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THE IMPLICATIONS OF CITIZENS UNITED V. FEDERAL ELECTION COMMISSION ON TEXAS CORPORATE ELECTION LAWS

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HILLARY AND “THE HAMMER”:
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I. INTRODUCTION

In September 2005, then-United States Congressman and Majority Leader Tom “The Hammer” DeLay was criminally indicted on charges of conspiracy and money laundering by a Travis County grand jury for violating Texas election laws that banned corporate campaign contributions. Specifically, the charges alleged violations of Texas Election Code sections 253.003 (unlawfully making or accepting contributions), 253.094 (prohibiting contributions and expenditures of corporations and labor unions), and 253.104 (banning contributions to political parties within 60 days of a general election). A violation of any of these sections is considered a third degree felony in Texas.

Although the election law conspiracy charges were ultimately quashed, the former congressman and co-defendants faced charges for allegedly funneling $190,000 of corporate campaign contributions to Republican state candidates in 2002 in violation of state election law. In denying an appeal that sought to dismiss charges against co-defendants James Ellis and John Colyandro for unlawful acceptance of corporate campaign contributions and for money laundering, a Texas appellate court in Austin held that restrictions on campaign contributions were not subject to strict scrutiny analysis, but to a “less rigorous closely drawn or narrowly tailored” standard to meet a sufficiently important interest. Further, the appellate court held that restrictions on corporate campaign contributions were not overbroad to be considered a violation of the First Amendment.

In affirming the appellate court, the Texas Court of Criminal Appeals cited Citizens United v. Federal Election Commission, a sentinel Supreme Court case decided in January 2010 that held that federal election laws that ban corporate independent expenditures are unconstitutional. Defendant Colyandro argued that Citizens United, therefore, should factor
into the court’s analysis of the constitutionality of Texas campaign contribution laws. The Court distinguished this by stating that: “Although we agree that Citizens United has significantly affected the constitutional landscape with respect to corporate free speech by removing restrictions on independent corporate expenditures, we disagree with Colyandro’s contention that the decision has had any effect on the Court’s jurisprudence relating to corporate contributions.” However, what the court did not address—as it was not a question before the court—is that it is likely that Texas election laws that restrict the expenditures of labor unions and corporations in elections are unconstitutional because of the holdings of Citizens United. Included in this group are the statutes (sections 253.003, 253.094, and 253.104) that were at the core of the DeLay indictments and closely mirror federal regulations that were overruled in Citizens United. Specifically, 2 U.S.C. § 441b “prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech that is an ‘electioneering communication’ or for speech that expressly advocates the election or defeat of a candidate.”

II. PURPOSE OF COMMENT

The purpose of this Comment is fourfold. First, this Comment will provide an historical overview of key federal election laws, culminating in the holding of Citizens United v. Federal Election Commission, to establish the context and framework that may now conflict with current Texas election laws that govern the roles of corporations and labor unions in state elections. Second, this Comment will illustrate how Texas, through its application of article I, section 8 of its Constitution, has historically provided broader speech protections than the First Amendment of the U.S. Constitution. Third, this Comment will provide an analysis of the specific statutes that are likely unconstitutional based on Citizens United. Lastly, this Comment will suggest
legislative remedies the Texas Legislature, as well as the legislatures of other states, may consider in revising election laws to withstand a future First Amendment challenge in light of the 
*Citizens United* holding.

III. BACKGROUND

A. *Citizens United v. Federal Election Commission (FEC)*

In 2008, a nonprofit corporation by the name of Citizens United created a documentary film aimed to derail the presidential aspirations of then-United States Senator Hillary Rodham Clinton, who at the time was seeking the Democratic Party nomination for President of the United States.\(^16\) The film was entitled *Hillary: The Movie.*\(^17\)

Although a majority of the organization’s $12 million budget is derived from private individuals, Citizens United does receive some annual donations from for-profit corporations.\(^18\) Citizens United aimed to make *Hillary* available on video-on-demand within 30 days of the primary election.\(^19\) Anticipating this might be interpreted as a violation of 2 U.S.C. § 441b of the federal election code, the nonprofit sought relief in equity to declare the law unconstitutional as applied to the documentary and to enjoin the federal government from seeking criminal or civil penalties against the organization.\(^20\)

The district court granted summary judgment for the FEC, rejecting Citizen United’s request for an injunction.\(^21\) The United States Supreme Court ultimately assumed jurisdiction of the case, requesting the parties file supplemental briefs on the question of whether a prior Court holding in *Austin v. Michigan Chamber of Commerce*\(^22\) should be overruled\(^23\) as well as portions of the Court’s holding in *McConnell v. Federal Election Commission*,\(^24\) as both established the predicate for 2 U.S.C. § 441b.\(^25\) A review of both of these cases, coupled with an overview of *Buckley v. Valeo*,\(^26\) the landmark election law case that preceded and greatly influenced the
holdings of both *Austin* and *McConnell*, is critical in understanding the Court’s holding in *Citizens United*. These cases will be presented in chronological order and provide an important backdrop to understanding why certain sections of the Texas Election Code are likely now unconstitutional.

**B. Buckley v. Valeo**

*Buckley v. Valeo* was a *per curiam* decision issued in 1976 by the U.S. Supreme Court. It was, and arguably remains, “the most comprehensive reform legislation (ever) passed by Congress concerning the election of the President, Vice-President, and members of Congress.” The Federal Election Campaign Act of 1971, the legislation at the heart of the controversy, had been substantially amended in 1974 and eventually signed into law through congressional compromise with then-President Gerald Ford. The key amendments were as follows:

(a) [L]imits political contributions to candidates for federal elective office by an individual or a group to $1,000 and by a political committee to $5,000 to any single candidate per election, with an overall annual limitation of $25,000 by an individual contributor; (b) limits expenditures by individuals or groups “relative to a clearly identified candidate” to $1,000 per candidate per election, and by a candidate from his personal or family funds to various specified annual amounts depending upon the federal office sought, and restricts overall general election and primary campaign expenditures by candidates to various specified amounts, again depending upon the federal office sought; (c) requires political committees to keep detailed records of contributions and expenditures, including the name and address of each individual contributing in excess of $10, and his occupation and principal place of business if his contribution exceeds $100, and to file quarterly reports with the Federal Election Commission disclosing the source of every contribution exceeding $100 and the recipient and purpose of every expenditure over $100, and also requires every individual or group, other than a candidate or political committee, making contributions or expenditures exceeding $100 “other than by contribution to a political committee or candidate” to file a statement with the Commission.
The appellants sought declaratory judgment to have the Act ruled unconstitutional and to have it permanently enjoined from enforcement.\textsuperscript{32} The Court acknowledged that it was well within the province of Congress to establish election laws.\textsuperscript{33}

[T]he critical constitutional questions presented here go not to the basic power of Congress to legislate in this area, but to whether the specific legislation that Congress has enacted interferes with First Amendment freedoms or invidiously discriminates against non[-]incumbent candidates and minor parties in contravention of the Fifth Amendment.\textsuperscript{34}

Hence, the Supreme Court ultimately was tasked to analyze the newly adopted legislation in three key areas for constitutionality: contributions (18 U.S.C. § 608(b)),\textsuperscript{35} expenditures (18 U.S.C. § 608(e)(1)),\textsuperscript{36} and disclosure (2 U.S.C. § 434(e)).\textsuperscript{37}

1) Contributions

The Court applied the “O’Brien Test” in its evaluation of the amendment as it related to the issue of campaign contributions.\textsuperscript{38} In \textit{United States v. O’Brien},\textsuperscript{39} a case triggered by the burning of a draft card during the Vietnam War era, the Court held that speech could be restricted if there was “a sufficiently important governmental interest” in regulating conduct unrelated to the expressed speech.\textsuperscript{40} In the context of political speech, the Court articulated that while a contribution is a form of speech, the gesture alone does not communicate the core basis for the contributor’s support for the candidate.\textsuperscript{41}

The government argued that it satisfied the O’Brien test in restricting campaign contribution limits because of its primary goal of curtailing corruption and the appearance of corruption in elections.\textsuperscript{42} Two additional goals were also embedded in the Act: (1) a desire to level the playing field for candidates who are not affluent and (2) an attempt to contain the ever-increasing costs of campaigns, therefore making them more accessible to a greater pool of candidates.\textsuperscript{43} But corruption, or its appearance, was the greatest concern for the Court:
To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.\textsuperscript{44}

The Court held that on the subject of campaign contributions, First Amendment protections are not abridged if the government can demonstrate a “sufficient important interest” that is “closely drawn to avoid unnecessary abridgment of associational freedoms.”\textsuperscript{45} Hence, the Court ultimately held that limits on campaign contributions were constitutional and met the “rigorous standard of review established by our prior decisions.”\textsuperscript{46}

2) Expenditures

Provisions of the amended Federal Election Campaign Act of 1971 (hereinafter FECA) limited individuals, groups, and political parties to $1,000 “relative to a clearly identified candidate” during a calendar year.\textsuperscript{47} This also applied to independent expenditures made without coordination with a political campaign and quite possibly without the candidate’s awareness that such an expenditure had been contemplated.\textsuperscript{48} The law also limited the amount a candidate could spend from family or personal contributions\textsuperscript{49} and placed limits on the amount that could be spent on the entire campaign based on the level of the federal office sought.\textsuperscript{50}

The Court, however, looked at the issue of campaign expenditures through the lens of an “exacting scrutiny” level of review.\textsuperscript{51} Contrary to a campaign contribution, a campaign expenditure limit does not serve a governmental interest to lessen the reality nor the appearance of corruption.\textsuperscript{52} Instead, it simply hinders “vigorous advocacy” and the ability to “speak one’s mind.”\textsuperscript{53} In the end, the Supreme Court held that restrictions relating to independent expenditures, caps placed on family and personal dollars poured into a race, and limits placed on
the total dollar amounts to be spent on campaigns placed a substantial burden on candidates, individuals, and groups (including political parties) and violated the First Amendment.\(^\text{54}\)

3) Disclosure

Appellants challenged whether or not campaign contributions over $100 should be disclosed and made public\(^\text{55}\) and whether records of contributions in excess of $10 should be kept for a potential Federal Election Commission audit.\(^\text{56}\) To determine the constitutionality of the disclosure provisions, the Court applied strict scrutiny as its level of review.\(^\text{57}\) This precedent had been established by the Court in *NAACP v. Alabama ex rel. Patterson*,\(^\text{58}\) a freedom of association case that held that a state law that required an organization to turn over the names and addresses of its members violated the Due Process Clause of the Fourteenth Amendment and also served as an unconstitutional infringement on the members’ rights to freely associate with each other.\(^\text{59}\) Hence, the Court articulated that this provision in the amended FECA “must survive exacting scrutiny” to be held constitutional.\(^\text{60}\)

The burden, therefore, would be on the government to show there is a “relevant correlation” or “substantial relation” between the information required to be disclosed and the government interest to be achieved through the disclosure.\(^\text{61}\) As it related to campaigns, the Court distinguished the need for disclosure because it achieved three important objectives: (1) It allows voters to see where a candidate’s money is coming from and how it is spent;\(^\text{62}\) (2) it brings large contribution and expenditures to light;\(^\text{63}\) and (3) it provides an accounting and record keeping that can assist regulators in detecting violations of the law.\(^\text{64}\) The Court also rejected the notion that disclosing names of political contributors could potentially subject those individuals to the severe harassment and reprisals petitioners in *NAACP v. Alabama ex rel. Patterson* faced.\(^\text{65}\) In conclusion, the Court held there were “no constitutional infirmities”\(^\text{66}\) as it pertained
to the record keeping of donations to political committees that exceeded $10^{67} and to the
submitting of names, addresses, occupations and principal place of businesses of any contributor
who gave $100 or more to a political committee or candidate for public release by the FEC.\textsuperscript{68}

C. Austin v. Michigan Chamber of Commerce

\textit{Austin v. Michigan Chamber of Commerce},\textsuperscript{69} challenging the constitutionality of a
Michigan election law,\textsuperscript{70} stood for the proposition that political speech could be banned solely on
the organizational form of the speaker which, in the case at bar, was a nonprofit chamber of
commerce.\textsuperscript{71} In 1985, a special election was held to fill a vacancy to the Michigan House of
Representatives, prompting the Michigan Chamber of Commerce to advocate for a specific
candidate.\textsuperscript{72} The Chamber wanted to use funds from its general treasury, and not funds from a
segregated political action fund, to place an advertisement in a local newspaper to support the
candidate.\textsuperscript{73} Section 54(4) of the Michigan election law made it a felony to use corporate general
treasury funds for that purpose.\textsuperscript{74} Hence, the Michigan Chamber sought injunctive relief in
federal district court, arguing that the corporate ban law violated both the First and Fourteenth
Amendments of the U.S. Constitution.\textsuperscript{75}

The Chamber’s arguments for overturning the law were based in large part by the
holding of the Supreme Court in \textit{Federal Election Commission v. Massachusetts Citizens for
Life, Inc.} (hereinafter \textit{MCFL}),\textsuperscript{76} a sentinel case that held that 2 U.S.C. § 441b was
unconstitutional as applied to that organization because it “infringe[d] protected speech without a
compelling justification for such infringement.”\textsuperscript{77} \textit{MCFL}, a nonprofit organization that advanced
pro-life positions, disseminated a “Special Election Edition” in 1978 that urged its readers to
vote “pro-life,” listing some 400 candidates for various offices on the ballot and identifying them
as either supporting or opposing the organization’s views.\textsuperscript{78} The photographs of only thirteen
candidates were provided, all identified as supporting the organization’s positions. Because the publication was funded through the organization’s general treasury, a complaint was filed with the Federal Election Commission, alleging a violation of § 316 of the Federal Election Act of 1971. This Act was later amended in 1980 and became § 441b.

In an opinion penned by Justice Brennan, the Court wrote in MCFL that “[d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace.” The Court distinguished MCFL as an organization that had a core mission of disseminating ideas as opposed to accumulating capital. As the Court noted, “[w]hile MCFL may derive some advantages from its corporate form, those are advantages that redound to its benefit as a political organization, not as a profit-making enterprise.” Hence, the Court opined that MCFL, and other organizations of the same nonprofit form, did not “pose a threat to corruption.”

Although the Michigan Chamber and MCFL are both nonprofit organizations, Justice Marshall wrote in Austin that they were distinguishable in form in three key areas. First, the Court noted that MCFL was created to promote political ideas and that its bylaws state its purpose is to “foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political and other forms of activities.” The Chamber, while also promoting political ideas, provides its members with services and benefits that are economic in nature.

The second area of distinction was that MCFL lacked shareholders, meaning there would be no financial disincentive or consequence for a member to disagree with an organizational viewpoint. Although the Court noted the Chamber also lacked shareholders, the benefits
derived from membership might serve as a disincentive for a member to oppose the group, its policies or political positions. Hence, membership in the Chamber is more akin to being a shareholder of a business corporation.

Lastly, the Court distinguished the two nonprofits as to their respective independence from for-profit interests. It was the policy of MCFL to never accept corporate contributions; its funding came from individual donors. In stark contrast, more than three-quarters of the Chamber’s 8,000 members are business corporations.

Quoting from *Federal Election Committee v. National Conservative Political Action Committee*, another sentinel case dealing with federal election laws, the Court stated that there remains a “compelling governmental interest in preventing corruption [that] support[s] the restriction of the influence of political war chests funneled through the corporate form.” Therefore, the Court held that Michigan had a “sufficiently compelling rationale” to restrict the use of general treasury funds to expressly advocate for a candidate. If afforded the same exemption as MCFL, corporations could simply funnel money through the Chamber’s general treasury, serving as a “conduit for corporate political spending.” Therefore, *Austin* chartered and established a new legal proposition that corporate independent expenditures can be restricted based on the structure or form of the corporation.

**D. McConnell v. Federal Election Commission**

*McConnell v. Federal Election Commission* was a massive Supreme Court case that challenged the constitutionality of the Bipartisan Campaign Reform Act of 2002 (hereinafter BRCA), popularly known as McCain-Feingold. The Court consolidated eleven separate lawsuits that had been filed challenging the law by such diverse organizations as the National Rifle Association and the California Democratic Party and by individuals such as Senator Mitch
McConnell of Kentucky and Congressman Ron Paul of Texas. As it related to the participation of corporations in elections, the petitioners challenged section 201 of BRCA that defined “electioneering communications” as any cable, satellite or broadcast communication that identified a specific candidate for federal office that was aired for voters 60 days before a general or special election, or 30 days before a primary. Further, the petitioners challenged section 203 that placed a prohibition on “Corporate and Labor Disbursements for Electioneering Communications” that are financed through the general treasuries of the corporation or union.

1) Section 201 of the Bipartisan Campaign Reform Act

In upholding this section of the Bipartisan Campaign Reform Act, the Court rejected the plaintiffs’ argument that Buckley v. Valeo had created a distinguishable line of protected speech between express advocacy, speech that clearly advances the election or defeat of a candidate, and issue advocacy. The rationale articulated by the Court was that they were indistinguishable. In other words, even without using what the Court termed “express words of advocacy” of “vote for” or “vote against,” the issue ad message could still be crafted in such a way as to influence the outcome of an election. Further, the Court held that the term “electioneering communication” was not vague but was clearly defined as consisting of four elements: “(1) . . . a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners.”

2) Section 203 of the Bipartisan Campaign Reform Act

The plaintiffs argued that banning corporate and labor union disbursements from political communications was both underinclusive and overbroad. They considered it underinclusive because media corporations were exempt from the regulation and because requirements that
mandated corporations establish a segregated fund to form a Political Action Committee (PAC) did not, for example, apply to advertising on the Internet.\(^{113}\) It was argued the regulation was overbroad in that justifications advanced by the government to justify the regulation did not touch substantial portions of speech covered by the elections communications definition.\(^{114}\)

The Court rejected these arguments on several grounds. First, the Court held that unions and corporations can finance issue ads by establishing a PAC using segregated, non-general treasury funds.\(^{115}\) The Court stated corporations and unions could run true issue ads if specific candidates were not identified.\(^{116}\) A second justification for supporting the law was the Court’s reaffirmation that an issue ad run on the eve of a primary or general election is indistinguishable from an express advocacy ad.\(^{117}\) The Court agreed with Congress that legislation was needed to stem the flow of soft money financed by unions and corporations on television ads during the periods immediately before Election Day.\(^{118}\)

IV. ANALYSIS

Among the key holdings of *Citizens United v. Federal Election Commission*,\(^{119}\) there are three that have serious implications for Texas election law: (1) The Supreme Court overturned its previous decision in *Austin v. Michigan Chamber of Commerce* that held that political speech could be banned because of the corporate form of the speaker,\(^{120}\) (2) 2 U.S.C. § 441b, the election law that made it unlawful for a labor union, national bank, or corporation to make a campaign contribution or expenditure from its general treasury, was held unconstitutional and violative of the First Amendment,\(^{121}\) and (3) with the exception of the disclosure provisions of BRCA, the Court also struck down most of its previous holdings in *McConnell v. Federal Election Commission*, declaring the McCain-Feingold regulations, including section 203, were in violation of protected speech afforded by the First Amendment.\(^{122}\)
Chapter 253 of the Texas Election Code sets forth the guidelines for campaign contributions and expenditures for state elections. Subchapter A provides general guidelines, among them the admonishment found in section 253.004 that “[a] person may not knowingly make or authorize a political expenditure in violation of this chapter.” Subchapter D specifically governs the participation of corporations and labor unions in Texas elections. Corporations and labor unions are prohibited from participating in Texas elections outside the confines of a general-purpose committee, defined in part as a political organization formed to support or oppose two or more “unidentified” candidates or ballot measures. Corporations in Texas are banned from such campaign activities as sending out direct mail in support or defeat of a candidate, phone banks, or assisting with get-out-the-vote efforts. When analyzed against the Supreme Court’s holding in *Citizens United*, there are six state election laws in section 253 affecting corporations that are likely unconstitutional. Additionally, three other sections of the Texas Election Code, sections 251, 254 and 257, will likely require revision because of their legislative ties to section 253. An analysis of these laws and why they may clash with the First Amendment is provided below.

**A. Section 253.100—Expenditures for General-Purpose Committee**

This specific section of the Texas Election Code lists what a corporation can and cannot do in an election. For example, corporate funds can be used to establish a general-purpose committee and corporations can expend funds for that general-purpose committee for such administrative expenses as office equipment, Internet service, utilities and for clerical support. A corporation may only solicit funds from its stockholders and employees. A corporation in Texas is currently prohibited from participating in express advocacy to support or defeat a specific candidate.
In *Citizens United*, the Supreme Court reaffirmed its holding in *First National Bank of Boston v. Bellotti*\(^{139}\) that First Amendment protections also extend to corporations and that the government cannot restrict speech because the speaker is a corporation.\(^{140}\) Looking back historically, the Court said that it had previously invalidated federal election regulations that have placed limits on campaign expenditures, a key holding in *Buckley*.\(^{141}\)

The Court opined that laws that allow corporations to form a political action committee (PAC) do not overcome the First Amendment deficiencies of laws that ban corporations from directly speaking in an election, which is the case in Texas.\(^{142}\) “By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices from reaching the public and advising voters on which persons or entities are hostile to their interests.”\(^{143}\) The Court was clear that it was speaking to independent expenditures that have not been coordinated with a candidate and not soft money contributions.\(^{144}\) Independent expenditures, concluded the Court, do not “give rise to corruption or the appearance of corruption” even when made by a corporation.\(^{145}\) It should also be noted that 2 U.S.C. § 441b, similar to Texas election law, required corporations to solicit funds for a PAC solely from their stockholders and employees.\(^{146}\) The entire § 441b was declared unconstitutional.\(^{147}\)

**B. Sections 253.096 and 253.097–Ballot Measures**

Section 253.096 of the Texas Election Code permits a corporation to support or oppose a ballot question solely through a PAC.\(^{148}\) Further, section 253.097 limits the direct expenditure on the ballot measure to $100 without triggering detailed reporting requirements.\(^{149}\) Although disclosure requirements were upheld in *Citizens United*,\(^{150}\) these provisions limiting speech are in direct conflict with its holding\(^{151}\) and that of *Bellotti*.\(^{152}\)
Federal election law invalidated in *Citizens United*, limited the participation of corporations and unions for express advocacy or electioneering communications solely through the establishment of a political action committee (PAC). In *Citizens United*, the Court emphasized that while there are millions of companies in the United States, there are fewer than 2,000 corporate PACs. A political action committee had to be in existence before a corporation could donate to it. Because of this reality, it is possible the corporation’s views on issues and on candidates might not be made known until the PAC was established, which could be too late. Coupled with this, the Court noted that wealthy corporations have the financial resources to lobby Congress on issues when smaller corporations may not, making the law more detrimental to a smaller entity. The Court also noted that a loophole existed in federal election law that allowed wealthy individuals to spend unlimited amounts in independent expenditures. *Bellotti* was a Supreme Court case that invalidated a state law that banned the use of corporate treasury funds—funds completely independent of a PAC—to support or oppose a ballot measure if there was no direct tie to the interests of the corporation and the question being placed before voters. In that case, the Court rejected the state’s arguments that allowing corporations to expressly advocate for or against ballot questions would drown out the viewpoints of individuals, undermining the democratic process. “In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.” Prior to *Citizens United*, therefore, the Texas law could likely withstand constitutional scrutiny because state election laws allowed the corporation to speak through a PAC. But this is insufficient to support constitutionality today. The Court in *Citizens United* stated unequivocally that *Bellotti*
was not a case about viewpoint discrimination; rather, Belotti stood for the proposition that the government can’t ban a corporation from speaking.\textsuperscript{164}

It should also be reemphasized that the Supreme Court had previously invalidated limits on independent expenditures by candidates in Buckley, declaring such restrictions a violation of the First Amendment.\textsuperscript{165} The Court stated in Buckley that “[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quality of expression by restricting the number of issues discussed, the depth of their exploration and the size of the audience reached.”\textsuperscript{166}

C. Section 253.098–Communication Only With Stockholders or Members

In Texas, a corporation may make a direct campaign expenditure to communicate election-related information with its stockholders but not to the general public.\textsuperscript{167} In fact, the solicitation of funds to support the corporation’s PAC can only be financed by the donations of officers, stockholders, employees and their family members.\textsuperscript{168} To provide an illustration, if Petsmart wanted to create a general-purpose committee in Texas in compliance with section 253.097 to support a ballot question to abolish animal euthanasia, the funds for the PAC could only come from the officers, stockholders and employees of Petsmart and their families.\textsuperscript{169} Under current Texas law pursuant to section 253.098, Petsmart would be banned from asking customers at check out if they voluntarily wanted to donate a dollar to support the passage of the legislation.

In Citizens United, the Court dedicated an entire subsection to the issue of stockholders as the Government had justified its limits on corporate speech because of a perceived need to protect the interests of shareholders who might not endorse the political speech advanced by the corporation.\textsuperscript{170} This would allow the government to potentially restrict the speech of the press as
many media organizations are now owned by corporations. The Court felt that any disagreements as to what political messages a corporation put forth would best be resolved “through the procedures of the corporate democracy” and not through the suppression of speech.

The Court held that § 441b as it related to stockholders was underinclusive because there was a strict ban on political speech for the benefit of a dissenting shareholder only 30 or 60 days before an election. The regulation was considered overinclusive because it applied to all corporations, even a limited liability company that might only have one shareholder.

D. Section 253.099–Nonpartisan Voter Registration and Get-Out-The-Vote Campaigns

Although the Court did not specifically address nonpartisan voter registration and get-out-the-vote (GOTV) efforts in its opinion in Citizens United, these provisions were addressed in § 441b that was repealed. In that provision, a corporation was permitted to participate in voter registration and GOTV efforts if they were aimed exclusively to its employees and shareholders. Texas election law mirrors the invalidated federal law in section 253.099 as it pertains to voter registration and GOTV drives. This prohibition can also be found in the list of corporate “may nots” found in section 253.100.

Prior to Citizens United, for example, it would have been unlawful for WalMart to conduct a phone bank effort encouraging its customers to exercise their right to vote in a federal election, even without advocating for or against a particular candidate on the ballot. The Court in Citizens United opined that corporations, like individuals, are not monolithic and should not be forced to overcome “onerous restrictions” to exercise First Amendment guarantees. There may be scenarios, stated the Court, when a corporation may be best equipped because of its
expertise to address an issue or point out errors in speech made by elected officials and candidates.\textsuperscript{181}

E. Section 253.104–Contribution to Political Party

In Texas, a corporation or labor union is banned from making a contribution to a political party when it is within the 60 day period leading up to a general election.\textsuperscript{182} A violation of this provision constitutes a third degree felony offense.\textsuperscript{183} Further, section 257 of the Texas Election Code dictates that corporate contributions to a political party can be used for administrative overhead, to underwrite a state convention or finance a primary election.\textsuperscript{184} In analyzing the restrictions that ban corporations in Texas from participating in express advocacy,\textsuperscript{185} coupled by the restrictions of section 257 of the Election Code, one can deduct the purpose of these regulations are to foreclose the potential for the funneling of corporate funds to political parties for the purposes of express advocacy to support or defeat a candidate.

While this scenario was not addressed specifically in \textit{Citizens United}, it is clear that the Court considered banning corporations from releasing any form of an electioneering communication sixty days before an election as violative of the First Amendment as this was the central issue surrounding \textit{Hillary: The Movie}.\textsuperscript{186} In condemning the sixty day ban, the Court gave examples of advocacy that would be considered felonious acts under the provisions of federal election law in existence when the Citizens United lawsuit was filed.\textsuperscript{187} For example, it would have been a felony for the Sierra Club to run an ad sixty days before an election urging the public to vote against a member of Congress who supported logging in national forests.\textsuperscript{188} On the other end of the political spectrum, it would also be a felony if the National Rifle Association advocated against an incumbent who supported a handgun ban if the NRA’s viewpoints were publicly expressed sixty days or less before a general election.\textsuperscript{189} The Court
opined these were all examples of government censorship.\textsuperscript{190} Further, the Court stated that laws that restrict political speech must be evaluated under strict scrutiny, placing the burden on the government to prove such restrictions “further[] a compelling interest and is narrowly tailored to achieve that interest.”\textsuperscript{191} The First Amendment, held the Court, could not be abridged based on content or the viewpoints of the speaker.\textsuperscript{192} Hence, it is unlikely the sixty day ban of corporate contributions to political parties in Texas and the limitations of the use of those funds can be reconciled with the holdings of \textit{Citizens United}.

V. TEXAS AND THE FIRST AMENDMENT

Article I, section 8 of the Texas Constitution states:

Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.\textsuperscript{193}

The Supreme Court of Texas has affirmed that speech protections found in the state’s Constitution exceed those of its federal counterpart.\textsuperscript{194} Drafters of the 1876 Texas Constitution attempted to amend the language of article I, section 8 to more closely mirror the language of the First Amendment\textsuperscript{195} found in the U.S. Constitution.\textsuperscript{196} This proposal was rejected.\textsuperscript{197} In 1920, before the First Amendment of the U.S. Constitution had been incorporated to the states, the highest court in Texas held that even “fighting words” that might not be protected under federal law, would be considered protected expression under article I, section 8.\textsuperscript{198}

A sentinel Texas case involving this state’s “Freedom of Speech and Press; Libel”\textsuperscript{199} constitutional provision and the issue of prior restraint is \textit{Davenport v. Garcia}.\textsuperscript{200} In that case, the court stated that two requirements must be met to justify a prior restraint of speech: (1) there
must be an “imminent, severe harm,” and (2) that there is no less restrictive alternative to address that threat. The Texas Supreme Court has said it is its preference to sanction a speaker who has abused the right, rather than apply “pre-speech sanctions.” “Article one, section eight of the Texas Constitution . . . grants an affirmative right to ‘speak . . . on any subject,’ but also holds the speaker ‘responsible for the abuse of that privilege.’”

VI. SUGGESTIONS FOR LEGISLATIVE AMENDMENTS TO THE TEXAS ELECTION CODE

A. Legislative reactions to Citizens United

Because of the timing of the Citizens United decision, few states have had an opportunity to amend state laws affecting corporate campaign contributions as there are states, including Texas, which did not convene a regular session of their legislature in 2010. The Texas Legislature will reconvene on January 11, 2011. The Colorado General Assembly, however, was in session in 2010 and passed a law in May to address the holdings in Citizens United. The new Colorado law allows corporations and labor unions to make independent expenditures, but prohibits direct campaign contributions to candidates. The law also specifies that the new election law applies only to domestic corporations.

Several federal bills, including the DISCLOSE (acronym for “Democracy is Strengthened by Casting Light On Spending in Elections”) Act, have also been introduced to ban contributions in federal elections by domestic corporations with foreign parent companies. Federal election law still prohibits foreign nationals from making contributions to any election for federal, state or local office and the Citizens United holding didn’t affect this provision of law. Contrary to the Supreme Court’s admonishments, a few bills have been introduced that would either require the approval of the majority of the corporation’s shareholders before a
campaign expenditure could be made\textsuperscript{213} or would remove that discretion entirely from a corporation’s board of directors.\textsuperscript{214} The Pick Your Poison Act of 2010 was introduced to amend federal law to make it illegal for corporations with paid or registered lobbyists to make expenditures for electioneering purposes.\textsuperscript{215} To date, none of these federal proposals have been signed into law by President Obama.\textsuperscript{216}

\textbf{B. Recommendations for the Texas Legislature}

There are several steps the Texas Legislature can take to bring the Election Code into compliance with the holding of \textit{Citizens United}. These suggestions also take into account the areas of election law the Court upheld in \textit{Citizens United} and \textit{McConnell} and have essentially remained unchanged since the challenges to the Federal Election Campaign Act of 1971, the challenged legislation in \textit{Buckley v. Valeo}.

\textbf{1) Ban or limit direct corporate contributions to candidates}

As was referenced by the Court in \textit{Citizens United}, direct campaign contribution limits were challenged and upheld in \textit{Buckley}.\textsuperscript{217} The appearance and potential for quid pro quo politics between corporations and those seeking office was a sufficient basis to establish such a limitation.\textsuperscript{218} “[T]he primary interest served by the limitations and, indeed, by the Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.”\textsuperscript{219} The Court said that even under rigorous judicial review, the government would be justified in limiting direct contributions without infringing upon the First Amendment.\textsuperscript{220} The Colorado law bans direct contributions.\textsuperscript{221} Other states, such as Nevada, permit direct corporate campaign contribution to candidates in the amount of $10,000 per corporate entity, per election cycle, a practice in existence before the \textit{Citizens United} ruling.\textsuperscript{222}
Therefore, the Texas Legislature could well justify a limit or ban on direct corporate campaign contributions to candidates based on *Buckley*, a decision that has guided election law for 40 years.

2) **Allow domestic corporate independent expenditures**

As this is the cornerstone of *Citizens United*, the Texas Legislature will need to repeal or amend the majority of subchapter D of section 253 of the Election Code that pertains to corporations and unions. As long as the expenditure is truly independent from coordination with an identified candidate, any law that would continue to ban such campaign expenditures in light of *Citizens United* will likely not survive a court challenge. The Supreme Court also condemned the practice of speakers seeking governmental preapproval of speech due to the possible threat of facing serious criminal penalties. This practice constitutes a prior restraint, the Court stated. Consequently, the penalty provisions found throughout sections 253 and 257 of the Texas Election Code will also need to be modified or repealed.

Federal law prohibits a “foreign national” from making a contribution or expenditure at the federal, state or local level. The definition of foreign national includes “a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.” This law, therefore, does not apply to a foreign company having its principal place of business in the United States or a U.S. company, such as Nestlé or Red Bull, with foreign companies as parents. Hence, the Texas legislature may want to clarify corporate election law in this specific area.

3) **Require Disclosure**

Disclosure requirements have withstood constitutional challenges in *Buckley*, *McConnell*, and in *Citizens United*. The Court has stated disclosure laws are constitutional.
if the government can prove a “substantial” relationship between the law and a “sufficiently important government interest.” With the exception of using this information for harassment or retaliatory purposes, disclosure is considered constitutional and nonviolative of First Amendment principles. Disclosure, stated the Court, “is a less restrictive alternative to more comprehensive regulations of speech.

Section 201 of the McCain-Feingold laws, including those pertaining to disclosure, were upheld in Citizens United. If corporations are permitted to make independent expenditures in Texas elections, the legislature will most likely want an accounting of information as required currently under Texas Election Code section 255.001.

VII. CONCLUSION

Citizens United v. FEC has created a major shift in federal and state election laws and its full impact will not be known for decades to come, especially in today’s world of smart phones, pay-for-view programming, blogs, Twitter and Facebook. The highest court of this land has spoken, however: Corporations can make independent expenditures in campaigns but it is not a free for all. The Texas Legislature, and many throughout this country, can take affirmative steps to maintain control of state elections through limitations on direct contributions to candidates, clarifying laws banning the participation of foreign influences, and expanding disclosure requirements suitable to sustain a First Amendment court challenge.


2 See TX. ELEC. CODE ANN. § 253.003(a) (West 2009) (stating that “[a] person may not knowingly make a political contribution in violation of this chapter.”). The chapter also states that a person may not unlawfully accept a political contribution. TX. ELEC. CODE ANN. § 253.003(b) (West 2009). A violation of either subsection (a) or (b) is a third degree felony in Texas. TX. ELEC. CODE ANN. § 253.003(e) (West 2009).

3 See TX. ELEC. CODE ANN. § 253.094 (West 2009) (affirming that corporations and labor unions are prohibited from making contributions not authorized in the section of the election code); see also TX. ELEC. CODE ANN § 253.100(d) (West 2009) (specifically prohibiting corporations and labor unions from participating in such activities as political consulting to support or oppose a candidate, get out the vote efforts for the general public, or political polling). But see TX. ELEC. CODE ANN § 253.100(a) (West 2009) (“A corporation, acting alone or with one or more other corporations, may make one or more political expenditures to finance the establishment or administration of a general-purpose committee.”).
See TEX. ELEC. CODE ANN. § 253.104 (West 2009) (stating that a corporation or labor union may not make an authorized contribution “during a period beginning on the 60th day before the date of a general election for state and county officer and continuing through the day of the election”).

TEX. ELEC. CODE ANN. § 253.003(e) (West 2009); TEX. ELEC. CODE § 253.094(c) (West 2009); TEX. ELEC. CODE ANN. § 253.104(c) (West 2009); see also TEX. PENAL CODE ANN. § 12.34 (West 2009) (instructing that an individual found guilty of a third degree felony can be incarcerated between two and ten years and may be fined up to $10,000).


8 *Ex parte* Ellis, 279 S.W.3d 1, 19 (Tex. App.—Austin 2008, pet. granted). The court acknowledged that the U.S. Supreme Court has given great deference to Congress on the issue of restrictions on corporate campaign contributions. *Ex parte* Ellis, 279 S.W.3d 1, 19 (Tex. App.—Austin 2008, pet. granted). Quoting from *Federal Election Commission v. Beaumont*, the court...

9 Ex parte Ellis, 279 S.W.3d 1, 21 (Tex. App.—Austin 2008, pet. granted). Compare City of Houston v. Hill, 482 U.S. 451, 458 (1987) (stating that a party must show that restrictions must touch upon a substantial amount of protected conduct to prevail in an overbreadth facial challenge), and New York v. Ferber, 458 U.S. 747, 769 (1982) (stating that the overbreadth doctrine should only be used “as a last resort”), with Comm’n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 436 (Tex. 1998) (stating that although some unconstitutional application of a law could be conceived, it does not necessarily make the law overbroad on its face).


15 See 2 U.S.C. § 441b (2002) (“It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, . . . to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative [for] . . . Congress.”). An “electioneering communication” is defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary election. 2 U.S.C. § 434(f)(3)(A) (Supp IV 1970) (current version at 2 U.S.C. § 434(f)(3)(A) (2007)). In a presidential election, the distribution refers to a communication that “[c]an be received by 50,000 or more persons in a State where a primary election . . . is being held within 30 days.” 11 CFR § 100.29(b)(3)(ii) (2010).


movie/27588977 (last visited Dec. 27, 2010). A synopsis of the film described it as attempting
to “expose the truth behind former First Lady and Democratic New York Senator Hillary
Rodham Clinton's conflicts in the past, and her liberal plot for the future through showcased
statements, perceived flip-flops, and alleged distortions.” FILM.COM,

or percentage of annual corporate donations was not disclosed in the opinion. However, the
876, 894 (2010).


matter of law, the FEC was entitled to summary judgment and that 2 U.S.C. § 441b was
constitutional as applied to Hillary because there could be “no other interpretation than to inform
the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous
place in a President Hillary Clinton world, and that viewers should vote against her.”).


Comm’n, 130 S.Ct. 876 (2010)).


29 See Buckley v. Valeo, 424 U.S. 1, 7 (1976) (per curiam) (quoting from the holding from the circuit court’s opinion of this case in 519 F.2d 821, 831 (1975)).


32 Buckley v. Valeo, 424 U.S. 1, 8–9 (1976) (per curiam).

33 Buckley v. Valeo, 424 U.S. 1, 13 (1976) (per curiam). See U.S. CONST. art. 1, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law
make or alter such Regulations, except as to the Places of ch[oo]sing Senators.”). There was a
time in history when primary elections were not considered within the same context as general
elections in Article I. Newberry v. United States, 256 U.S. 232, 250 (1921). However, the
Court ultimately interpreted primaries as being within the purview of Congress to regulate.
United States v. Classic, 313 U.S. 299, 319–20 (1941). The Court has also acknowledged the
authority of Congress to legislate the elections of the U.S. President and Vice


35 See 18 U.S.C. § 608(b) (1974), repealed by Pub.L. 94-283, Title II, § 201(a), May 11, 1976,
90 Stat. 496 (limiting the contributions to any candidate for federal office to $1,000). The same
section provided that “[n]o political committee (other than a principal campaign committee) shall
make contributions to any candidate with respect to any election for Federal office which, in the
aggregate, exceed $5,000.” 18 U.S.C. § 608(b)(2) (1974), repealed by Pub.L. 94-283, Title II,
§ 201(a), May 11, 1976, 90 Stat. 496. Further, the section states that “[n]o individual shall make
contributions aggregating more than $25,000 in any calendar year.” 18 U.S.C. § 608(b)(3)

36 See 18 U.S.C. § 608(e)(1) (1974), repealed by Pub.L. 94-283, Title II, § 201(a), May 11,
1976, 90 Stat. 496 (stating that “[n]o person may make any expenditure . . . relative to a clearly
identified candidate during a calendar year which, when added to all other expenditures made by
such person during the year advocating the election or defeat of such candidate, exceeds $1,000.”
Subsection (c)(2)(B) of § 608 further provides that an expenditure is made on behalf of a
candidate, including a vice presidential candidate, if it is made by (i) an authorized committee or
any other agent of the candidate for the purposes of making any expenditure; or (ii) any person
authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure. 18 U.S.C. § 608 (c)(2)(B) (1974), repealed by Pub.L. 94-283, Title II, § 201(a), May 11, 1976, 90 Stat. 496.

37 See 2 U.S.C. § 434(e) (Supp. IV 1970) (current version at 2 U.S.C. § 434 (2010)) (requiring that any contribution to a political committee or candidate, in an aggregate amount in excess of $100 within a calendar year would require a filing with the FEC).

38 Buckley v. Valeo, 424 U.S. 1, 15 (1976) (per curiam); see United States v. O'Brien, 391 U.S. 367, 369 (1968) (referring to a case heard during the Vietnam Era in which a defendant had been convicted for burning his draft card, a gesture he considered symbolic speech protected by the First Amendment).

39 United States v. O'Brien, 391 U.S. 367 (1968). David Paul O’Brien was tried and convicted for burning his Selective Service card in front of a South Boston Courthouse. United States v. O'Brien, 391 U.S. 367, 369 (1968). O’Brien did not deny burning the draft card, but said he did it to influence the public to adopt his anti-war views. United States v. O’Brien, 391 U.S. 367, 369–70 (1968). In a 7-1 opinion authored by Chief Justice Earl Warren, the Court upheld the conviction, establishing what is commonly referred to since the ruling as the “O’Brien Test” that "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest” and the interest is “unrelated to the suppression of free expression.” United States v. O’Brien, OYEZ ORG., http://www.oyez.org/cases/1960-1969/1967/1967_232 (last visited Nov. 15, 2010).

The Court went further to state that “at most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.” Buckley v. Valeo, 424 U.S. 1, 21 (1976) (per curiam).

See Buckley v. Valeo, 424 U.S. 1, 25–26 (1976) (per curiam) (stating that a person who is not from a wealthy family must rely solely on contributions to finance his or her campaign).

Congress and the public had become informed of the various aspects of the 1972 campaign. Revelations of huge contributions from the dairy industry, a number of corporations (illegally) and ambassadors and potential ambassadors, made the 1972 election a watershed for public confidence in the electoral system. Such matters dramatize rather than define the widespread concerns over the problem of undue influence. After extensive investigation, Congress concluded that such corrupt and pernicious practices are more likely to occur when there are no effective limits on amount of campaign expenditure. In short, big-spending campaigns pull like a magnetic field.

Buckley v. Valeo, 519 F.2d 821, 839 (1st Cir. 1975).

Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam). Compare Cousins v. Wigoda, 419 U.S. 477, 487 (1975) (stating that the freedom to associate with those who hold similar political beliefs is protected by the First and Fourteenth Amendments), and NAACP v. Button, 371 U.S. 415, 438 (1963) (“Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”), with Shelton v. Tucker, 364 U.S. 479, 488 (1960) (holding that while a governmental interest for abridging personal rights may be “legitimate and substantial,” it should be achieved by the least restrictive means to achieve its end goal).

Buckley v. Valeo, 424 U.S. 1, 29 (1976) (per curiam). Compare Kusper v. Pontikes, 414 U.S. 51, 57 (1973) (holding the right of association is a “basic constitutional freedom”), and Shelton
with Cousins v. Wigoda, 419 U.S. 477, 488 (1975) (declaring a “significant interference” with
protected rights of political association “may be sustained if the State demonstrates a sufficiently
important interest and employs means closely drawn to avoid unnecessary abridgment of
associational freedoms”), and NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460–61
(1958) (stating that government “action which may have the effect of curtailing the freedom to
associate is subject to the closest scrutiny”).


48 Buckley v. Valeo, 424 U.S. 1, 47. (1976) (per curiam).

49 See Buckley v. Valeo, 424 U.S. 1, 51 (1976) (per curiam) (limiting personal or family
contributions to $50,000 for the offices of President or Vice President, to $35,000 for a United
States Senate seat, and $25,000 for a race for the United States House of Representatives).

50 Buckley v. Valeo, 424 U.S. 1, 54–55 (1976) (per curiam). Section 608(c) of the Act capped a
presidential nominee to $10 million in seeking the nomination and allowed the nominee to spend
candidate for United States Senate could spend $150,000 or “the greater of eight cents multiplied
by the voting age population.” Buckley v. Valeo, 424 U.S. 1, 55 (1976) (per curiam). A
candidate for the United States House of Representatives was limited to $70,000. Buckley v.
Valeo, 424 U.S. 1, 55 (1976) (per curiam). In contrast, the reported campaign expenditures of
Barack Obama for his 2008 race for president exceeded $780 million. Candidate (P80003338)
bin/cancomsrs/?_08+P80003338 (last visited Nov. 13, 2010).
See Buckley v. Valeo, 424 U.S. 1, 44 (1976) (per curiam) (stating that where political expression is an issue, the government bears the burden to justify legislation that limits First Amendment protections).


Buckley v. Valeo, 424 U.S. 1, 48 (1976) (per curiam). The Court went on to say that the ability of the government to suppress the speech of “some elements in our society” in order to enhance the speech of others is “wholly foreign to the First Amendment.” Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam).

Buckley v. Valeo, 424 U.S. 1, 58–59 (1976) (per curiam); see also Mills v. Alabama, 384 U.S. 214, 215 (1966) (holding that an Alabama law that criminalized the writing of a political newspaper editorial on election day was unconstitutional). “[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs,” including discussions about candidates. Mills v. Alabama, 384 U.S. 214, 218 (1966).


Buckley v. Valeo, 424 U.S. 1, 82 (1976) (per curiam). The law required that a political committee keep record of all donors who contribute more than $10. 2 U.S.C. § 432(c)(2) (Supp. IV 1970) (current version at 2 U.S.C. § 432(c)(2) (2010)). This accounting would be required in
the event of an audit by the Federal Election Commission of the campaign contribution records.


57 Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam). “To withstand strict scrutiny, a law must be in furtherance of a compelling government interest and go no further than necessary in impeding First Amendment rights. This rigorous test is only applied when there is a substantial interference with First Amendment rights.” *Strict Scrutiny*, FIRST AMENDMENT CTR., http://www.fac.org/about.aspx?item=glossary (last visited Nov. 14, 2010).

58 NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958). *NAACP v. Alabama ex rel. Patterson*, was a civil rights-era case that commenced when the Attorney General of Alabama sought to halt the operations of the civil rights organization. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 452 (1958). The state requested production of the names and addresses of the organization’s members throughout the entire state. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 453 (1958). When the organization refused to produce the documents on constitutional grounds, they were held in civil contempt and fined $10,000 with a threat of an escalating fine of $100,000 if they refused to produce the requested documents as ordered by the circuit court. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 453–54 (1958).

59 *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958) (holding that the privacy and freedom of association interests involved in forcing an organization to provide its membership list to the state bring such a demand within the purview of Fourteenth Amendment protections).

60 Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam). *Compare* Gibson v. Fla. Legis. Comm., 372 U.S. 539, 546 (1963) (opining that the government must show a “substantial relation” between the information sought and its compelling state interests when infringing upon the
constitutionally protected rights of the press, association and speech), *and* NAACP v. Button, 371 U.S. 415, 438 (1963) (stating that the Court has consistently required the showing of a compelling state interest when laws come into conflict with First Amendment issues), *with* Bates v. Little Rock, 361 U.S. 516, 524 (1960) (holding that “[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.”).

61 Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam).


63 Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam); see also Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936) (affirming that an informed public is the strongest restraint against an inefficient government).

64 *See* Buckley v. Valeo, 424 U.S. 1, 67–68 (1976) (per curiam) (stating that the disclosure requirements serve a “substantial” interest on behalf of the government).

65 *See* Buckley v. Valeo, 424 U.S. 1, 69–70 (1976) (per curiam) (affirming that it would be “highly speculative” to infer that campaign donors would be subjected to public harassment). In *NAACP v. Alabama ex rel. Patterson*, the petitioners made a record of hostility that had been aimed at its members. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).


Examples of the hostility included being fired from a job, threats of physical harm, and other economic hardships.

67 See Buckley v. Valeo, 424 U.S. 1, 84 (1976) (per curiam) (stating that the Court would not inquire whether disclosing what could be conceived by some as a small gift could violate the First Amendment).

68 Buckley v. Valeo, 424 U.S. 1, 84 (1976) (per curiam).


70 See Mich. Comp. Laws Ann. § 169.254(1) (West 2010) (“[A] corporation, joint stock company, domestic dependent sovereign, or labor organization shall not make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of a contribution”). A contribution is further defined as

- a payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person, made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question.


74 *See Mich. Comp. Laws Ann.* § 169.254(4) (West 2010) (“A person who knowingly violates this section is guilty of a felony punishable, if the person is an individual, by a fine of not more than $5,000.00 or imprisonment for not more than 3 years, or both, or, if the person is not an individual, by a fine of not more than $10,000.00”).


Fed. Election Comm’n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 238 (1986). The thirteen named candidates were either listed as having a 100% voting record in step with the organization or were on record as stating positions in line with the organization’s viewpoint. Fed. Election Comm’n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 244 (1986).


See Fed. Election Comm’n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 259 (1986) (noting that Congress had placed these restrictions to stem the “corroding effect” of money in elections and, therefore, the purpose of § 441b is “to ensure that competition among actors in the political arena is truly competition among ideas”).


See Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 662 (1990), overruled by Citizens United v. Fed. Election Comm’n, 130 S.Ct. 876 (2010) (highlighting the Chamber’s position that it is a nonprofit organization that has incorporated and should be viewed in the same light the Court has viewed other nonprofit organizations such as Massachusetts Citizens for Life); see also Fed. Election Comm’n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263 (1986) (stating that some corporations are more similar in form to a volunteer political organization).

Citizens for Life, Inc., 479 U.S. 238, 264 (1986) (stating that Massachusetts Citizens for life was formed for “the express purpose of promoting political ideas”).


90 See Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 663 (1990), overruled by Citizens United v. Fed. Election Comm’n, 130 S.Ct. 876 (2010) (stating that while a member may not agree with the political viewpoints of the organization, the benefits of membership would be sufficient to influence the member to remain involved and pay dues). On its current website, the Chamber says it provides lobbyists on behalf of its members to “champion member interests” and also provides credit card processing services. Member Benefits, MICH. CHAMBER OF COMMERCE, http://www.michamber.com/mx/memberbenefits (last visited Nov. 15, 2010).


While [2 U.S.C.] § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress’ judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.


The segregated fund could only be filled with (1) contributions from members of the corporation who were individuals, (2) stockholders, and (3) directors and officers. Mich. Comp. Laws § 169.255(3) (West 1979) (current version at Mich. Comp. Laws. Ann. § 169.255(3) (West 2010)).

99 See Citizens United v. Fed. Election Comm’n, 130 S.Ct. 876, 903 (2010) (stating that Austin had been supported by and rested upon three policy goals: (1) Anti-distortion, (2) anti-corruption, and (3) shareholder protection).


Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976) (per curiam). In Buckley, words such as “vote for,” “elect,” “support,” “defeat,” and “reject” were considered to advocate the support or defeat of a candidate. Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976) (per curiam).


117 See McConnell v. Fed. Election Comm’n, 540 U.S. 93, 206 (2003), abrogated by Citizens United v. Fed. Election Comm’n, 130 S.Ct. 876 (2010) (acknowledging there was a dispute between the plaintiffs, respondents, and the district court as to the actual percentage of issue ads that identified a specific candidate in the periods before the primary and general elections when express advocacy would otherwise be banned).


TEX. ELEC. CODE ANN. § 253 (West 2009). Divided into six subchapters (A though F), this Chapter is entitled “Restrictions on Contributions and Expenditures.” TEX. ELEC. CODE ANN. § 253 (West 2009).

TEX. ELEC. CODE ANN. § 253.004 (West 2009). Texas law states that if an individual knows that a campaign contribution came from a source in violation of election law, it can’t be expended in whole or in part. TEX. ELEC. CODE ANN. § 235.005 (West 2009).

TEX. ELEC. CODE ANN. §§ 253.091–.104 (West 2009).

TEX. ELEC. CODE ANN. § 253.100(a) (West 2009).
See TEX. ELEC. CODE ANN. § 251.001(14) (West 2009) (defining a general-purpose committee). A general-purpose committee can also be formed to assist two or more elected incumbents as long as they are unidentified. TEX. ELEC. CODE ANN. § 251.001(14)(B) (West 2009).

In 2004, a civil lawsuit was filed in the 345th Judicial District in Austin by three defeated Democratic candidates who had lost their 2002 election bids to their Republican opponents. Westar Energy, Inc. v. Sylvester, No. 03-05-00276-CV, 2005 Tex. App. LEXIS 8277, at *1–2 (Tex. App.—Austin Oct. 6, 2005, no pet.) (mem. op.). The plaintiffs alleged that illegal corporate campaign contributions had been made to Texans for a Republican Majority Political Action Committee (TRMPAC) and those corporate funds had been used to support their Republican opponents. Westar Energy, Inc. v. Sylvester, No. 03-05-00276-CV, 2005 Tex. App. LEXIS 8277, at *1–2 (Tex. App.—Austin Oct. 6, 2005, no pet.) (mem. op.). Among the donors were national corporations including AT&T Corp., Bacardi USA, and Sears Roebuck. Sylvia Moreno & R. Jeffrey Smith, Treasurer of DeLay Group Broke Texas Election Law, THE WASHINGTON POST (May 27, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/05/26/AR2005052600875.html.

TEX. ELEC. CODE ANN. § 253.100(d)(2) (West 2009).

TEX. ELEC. CODE ANN. § 253.100(d)(4) (West 2009).

TEX. ELEC. CODE ANN. § 253.100 (West 2009).

TEX. ELEC. CODE ANN. § 253.100(a) (West 2009).

TEX. ELEC. CODE ANN. § 253.100(a)(3) (West 2009).

TEX. ELEC. CODE ANN. § 253.100(a)(2) (West 2009).

TEX. ELEC. CODE ANN. § 253.100(a)(4) (West 2009).
TEX. ELEC. CODE ANN. § 253.100(a)(6) (West 2009).

TEX. ELEC. CODE ANN. § 253.100(b) (West 2009). In Texas, a labor union may only participate in elections within the same context as a corporation. TEX. ELEC. CODE ANN. § 253.100(c) (West 2009).

TEX. ELEC. CODE ANN. § 253.100(d)(1)–(8) (West 2009). A corporation can’t recruit a candidate to run for an office. TEX. ELEC. CODE ANN. § 253.100(d)(8) (West 2009). A corporation can’t create brochures or send out direct mail to support or oppose a specific candidate. TEX. ELEC. CODE ANN. § 253.100(d)(3) (West 2009). A corporation can’t conduct a poll aimed to support or oppose a candidate. TEX. ELEC. CODE ANN. § 253.100(d)(7) (West 2009).


See Citizens United v. Fed. Election Comm’n, 130 S.Ct. 876, 897 (2010) (opining that a political action committees are subject to extensive regulations and are expensive to administer). When Citizens United was argued, there were 22 states that banned the use of corporate treasury funds for independent expenditures for campaigns. Brief for Appellee at 18, n. 3, Citizens United v. Fed. Election Comm’n, 130 S.Ct. 876, 897 (2010) (No. 08-205). At the end of calendar year 2009, there were more than 4,600 political action committees registered with the Federal Election Commission. PAC Activity Remains Steady in 2009, FED. ELECTION COMM’N (Apr. 6, 2010), http://www.legistorm.com/score/viewPressRelease/id/7025.html. There were 1,803 state political action committees (including general, specific, and judicial related PACs) registered with the Texas Ethics Commission during that same cycle. Political Committees Sorted by Contributions Received During Calendar Year 2009, TEX. ETHICS COMM’N (Oct. 14, 2010), available at http://www.ethics.state.tx.us/tedd/2009_PACs_by_Total_Contribs.pdf.

See Citizens United v. Fed. Election Comm’n, 130 S.Ct. 876, 907 (2010) (stating that allowing corporate viewpoints to be heard, the public will be empowered to decide what is true and what is not).


See TEX. ELEC. CODE ANN. § 253.096 (2009) (stating a “corporation or labor organization may make campaign contributions from its own property in connection with an election on a measure only to a political committee for supporting or opposing measures exclusively.”).


A corporation or labor organization not acting in concert with another person may make one or more direct campaign expenditures from its own property in connection with an election on a measure if the corporation or labor organization makes the expenditures in accordance with Section 253.061 or 253.062 as if the corporation or labor organization were an individual.

TEX. ELEC. CODE ANN. § 253.097 (2009). Section 253.061 regulates when the PAC spends $100 or less on a measure. TEX. ELEC. CODE ANN. § 253.061 (West 2009). If a PAC contributes in excess of $100 to a measure, they are required to keep detailed records of all contributions and expenditures and file disclosure reports with the Texas Ethics Commission as required specified in Chapter 254 of the Texas Election Code. TEX. ELEC. CODE ANN. § 253.062 (West 2009); see also TEX. ELEC. CODE ANN. § 254.031 (West 2009) (providing directions and regulations on the contents of what must be reported to the state in a campaign contribution and expense report), and TEX. ELEC. CODE ANN. § 254.151 (West 2009) (specifying the reporting requirements of a general-purpose committee). The general-purpose committee must identify every donor and the amount the donor donated to the PAC. TEX. ELEC. CODE ANN. § 253.151(9) (West 2009).


See First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978) (holding that the type of speech the appellants sought to advance was “the heart” of the First Amendment).


First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 795 (1978). The Massachusetts law made it illegal for a corporation to use funds to influence a ballot question unless it “materially affect[ed]” the business. MASS. GEN. LAWS ANN., ch. 55, § 8 (West Supp. 1977) (current version at MASS. GEN. LAWS ANN., ch. 55, § 8 (West 2010)). The law in question further stated that “[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.” MASS. GEN. LAWS ANN., ch. 55, § 8 (West Supp. 1977) (current version at MASS. GEN. LAWS ANN., ch. 55, § 8 (West 2010)). In the 1970s when this law was in effect, a
corporation that violated this election provision could be fined up to $50,000 and its officers could be both fined sent to prison for a year. MASS. GEN. LAWS ANN., ch. 55, § 8 (West Supp. 1977) (current version at MASS. GEN. LAWS ANN., ch. 55, § 8 (West 2010)).


162 TEX. ELEC. CODE ANN. § 253.096 (West 2009).


167 See TEX. ELEC. CODE ANN. § 253.098(a) (West 2009) (“A corporation or labor organization may make one or more direct campaign expenditures from its own property for the purpose of communicating directly with its stockholders or members, as applicable, or with the families of its stockholders or members.”); see also TEX. ELEC. CODE ANN. § 253.100(d)(1)–(8) (West 2009) (providing a list of campaign activities a corporation is both permitted and prohibited from participating in). In Texas, a corporation can only conduct an election poll for the benefit of its stockholders or members. TEX. ELEC. CODE ANN. § 253.100(d)(7) (West 2009). A Texas corporation is barred from recruiting a candidate to run for office, even from within its own ranks. TEX. ELEC. CODE ANN. § 253.100(d)(8) (West 2009).

168 TEX. ELEC. CODE ANN. § 253.100(b) (West 2009).


http://www.freepress.net/ownership/chart/main?gclid=CKmegom6gKYCFc4M2godSA0osw (last visited Dec. 22, 2010). General Electric, Inc. is the parent company of NBC and Telemundo. Ownership Chart: The Big Six, Free Press,
http://www.freepress.net/ownership/chart/main?gclid=CKmegom6gKYCFc4M2godSA0osw (last visited Dec. 22, 2010). CBS Corporation is the largest supplier of video to Google and owns the CBS Television Network and book publishing giant Simon & Schuster. Ownership Chart: The Big Six, Free Press,


See TEX. ELEC. CODE ANN. § 253.099 (West 2009) (“A corporation or labor organization may make one or more expenditures to finance nonpartisan voter registration and get-out-the-vote campaigns aimed at its stockholders or members, as applicable, or at the families of its stockholders or members.”).

TEX. ELEC. CODE ANN. § 253.100(d)(4) (West 2009).


182 TEX. ELEC. CODE ANN. § 253.104 (West 2009); see also TEX. ELEC. CODE ANN. § 275.004(a) (West 2009) (stating that “[b]eginning on the 60th day before the date of the general election for state and county officers and continuing through the day of the election, a political party may not knowingly accept a contribution authorized by Section 253.104 or make an expenditure from the account required by Section 257.002”). Section 257.002 provides that funds contributed to a political party can only be used for administrative overhead, for the costs associated with a party’s convention, or for the administration of a primary election. TEX. ELEC. CODE ANN. § 257.002(a)(1)–(2) (West 2009).

183 See TEX. ELEC. CODE ANN. § 253.104(c) (West 2009) (stating that a corporation or labor union that knowingly violates this section commits a third degree felony); see also TEX. ELEC. CODE ANN. § 257.004(b) (West 2009) (declaring that political parties that knowingly violate the sixty day rule are guilty of a third degree felony).

184 TEX. ELEC. CODE ANN. § 257.002(a) (West 2009).

185 TEX. ELEC. CODE ANN. § 253.100(d) (West 2009).


193 TEX. CONST. art. I, § 8.


195 See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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”).


198 See Davenport v. Garcia, 834 S.W.2d 4, 9 (Tex. 1992) (referencing Ex parte Tucker, 110 Tex. 335, 220 S.W. 75, 76 (1920)). Contra Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942) (upholding the conviction of a Jehovah Witness charged with calling a city marshal a “God damned racketeer” in violation of state law that made it illegal to utter words considered derisive or annoying to anyone in public).

199 TEX. CONST. art. I, § 8.

Davenport v. Garcia, 834 S.W.2d 4, 10 (Tex. 1992); see also Ex parte McCormick, 129 Tex. Crim. 457, 88 S.W.2d 104, 106 (1935) (emphasizing the historical fact that the placement of freedom of speech protections in the U.S. Bill of Rights stemmed from the desire to overcome the repression of speech experienced by citizens in England and in the American colonies); Ex parte Foster, 44 Tex. Crim. 423, 71 S.W. 593, 595 (1903) (opining that within a judicial context, the court has no authority to ban the publishing of testimony unless it is of an obscene nature).

Davenport v. Garcia, 834 S.W.2d 4, 10 (Tex. 1992); see also Neb. Press Ass’n v. Stuart, 427 U.S. 539, 565 (1976) (stating that a trial court must attempt to identify whether or not a less restrictive means exists before issuing a prior restraint on speech).


208 S.B. 10–203, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010). The law was passed in response to interrogatories the Governor of Colorado had submitted to that state’s Supreme Court to clarify the constitutionality of election laws that banned political contributions from labor unions and corporations in light of the holding of *Citizens United v. FEC*. *In re Interrogatories Propounded by Governor Ritter, Jr., Concerning Effect of Citizens United v. FEC on Certain Provisions of Article XXIII of Constitution of State*, 227 P.3d 892 (Colo. 2010) (en banc). The Supreme Court of Colorado held that laws that banned corporations from express advocacy to support or defeat a candidate were unconstitutional. *In re Interrogatories Propounded by Governor Ritter, Jr., Concerning Effect of Citizens United v. FEC on Certain Provisions of Article XXIII of Constitution of State*, 227 P.3d 892, 894 (Colo. 2010) (en banc). The court also held that laws that banned corporations and labor unions from funding electioneering communications were also unconstitutional. *In re Interrogatories Propounded by Governor Ritter, Jr., Concerning Effect of Citizens United v. FEC on Certain Provisions of Article XXIII of Constitution of State*, 227 P.3d 892, 894 (Colo. 2010) (en banc).


210 See DISCLOSE Act, S. 3628, 111th Cong. (2d Sess. 2010) (proposing an amendment to the Federal Election Campaign Act of 1971 that would “prohibit foreign influence in Federal elections” and would also prohibit government contractors from spending funds in elections).
See also DISCLOSE Act, H.R. 5175, 111th Cong. (2d Sess. 2010) (proposing similar bans as S. 3628, 111th Cong. (2d Sess. 2010)).


See S.B. 10–203, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010) (stating unequivocally that “[n]othing in these recent judicial decisions authorizes either the direct contribution of resources from corporations or labor organizations to candidates for state or local office or the indirect contribution of resources from corporations or labor organizations to such candidates . . . .”).

See NEV. REV. STAT. § 294A.100 (West 2009) (establishing the contribution limits to $5,000 for the primary election and $5,000 for the general election). In Nevada, a “person” is defined as an individual, a business or “[a]ny nongovernmental legal entity, including, without limitation, a corporation, partnership, association, trust, unincorporated organization, labor union, committee for political action, political party and committee sponsored by a political party.” NEV. REV. STAT. § 294A.009 (West 2009).


Compare TEX. ELEC. CODE ANN. § 253.094(c) (West 2009) (stating that it is a third degree felony if a corporation or labor union makes a political contribution in violation of subchapter D), and TEX. ELEC. CODE ANN. § 253.101(b) (West 2009) (making it a third degree felony if a corporation or union makes political expenditures from funds that came about as a condition of employment or from membership dues), with TEX. ELEC. CODE ANN. § 253.104(c) (West 2009) (enforcing that it is a third degree felony for a corporation or union to make a contribution to a political party within 60 days of a general election), and TEX. ELEC. CODE ANN. § 257.004(b) (West 2009) (stating that a political party that receives a political contribution from a corporation . . . .”)
or union is guilty of a third degree felony of the donation is received 60 days or less before a
general election).


(last visited Dec. 29, 2010). Nestlé USA is owned by Nestlé S.A. of Switzerland. Nestlé USA at
29, 2010).

230 See Red Bull’s Innovative Marketing: Transforming a Humdrum Product into a Happening
Brand (last visited Dec. 29, 2010) (highlighting the success of the Austrian company that
reportedly had a 70 percent share of the energy drink global market in 2005).


Valeo, 424 U.S. 1, 64, 66 (1976) (per curiam)).


requirements allow contributions and expenditures to be properly monitored).

See TEX. ELEC. CODE ANN. § 255.001 (West 2009) (requiring that all express advocacy be identified as political advertising, and identifying the name of the person or committee that paid for each political advertisement).