerequisite for democratic government—than as an end in itself. The Court goes on to explain that the purpose of the First Amendment's broad protection for political expression is "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[14] Despite recognizing that both contributions and expenditures occupy the same political speech arena, the *Buckley* Court goes on to treat the two forms of campaign spending very differently—contributions are accorded only "marginal" First Amendment value, while expenditures are entitled to full First Amendment protection.

The Court bases its holding that contributions have only marginal First Amendment value on an argument known as the proxy speech rationale: that "the transformation of contributions into political debate involves speech by someone other than the contributor."[15] In an often-cited passage, the Court explains:

> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to

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[12] 424 U.S. at 14.

[13] The best-known articulation of this theory can be found in ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); *see also* OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

[14] *Buckley*, 424 U.S. at 14.

[15] *Id.* at 21.

> present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.[16]

As is evident from the passage above, a fundamental assumption of the proxy speech rationale is the truism that "[f]reedom of speech presupposes a willing speaker"[17]—i.e., money as speech must be *volitional*, or voluntarily dedicated to the purpose of expression. Money takes on First Amendment value only because it "serves as a general expression of support for the candidate and his views."[18] The First Amendment takes no notice of dollars sitting in a bank account, any more than it does of paint filling up a tube. It is only the spender's act of donating that is expressive, not the dollars themselves. In other words, the expressive value of proxy speech is not durable. A painting retains its expressive quality as it passes from painter to collector to auctioneer to museum. A contribution, under *Buckley*'s reasoning, ceases to express anything of the spender's intent once the act of contributing has taken place, although the recipient is, of course, able in turn to dedicate the funds to her own expressive purpose. Thus, contributions, like proxy speech, are of lesser First Amendment value because the expressive value of the contribution to the contributor is extinguished in the transaction, although it is possible that the recipient's use of the funds will accrue First Amendment significance.

In applying this volitional approach to the First Amendment treatment of political spending, the Supreme Court adopts a proxy speech analysis that features three significant attributes. The first attribute is that such First Amendment value is *non-monetizable*—as the Court points out, the expressive value of a contribution is *symbolic*, so that the quantity of expression it represents has no objective relationship to the amount of money in the contribution. As the Court explains, "At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate."[19] After all, my $100 contribution might entail a substantial sacrifice on my part, in terms of my personal financial budget, and I might spend $100 only on the candidates and causes about which I care most passionately, although I might be willing to give smaller contributions to causes about which I feel less urgency. Once, however, my $100 contribution is removed from the context of my personal financial calculus, there is no longer any relationship between the amount of money and the intensity of my support. The $100 that, for me, represents a major financial commitment might, for a wealthier individual, be a mere token, disbursed as a matter of course to a great number of low-priority candidates and causes. Strangely, then, my $100 contribution would have more First Amendment value as a

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[16] *Id.*

[17] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976).

[18] *Buckley*, 424 U.S. at 21.

[19] *Id.*

measure of the intensity of my support than the $100 contribution of my wealthier neighbor. Once the two $100 contributions reach the campaign's coffers, however, all indices of intensity disappear.

A second attribute of the proxy speech rationale is that such money-as-speech is liquid—a sum of money intended to fund an expression of support for a candidate can be contributed to that candidate's campaign, can be donated to a third-party association that supports that candidate,[20] or can be spent by the supporter herself on communications in support of the candidate. As the *Buckley* majority explains:

> The overall effect of the Act's contribution ceilings is merely . . . to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.[21]

The *Buckley* Court treats these alternative channels as a constitutionally acceptable substitute for the original form of the intended spending.

The final attribute of the proxy speech rationale is that political spending as proxy speech is *intransitive*—the speech value a spender may assign to money does not automatically pass from one person to another in any given transaction. Thus, I might give $100 to a political candidate or party, and that contribution is expressive and carries First Amendment value. However, once that $100 leaves my account, it does not retain the same quantity or intensity of First Amendment value that I had assigned to it. After all, the candidate or political party who receives it may spend the funds on an expressive purpose—such as broadcasting a campaign advertisement—or a non-expressive purpose, such as renting office space, paying travel expenses, or hiring legal counsel. Even if the candidate does spend the funds on an expressive purpose, that expression is that of the candidate, not of the original spender.

B. Expenditures: Enter the Commodity Rationale

As noted above, in its analysis of contributions, the Court had confronted questions regarding the creation and retention of First Amendment value in otherwise constitutionally inert funds. By contrast, the Court takes the First Amendment value of such spending as a given with political expenditures. But notably, in holding that campaign expenditures are subject to the highest degree of First Amendment protection, the Court never straightforwardly endorses a First Amendment "freedom to spend" or otherwise directly equates speech and money.

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[20] Separate First Amendment issues, of course, arise when part of a contributor's message is intended to be conveyed through the association through which she makes her contribution. Such associational issues are discussed *infra*, Section II.B.

[21] *Buckley*, 424 U.S at 21–22.

Instead, the Court simply assumes a direct correlation between campaign expenditures and volitional speech. The Court remarks, for example, that the "plain effect" of the expenditure ceiling is "to prohibit all individuals . . . and all groups . . . from voicing their views 'relative to a clearly identified candidate' through means that entail aggregate expenditures of more than $1,000 during a calendar year."[22] Later, the Court reiterates that "the independent expenditure ceiling . . . heavily burdens core First Amendment expression."[23] In an expenditure, volition is not deemed exhausted because whatever transactions occur are deemed to be part of the overall design of the spender. For example, a spender may hire a producer to create an advertisement, but that transaction is not deemed to extinguish the volitional impulse of the spender: the advertisement is still considered the spender's speech so long as the spender retains ultimate control over the advertisement. Thus, rather than being deemed proxy speech, an expenditure is treated as a direct expression of the speaker's views (i.e., one in which no transaction occurs in which the volitional impulse of the donation could be exhausted).

Similarly, the Court bypasses the question of whether the First Amendment value of an expenditure is context-dependent (i.e., tied to a particular organization or structure) or whether it is liquid. Although the Court recognizes that political expenditures, like political contributions, possess a degree of liquidity, the Court still holds that the expenditure ceiling is impermissible since it forecloses multiple channels of advocacy, personal and associational, leaving an individual who wishes to expend more than the limit on communication advocating the election of a federal candidate no lawful outlet. As the Court notes, "[T]he Act's dollar ceilings restrict the extent of the reasonable use of virtually every means of communicating information."[24] Thus, it is unnecessary for the Court to decide whether the First Amendment value of an expenditure is tied to a given organizational context, since it holds that the expenditure ceilings limit all organizational contexts.

As I have just explained, it is possible to treat two of the attributes of proxy speech—its intransitivity and its liquidity—as simply inapplicable to direct political expenditures while still remaining consistent with a volitional account of First Amendment value. Where the *Buckley* Court's analysis is incompatible with a volitional theory is in its assumption that the First Amendment value of an expenditure has a direct correlation with its dollar value—in essence, that it is monetizable or quantifiable. Here, a purely volitional account of First Amendment value cannot account for the differential treatment of contributions and expenditures. After all, a contributor presumably feels the same level of "intensity" regarding a $100 contribution in support of a particular candidate as she does about a $100 expenditure. To

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[22] *Id.* at 39–40.
[23] *Id.* at 47–48.
[24] *Id.* at 18 n.17.

put it another way, the Court's observation about contributions—"[a]t most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate"[25]—would seem to apply with equal accuracy as a description of an expenditure.

Instead, only a separate theory of First Amendment value can adequately account for the differential treatment of contributions and expenditures. In its analysis of expenditures, the Supreme Court employs a commodity approach to First Amendment value that differs markedly from the volitional reasoning it had applied to its analysis of contributions. Under such a theory, an expenditure, as soon as it is made, enters the marketplace and is assigned an objective value that is not dependent on its volitional content. Accordingly, the *Buckley* Court suggests that the expenditure limits raise constitutional concerns because such a restriction "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[26] Thus, the Court rules that Federal Election Campaign Act's (FECA's) "expenditure ceilings impose direct and substantial restraints on the quantity of political speech."[27] Under a commodity rationale, any law that reduces the amount of communication—measured by dollar value—existing in the marketplace is a presumptive First Amendment violation. Thus, the volitional theory and the commodity theory coexist, albeit somewhat uneasily, in the *Buckley* opinion, and this uncomfortable cohabitation continues over the decades of the development of campaign finance doctrine.

II. The Post-Buckley Case Law: Dormancy and Dominance

A. *Bellotti: The Commodity Approach's High-Water Mark*

Two years after the *Buckley* Court employed the commodity account of First Amendment value, the *Bellotti* Court, in a 5–4 decision, elevated this rationale to its high-water mark—one that persisted for over 30 years until the *Citizens United* decision pushed the commodity rationale to even greater heights.

The *Bellotti* case concerned a constitutional challenge to a Massachusetts statute that broadly prohibited business corporations from making any direct or indirect expenditures for the purpose of "influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."[28] Notably, unlike the federal corporate expenditures restriction at issue in *Citizens United*, the Massachusetts statute did not provide any means, such as a PAC or similar segregated fund, for the corporate point of view to be communi-

[25] *Id.* at 21.
[26] *Id.* at 19.
[27] *Id.* at 39.
[28] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 768 (1978).

cated to the general public.[29] Thus, the Massachusetts statute arguably banned not simply a funding source, but also a viewpoint—the corporate position on certain ballot questions—making such issues subjects "about which corporations may never make their ideas public."[30]

In *Bellotti*, more than 30 years prior to *Citizens United*, the Court was thus presented with an opportunity to rule on the question of whether corporations have "free speech rights." Under a volitional theory, to say that corporations "have" the same First Amendment rights as natural persons would be to say that the volitional impulse of a corporation is as valid a source of First Amendment value as the volitional impulse of an individual—either is capable of imbuing otherwise inert funds with constitutional significance. To make such an argument would necessarily involve the Court in a philosophical question: what does it mean for a corporation to have volition or intentionality to express itself?

Rather than facing this question squarely, the Court sidestepped it, explaining that the First Amendment protects societal interests that might be broader than those of the party seeking vindication:

> The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect. We hold that it does.[31]

While the *Buckley* Court had focused on the intention of the spender—whether her spending was intended to convey a message, and, if so, whether

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[29] A short overview of restrictions on corporate and union electioneering seems useful here. Since 1947, federal law had barred corporations and unions from using general treasury funds for independent expenditures. 2 U.S.C. § 441(b) (2006). Instead, corporations could engage in such election-related expenditures only by establishing and administering a "separate segregated fund," or PAC. To avoid vagueness and overbreadth problems, *Buckley* had narrowed this prohibition, construing it to apply only to expenditures that expressly advocated the election or defeat of a federal candidate. 424 U.S. at 43 n.51. Given widespread circumvention of the express advocacy restriction through "sham issue advertisements," Section 203 of the Bipartisan Campaign Reform Act of 2002 later extended this restriction to apply to "electioneering communications," which were television or radio advertisements that featured a federal candidate and were targeted to the relevant electorate within a certain time period prior to an election. 2 U.S.C. § 441b(b)(2) (2006). The Supreme Court in *McConnell* upheld the corporate electioneering communications ban against a facial constitutional challenge, reasoning that the existence of the PAC alternative gave corporations and unions a "constitutionally sufficient" alternative to participate in federal electoral politics. McConnell v. FEC, 540 U.S. 93, 203 (2003). The *McConnell* Court also cited the "unanimous view" of the Supreme Court in *National Right to Work* that the expenditures restriction "permits some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses of 'separate segregated fund[s],' which may be 'utilized for political purposes.'" *Id.* (alterations in original) (citation omitted) (quoting FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 201–02 (1982)). The Court had also upheld a state law analogous to the federal expenditures restriction in *Austin*. Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

[30] *Bellotti*, 494 U.S. at 784.

[31] *Id.* at 776.

this message survived the transaction—the *Bellotti* Court focuses entirely on the *hearer*. Indeed, referring back to the deliberative goals of the First Amendment, the Court measures First Amendment value entirely from the perspective of the audience, referring to "[t]he inherent worth of the speech in terms of its capacity for informing the public."[32] Such worth, according to the Court, "does not depend upon the identity of its source, whether corporation, association, union, or individual."[33]

But how is such a statement reconcilable with the holding of *Buckley*, which set up a hierarchy of First Amendment value depending on the directness with which a particular donation conveyed the volitional impulse of the spender? In order to hold that such value is not source-dependent, doesn't the Supreme Court have to answer the question that it claims it is not answering: whether corporations are equally capable of generating First Amendment value as individuals? In order to extricate itself from this bind, the *Bellotti* Court reaches a compromise between the volitional and commodity rationale. The only question it seeks to answer is whether the First Amendment protects communications with a corporate source *at all.* It treats the Massachusetts statute as a total ban on informational content from a particular source on a particular subject: "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[34] The Massachusetts statute's total restriction on ballot issue communications with a corporate source enables the Court to treat a source restriction, corporate funding, as identical to a viewpoint restriction—the corporate point of view. The equation of source and viewpoint made possible by the all-encompassing nature of the Massachusetts restriction makes this a much easier case from a First Amendment perspective—since viewpoint restrictions are almost never constitutional—and allows the Court to avoid the more difficult question of the relative First Amendment value of corporate versus individual expression.

The Court thus characterizes the question of where such corporate communications lie on the general spectrum of First Amendment value as beyond the scope of its opinion, declining to "address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment."[35] Instead, the Court concerns itself merely with the threshold question of whether the "corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection."[36] Thus, the *Bellotti* Court reaches a somewhat unstable compromise between the volitional and commodity approaches. The commodity approach answers a threshold question: Is the First Amendment implicated by a particular communication? Only once that threshold question

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[32] *Id.* at 777.
[33] *Id.*
[34] *Id.* at 783.
[35] *Id.* at 777.
[36] *Id.* at 778.

is answered need a court reach questions regarding the relative value of particular types of political spending, and the *Bellotti* Court never ventures beyond this threshold.

B. Through the Looking Glass: The Two Faces of First Amendment Volition

For decades of campaign finance case law, *Bellotti* served as the high-water mark of the commodity rationale. In subsequent cases, the Court, for the most part, retreated from this high-water mark, often employing volitional rhetoric, although it did so in ways that amplified the tensions between the volitional and commodity accounts. In particular, faced with a range of political spending transactions, the Court attempted to sort out which transactions represent a furtherance of an individual's volitional impulse, and which transactions represent a diversion or an exhaustion of that impulse. In the decades after *Buckley*, the Court was asked to consider whether contributions made to political associations and advocacy organizations could, like contributions to political parties, be deemed merely marginal speech, or whether such contributions should be accorded the full First Amendment protection applicable to expenditures. In applying this distinction to various entities, the Court passed on multiple opportunities to rethink the contribution/expenditure distinction.

At first, the cases closely followed the proxy speech rationale articulated by the *Buckley* Court. For example, in *California Medical Ass'n v. FEC*,[37] the Court upheld the constitutionality of FECA's $5000 limit on contributions to political action committees. In that case, the California Medical Association (CMA), a nonprofit doctors' association, challenged this contribution limit as applied to a multicandidate political action committee that it had formed, CALPAC. CMA argued that the limit on contributions to PACs should be treated as "an unconstitutional expenditure limitation because it restricts the ability of CMA to engage in political speech through a political committee . . . ."[38] In rejecting this argument, the Court noted that CMA remained free to engage in independent political advocacy, but that contributions—whether they were made to a candidate or to a political committee—remained "speech by proxy" that "is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection."[39] The Court explained that:

> [A]ppellants' claim that CALPAC is merely the mouthpiece of CMA is untenable. CALPAC instead is a separate legal entity that

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[37] 453 U.S. 182 (1981). Although *CMA* was decided on a 5–4 basis, the four justices who dissented did so on the basis that the appeal should have been dismissed for want of jurisdiction, contending that it should not have been certified for appellate resolution. *Id.* at 209 (Stewart, J., dissenting).

[38] *Id.* at 195 (plurality opinion).

[39] *Id.* at 196 (plurality opinion).

> receives funds from multiple sources and that engages in independent political advocacy. Of course, CMA would probably not contribute to CALPAC unless it agreed with the views espoused by CALPAC, but this sympathy of interests alone does not convert CALPAC's speech into that of CMA.[40]

Thus, despite the similarity of CMA's and CALPAC's presumed aims, a transaction was still deemed to exhaust the volitional impulse of the spender, except where the recipient is the mere "mouthpiece" of the spender. The *CMA* Court also rejected an equal protection challenge to the PAC contribution limit based on the fact that corporations, unlike individuals, had no limits placed on establishment, administration, and solicitation expenses for their associated PACs.

Significantly, in rejecting this challenge, the Court did not differentiate between the First Amendment *value* of political spending by a corporation rather than an individual, instead simply noting that "these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process."[41] This treatment of corporate status as a question of state interests rather than as a question of First Amendment value had major repercussions in the subsequent case law, as discussed *infra* Section II.C.

Despite the application of the proxy rationale in the *CMA* case, in the very next year, the Court avoided the question of differential First Amendment value in *Citizens Against Rent Control v. City of Berkeley*.[42] In that case, the Court struck down a $250 limitation on contributions to ballot-measure committees, reasoning that the anticorruption interests applicable to candidate elections did not apply in ballot initiative campaigns. As Justice Marshall's concurring opinion pointed out, the majority opinion was "silent on the standard of review it is applying to this contributions limitation."[43] As with the ballot-initiative restriction at issue in *Bellotti*, the Supreme Court in *Citizens Against Rent Control* (*CARC*) merely ruled that First Amendment interests were implicated in the restriction, without specifying whether the contributions to ballot-measure committees warranted the higher level of protection applicable to independent expenditures, or whether they were, like contributions to candidates, of only "minimal" First Amendment value.

For the first several cases after *Buckley*, the volitional logic of the contributions/expenditures distinction had managed to survive relatively intact—whether through endorsement (as in *CMA*) or through avoidance (as in the ballot initiative cases, *Bellotti* and *CARC*). Starting with the Court's 5–4 decision in *FEC v. National Conservative Political Action Committee* (*NCPAC*),[44] however, the Court continued to invoke a volitional rationale,

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[40] *Id.* (plurality opinion).
[41] *Id.* at 201 (majority opinion).
[42] 454 U.S. 290 (1981).
[43] *Id.* at 301 (Marshall, J., concurring).
[44] 470 U.S. 480 (1985).

but transformed its application almost beyond recognition. As the Court struggled to reconcile rights of political association with *Buckley*'s logic of proxy, it eventually arrived at an approach that treated contributions and expenditures as mirror-image opposites—political contributions would be treated as proxy speech, whose First Amendment value was nonmonetizable, liquid, and intransitive, while political expenditures by individuals and political organizations would be treated as monetizable, organizationally rooted, and transitive. Not until the Burger Court had given way to the Rehnquist Court did the Court directly confront the issue of whether such heightened First Amendment protection should apply with equal force to expenditures from the treasury funds of business corporations.

In *NCPAC*, the Court, consistent with its protective stance toward independent expenditures, struck down spending limits on independent expenditures for PACs seeking to further the election of a publicly financed candidate. The Court reasoned that the proxy speech rationale did not apply where associational rights were at issue. "[T]he 'proxy speech' approach is not useful . . . [where] the contributors obviously like the message they are hearing from [the] organization[ ] and want to add their voices to that message; otherwise they would not part with their money."[45] The Court reasoned that through contributions to a political organization, an individual chooses to engage in "associational speech," endorsing all communications by that group, so that they can be deemed extensions of the individual's original volitional impulse.[46] The problem with this "endorsement" theory is that it proves too much. If contributions to an independent PAC implicitly endorse all expenditures by that PAC—making them, by extension, the expression of the contributor—wouldn't the same be true for contributions to any other PAC, to a political party, or to a candidate?[47] For all of these examples, it is equally true that contributors "want to add their voices to that message; otherwise they would not part with their money."[48]

While continuing to employ the rhetoric of a volitional rationale, the *NCPAC* decision inverts its application, particularly with regard to the expressive significance of money. For the *Buckley* court, political contributions were treated as proxy speech, as nonmonetizable, liquid, and intransitive. In the *NCPAC* Court's analysis of expenditures, exactly the opposite propositions apply. Rather than being nonmonetizable and symbolic, political expenditures are treated as a direct expression of political will—expressive intention measured in the aggregate rather than individually.

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[45] *Id.* at 495.

[46] As Justice Thomas later described this holding, "Moreover, we have recently recognized that where the 'proxy' speech is endorsed by those who give, that speech is a fully protected exercise of the donors' associational rights." Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 639 (1996) (Thomas, J., concurring in the judgment and dissenting in part).

[47] *Cf.*, *e.g.*, Cal. Med. Ass'n v. FEC, 453 U.S. 182, 196 (1981) ("Of course, CMA would probably not contribute to CALPAC unless it agreed with the views espoused by CALPAC, but this sympathy of interests alone does not convert CALPAC's speech into that of CMA.").

[48] *NCPAC*, 470 U.S. at 495.

Second, rather than being viewed as liquid, First Amendment value is treated as dependent on an organizational structure. Although a contributor to a PAC could make independent expenditures herself, the PAC form is treated as indispensable to her expression. Finally, rather than treating the First Amendment value of money as intransitive—as with contributions to a candidate or party—the *NCPAC* Court treats expenditures made through a political association as presumptively endorsed by the contributor. Under *Buckley* and *CMA*, the assumption was that proxy speech was not an extension of the contributor's volitional impulse unless the proxy functioned as a mere "mouthpiece" for the contributor. Under *NCPAC*, the exact opposite assumption applies; the proxy organization is assumed to further the volitional impulse of the contributor.

C. MCFL*,* Austin*, and* McConnell*: First Amendment Volition and Corporate Political Spending*

As the Burger Court gave way to the Rehnquist Court, the Court faced renewed challenges to restrictions on corporate political spending. In three cases—*FEC v. Massachusetts Citizens for Life* (*MCFL*),[49] *Austin v. Michigan Chamber of Commerce*,[50] and *McConnell v. FEC*[51]—the Court assessed the constitutionality of a restriction on corporate independent expenditures, which was the same topic the Court later considered in *Citizens United.* In upholding the constitutionality of the expenditures restriction in these three cases, the Court largely avoided the commodity account of First Amendment value, which underlies the *Buckley* Court's overturning of the federal expenditures ceiling. Instead, the Court in these three cases seemed to import volitional reasoning into the expenditures arena. The net result was a compromise that survived for over 20 years, until *Citizens United*—that restrictions on political expenditures that lack a volitional nexus, such as expenditures out of corporate treasuries, pass constitutional muster.

In *Austin*, the Court adopted an "anti-distortion" rationale, refusing to treat political expenditures by business corporations as advancing the volitional impulse of shareholders. The *Austin* Court reasoned that the inclusion of such business-corporate expenditures would distort political discourse. However, in all three cases, the Court engaged in this volitional analysis only in its discussion of the state interests that could justify regulation, not as a matter of First Amendment value. Despite the supposed absence of any volitional nexus, then, business-corporate expenditures were deemed to have First Amendment value equivalent to any other expenditure, so that regulation of such expenditures must survive in the realm of strict scrutiny—an environment that ultimately proved fatal to the anti-distortion rationale in *Citizens United*.

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[49] 479 U.S. 238 (1986).
[50] 494 U.S. 652 (1990).
[51] 540 U.S. 93 (2003).

In a 5–4 decision in *MCFL*, the Court held the federal corporate expenditure restriction unconstitutional as applied to nonprofit ideological advocacy corporations that had no shareholders and that did not accept contributions from for-profit corporations or unions. The Court based its holding on the fact that "[i]ndividuals who contribute to appellee are fully aware of its political purposes, and in fact contribute precisely because they support those purposes."[52] Accordingly, the Court reasoned that such nonprofits "have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status."[53] Rather than treating such political expenditures as liquid—so that a state could constitutionally require that one organizational form rather than another be used—a plurality of the Court ruled that the separate segregated funds requirement imposed a "substantial" restriction on speech, at least for ideological nonprofits.[54] Thus, for expenditures, the *MCFL* Court deemed First Amendment significance to attach to the organizational structure through which they are spent, while viewing contributions as liquid—the expressive intention could be diverted to other organizations and forms of spending without imposing a burden on speech.

While treating the First Amendment value of political expenditures as monetizable—having a direct correlation with the amount spent—for ideological nonprofits, the *MCFL* Court emphasized that no such assumption should apply to the treasury funds of business corporations. Thus, the *MCFL* Court reasoned that, at least for political (as opposed to business) organizations, "[r]elative availability of funds is after all a rough barometer of public support."[55] The Court, however, distinguished the treasuries of business corporations as lacking such a volitional nexus:

> The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.[56]

Indeed, the Court identified the corporate expenditures restriction for business corporations as "meant to ensure that competition among actors in the political arena is truly competition among ideas."[57] But although the *MCFL* Court reasoned that the treasury funds of a business corporation are not directly related to any expressive intention of shareholders, the structure of the

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[52] 479 U.S. at 260–61.
[53] *Id.* at 263.
[54] *Id.* at 252.
[55] *Id.* at 258.
[56] *Id.*
[57] *Id.* at 259.

Court's decision suggested that strict scrutiny should apply to all political expenditures—whether by business corporations or by ideological nonprofits. Although the narrow holding of *MCFL* was limited to ideological nonprofits, the Court's analysis treated all corporate political expenditures as *prima facie* entitled to the highest level of First Amendment protection.

Austin expanded on *MCFL*'s reasoning, explaining that business corporate expenditures risk a "distortion" of our political discourse because the immensity of corporate treasuries bears no relation to the popular support for the ideas advanced therewith.[58] Although the *Citizens United* majority later overruled *Austin* as an "aberration,"[59] its holding closely followed the reasoning of the *MCFL* Court. In *Austin*, the Court considered a Michigan statute that, like the FECA corporate expenditure restriction, prohibited corporations from using treasury funds for independent expenditures in support of or in opposition to state candidates.[60] As in FECA, corporations could make such expenditures only through a separate segregated fund.[61]

Notably, although *Austin* dealt with political expenditures, which it called "political expression 'at the core of our electoral process and of the First Amendment freedoms,'"[62] it treated such expenditures in a manner more consistent with *Buckley's* treatment of low-value speech (political contributions) than of high-value speech (political expenditures). Thus, the Court treated the First Amendment value of corporate political spending as nonmonetizable, liquid, and transitive—that is, as the volitional equivalent of proxy speech. First, the Court treated such expressive value as nonmonetizable: corporate treasuries risk a "distortion" of the political process because their accumulated funds "have little or no correlation to the public's support for the corporation's political ideas."[63] Second, the Court treated the volitional impulse of shareholders as liquid: the PAC requirement was held not to be a "ban" on the viewpoints expressed, but instead was deemed a means to ensure that "the speech generated accurately reflects contributors' support for the corporation's political views."[64] Third, the Court treated the shareholder's volitional impulse as intransitive: the political spending of the corporation was not deemed to advance the volitional impulse of the shareholder without a specific dedication by the shareholder of such funds for political uses. This treatment of the corporate expenditures as nonmonetizable, liquid, and transitive would seem to indicate that the *Austin* Court deemed such expenditures to be low-value First Amendment speech. But rather than holding that such corporate expenditures had low First Amendment *value*, the *Austin* Court employed the nonmonetizable, liquid, and tran-

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[58] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990).
[59] Citizens United v. FEC, 130 S. Ct. 876, 907 (2010).
[60] 494 U.S. at 654.
[61] *Id.* at 654–55.
[62] *Id.* at 657 (quoting Buckley v. Valeo, 424 U.S. 1, 39 (1976)).
[63] *Id.* at 660.
[64] *Id.* at 660–61.

sitive nature of corporate expenditures as support for the state's asserted interest in the expenditure restrictions.

McConnell v. FEC follows upon the reasoning in *Austin*, further strengthening the congruence between the law on political contributions and for-profit corporate expenditures. Indeed, in its discussion of the corporate expenditures restriction, the *McConnell* Court quotes at length from the decision in *Beaumont v. FEC*, a case regarding the ban on corporate *contributions*:

> The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through registration and disclosure without jeopardizing the associational rights of advocacy organizations' members.[65]

Like the relatively marginal First Amendment value of political contributions, the First Amendment value of corporate expenditures is deemed to be nonmonetizable and liquid. This value is undiminished, even though the PAC requirement places both spending limits and organizational requirements on such corporate political spending. Once again, corporate political speech is treated in a manner similar to the treatment of low-value speech, but the Court imports these volitional arguments into a state-interests rationale.

D. Contributions Revisited: The Persistence of Volition

At the same time that the Court was importing a version of volitional analysis into the expenditures arena, it continued to employ volitional reasoning to accord political contributions only marginal First Amendment value. In *Nixon v. Shrink Missouri Government PAC*, the Court upheld a state candidate contribution limit that was lower, in real dollar terms, than the contribution limits upheld in *Buckley*.[66] Although the *MCFL* Court had previously ruled that the separate segregated funds requirement placed an unconstitutional burden on independent political expenditures, the Court showed no such solicitude for contributions, holding that "limiting contributions left communication significantly unimpaired."[67] Indeed, the Court ruled that contribution limits should be upheld unless they were "so radical in effect as to render political association ineffective, drive the sound of a

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[65] 540 U.S. at 204 (quoting Beaumont v. FEC, 539 U.S. 146, 163 (2003)) (citations and internal quotation marks omitted).

[66] 528 U.S. 377, 381 (2000).

[67] *Id.* at 387.

candidate's voice below the level of notice, and render contributions pointless."[68]

Similarly, in *Beaumont*, the Court upheld the ban on corporate contributions in a case that challenged the application of this ban to nonprofit advocacy corporations, even as *MCFL* had struck down the expenditures restriction as applied to nonprofit advocacy corporations.[69] In rejecting the challenge to the contribution ban the Court emphasized the speech-by-proxy rationale, under which contributions are deemed to retain little of the volitional impulse of the original spender:

> Within the realm of contributions generally, corporate contributions are furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members and of the public in receiving information. A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information.[70]

Thus, the Court in *Beaumont* refused the invitation to bring its analysis of nonprofit corporate contributions into line with its treatment of nonprofit corporate expenditures in *MCFL*, instead choosing to further entrench the contribution/expenditure distinction.

III. *Citizens United* and the Ascendancy of the Commodity Account

At the advent of the Roberts Court, the campaign finance case law had developed two nearly mirror-image categories of political spending: contributions having First Amendment value that is non-monetizable, liquid, and intransitive and expenditures possessing First Amendment significance that is monetizable, organizationally rooted, and transitive. Both doctrines—that applying to contributions and that applying to expenditures—employed the rhetoric of the volitional account of the First Amendment, but both reached nearly diametrically opposed results. Under a volitional theory, the Court had been primarily concerned with the development and refinement of First Amendment hierarchies—contribution v. expenditure, direct v. proxy, ideological v. for-profit—in which First Amendment value was assessed with respect to the spender's original expressive intent. At the same time, the commodity account that the *Buckley* Court had partially endorsed and that the *Bellotti* Court had applied as a threshold question of First Amendment

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[68] *Id.* at 397. Later, in *Randall v. Sorrell*, the Court found that a contribution limit could be so low as to fail to meet even this relatively lenient standard. 548 U.S. 230 (2006) (striking down Vermont's contribution limits).

[69] Beaumont v. FEC, 539 U.S. 146, 149.

[70] *Id.* at 161 n.8 (citations omitted).

value had remained largely dormant throughout the development of the campaign finance case law. In its initial cases—*Randall v. Sorrell*,[71] *FEC v. Wisconsin Right to Life*,[72] and *Davis v. FEC*[73]—the Roberts Court had demonstrated skepticism toward campaign finance regulation, but had not essentially disturbed the existing doctrinal framework.

A. Background of the Case

Citizens United started as a little-noticed lawsuit regarding a ninety-minute documentary called *Hillary: The Movie*. The so-called documentary was harshly critical of Hillary Clinton, who was then a presidential primary candidate, arguing that she was unfit to be Commander-in-Chief, unqualified for the presidency, and that "a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House."[74] In the period before the 2008 primary elections, Citizens United, a nonprofit corporation that received some part of its funding from business corporations, wished to distribute the documentary on cable television as a "video-on-demand" and to run broadcast advertisements promoting it.[75]

The lawsuit was brought as an as-applied challenge to federal restrictions on corporate and union express advocacy and electioneering communications[76]—restrictions that had been upheld against a facial challenge in *McConnell*, and whose state law counterpart had been upheld in *Austin*.[77] Rather than resolving the case on narrow grounds as an as-applied challenge, the Supreme Court made an unexpected move on the last day of the 2009 term. The Court requested expedited reargument on whether the Court's precedents in *Austin* and *McConnell* should be overturned, and whether the restrictions on corporate expenditures should be held facially unconstitutional, vastly expanding the scope and consequences of the case. Suddenly, this sleepy little case had the potential to transform federal politics. The political community sat up and took notice: forty-one amicus briefs were filed in the few short weeks of the Court's rushed briefing schedule. The end result was, of course, a sweeping decision, which cleared the way for unlimited corporate and union expenditures in federal elections for the first time in the modern era.

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[71] 548 U.S. 230 (2006).
[72] 551 U.S. 449 (2007).
[73] 128 S. Ct. 2759 (2008).
[74] Citizens United v. FEC, 130 S. Ct. 876, 890 (2010).
[75] *Id.* at 886–87.
[76] *See supra* note 28.
[77] McConnell v. FEC, 540 U.S. 93, 203 (2003); Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

B. The Commodity Approach in Ascendance

Citizens United represents a change of direction away from the volitional theory that was prevalent in the rhetoric and reasoning of previous Court majorities and towards the ascendancy of the commodity conception of First Amendment value. Indeed, while the volitional account and the commodity account had coexisted—albeit uneasily—over decades of campaign finance doctrine, the *Citizens United* majority articulates a radical version of the commodity account—a source-blind approach that would appear inconsistent with the volitional account, at least if applied to contributions as well as expenditures. In contrast to the doctrinal hierarchies of the volitional rationale, the *Citizens United* majority's view of speech commodities is flattened out: the majority opinion simply does not concern itself with inquiring into the source of First Amendment value, much less whether political spending maintains the volitional intent of a particular contributor. Instead, the majority adopts—and indeed constitutionalizes—a source-blind conception of First Amendment value: "the worth of speech 'does not depend upon the identity of its source, whether corporation, association, union, or individual.'"[78]

Under the *Citizens United* majority's account of First Amendment value, an expenditure on political communication, in the instant that it is made, is commodified: it enters into the economic marketplace and receives a market value. Such a market value is measured not from the perspective of the generator of the communication—the speaker or spender—but by the marketplace, which assigns an objective and quantifiable value to the communication, which is correlated to its monetary worth. The First Amendment terrain that the Court envisions is one of preexisting speech commodities with values corresponding to the economic marketplace. In the Court's view, each dollar of political spending is a quantum of presumptively equivalent First Amendment value, and any attempt to differentiate between these quanta would involve the state in impermissible discrimination.

C. Is Citizens United *on a Collision Course with* Buckley*?*

The *Citizens United* Court's seemingly simple source-blind doctrine has potentially sweeping implications for the law of campaign finance reform, at least if taken literally. After all, most federal and state campaign finance laws—including the framework established in FECA and BCRA—are predicated upon a system of source and amount restrictions that make distinctions among funds from corporations, political action committees, political parties, and individuals. Moreover, much of campaign finance jurisprudence is based on the framework set forth in *Buckley* that contributions, as proxy speech, are entitled to lesser First Amendment protection than political ex-

[78] *Citizens United*, 130 S. Ct. at 904 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978)).

penditures. Notably, while the *Citizens United* Court distinguishes the First Amendment case law on contributions, it does so only on the grounds that contributions have been held to have a definite nexus with "quid pro quo corruption," a nexus which the Court holds is absent as to independent expenditures.[79] The Court does not mention the better-known holding of *Buckley*, the proxy speech rationale, deeming contributions to have only marginal First Amendment value. Moreover, the Court notes that contributions are not at issue in the case before it in language that seems to invite further constitutional challenge: "Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny."[80] Can *Buckley*'s contribution/expenditures rationale long survive if one half of the doctrine—contributions—is predicated on hierarchical distinctions based on spender volition, while the other half of the doctrine—expenditures—expressly forbids any such inquiry and deems any hierarchical treatment constitutionally suspect?[81] As demonstrated below, the assumptions the *Citizens United* majority makes about the nature of corporate political spending are directly in conflict with the volitional assumptions underlying *Buckley*'s core holdings.

1. *First Amendment Monetization: Money as Speech*

First of all, as explained above, the *Buckley* Court's proxy rationale treated the First Amendment value of political contributions as non-monetizable—i.e., the amount of such contributions bore no direct correlation to the First Amendment value of the funded expression. Conversely, the First Amendment value of political expenditures was deemed to be directly correlated with the amount of money expended. In the political association cases, the Court extended this reasoning beyond individual expenditures, treating the First Amendment value of expenditures by political or ideological organizations as similarly monetizable. However, in *MCFL*, *Austin*, and *McConnell*, the Court had specifically disclaimed the application of this approach to spending by business corporations, reasoning that corporate treasury funds could not be deemed a "barometer" of popular support because corporate funds did not represent an exercise of political volition by shareholders. *Citizens United* overturns this distinction, rejecting *Austin* and *McConnell*'s "distortion" rationale directly, and rejecting *MCFL*'s "barometer" distinction by implication. The majority opinion derogates the "distortion" rationale as simple equalization[82]—the attempt to discriminate against corporate

[79] *Id.* at 901–02.
[80] *Id.* at 909.
[81] *See id.* at 899 ("Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers.").
[82] *Id.* at 904 (noting that "*Buckley* rejected the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections.'") (citation omitted).

sources simply because they, unlike ordinary citizens, have access to "immense aggregations of wealth that are accumulated with the help of the corporate form."[83] Thus, the *Citizens United* majority reasons, "[t]he rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."[84]

But, as explained above, such bald equalization was never the driving force behind the "distortion" rationale. Indeed, the *Austin* Court had explicitly recognized that "the mere fact that corporations may accumulate large amounts of wealth is not the justification for [the expenditures restriction]."[85] Instead, the *Austin* and *McConnell* Courts reasoned—in terms reminiscent of the volitional approach—that funds that "have little or no correlation to the public's support for the corporation's political ideas" risked distorting the political process.[86] But under the *Citizens United* Court's commodity account of First Amendment value, the First Amendment values of all political expenditures are treated as monetizable, whether or not they have any nexus with the expressive volition of an actual person.

2. *First Amendment Illiquidity: The Rigidity of the Corporate Form*

Buckley took a liquid approach to the First Amendment value of political contributions. If the expressive volition of the contributor could not express itself fully through contributions to a candidate or political party, such volition could be diverted to other channels—independent expenditures or political organizations—without substantial diminishment. As the case and statutory law developed, PACs were deemed a constitutionally sufficient outlet for the expressive volition of political spending, as repeatedly emphasized by the Courts in *Austin*, *NRWC*, and *McConnell*. Nonetheless, Justice Kennedy's opinion treats the First Amendment value of corporate political spending as absolutely illiquid, so that the requirement that corporations spend through PACs rather than out of their treasuries is treated as the simple equivalent of censorship. As the majority opinion states:

> Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. A PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak.[87]

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[83] *Id.* at 923 (Roberts, C.J., concurring) (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)) (internal quotation marks omitted).

[84] *Id.* at 905.

[85] 494 U.S. at 660.

[86] *Citizens United*, 130 S. Ct. at 905 (quoting *Austin*, 494 U.S. at 660) (internal quotation marks omitted).

[87] *Id.* at 897.

Justice Kennedy's opinion seeks to justify the invalidation of the sixty-year-old corporate expenditures restriction by reference to the ultimate deliberative goals of the First Amendment: "[b]y suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."[88] But, given that generations of Courts had held that the PAC alternative gave constitutionally sufficient room for the expression of the "corporate point-of-view," it is unclear on what evidence Justice Kennedy bases his diagnosis that our political system has suffered from a lack of input by corporations and other special interests.

3. *First Amendment Transitivity: Avoiding Corporate Personhood*

The source-blind approach adopted by the *Citizens United* Court allows the Court to sidestep the issue of transitivity, and, with it, perhaps the most mystifying question in the First Amendment treatment of corporate political spending: whose speech are we talking about? Is it that of management, the shareholders, or the corporate "person" itself? Although *Citizens United* was widely reported in the press as granting First Amendment rights to corporations, the majority opinion notably lacked a full-throated defense of the concept of corporate personhood. The majority never outright says that corporate political expenditures represent an expression of the political opinions of the corporation—after all, a corporation no more "has" political opinions than it has a favorite color. But under a volitional theory, value is generated in otherwise constitutionally inert funds only through an exercise of political volition. What is the source of the First Amendment value of spending from corporate treasuries?

In *Buckley,* the Court had treated expressive volition as *intransitive*, at least with regard to political contributions: the speech of a "proxy," such as a party or candidate, is not deemed to advance the volitional impulse of the contributor. But when dealing with corporate political spending, who is the relevant speaker whose volitional impulse should be taken into account? One option is that the communication expresses the "volition" of the corporation. But to take this option would require the Court to hold directly that a corporation is a First Amendment "person" and is an equally legitimate source of "volition" as a natural person. Thus far, the Court has been unwilling to argue this point directly, instead following *Bellotti*'s avoidance of this issue.[89]

The other option would be that a corporate communication could derive its First Amendment value from the shareholders' initial dedication of the funds to a communicative purpose. This would represent an extension of the associational rights rationale applied in *NCPAC* and *MCFL* to political orga-

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[88] *Id.* at 907.
[89] *See supra* Part II.A.

nizations. This explanation, however, lacks plausibility, at least for business corporations. It is difficult to argue that a shareholder's purchase of shares conveys any volitional impulse that would imbue these funds with First Amendment value. Similarly, it is hard to conceptualize a business corporation as an "association" in the First Amendment sense, so that any volitional impulse of the shareholder could be deemed subsumed in the expression of the corporation. In any case, if the First Amendment value of a corporate political expenditure derived from the will of the shareholders its value would seem to be more akin to the marginal value accorded to contributions or other "speech by proxy" than to the heightened First Amendment value accorded to direct political expenditures.

Instead of deciding between these two options and settling the question of whose speech is at issue, Justice Kennedy's opinion simply avoids the issue. Under the source-blind, fully commodified view of speech adopted by the majority, speakers are almost absent from the picture—there are only speech commodities and speech consumers, and the only relevant values are the values of the economic marketplace.

4. *First Amendment Fault Lines*

So where does all of this leave us? The *Citizens United* Court justifies its overruling of *Austin* and *McConnell* by referring to that line of precedent as an "aberration." Much attention has been focused on the question of state interests and whether *Austin*'s anti-distortion rationale or *Citizens United* is more in accord with the body of law.

But in terms of a separate line of doctrine—the doctrine that concerns itself with differential questions of First Amendment value—*Citizens United* does represent an outlier and a new high point for a commodity theory of First Amendment value. Nowhere in the Court's opinion is any regard paid to the volitional account of the creation and retention of First Amendment value, and the source-blind approach adopted by the majority seems to preclude volitional analysis. The Court's conception of the First Amendment is one in which all political spending has equivalent value. As such, it is radically at odds with the core reasoning of *Buckley*—that some political spending (i.e., contributions) is of lesser First Amendment value because it cannot truly be said to represent the volitional impulse of the spender who initially dedicated funds to an expressive purpose. It is also at odds with decades of campaign finance case law that had taken as one of its central inquiries the question of whether and to what extent a given political expenditure could be deemed to advance the volitional momentum of the original spender. Thus, we find ourselves on a fault line of First Amendment doctrine. As an armada of new challenges makes their way towards the Court, campaign finance doctrine appears profoundly unstable.

Conclusion: Quantity Without Quality?

The *Citizens United* majority opinion posits a radically simplistic vision of the First Amendment as applied to money in politics. In the Court's view, all speech commodities are of equivalent First Amendment value—whether they represent the political conviction of an individual or the profit-maximizing impetus of a business corporation. Thus, a court need not grapple with difficult questions of relative First Amendment value—the *quality* of the speech at issue. Instead, the court's only determination is a mechanical assessment of *quantity*. The majority's reasoning takes the following form:

1. Political speech is a First Amendment good.
2. Therefore, more speech is better than less speech.
3. Therefore, any law restricting speech is a *prima facie* violation of the First Amendment.

Money enters into the equation only as it pertains to speech quantity:

1. Money, in the form of political spending, can lead to the creation of speech.
2. Therefore, more money results in more speech.
3. Therefore, any law restricting political spending is a *prima facie* violation of the First Amendment.

Under this source-blind vision, whether a campaign advertisement is funded by an individual, a group of individuals, or a corporation makes no difference to the First Amendment value of such an advertisement—each such advertisement is a presumptively equal input into the marketplace of political ideas. Indeed, for the state to distinguish among such advertisements based on source is to engage in impermissible discrimination.

One can readily understand the surface appeal of such a source-blind approach—it holds out the illusion of neutrality to judges to whom inquiries into First Amendment value seem uncomfortably close to content- or even viewpoint-based discrimination. But the source-blind approach is highly troubling because its veneer of neutrality conceals a deeper and more fundamental inequality. As the Supreme Court remarked in *Buckley*, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."[90] Just as there would be nothing neutral about a race event that pitted a human runner against a race car, there is nothing neutral about a free market of ideas that requires individuals to outspend corporate treasuries in order to make their ideas available to the electorate.

The difference between individual and corporate election spending does not merely inhere in the aggregate amounts of money available to each—nor even in the relative advantages each enjoys in terms of the ability to amass and spend capital. Instead the difference inheres most fundamentally, and irreducibly, in the First Amendment value of the political spending of each. The volitional approach taken by the *Buckley* Court and by subsequent gen-

[90] Buckley v. Valeo, 424 U.S. 1, 97–98 (1976).

erations of courts was one effort to account for *quality* as well as quantity in confronting the vexed question of First Amendment value. Grappling with this question, as this Article has tracked, embroiled the Court in fine distinctions and in doctrinal quandaries. But to abandon the question of First Amendment value is no solution—it is to put our politics and our constitutional values on the auction block.