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The Lonely Death of Public Campaign Financing

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I. INTRODUCTION

It may be a cliché to observe that campaign finance reform has conclusively proved that the road to perdition is paved with good intentions and that unforeseen consequences plague the human condition. Perhaps all areas of the law are, to a greater or lesser degree, evidence of these sad truths. Nevertheless, our continuing quest for “clean” elections and cosmic justice in the realm of campaign finance brings to mind Albert Einstein’s reflections on insanity.

Remarking on the irony of offering in the inability of years – actually decades – of reform to wring “excess” money out of the process, Chief Justice John Roberts declared that "enough is enough." Perhaps he is right.

Much of the problem arises from constitutional stumbling blocks. Although the Supreme Court’s guidance has been rather fluid, the core of the problem has been the idea, more or less consistently adhered to, that there is a constitutional distinction between the regulation of expenditures and

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1 William P. Marshall, The Last Best Chance For Campaign Finance Reform, 94 NORTHWESTERN L. REV. AT 342-345 (listing examples of unintended consequences of reform, including a decline in grassroots campaigning, the rise of "soft money" for "party building," issue ads, independent ads, a substantial increase in the time that must be devoted to fundraising and bundling).

2 See, e.g., Margaret Howard, The Law of Unintended Consequences, 31 South. Ill. L.J. 451 (2007) (in context of amendments to bankruptcy law); See also National Paint & Coatings Ass’n v. City of Chicago, 45 F.3d 1124, 1132 (7th Cir. 1995) ("Time and time again social science research teaches that laws fail to achieve their goals – that the laws provoke costly adjustments that make the majority worse off.")

3 Einstein reportedly defined insanity as "doing the same thing over and over and expecting different results." (Available on-line at http://www.quotationspage.com/quotes/Albert_Einstein/31) (last visited March 10, 2009).


5 See Richard L. Hasen, Justice Souter: Campaign Finance Law’s Emerging Egalitarian, 1 ALBANY GOV’L REV. 169, 172 (2008) ("... the Court’s jurisprudence has swung like a pendulum between periods of Court skepticism of campaign finance regulation and Court deference to congressional and state judgments about the need for such regulation.")
Restrictions on the latter are often claimed to more directly serve the interest in avoiding the apparent or actual quid pro quo corruption that the Court has sometimes but not always claimed is the only justification for regulation. Restriction of the former is said to more substantially impair First Amendment values because it (or so the Court has said) directly limits a message chosen by the speaker and her ability to disseminate it.

That the First Amendment, while permitting relatively robust regulation of contributions to a candidate, permits virtually no restrictions on expenditures by a candidate, has created the modern phenomenon of the self-funded millionaire politician for whom public office is a prerogative of family wealth or a nice coda to a successful business career. In 1972, General Motors heir Davis v. FEC, 128 S.Ct. 2759 (2008); FEC v. Wisconsin Right to Life, 126 S.Ct. 2652, 2672 (2007)(WRTL II); Buckley v. Valeo, 424 U.S. 1, 20-23 (1976) (drawing distinction).

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7 Davis, supra note 6, at 2773 (leveling opportunities for candidates of different wealth is not a legitimate government objective); WRTL II, supra note 6, at 2672-73 (interest in combating "corrosive and distorting immense aggregations of wealth" does not extend beyond campaign speech); Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480, 496-97 (1985) ("preventing corruption or the appearance of corruption are the only legitimate and compelling interests thus far identified for restricting campaign finances."); Buckley supra note 6, at 48-49 (1976) ("[t]he interest in equalizing the financial resources of candidates" does not justify restricting campaign expenditures).


9 Buckley v. Valeo, supra note 6, at 19.


11 See, e.g., Buckley, 424 U.S. at 52 (striking down campaign and individual expenditure limits).


13 Stewart R. Mott, 70, Offbeat Philanthropist, Dies, New York Times, June 14, 2008 (GM heir heavily bankrolled the campaigns of Eugene McCarthy and George McGovern). Mott later opposed efforts at campaign finance regulation. Id.
Stewart Mott would finance an experienced public servant like George McGovern. In 1992, H. Ross Perot and Steve Forbes would run themselves. There has been more room for regulation of expenditures on behalf of a candidate, but statutory interpretation, regulatory omissions and constitutional limitations have left room for a brisk business in independent expenditures.

17 First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (striking down restriction on corporate expenditures on referendum campaign); Buckley, supra note ___, at ___ (upholding restriction on coordinated independent expenditures); Austin v. Michigan Chamber of Commerce, supra note ___, at ___ (upholding restriction on corporate expenditures supporting a candidate); McConnell v. Federal Elections Commission, supra note ___, at ___ (upholding blackout period on independently financed ads that are the “functional equivalent” of express advocacy for a candidate).

18 See Buckley, 424 U.S. at 43-44 (interpreting limitation on independent expenditures to messages expressly advocating the election or defeat of a candidate); Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238, 249 (1986) (MCFL) (adopting same limiting construction for limitations on corporate and union expenditures).

19 One huge “loophole” has been the freedom of organizations qualified under 26 U.S.C. § 527, who do not qualify as political committees, to engage in substantial and lightly regulated independent expenditures.

20 See, e.g., WRTL II, 127 S.Ct. 2652 (2007) (striking down application of “blackout period” on independent expenditures for “genuine issue ads”); MCFL, supra note ___, at 263-64 (striking down restrictions on express advocacy by an incorporated advocacy organization that did not accept contributions from “for profit” corporations); Bellotti, 435 U.S. 765 (striking down restriction on corporate expenditures on referendum campaign).
expenditures that, rather than promote a favored candidate, criticize the positions of her opponent. This has given us the current phenomenon of sepia-toned advertisements urging us to call Senator Foghorn and tell him to stop starving children and destroying the Republic. While negative campaigning is not a current phenomenon or the product of regulation, the modern independent ad –

22 Although they were apparently run by regulated political action committees, during the 2008 presidential campaign, for example, an organization identified as Brave New PAC and Democracy for America ran black and white photographs of a post-operative John McCain spliced with interviews of doctors discussing the recurrence of melanoma. “John McCain is 72. He's had cancer 4 times.” (available on-line at http://www.youtube.com/watch?v=DHvJPGnmOxE) (last visited March 10, 2009). A group called OurCountryDeservesBetter PAC ran an ad featuring mug-shots of Weather Underground leader Bill Ayers and clips of Reverend Jeremiah Wright’s less temperate sermons calling on Senator Obama and “his friends” to “keep the change.” “Obama’s Ties to Ayers, Rev. Wright and Kilpatrick” (available on line at http://www.youtube.com/watch?v=DEzQUpcAjoE) (last visited March 10, 2009).

23 A parody of the genre (although depicting campaign approved messages) aired during the 2008 election cycle on Saturday Night Live featuring ads narrated by a man identified as a “legend” for having the “most sarcastic voice in the world of campaign ads.” One spot attacked Barack Obama for supporting “universal” health care, claiming that health care for the “entire universe” would be expensive and would include “Osama bin Laden.” (“McCain Approves Cold Open,” available online at http://www.nbc.com/Saturday-Night_Live/video/clips/mccain-approves-open/669582/) (last visited March 20, 2009).

attacking in the guise of attempting to persuade – is certainly encouraged by regulation and the desire to avoid its limitations.\textsuperscript{25}

Regulatory responses have ensued, but money has proven to be difficult to tame. What cannot be done through contribution can be done with expenditure. Dollars that can no longer be given to a candidate are given to a political party. Money that cannot be contributed to a party is given to an independent organization. What cannot be done by a political committee is done by a 527 or 501(c)(4) organization. Dollars that can no longer be spent in one way simply flow to a new use.\textsuperscript{26} At least one commentator\textsuperscript{27} has likened campaign finance reform to a game of “Whac-A-Mole.”\textsuperscript{28}

For this reason, the white whale for many Captain Ahabs\textsuperscript{29} of the campaign finance reform movement has often been “effective public financing”.\textsuperscript{30} The current system of public financing for presidential elections has become largely irrelevant,\textsuperscript{31} as the fundraising prowess of George W. Bush...
and Barack Obama far outstripped the amount of public funds available. Given the effectiveness of bundling and "microdonations" raised over the benefit of accepting public funding (and its attendant limitations on campaign expenditures) would leave any publicly funded presidential campaign at a marked financial disadvantage.

But the dream persists. Prominent organizations call for reform of the presidential system and extension of public financing to legislative races. A number of states still employ – or are currently seeking to adopt or reform – public financing of elections. Often promoted under the rubric of "clean" or "fair" elections, these systems generally involve the provision of public funds to

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33 "Bundling" is a technique in which a candidate's supporters solicit and "bundle" contributions from friends and associates. See, e.g., Marshall, supra note ___, at 344. The increase in the maximum individual contribution from $1,000 to $2,300 raised the effectiveness of bundling.

34 Microdonations are generally described as those beneath $200, often raised in increments and over the internet. Hasen, More Supply, supra note ___ at 15-16.

35 Id. Even candidates who initially pledge to accept public funding have found it in their best interest to abandon the pledge. See "Obama to Reject Public Funds for Election," Washington Post, June 20, 2008. John McCain also announced that he would accept public funds, only to decline them later.

36 For example, Common Cause is "working with the Presidential Public Financing Reform Project, a coalition of reform groups including League of Women Voters, Public Citizens, Public Campaign, U.S. PIRG and Democracy to "reboot" the current system, Presidential Public Financing, (available on line at http://commoncause.org/site/pp.asp?c=dkLNKLNAIWG26=4773833).


38 A summary of state public financing systems can be found on Common Cause's website at http://www.commoncause.org/site/pp.asp?c=dklnk1mgjwg&b=507399. Proposals are pending in, among other places, California, New York and Wisconsin.
candidates who have raised some minimum amount or aggregate number of private contributions.\(^{39}\) In return for public funds, a candidate agrees to restrictions on further private contributions and expenditures. The idea is to reduce the role of "Big Money" – or, for that matter, money in general – in elections.\(^{41}\)

Recognizing the constitutional limitations on reform, state public funding laws frequently provide "relief" – referred to by names such as "reserve funds" and "fair fight funds" – to publicly financed candidates running against a self-financed or privately financed candidate\(^{42}\) whose spending has exceeded a trigger amount, or candidates who face independent expenditures directed against them.\(^{44}\) These responses may include permitting the "disadvantaged" candidate to raise more money, providing matching state funds, or some combination of the two.

This essay argues that the game is over – the victim of two major campaign finance decisions of the Roberts Court. It is my view that the Supreme Court's decision in *Federal Elections Commission v. Davis*\(^{48}\) will prove to be fatal to most, if not all, asymmetrical public financing schemes and that the Court's treatment of expenditures for issue advocacy announced in *Wisconsin Right to Life v. Federal Elections Commission*\(^{49}\) will leave most forms of independent expenditures beyond effective limitation. The combination may render public financing systems – at least as a device to substantially reduce the influence of private money on elections – effectively futile.

\(^{39}\) North Carolina's statute providing for the public funding of judicial elections states that its purpose is "to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections" N.C. Gen. Stat. § 163.278.61 (2008).

\(^{41}\) In other words, a candidate who opts out of public financing.

\(^{44}\) See, e.g., Ariz. Rev. Stat. § 16-1, 901.01; North Carolina Stat. § 163.278.67.


\(^{49}\) 127 S. Ct. 2652 (2007).
Part II of this essay briefly reviews the evolution of the distinction between expenditures and contributions and the various rationales that the court has considered as potential justification for regulation. Part III considers the degree of constitutional protection now apparently enjoyed by independent expenditures for issue advocacy after the Court's decision in WRTL II. Part IV addresses the impact of Davis on these attempts to restrict or blunt the impact of independent expenditures through asymmetrical public financing systems. I argue that most such systems cannot be reconciled with Davis' suggestion that measures designed to "counter" the constitutionally protected speech of one side of a campaign are unconstitutional burdens upon that speech. Part V argues that this is the right outcome and suggests, in Chief Justice Roberts' words, that "enough is enough." But, ironically and perhaps happily, it comes at a time when the case for regulation has been significantly weakened by technological advances, validating a Madisonian solution to concern over the influence of "special" interests.

II. SPEND IT YOURSELF: THE DISTINCTION BETWEEN EXPENDITURES AND CONTRIBUTIONS

A. Origin of the Distinction

Our problem begins with the seminal case of Buckley v. Valeo,\(^50\) which considered a constitutional challenge to certain aspects of comprehensive federal campaign finance reform passed in the wake of the unpleasantness known as Watergate. Buckley considered 1974 amendments to the Federal Election Campaign Act (FECA) of 1971. FECA contained a number of provisions, including limitations on contributions to a candidate and expenditures by or on behalf of a campaign.

\(^50\) 424 U.S. 1 (1976).

\(^54\) Buckley upheld public financing, disclosure requirements and caps on individual contributions to campaigns. It struck down limits on expenditures by candidates on our behalf, limits for total expenditures by a campaign, caps on independent expenditures and certain provisions constituting the Federal Elections Commission.
Buckley is a lengthy and complex decision addressing multiple statutory provisions. The judgment of the Court was expressed in a per curiam opinion, parts of which were joined by different groups of Justices. Full explication of the case is beyond the scope – and need – of this essay. For our purposes, it is most important to note that the Court upheld certain limitations on contributions. A limitation upon the amount that can be contributed to a candidate "entails only a marginal restriction" upon the contributor's expressive rights because a contribution communicates only general support for a candidate and his views but not "the underlying basis of that support." A subsequent opinion of the court characterizes contributions as "speech by proxy." Nor, it concluded, does the quantity of communication "increase perceptibly with the size of the contribution." Contribution limits, moreover, more readily serve the state interest in limiting "the actuality and appearance of corruption resulting from large individual financial contributions."

FECA also placed limits on expenditures "relative to a clearly identified candidate." Before passing on their constitutional validity, the per curiam opinion, in an effort to avoid problems of vagueness and overbreadth, construed this language to apply only to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." The Court explained:

"[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on

55 FECA prohibited individuals from contributing more than $25,000 in a single year or more than $1,000 to a single candidate. Id. at 13.
56 Id. at 20-21.
58 Buckley, 424 U.S. at 21.
59 Id. at 26-27.
60 Buckley, 424 U.S. at 1.
61 Id. at 44.
various issues, but campaigns themselves generate issues of public interest."\(^{62}\)

In drawing this distinction, the Court said that determining what constitutes "express advocacy" would turn on a finding of what came to be called "magic" words such as "vote for," "elect" or "support."\(^{63}\)

The Court upheld FECA's reporting and disclosure requirements with respect to its narrowed definition of "expenditures," i.e., those expressly advocating the election or defeat of a clearly identified candidate. However, it struck down a cap on the amount of such expenditures. In doing so, it argued that limitations on expenditures do limit communication (i.e., spending money to disseminate a particular message of the speaker's choosing does communicate more by spending more) in a way that contribution limits do not. The Court observed that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."\(^{64}\)

Moreover, independent expenditures, in the Court's view, did not "appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."\(^{65}\) This reduced interest in preventing actual or apparent corruption was insufficient to justify the more substantial burden on expression entailed in expenditure limits.\(^{66}\) Any broader interest in equalizing the interests of competing interests was "wholly foreign to the First Amendment."\(^{67}\)

\(^{62}\) Id. at 42.
\(^{63}\) Id. at 80.
\(^{64}\) Id. at 17.
\(^{65}\) Id. at 46.
\(^{66}\) Id. at 44. *Ironically, given the Court's own limiting construction, the Court also noted that a limitation on independent expenditures would be under-inclusive because expenditures for communications that avoided express advocacy were left unregulated.*\(^{67}\)
\(^{67}\) Id. at 48-49.
Buckley's distinction between expenditures and contributions has been criticized by regulatory opponents as well as regulatory skeptics. Justice Thomas, for example, has argued that it is based on a false distinction between actual and proxy speech. Whether one chooses to participate by expenditure or contribution, there is "usually some go between that facilitates the dissemination of the spender's message – for instance, an advertising agency or a television station" such that calling a contribution "speech by proxy" does little to differentiate it from an expenditure. Nor, in Justice Thomas' view, is it correct to say that a contribution to a candidate does not constitute communication by the donor who, by contributing, endorses and facilitates a message (that of her candidate) which she prefers. A larger contribution, in his view, communicates "more" every bit as much as a larger expenditure. Buckley's distinction between expenditures and contributions, in his view, "ignores the distinct role of candidate organizations as a means of individual participation in the Nation's civic dialogue."

Justice Thomas would leave much less room for regulation. Justice Stevens, on the other hand, believes that expenditure limits, because they simply enable speech, should be analyzed as time, place and manner restrictions. After all, orderly debate is always more enlightening than a shouting match that awards points on the basis of decibels rather than reasons. Quantity limitations are commonplace in any number of other contexts in which high-value speech occurs. Litigants in this Court pressing issues of the utmost importance to the Nation are allowed only a fixed time for oral debate and a maximum number of pages for written argument. As listeners and as readers,  

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73 Shrink Missouri, supra note __, at 413.
74 Id.
75 Id. at 414-415.
76 Id. at 419.
77 Id. at 418.
78 Davis, supra note __, at 2778.
judges need time to reflect on the merits of an issue; repetitious arguments are disfavored and are usually especially unpersuasive. Indeed, experts in the art of advocacy agree that "lawyers go on for too long, and when they do it doesn't help their case."79

Justice Stevens continues, "Congress is entitled to make the judgment that voters deserve the same courtesy and the same opportunity to reflect as judges; flooding the airwaves with slogans and sound-bites may well do more to obscure the issues than to enlighten listeners."80 In his view, "the notion that rules limiting the quantity of speech are just as offensive to the First Amendment as rules limiting the content of speech is plainly incorrect."81

B. Persistence of the Distinction

Nevertheless, the distinction between expenditures and contributions has proven relatively robust. In First Nat. Bank of Boston v. Bellotti,82 for example, the Court struck down a Massachusetts statute prohibiting corporations from spending on communications relating to referenda other than those "materially affecting any of the property, business or assets of the corporation."83 The Court found no support for the proposition that otherwise protected speech loses its protection because its source is a corporation.84 This did not mean, however, that corporate restrictions on contributions could not be upheld. The Bellotti court distinguished restrictions on corporate contributions as an attempt to prevent apparent or actual corruption on interests not presented by the referenda restriction.85 And, as we will see, restrictions on corporate contributions have been upheld.86

79 Id. at 27-79.
80 Id.
81 Id.
83 Id. at 766.
85 Id. at 788 n. 26.
86 See pp. ____, infra.
In Federal Election Com’n v. National Conservative Political Action Committee (NCPAC), the Court struck down a restriction on expenditures to further the election of a presidential candidate who has accepted public financing. In Colorado Republican Federal Campaign Committee v. Federal Election Commission (Colorado I), it struck down limits on political party expenditures for a general election campaign for Congressional office.

The Court has, however, permitted restrictions on expenditures that constitute “express advocacy” in Buckley’s terms – at least when undertaken by a corporation. In FEC v. Massachusetts Citizens for Life (MCFL), the Court considered whether the prohibition against corporate use of treasury funds “in connection” with a federal election set forth in 2 U.S.C. § 441b, could be constitutionally applied to the activities of MCFL. MCFL was a nonprofit corporation that did not accept donations from business corporations, but raised money from its individual members and activities such as raffles, garage and bake sales, picnics and dances. The Court applied the same narrowing construction to § 441b as it had to the prohibitions of independent expenditures in Buckley, holding that it prohibited only those expenditures that constitute “express advocacy.”

Although MCFL’s activities did constitute express advocacy, a majority of the Court found that, as applied to MCFL, § 441b unconstitutionally burdened MCFL’s right of free expression. Although § 441b could be justified as a limit on the capacity of corporate entities to use resources amassed in the economic marketplace to provide an unfair advantage in the political marketplace, application of the statute to MCFL did not serve that interest because it “was formed to disseminate political ideas, not to amass capital. The resources it has

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88 Id. at 482-83.
92 Id. at 242.
93 Id. at 249.
94 Id.
95 Id. at 261.
96 Bellotti, 435 U.S. at 264.
available are not a function of its success in the economic marketplace, but its popularity in the political marketplace.\textsuperscript{97}

In short, the Court concluded, "MCFL is not the type of "traditional corporation[n] organized for economic gain," that has been the focus of regulation of corporate political activity\textsuperscript{66} and announced an exception for what has come to be known as MCFL corporations.\textsuperscript{98}

The scope of MCFL's constitutional limitation has not proven to be particularly robust. For example, in \textit{Austin v. Michigan Chamber of Commerce}, the Court upheld a Michigan statute that prohibited corporate treasury funds from being used for independent expenditures in support of, or in opposition to, a candidate.\textsuperscript{71} The prohibition, the Court concluded, was narrowly tailored to serve a compelling state interest.\textsuperscript{99} Although the Chamber of Commerce was a non-profit entity, it was not formed for the purpose of advocacy.\textsuperscript{100} Additionally, it did not consist entirely of members supporting its political purposes and accepted money from for-profit corporations.\textsuperscript{101}

Nevertheless, the narrowing construction of § 441b contributed to the ability of interested parties to engage in independent issue advocacy as long as they carefully avoided the "magic words" of express advocacy. Thus, not only expenditures by individuals and unincorporated associations, but ads run by (or with the contributions of) corporations and unions fell within the safe harbor.

\textsuperscript{97}Id.
\textsuperscript{66}Id. at 259.
\textsuperscript{98}Such an "exempted organization," in the Court's view, has three attributes. First, "it was formed for the express purpose of promoting political ideas, and cannot engage in business activities." Id. at 263-64. Because its funding is attracted for political purposes, "[t]his ensures that political resources reflect political support." Id. Second, "it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings." Id. Finally, it will not have been "established by a business corporation or a labor union, and its policy not to accept contributions from such entities." Id. This, the Court reasoned, "prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." Id.
\textsuperscript{71}494 U.S. 652, 652-54 (1990).
\textsuperscript{99}Id. at 652.
\textsuperscript{100}Id. at 672 (Brennan, J., concurring)
\textsuperscript{101}Id. at 664.
Restrictions on contributions have fared better. In *FEC v. National Right to Work Committee*,\(^{102}\) the Court upheld restrictions on contributions on corporate political action committees organized to make campaign contributions, relying on the special advantages of the corporate form and the differing nature of contributions both with respect to communicative impact and the potential for corruption. In *Nixon v. Shrink Missouri Government Political Action Committee*,\(^{101}\) it upheld state limitations on campaign contributions, notwithstanding that, in real terms, the state restrictions were substantially lower than those approved in *Buckley*.\(^{104}\) In doing so, it made clear that contribution limits involving "significant interference" with associational rights, need not survive strict scrutiny. Instead, the government need only show that the restriction was "closely drawn" to match a "sufficiently important interest."\(^{105}\) In *Federal Election Commission v. Colorado Republican Federal Campaign Committee (Colorado II)*, it rejected a facial challenge to limits on party expenditures coordinated with a campaign, continuing *Buckley’s* view that coordinated expenditures are very much like contributions. In *FEC v. Beaumont*,\(^{106}\) the Court upheld prohibitions on corporate contributions from even corporations who, like MCFL, are advocacy organizations.


This rough congruity – with contributions and expenditures constituting express advocacy being subject to substantial regulation – and other expenditures being relatively free – has co-existed with substantial disagreements between the court’s regulatory proponents and regulatory skeptics regarding the nature of the state’s interest in regulating campaign contributions and expenditures.

One perspective has suggested that restrictions may only be based upon the interest in avoiding actual or apparent corruption understood as the undue influence of individual donors upon individual candidates, *i.e., quid pro quo* or "play for pay" corruption. This view has tended to prevail – or at least receive greater emphasis – in cases involving regulation of expenditures.

\(^{102}\) 439 U.S. 197 (1982).
\(^{101}\) 528 U.S. 337 (2000).
\(^{104}\) Id. at 396-97.
\(^{106}\) Id. at 386-87.
\(^{105}\) 539 U.S. 146 (2003).
The *per curiam* opinion in *Buckley*, for example, said that the only interest supporting such regulations is the prevention of actual or apparent corruption.\(^{107}\) It argued that the "concept that government may restrict the speech of some elements of society in order to enhance the relative voices of others is wholly foreign to the First Amendment . . . ."\(^{108}\) In *National Conservative Political Action Committee*, the majority again claimed that "preventing corruption or the appearance of corruption are the only legitimate and compelling interests thus far identified for restricting campaign finances."\(^{109}\) It defined corruption as elected officials "being influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."\(^{110}\) Restriction of independent expenditures do not serve that interest because "an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more."\(^{111}\) "The absence of prearrangement and coordination of an expenditure with the candidate or his agent," the majority reasoned, "not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."\(^{112}\)

That these communications might have an effect the Court concluded, is a matter to be embraced and not lamented:

\begin{quote}
The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.\(^{113}\)
\end{quote}

At the same time – in cases upholding regulation, often involving contributions – the Court often suggested an interest in combating an expanded form of corruption. In *MCFL*, for example, the Court recognized that restrictions

\(^{107}\) *Buckley*, supra note ___, at 48-49.

\(^{108}\) *Id.*

\(^{109}\) *NCPAC*, supra note ___, at 496-97.

\(^{110}\) *Id.*

\(^{111}\) *Id.* at 498.

\(^{112}\) *Id.* at 497, *quoting Buckley*, supra note ___, at 47.

\(^{113}\) *Id.* at 498.
on corporate contributions and express advocacy might be justified by "the need to restrict 'the influence of political war chests funneled through the corporate form,' to 'eliminate the effect of aggregated wealth on federal elections,' to curb the political influence of 'those who exercise control over large aggregations of capital,' and to regulate 'substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization.'" This interest in limiting what the majority called "the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas."  

That rationale is, of course, broader than the type of quid pro quo corruption emphasized in *Buckley* and *NCPAC*, suggesting a legitimate state interest in counteracting the impact of unequal financial resources in political campaigns. In *Shrink Missouri*, the Court again recognized a broader "corruption" concern:

In speaking of 'improper influence' and 'opportunities for abuse' in addition to 'quid pro quo arrangements,' we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress would constitutionally address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery.  

This interest was expressly rooted not only in actual threats, but public perception.  

114 *MCFL*, supra note ___, at 257.

115 Id.

116 *Shrink Missouri*, supra note ___, at 389.

117 Id. at 388-89, quoting *Buckley v. Valeo*, supra note ___, 428 U.S. at 26-27. ("Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical . . . if confidence in the system of representative government is not to be eroded to a disastrous extent.")
This more expansive view of corruption is only partially concerned with corruption as commonly understood, i.e., the idea of improper influence. It suggests that the fact – or widespread belief – that money buys access can justify regulation. Beyond that, it seeks to address what it fears is the disproportionate influence of those with money to spend. As Justice Brennan put it in *MCFL*, the concern is 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.”118 The availability of public funds are – or ought to be – a “rough barometer of public support” and funds, accumulated, for example, by a business corporation reflect success in the economic rather than the political marketplace.119

On this theory, with its emphasis on insulation of the political marketplace from the disparities of wealth created in an market economy, rests uneasily with the distinction between expenditures and contributions. Even if the latter do not raise the same prospect of quid pro quo corruption, they permit the political process to be influenced by the economic marketplace. They permit those with more money to speak louder. If the state really wishes to construct a more egalitarian system of campaign finance in the sense of divorcing – or at least distancing – it from the distribution of private wealth, then its objective is at war with the strong and robust constitutional protection of expenditures.

III. WHACKING THE MOLE: EXPENDITURES SURVIVE

A. An Attempt to Limit Independent Expenditures

118 *MCFL*, supra note _, at 257.
119 Id. at 258.
120 *McConnell*, 540 U.S. at 127, n. 20.
The result was, as noted earlier, a robust and substantial movement of money to independent expenditures. During the 1998 election cycle spending on issue ads doubled to between $270 and $340 million and exceeded $500 million in 2000. Independent expenditures related to 527 organizations exceeded $250,000,000 in 2008; $206,000,000 in 2006 and over $440,000,000 in 2004. During the 2008 election cycle, independent money shifted, to some extent from 527s to 501(c)(4) organizations. This move may have been promoted by more lenient disclosure requirements.

Concern over the proliferation of these ads and the relative lack of restrictions on the way in which they are financed ultimately led to passage of the Bipartisan Campaign Reform Act of 2002 (BCRA), popularly known as the McCain-Feingold Act. In its pertinent part, the BCRA prohibits electioneering communications paid for with corporate or union treasury funds within thirty days of a primary and sixty days of a general election for a federal office.

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133 § 431-434 (2002).
Election communications are defined as any communication "mentioning a candidate for federal office."\textsuperscript{149} This aspect of the BCRA was upheld against a facial challenge in \textit{McConnell v. Federal Election Commission}.\textsuperscript{150} Writing for a 5-4 majority, Justices O'Connell and Stevens explained that \textit{Buckley}'s distinction between express and issue advocacy was a matter of statutory interpretation, not constitutional command.\textsuperscript{151} It was adopted, in the view of the majority, to cure the potentially fatal vagueness of FECA's definition of restricted expenditures "to include the use of money or other assets 'for the purpose of . . . influencing' a federal election."\textsuperscript{152} These vagueness concerns, in the view of the Court, are not present in the more specific definition of prohibited communications in the BCRA.\textsuperscript{153} All ads mentioning a candidate are prohibited during the blackout period.

Although the Court declined to abandon \textit{Buckley}'s differing approaches to contributions and expenditures,\textsuperscript{154} a majority rejected the idea that the First Amendment requires Congress to treat "so-called issue advocacy differently for express advocacy."\textsuperscript{155} The majority rejected the idea that the First Amendment erects a rigid barrier between restriction of express advocacy and of issue advocacy. Regulation of the former, it reasoned, was necessary to serve Congress' goal to combat real or apparent corruption. The distinction between the presence or absence of \textit{Buckley}'s "magic words" was "functionally meaningless" – or at least had proven to be.\textsuperscript{156}

There is "[l]ittle difference," the majority said, "between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" Indeed, campaign professionals testified that the most effective campaign ads, like the most effective commercials for product such as Coca-Cola, should, and did, avoid the use of the magic words. Moreover, the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election.

\textsuperscript{149} Id.
\textsuperscript{150} 540 U.S. 93 (2003).
\textsuperscript{151} Id. at 105.
\textsuperscript{152} Id. at 191 (quoting \textit{Buckley}, 424 U.S. at 77).
\textsuperscript{153} Id. at 194.
\textsuperscript{154} Id. at 137-38.
\textsuperscript{155} Id. at 127.
\textsuperscript{156} McConnell, 540 U.S. at 193.
In fact, some campaign professionals claim that the most effective ads avoid the use of magic words. But although the ads may have been functionally equivalent, the methods by which they were financed is not: Corporations and unions spent hundreds of millions of dollars of their general funds to pay for these ads, and those expenditures, like soft-money donations to the political parties, were unregulated under FECA. Indeed, the ads were attractive to organizations and candidates precisely because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money.

The ads, moreover, are usually run by groups with bland and mysterious names, often falsely suggesting a grassroots provenance. Voters may be unlikely to know who sponsored them.

The Court observed that political candidates and parties would ask those who had donated their permitted quota of hard money to contribute additional funds for issue advocacy. Such candidates and parties "knew who their friends were." Requiring words of express advocacy, in the view of the majority, created a massive opportunity for evasion that Congress chose to address through the BCRA's blackout period for electioneering communication financed by corporate and union treasury funds.

157 Id. at 126-27. The Court noted that very few candidate ads contained words of express advocacy. Id. at 127 n.18.
158 Id. at 193 n.77.
159 Id. at 127.
160 Id. at 128.
161 Id. at 129.
162 Id. at 137-38.
163 McConnell, 540 U.S. at 137-38.
Once again, the Court recognized a state interest in combating a "broader form of corruption" that seeks to diminish the political influence of wealth. The prohibition against use of corporate and union treasury funds was justified, it said, by Congress' interest in restraining "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."\(^{166}\)

This has (or, at least for a brief period of time, had) two implications for the future of issue advertising. The interest in avoiding the fact or appearance of corruption could be said to justify the restriction of communications that may have the effect of aiding a candidate even in the absence of any connection with or coordination with the candidate, or words of express advocacy. Although a majority retained the distinction between expenditures and contributions, expenditures could be restricted in support of limitations on contributions.

In addition, as in MCFL and Austin, a majority once again held that restricting the advantages in amassing resources supposedly enjoyed by corporations justifies restriction on corporate speech. It suggested, moreover, a related interest in equalizing resources in political campaigns—in achieving what Rick Hasen calls barometric equality, i.e., the notion that financial support should roughly reflect popular support.\(^{167}\) Although raised in the context of corporations and unions, McConnell suggested again that the state has an interest in ensuring, at least, some relationship between financial and popular support.

McConnell itself did not end—or even diminish—issue advertisements. Regulatory gaps and legal ingenuity enabled continued growth in independent expenditures.\(^{168}\) These could still be financed by individuals and relatively certain groups, such as 527 organizations, who continued to be outside most federal statutory restrictions. Money found a way.

But the path to greater restriction seemed clear. The breadth of the McConnell rationale, encompassing not only the capacity of corporations and unions to amass large amounts of wealth, but a broader notion of the anti-

\(^{166}\) Id. at 205 quoting Austin, 494 U.S. at 660.


\(^{168}\) See pp. ___ supra.
corruption rationale suggested that many of the remaining legislative lacunae could be readily closed and issue advertising could be substantially restricted.

B. The Protection of Issue Advocacy

But not for long. In Wisconsin Right to Life, a nonprofit pro-life organization sought to run ads during the blackout period addressing the filibuster of Bush administration judicial nominees. The ads in question were fairly standard representations of the genre. They called upon Wisconsin Senators Kohl and Feingold to support up or down votes on President Bush's judicial nominees. WRTL wished to run the ads during the blackout period preceding Senator Feingold's bid for reelection. It wished to use general treasury funds to pay for the ads and admitted that these funds included corporate donors.

The matter came to the Court twice. In FEC v. Wisconsin Right to Life (WRTL I), the Court held that McConnell did not foreclose "as applied" challenges to the BCRA. One year later, in WRTL II, the Court upheld Wisconsin Right to Life's "as-applied" challenge, splitting three ways.

169 WRTL II, 127 S. Ct. at 2660-61. One of the ads, called Wedding, featured a bride and groom at the altar. ""Pastor: And who gives this woman to be married to this man? "Bride's Father: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up..." "Voice-Over: Sometimes it's just not fair to delay in important decision. But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' vote. So qualified candidates don't get a chance to serve. It's politics at work, causing gridlock and backing up some of our courts to a state of emergency. "Contact Senators Feingold and Kohl and tell them to oppose the filibuster. "Visit: BeFair.org "Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee." Id. (quoting Wis. Right to Life, Inc. v. FEC, 466 F.Supp. 2d 195, 198 n.3 (D.D.C. 2006), aff'd 127 S.Ct. 2652 (2007)). The text of the other two WRTL advertisements were similar. See id. at 2660-61.

170 Id. at 2660.

171 Id. at 2661.


173 WRTL II, 127 S. Ct. 2652.
Kennedy, Scalia and Thomas, who dissented in McConnell, reiterated their belief that the blackout provision was facially unconstitutional. Justices Souter, Stevens, Ginsburg and Breyer, all of whom (with Justice O'Connor) were in the McConnell majority, would have upheld application of the blackout provision to the ads in question. Chief Justice Roberts and Justice Alito’s “principal” opinion (written by Chief Justice Roberts), agreed that Wisconsin Right to Life and its corporate donors have a First Amendment right to communicate on issues of interest – even during the election and even if they name a candidate for federal office. Restriction of this right cannot, in the absence of coordination with the candidate, be justified by the interest in avoiding actual or apparent impropriety. The principal opinion nevertheless purports to follow McConnell's holding that the "functional equivalent" of express advocacy may be restricted. But it adopted an extraordinarily generous definition of "genuine issue advocacy." In order to protect the liberty to "discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment," the test for express advocacy or its functional equivalent "must be objective, focusing on the communication's substance rather than on amorphous considerations of intent and effect." Thus, neither the intent nor the effect (in the sense of examining whether an ad actually influences – or is likely to influence – votes) is relevant. Thus, the principal opinion held that BCRA's blackout provisions can only be applied to ads that are "susceptible [to] no reasonable interpretation other than as an appeal to vote for or against a specific candidate (emphasis mine)." In other words, if a communication can reasonably be called an issue ad, then it is an issue ad.

While one could imagine an inquiry into the nature of an ad that is highly contextualized and driven by the role played by that ad in the particular race, the principal opinion made clear that it does not expect this to be the case.

174 Id. at 2675.
175 Id. at 2687.
176 Id. at 2659.
177 Id. at 2666 (quoting Bellotti, 435 U.S. at 776).
178 WRTL II, 127 S. Ct. at 2655.
179 Id. at 2655.
180 Id. at 2671-72.
Because the possibility of a lengthy, indeterminate and necessarily subjective inquiry would chill speech, the inquiry into whether an ad cannot be construed as an issue ad must be objective and straightforward in a way that will minimize uncertainty and that will not deter protected speech. The "benefit of the doubt" ought to go to "speech, not censorship," therefore, this inquiry must not be overly concerned with context and the determination should involve little, if any, discovery. Thus, the debate over whether something is a "phony" or "genuine" issue ad is reduced to whether it discusses . . . issues.

The Court agreed that "the distinction between issues and candidates and advocacy of election or defeat of candidates often dissolves in practical application." But, unlike McConnell, the WRTL II Court held "that is not enough to establish that the ads can only be reasonably viewed as advocating or opposing a candidate in a federal election." "Discussion of the issues," it continued, "cannot be suppressed simply because the issues may also be pertinent in an election." Where the First Amendment is implicated, the "tie goes to the speaker."

The Court had little difficulty finding that WRTL's ads were genuine issue advertising.

Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a

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183 Id. at 2655.
184 Id. at 2656.
185 Id. at 2663.
186 Id. at 2669. McConnell majority thought them "functionally identical in important respects." McConnell, supra note ___, at 126.
187 Id. at 2669.
188 WRTL II at 2669.
candidate's character, qualifications, or fitness for office.  

That WRTL and its Political Action Committee opposed Senator Feingold's re-election, in the Court's view, went only to its subjective intent and was therefore irrelevant. Nor did it matter that the ad ran near and on election and after the Senate had recessed. An issue ad might reasonably be run when a legislator is back home or to coincide "with public interest rather than a floor vote."

The Court was also unimpressed that the ad directed viewers to a website that set forth the Senators' positions on judicial filibusters and allowed visitors to sign up for "e-alerts," some of which "contained exhortations to vote against Senator Feingold."

Regulation of issue ads could not, in the view of the principal opinion, be justified by the state's interest in preventing actual or apparent corruption or in promoting a more "egalitarian" system of campaign finance:

This Court has long recognized "the governmental interest in preventing corruption and the appearance of corruption" in election campaigns. This interest has been invoked as a reason for upholding contribution limits. As Buckley explained, "[t]o 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." We have suggested that this interest might also justify limits on electioneering expenditures because it may be that, in some circumstances, "large independent expenditures pose the same

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189 Id. at 2667.
190 Id. at 2668.
191 Id.
192 Id.
The majority rejected the interest in combating a "broader" form of corruption and minimizing the influence of corporate wealth relied upon in *Austin* and *McConnell*.

Specifically, the corruption represented by "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form" was not enough to trump First Amendment rights. This "broader form of corruption," he said, does not apply outside the scope of campaign speech and "genuine issue ads" (as *WRTL II* defines them) are not that.

McConnell arguably applied this interest [which this Court had only assumed could justify regulation of express advocacy] to ads that were the "functional equivalent" of express advocacy. But to justify regulation of WRTL's ads, this interest must be stretched yet another step to ads that are not the functional equivalent of express advocacy. Enough is enough.

"Issue ads like WRTL's," according to Chief Justice Roberts, "are by no means equivalent to contributions, and the quid-pro-quo corruption interest cannot justify regulating them. To equate WRTL's ads with contributions is to ignore their value as political speech."

Finally, the principal opinion declined to continue the game of "Whac-A-Mole." It rejected the idea that an expansive definition of "functional equivalent" is needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions.

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193 Id. at 2672. (internal citations omitted).
194 *WRTL II*, 127 S. Ct. at 2672.
195 Id.
196 Id. at 2672-73.
197 Id.
198 Id. at 2656 (internal citations omitted).
199 Id. at 2656.
inconsistent with strict scrutiny.\textsuperscript{201} It held that the option for WRTL to form a PAC could not justify the restriction of speech other than express advocacy or its functional equivalent.\textsuperscript{202}

As noted earlier, Justice Scalia, joined by Justices Kennedy and Thomas, would have overruled \textit{McConnell}, arguing that the test in the principal opinion remained imprecisely vague.\textsuperscript{123} Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, dissented, raising again the theme of the need to counter the political impact of “concentrations of money in self-interested hands” that “threatens the capacity of this democracy to represent its constituents and the confidence of its citizens in their capacity to govern themselves.”\textsuperscript{203} These interests, critical in \textit{MCFL, Austin} and \textit{McConnell}, justify, as opposed to a laissez faire approach to the electoral process, “clear and reasonable boundaries . . . to limit ’the corrosive and distorting effects of immense aggregation of wealth.”\textsuperscript{204} The principal opinion, they argued, left little room for this:

Because it is difficult to imagine a communication short of an explicit endorsement of a candidate for public office that would not qualify as issue advocacy under Chief Justice Roberts’s test and because interdicting circumvention of federal election law is no longer a compelling state interest, all exempt organizations would be free of any meaningful limitation on their campaign activities.\textsuperscript{205}

\begin{quote}
There was, in the view of the four dissenting justices, no way that the hypothetical "Jane Doe ad" regarded as the "functional equivalence" of express advocacy in \textit{McConnell} would not be considered genuine issue advocacy under the test adopted by the principal opinion in WRTL II.\textsuperscript{206} The three concurring
\end{quote}

\textsuperscript{201} Id. at 2672.
\textsuperscript{202} Id. at 2673.
\textsuperscript{123} WRTL II, 127 S. Ct. at 2687 (Scalia, J., concurring).
\textsuperscript{203} Id. at 2689 (Souter, J., dissenting).
\textsuperscript{204} Id. at 2705 (Souter, J., dissenting).
\textsuperscript{205} Id. at 2699-2700 (Souter, J., dissenting).
\textsuperscript{206} Id. at 2698-99 (Souter, J., dissenting).
justices agreed.^{207} For the dissent, McConnell had been "inverted."^{208} We meant, they said, "that an issue ad without campaign advocacy could escape restriction."^{209} The principal opinion, however, "wrings the opposite conclusion" from McConnell stating that if there is any way to characterize an ad as issue advocacy, it is free from restriction.^{210}

1. The Continued Viability of Issue Ads

WRTL II has two implications that are important here. It affirms the continued viability of the now over thirty-year old distinction between expenditures and contributions. The latter can be restricted to avoid actual or apparent corruption, but the former – even if candidates are able to know who their friends are – cannot. And while it does not return – at least not explicitly – to the regime of magic words, it should not be difficult to frame election cycle communications as "genuine issue advocacy." As a consequence, the market for issue ads is likely to remain robust. As the WRTL’s dissent^{211} and a number of commentators have noted,^{212} WRTL II creates a rather large safe harbor for

^{207} Id. at 2683 n. 7 (Scalia, J., concurring in part and concurring in the judgment.). One is tempted to observe that any proposition of law agreed upon by Justices Scalia and Thomas, Justice Kennedy, and Justices Stevens, Souter, Breyer and Ginsburg may well be taken as conclusively proven.

^{208} Id. at 2699.

^{209} Id.

^{210} Id. Although it seems indisputable that the WRTL II principal opinion is inconsistent with McConnell, it is less clear that it "inverts" it. It does not suggest, for example, that only campaign ads without issue content are subject to restriction or even that any issue content will immunize an ad for restriction.

^{211} Id. at 2705 ("After today, the ban on contributions by corporations and unions and the limitation on their corrosive spending when they enter the political arena are open to easy circumvention, and the possibilities for regulating corporate and union campaign money are unclear.")

independent expenditures mentioning candidates but purporting to focus on issues. FEC regulations seeking to implement WRTL II do not suggest otherwise. After setting forth the test from the principal opinion, i.e., that corporations and labor organizations are prohibited from making electioneering communications only if "the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate," the rules provide for a safe harbor. In pertinent part, a communication will fall within the safe harbor if it does not mention any election, candidacy, political party, opposing candidate or voting by the general public, does not take a position on any candidate's or officeholder's character, qualifications or fitness for office and focuses on a legislative, executive or judicial matter or issue while it urges a candidate to take a particular position or action with respect to the matter or issue, or urges the public to adopt a particular position, and to contact the candidate with respect to the matter or issue; or propose a commercial transaction, such as the purchase of a product or service or attendance at a commercial event for a fee.216

But even ads outside the safe harbor must nevertheless be examined for "indicia of express advocacy" or has an interpretation other than as an appeal to vote for or against a clearly identified federal candidate." Drawing on Chief Justice Roberts' controlling opinion,218 it identifies such indicia as mention of "an ("The WRTL ruling essentially brings us back to a 'magic words' test."); (But see Paul S. Ryan, Wisconsin Right to Life and the Resurrection of Forgatch, 19 Stan. L. & Policy Rev. 130 (2008) (arguing that WRTL II should be not be read to require magic words but to say that an ad is the functional equivalent of express advocacy "when read as a whole, and with limited reference to external events, [it is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." cf. Margaret G. Perl and Kimberly A. Demarchi, Direct Democracy and Indirect Regulation: The Brewing Conflict Between Federal Campaign Finance Law and State Ballot Measure Campaigns, 34 Wm. Mitchell L. Rev. 591, 623 (2008) ("WRTL has arguably removed most of the restrictions that BCRA's electioneering communications provision placed on ballot measure committee advertisements featuring a federal candidate").219

216 11 C.F.R. § 114.15(b).
217 11 C.F.R § 114.15(c).
218 The principal opinion in WRTL II observed that the ads in question lacked "indicia of express advocacy." They did not "mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications or fitness for office." WRTL II, supra note ___, at 2667.
election, candidacy, political party, opposing candidate, or voting by the general public or takes a position on a candidate’s character, qualifications or fitness for office.”219 Again, in pertinent point, content that would support an interpretation other than as an appeal to vote for or against a candidate includes focusing on a public policy issue and urging a candidate to take a position or calling upon the public to contact the candidate. It may consist of an ad that "includes a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than" voting for or against a candidate. Only the communication itself and basic background necessary to put the communication in context that can be obtained "with minimal, if any, discovery" may be considered.220

The FEC “indicia” are easily avoidable.– the WRTL ads avoided them all and so do most issue ads.221 In the event that one has not happened upon a current legislative issue, there does remain room to argue over exactly what constitutes commentary on a candidate’s “character, fitness, or qualification for office.” The limitation is not meaningless. The most straight forward understanding of the phrase would limit it to comments on a candidate unrelated to issues. Thus the ads raising the specters of Senator McCain’s cancer and President Obama’s radical associates may not be genuine issue ads. But that line may be far from clear. What of criticizing a candidate’s relationship with lobbyists and calling for the reform of ethics standards? WRTL II’s protection of issue advocacy would seem to require some substantial room for discussion of a candidate’s position on the issues, notwithstanding that objectionable positions on the issues could be, in some sense, bear on her "fitness" for office.222

219 See above

220 11 C.F.R. § 114.15(a). This information may include whether an individual is a candidate or whether the communication describes a public policy issue. Id. The rules provide that "[a]ny doubt will be resolved in favor of permitting the communication." 11 C.F.R. 114.15(c)(3).

221 Although one could argue that the Obama ad is calling on him to repudiate radical ideologies.

222 Responding to a request for an advisory opinion, the FEC deadlocked on whether proposed ads by the National Right to Life Committee discussing Barack Obama’s actions with respect to an abortion bill while he was in the Illinois Senate. Both ads questioned his honesty and one concluded with the phrase “Barack Obama: a candidate whose word you can’t believe in.” “FEC Deadlocks Over Issue Ads” CQPolitics, October 23, 2008 (http://www cqpolitics.com/wmspage.cfm?parm1=5&docID=news-000002978532)
A case for a more narrow construction of **WRTL II** might seize upon the fact that Wisconsin Right to Life's ad did not state Senator Feingold's position (although it featured the URL for a website on which that information could be found), a fact noted by the principal opinion in distinction of the "Jane Doe" ad cited by *McConnell.*223 Could it be argued that an ad that mentions and then criticizes a candidate's position is the functional equivalence of express advocacy?

But it would an extraordinarily cramped view of an issue ad that limited it to calling for advocacy without setting forth the position of the office holder to whom that advocacy is to be directed. It seems reasonable to suspect that citizens will be far more likely to contact an official who is thought to oppose the position that they prefer. Outside the context of an election, advocacy organizations, in attempting to rouse support for or against a particular piece of legislation, typically offer arguments for their position and identify the position of various legislators and officials.224 Thus, the identification and criticism of an official's position does not distinguish "genuine" from "phony" ads.

More fundamentally, the philosophical orientation of **WRTL II**'s principal opinion, shared by the concurrence, does not suggest a narrowing reading. It's insistence on the need to resolve all doubts in favor of speech that makes such a reading unlikely.

Nor have post **WRTL-II** cases suggested a narrow construction. In *North Carolina Right to Life, Inc. v. Leake* (NCRTL III), the Fourth Circuit upheld a challenge to North Carolina's two-pronged test for express advocacy or its

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223 **WRTL II**, 127 S. Ct. at 2667 n.6.
The court found a variety of infirmities, including language that permitted a finding that speech may be regulated based on how a "reasonable person" would interpret its "essential nature" in light of four contextual factors. The court in Center for Individual Freedom, Inc. v. Ireland, the United States District Court for the Southern District of West Virginia struck down a facial challenge to a statute that also permitted a finding that a message constitutes express advocacy if it "can only be interpreted by a reasonable person" as advocating the election or defeat of a candidate because "the electoral portion" is clear and "reasonable minds could not differ" as to its character. This reliance on a posited "reasonable person," in the court's view, is inconsistent with WRTL II. Although Ireland's outcome may be better explained by the lack of interpretive guidelines in West Virginia's statutes, Ireland and NCRTL III's rejection of a standard based upon how a reasonable person would (as opposed to "could") interpret an ad seems consistent with WRTL II's insistence that a "tie" go to the speaker.

Other post-WRTL II cases provide little guidance. In The Real Truth About Obama, Inc. v. FEC, a district court rejected the plaintiff's claims that the FEC's regulations defining express advocacy are unconstitutional. In Human Life of Washington, Inc. v. Brumsickle, a district court upheld disclosure requirements on issue advocacy addressing the same issue presented by a pending referendum. Some guidance may – although not necessarily - be provided by the Supreme Court in Citizens United v. FEC. Citizens United involved application of BCRA's restriction on electioneering communications to a film

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232 Id. at 280-81.
234 Id. *9.
235 Id. at *11.
236 WRTL II, 127 S. Ct. at 2669.
entitled "Hillary: The Movie," produced by a 501(c)(4) organization called Citizens United. The film focused on then-presidential candidate Senator Hillary Rodham Clinton’s “Senate record, her White House record during President Bill Clinton’s presidency . . . her presidential bid” and included “[express opinion on whether she would make a good president].”

Although display of the film in theatres and distribution by DVD are outside the scope of BCRA, Citizens United also sought to make the film available on a “video on demand” cable channel and the FEC takes the position that the prohibition on broadcasting electioneering communications applies.

The District Court denied Citizens’ motion for a preliminary injunction, finding that the film did not reference legislative issues, referenced the election and Senator Clinton’s candidacy and “takes a position on her character, qualifications, and fitness for office.” In the court’s view, the film was “susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her.”

There are ways for the case to be decided that will not shed further light on WRTL II. The Court might simply decide that the statute does not apply to video on demand. If the District Court’s description is accurate, the conclusion that “Hillary: The Movie” constitutes the “functional equivalent” of express advocacy seems unexceptional under McConnell in WRTL II. It might, although this seems unlikely, accept Citizens’ invitation to overrule Austin making the distinction between “express” and “genuine issue advocacy” irrelevant.

On the other hand, it could choose to expand on the definition of “genuine issue advocacy” in a way that makes clear that some express advocacy (which seems clearly to have been present in the film) cannot justify application of the blackout period to communications which also include substantial issue advocacy. This seems likely. At oral argument, in defending application of BCRA to the ninety minute video, the government argued that Congress could.

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241 Id. at 275.
242 Id.
243 Id. at 279.
244 Id.
245 Transcript of oral argument in Citizens United v. FEC 29-30(March 24, 2009) (available on line at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-205.pdf)
subject to a possible “media exception, ban constitutionally prohibit the use of
corporate funds to publish or distribute a book containing express advocacy.”
Although the current BCRA would not reach that, the government did say that its
prohibition could be applied to lengthy and detailed communications such as
*Hillary: The Movie*, arguing that a corporation could not, for example, publish or
distribute a book through satellite transmission to be read on a Kindle device.
This seemed to trouble the Court and *Citizens United* may, by statutory
construction or another finding that the statute is unconstitutional as applied,
further expand the scope of genuine issue advocacy.

*Even if the Court rules for the FEC, it seems likely to do so on the basis
that Hillary: The Movie contains (indeed is apparently filled with) commentary
on Hillary Clintons’ character, qualifications and fitness for office.*

It seems unlikely, however, that it will retreat from the broad protection that it announced
only two years earlier.

2. **WRTL II Suggests a Narrow View of the Corruption Interest**

*WRTL II's second implication is that the majority unambiguously
dismissed by the posited state interests that supported the outcome in *McConnell.*
That an ad may have been intended to influence an election and had that effect is
insufficient to restrict it on anti-corruption grounds, notwithstanding that
politicians will "know who their friends are." It roundly rejects the "egalitarian"
justification for reform.

*A relatively free rein for independent expenditures makes public
financing difficult. Even if some combination of campaign restrictions and
enhanced funding makes opting into a system of public financing more attractive
than reliance on private funds, the ability of private money to flow to

247 Id. at 28-29.
248 Id. at 11, 20.
249 There is also a case moving through the lower courts that raises the question of
whether an organization that qualifies as a political committee under federal law
(because, for example, its major purpose is the nomination and election of a candidate)
can be constitutionally subjected to contribution limits upon its donors. A district court
denied the plaintiff’s motion for a preliminary injunction, *SpeechNow.org v. FEC*, 567
250 524 F.3d 427, 432 (4th Cir. 2008).
independents threatens to swamp the publicly financed messages of the candidates. It is unlikely that any politically feasible amount of public financing will come close to matching the flow of independent money to critical races. As noted earlier, one response to relatively unconstrained independent expenditures, enacted in various states, is to provide favorable treatment to candidates facing independent expenditures (or self-financing candidates). Most simply, states with public financing systems may provide additional funds to candidates facing self-financing opponents or independent expenditures. Alternatively, the law may permit higher contribution levels for candidates facing a self-financing opponent or one well supported by independent groups.

These systems have fared well in the lower courts. In North Carolina Right to Life Committee v. Leake, (Leake III), the Fourth Circuit upheld a state scheme that provided additional funding to certain candidates facing well-financed non-participating candidates. Such a system, in the court's view, "furthers, not abridges, pertinent First Amendment values." To the extent that non-participating candidates or independent groups are deterred from speech, it is a result of "a strategic, political choice, not from a threat of government censure or prosecution."

In Daggett v. Commission on Governmental Ethics and Election Practices, the First Circuit upheld a similar system in Maine. The court declined to "equate responsive speech with the impairment of the initial speaker" and observed that "the purpose of the First Amendment is to "secure the widest possible dissemination of information from diverse and antagonistic sources.""

In Gable v. Patton, the Sixth Circuit upheld a Kentucky scheme that raised contribution limits for those facing nonparticipating candidates who have exceeded the public financing system limit on expenditures and matched the additional funds raised on a two for one basis until the expenditure limit was reached. The system was so favorable to participating candidates that the court could conceive of only a narrow set of circumstances in which a candidate would choose not to participate (i.e., where she intends to exercise expenditures limit

253 Id. at 436 (quoting Buckley, 424 U.S. at 92-93).
254 Id. at 438.
255 205 F.3d 445, 450 (1st Cir. 2000).
160 Id. at 464 (quoting Buckley, 424 U.S. at 49).
161 142 F.3d 940, 953 (6th Cir. 1998).
and believes that she can advance her opportunity by more than three to one). Nevertheless, it upheld the system.\footnote{Id. at 948.}

Prior to last year,\footnote{Id. at 954; See also Wilkinson v. Jones, 876 F.Supp. 916 (W.D. Ky. 1995).} only one case has struck down such a system. In \textit{Day v. Hollahan}, the Eighth Circuit concluded that a Minnesota law that increased a candidate's expenditure limits and provided additional public funding in response to independent expenditures burdened the speech of those making the independent expenditures.\footnote{34 F.3d 1356, 1363-66 (8th Cir. 1994). But the Eighth Circuit has upheld a law that permitted publicly financed candidates to exceed an expenditure ceiling if her non-participating opponents raised funds in excess of a trigger amount. See Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996). However, unlike the system under review in \textit{Day}, the Rosenstiel scheme provided no additional public funds.}

\textit{But WRTL II itself suggests a problem. These systems are explicitly designed to "equalize" resources (or, at least, to insulate campaigns from the private distribution of wealth) and to deter large donors or organized interests to spend money outside the regulated system in an effort to influence elections. WRTL II suggests that a majority of the current Court does not believe that such expenditures pose a threat of actual or apparent corruption. Nor does that majority appear to believe that regulation of expenditures should seek to "level the playing field" between candidates and contending political factions – to, in the words of Cass Sunstein, prevent "disparities in wealth to be translated into disparities in political power."}\footnote{Cass Sunstein, \textit{Political Equality and Unintended Consequences}, 94 COLUM. L. REV. 1390, 1390 (1994).}
IV. THE PLAYING FIELD IS NOT FLAT: WILL PUBLIC FINANCING FADE AWAY?

 A. Davis v. FEC: Helping One Side Burdens the Other

Sure enough, yet another mole has sprung up. In *Davis v. FEC*, the Supreme Court considered a challenge to the BCRA’s “millionaire amendment” - a provision that raised both contribution limits and lifted caps on coordinated party expenditures for candidates facing a self-financed candidate with a financial advantage exceeding a trigger amount.\(^{169}\) These liberalized limits were to remain in place until the self-financed advantage has been eliminated.\(^{260}\)

The Supreme Court, once again by a 5-4 vote, held that the amendment impermissibly burdened the right of a self-financing candidate to aggressively advocate his election.\(^{261}\) *A candidate who chooses to exercise that right must endure the burden that is placed on that right by the activation of a scheme of discriminating contribution limits.*\(^{262}\) This burden could not, in the view of the majority, be justified by an interest in avoiding real or apparent corruption.\(^{263}\) Self-financed candidates, *it reasoned*, cannot “corrupt” themselves.\(^{264}\)

*And that ended the matter.* The majority, *once again*, flatly rejected the notion that restrictions on speech could be justified by a desire to “level electoral opportunities for candidates of different personal wealth.”\(^{265}\) As in *WRTL II*, this “broader” definition of corruption or interest in creating a more egalitarian system of campaign finance was deemed insufficient to support the abridgment of speech stemming from asymmetrical contribution limits. In the view of the majority, only the interest in the prevention of actual or apparent corruption is compelling.

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\(^{169}\) *Davis*, 128 S. Ct. at 2766.

\(^{260}\) Essentially the law called for calculation of a number referred to as the “opposition personal funds amount” (OPFA) obtained by adding each candidate’s expenditure of personal funds to 50% of the funds raised from contributors. If one candidate enjoyed an advantage in excess of $350,000, the asymmetrical limits would apply to the disadvantaged candidate until the OPFA advantage was eliminated.\(^{266}\)

\(^{262}\) *Davis*, 128 S. Ct. at 2774.

\(^{263}\) Id. at 2272.

\(^{264}\) Id.

\(^{265}\) Id. at 2773.
On the contrary, in Buckley, we held that "[t]he interest in equalizing the financial resources of candidates" did not provide a "justification for restricting" candidates' overall campaign expenditures, particularly where equalization "might serve . . . to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." We have similarly held that the interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections" cannot support a cap on expenditures for "express advocacy of the election or defeat of candidates," as "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."\(^{266}\)

Such an objective, according to Justice Alito, would have "ominous implications because it would permit Congress to arrogate the voter's authority to evaluate the strengths of candidates competing for office."\(^{267}\)

Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, and it is a dangerous business for Congress to use the election laws to influence the voters' choices.\(^{268}\)

Finally, the asymmetrical limitations at issue in Davis could not be justified to remedy the disadvantage that restrictions on campaign contributions and coordinated expenditures impose upon candidates who are not wealthy.\(^{269}\)

As in WRTL II, the Court held that restrictions on protected speech cannot be

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\(^{266}\) Id. (quoting Buckley, 424 U.S. 48-49, 56-57).

\(^{267}\) Davis, 128 S. Ct. at 2773.

\(^{268}\) Id. at 2774 (internal citations omitted); See Bellotti, 435 U.S. at 791 n.31.

\(^{269}\) Id. at 2773-74.
justified by a desire to "mitigate the untoward consequences of Congress' own handiwork." 270

Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, dissented. 271 While only Justice Stevens would have abandoned Buckley's distinction of contributions and expenditures, 272 the four dissenters did not see the asymmetrical limits as a burden on the self-financing candidate:

The Millionaire's Amendment quiets no speech at all. On the contrary, it does no more than assist the opponent of a self-funding candidate in his attempts to make his voice heard; this amplification in no way mutes the voice of the millionaire, who remains able to speak as loud and as long as he likes in support of his campaign. Enhancing the speech of the millionaire's opponent, far from contravening the First Amendment, actually advances its core principles. If only one candidate can make himself heard, the voter's ability to make an informed choice is impaired. And the self-funding candidate's ability to engage meaningfully in the political process is in no way undermined by this provision. 273

The dissenters challenged the majority's assertion that only the government's interest in preventing actual or apparent corruption could justify such a regulation.

Indeed, we have long recognized the strength of an independent governmental interest in reducing both the influence of wealth on the outcomes of elections, and the appearance that wealth alone dictates those results. In case after case, we have held that statutes designed to

270 Id. at 2774.
271 Id. at 2777 (Stevens, J., dissenting).
272 Davis, 128 S. Ct. at 2777-79 (Stevens, J., dissenting).
273 Id. at 2780. (internal citations omitted).
protect against the undue influence of aggregations of wealth on the political process – where such statutes are responsive to the identified evil – do not contravene the First Amendment.  

"Although," the dissent continued, "the focus of our cases has been on aggregations of corporate rather than individual wealth, there is no reason that their logic – specifically, their concerns about the corrosive and distorting effects of wealth on our political process – is not equally applicable in the context of individual wealth."  

B. The Implications of Davis and WRTL II

If WRTL ensures the continued vitality of independent expenditures, Davis seems to limit the potential for regulatory response. It suggests that aiding the opposition is a burden on protected speech that cannot be justified by a desire to reduce the influence of money and to level the playing field. If that is so, asymmetrical schemes of public financing that provide additional funding or raise contribution limits in response to independent expenditures are presumably unconstitutional.

In response to a blog post in which I initially set forth the argument developed here, a case comment in the Harvard Law Review argues that asymmetrical funding can be saved by the distinction between government subsidies and penalties. At least under certain circumstances, the government can fund speech without also funding analogous speech. It can, for example, fund only family planning clinics that do not counsel patients about abortion.

274 Id. at 2781.
275 Id.
It can consider "general standards of decency" in making grants to artists\(^{279}\) and forbid nonprofits who engage in lobbying from receiving tax deductible contributions.\(^{280}\)

In the view of the Harvard author, it can also choose to provide additional funding to those candidates who face substantial independent expenditures.\(^{281}\) *Davis*, according to the author, involves a government restriction on speech, *i.e.*, the lower (actually unchanged) campaign contribution limits applicable to candidates choosing to self finance above a certain level.\(^{282}\) Asymmetrical financing, the comment argues, is not a restriction, but a subsidy that enhances the "speech power" of a candidate who must contend with a self-financing opponent.\(^{283}\) The Harvard author argues that Justice Alito, given his self professed judicial modesty, could not have meant to discard, *sub silentio*, the distinction between subsidies and penalties and its "clear doctrinal line" between asymmetrical restrictions and asymmetrical funding.

It certainly is the case that, *subject to certain limitations and under certain circumstances*, the government can pick and choose what speech it will subsidize. It is also the case that courts have upheld the decision not to fund the expression of certain points of view. *It has, from time to time, used the language of penalty and subsidy to characterize prohibited and permitted government responses to private speech. It is not the case that the distinction between penalties and subsidies – a branch of the law of unconstitutional conditions*\(^{285}\) *- is readily discerned or consistently applied.*\(^{286}\) It is, in fact, one of the most

\(^{281}\) Id. at 381.
\(^{282}\) Id. at 383-84.
\(^{283}\) Id. at 384.
\(^{284}\) See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 ("[n]either the Court nor the commentary . . . has developed a satisfying theory of what is coercive about unconstitutional conditions."))
confusing areas of First Amendment law and certainly cannot be navigated by the application of labels.

In my view, however, the language of penalty and subsidy is not itself very helpful. Both were present in *Davis* and are present in a system of asymmetrical public financing. In *Davis*, one could, with the majority, characterize the millionaire’s amendment as a penalty on those who exercise their constitutionally protected right to self-finance. Relaxing contribution restriction for one’s opponent will certainly be perceived as a penalty and it is well within our customary uses of language to call it such.

But one might also, with the minority, characterize it as an attempt to promote (if not exactly subsidize) the speech of those faced by self-financed candidates. Indeed, Justice Stevens’ position in dissent was that *Davis* did no more than empower responsive speech, *i.e.*, enable "speech power." Similarly, while one can see the government subsidy cases as selective "empowerment" of only certain types of speech, *i.e.*, as a subsidy, it is just as easy to call it a penalty. The family planning clinic that wishes to provide information about abortion must forego government funding as a condition of doing so. A nonprofit loses its tax exemption for exercising its right to lobby its elected representatives. Referring to something as a "penalty" or a "subsidy" is an interpretive choice that is not guided by the terms themselves.

While this distinction could be made to turn on whether government cuts a check, that seems overly formalistic and, in any event, inconsistent with the precedent. Loss of a tax deductible contribution is not the receipt of funds but, as in *Davis*, the imposition of a more onerous set of rules impacting the solicitation of funds.

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287 Martin H. Redish and Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 Minn. L. Rev. 543 (1996) (Proposing complicated framework that distinguishes negative and positive subsidies; positive subsidies that are "policy" and "auxiliary," auxiliary subsidies that are "categorical," "viewpoint-based," or subsidies of "judgmental necessity.").

288 Cass R. Sunstein, *Half Truths of the First Amendment*, 1993 UNIVERSITY OF CHICAGO LEGAL FORUM 25, 140 (Distinction between penalties and subsidies "forces us to chase ghosts" and is irrelevant).

289 ("Conclusory labels often take the place of analysis.")

290 *Davis*, 128 S. Ct. at 2780 (Stevens, J., dissenting).
The terminology, it seems to me, is a way of characterizing the impact of a selective subsidy or a different set of rules on the disfavored party. Thus, while a speaker has no right to government largesse (subsidy), she does have the right to be free from undue interference (penalty). Whether one calls a regulatory scheme a more attractive set of limitations or a direct subsidy is not the critical question. What is important is a judgment about the way in which a government action impacts protected speech and that judgment must now be understood in light of Davis.

The problem in Davis – and it is also present in an asymmetrical financing system – is that an election is, in the words of Justice Stevens, a “zero-sum,” game. This is not true – at least not in the same way – in the government subsidy cases. The loss of a tax exemption for lobbying applies equally to, say, Wisconsin Right to Life and Planned Parenthood. While one might argue that funding family planning clinics that do not provide information about abortion or subsidizing art that is not transgressive "burdens" those who wish to provide abortion information or lay bare the horror of conventional values, the harm is quite indirect. In an election, what helps one side directly and immediately harms the other. The subsidy to an opponent necessarily burdens the speaker.

Thus, Davis regarded the benefit (higher contribution limits and unlimited coordinated expenditures) as "an unprecedented penalty on any candidate who robustly exercises [his or her] First Amendment right" because increased contribution limits for one's opponent constitutes a "special and potentially significant burden." Significantly, the Court cited Day v. Holahan, the only case striking down asymmetrical public financing and expenditure limits, in support of that position. The burden, it explained, was that "the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of politics." Rather than justifying the burden, the effort to "level the playing field" by assisting a candidate who opposed the speaker's position is the burden.

291 Id. (Stevens, J., dissenting).
292 Id. at 2764.
293 Id. at 2772.
294 Id.; See pp. supra.
295 Davis, 128 S. Ct. at 2772.
It is triggered, moreover, by the decision to speak. It is not the decision to provide information on abortion that causes a subsidy to be provided to another clinic that does not wish to do so. Although the loss of the tax deduction subsidy for an organization's donors does turn on the choice to speak, it does not do so in a way that impairs the "speech power" of the speaker relative to opposing points of view (although it does make it more difficult to raise money for other purposes, some of which might include speech.) Particularly in the context of an election, the effect – and intent – of such a scheme is to dissuade constitutionally protected speech and to do so in a way that the Davis majority regarded with extreme skepticism.

The latter point, it seems to me, is also critical. After WRTL II and Davis, the Court (at least assuming consistency of doctrine) is unlikely to apply a linguistic distinction between subsidies and penalties apart from consideration of their impact on the election context and a distrust of the ability of incumbent politicians to neutrally regulate the political process. The "subsidy" that is provided (or, if you prefer, the "penalty" that is imposed) does so in a context that is ripe for mischief and self dealing. The rules that silence election speech are drawn by the incumbents who will then get to play by them to win reelection. As the Davis court noted, it is "dangerous" business to allow elected officials to act to minimize some electoral advantages and not others.

A better argument might distinguish Davis by arguing that the constitutionally protected right is to speak on issues and the additional subsidy would be provided to a targeted candidate and not to some individual or organization seeking to present the opposing view on the pertinent issue. One could argue that the burden on the speaker is an "indirect" burden in a way that the burden imposed by the millionaire's amendment is not. Asymmetrical public financing or "rescue" funding does not necessarily pay for a message advocating the opposing position on the pertinent issue (although it might) but only the candidate who the issue advocacy is seeking to persuade.

301 Id. at 2774.
But that would seem to exalt form over substance. The protected interest does not simply involve communication directed to the targeted candidate but to the public at large as well. The burden on the constitutionally protected right of the advocacy organization is clear. If it chooses to speak, the government will give money to a candidate who opposes what it supports. Whether one characterizes this as "direct" or "indirect" seems wholly beside the point. The burden is real and substantial. As the Eighth Circuit noted in Day, "[T]he knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech." 302

One might also argue that the state interest in independent expenditures is stronger than limiting the advantages of a self-financed candidate. Presumably, a candidate will not be beholden to herself for parting with some of her own fortune in seeking public office (although she may be partial to those interests and policies that she perceived to have helped her accumulate and maintain it), but it is hardly unreasonable to think that a candidate will perceive a need to remain on friendly terms with those who supported her election and who may attempt to wield similar influence in future campaigns.

There is much that could be asked about whether this is, in fact, the way in which the political world really works. It is unclear, for example, that interested parties support candidates whose views are tabula rasa, up for auction to whoever offers the most support. Interested parties may well prefer to invest in candidates who hold views that they feel are conductive to their interests. 303

It is unclear, moreover, whether the provision of additional funding materially reduces the threat of actual or apparent corruption. Providing funds to one’s opponent does not, after all, change whatever dependence the candidate benefitting from independent expenditures has upon those who financed them. The potentially corrupting influence of these expenditures will be eliminated only if the provision of matching funds or asymmetrical contribution limits

302 Day, 34 F.3d at 1360.
303 See, e.g., Shrink Missouri, supra note 16 at 394-95 (citing conflicting studies).
304 WRTL II, 127 S. Ct. at 2659.
More fundamentally, this argument rests precisely on the interest that was rejected in \textit{WRTL II}. The possibility of gratitude, as opposed to a \textit{quid pro quo}, was not enough to justify the restriction of speech. For the five Justices concurring in the result in \textit{Wisconsin Right to Life}, uncoordinated independent expenditures – at least as long as they can be interpreted to be issue advocacy – do not create a threat of actual or apparent corruption that is sufficiently strong to warrant the BCRA’s restrictions on constitutionally restricted speech.\footnote{Asymmetrical financing schemes have also been upheld as efforts to encourage candidates to participate in systems of public financing.\footnote{On this view, a state might offer additional help (or relaxed restrictions) to candidates who agree to abide by whatever limitations opting into the system of public financing entails. If public financing is seen as a response to actual or apparent corruption, then protecting candidates who opt in from being swamped by independent expenditures might further that end. But that interest – \textit{i.e.}, avoiding actual or apparent corruption – is apparently not enough to justify the penalty of providing funds to one’s opponent or to restrict genuine issue ads. If that is so, it is difficult to see why the encouragement of public financing – which is a means rather than an end – adds anything to the state’s interest.}}

Asymmetrical financing schemes have also been upheld as efforts to encourage candidates to participate in systems of public financing.\footnote{A better argument might distinguish \textit{Davis} by arguing that the constitutionally protected right is to speak on issues and the additional subsidy would be provided to a targeted candidate and not to some individual or organization seeking to present the opposing view on the pertinent issue. One could argue that this is an “indirect” burden, \textit{i.e.}, it does not necessarily fund a message advocating the opposing position on the pertinent issue (although it might) but will burden the speaker only if its issue advocacy fails to convince the targeted candidate. If the protected interest is to persuade the targeted candidate to support the advocacy group’s position, the provision of additional campaign funds does not, it could be said, directly burden that interest. But that would seem to exalt form over substance. The protected interest does not simply involve communication directed to the targeted candidate but to some other audience.\footnote{Some circuit courts have upheld asymmetrical systems on such a rationale for burdening independent expenditures has been rejected.}} On this view, a state might offer additional help (or relaxed restrictions) to candidates who agree to abide by whatever limitations opting into the system of public financing entails. If public financing is seen as a response to actual or apparent corruption, then protecting candidates who opt in from being swamped by independent expenditures might further that end. But that interest – \textit{i.e.}, avoiding actual or apparent corruption – is apparently not enough to justify the penalty of providing funds to one’s opponent or to restrict genuine issue ads. If that is so, it is difficult to see why the encouragement of public financing – which is a means rather than an end – adds anything to the state’s interest.\footnote{Shortly before the fall 2008 election, a district judge in Arizona found that a challenge to Arizona’s asymmetrical public financing scheme had a substantial likelihood of success on the merits but declined to enjoin its enforcement due to the short period of time before the election. Martin v. Brewer, Case No. \textendash{} (D.Ariz. October 17, 2008) (available through PACER).}
Given the sharp division on the Court and the possibility for changes in its composition, it may be that we will see the Court abandon \textit{WRTL II}'s rejection (repeated in \textit{Davis}) of an egalitarian rationale for reform and its expansive protection for individual expenditures. Perhaps it will retreat from \textit{Davis}' treatment of efforts to achieve equality by providing financial benefits to a candidate who faces an opponent who has obtained a disfavored form of financial advantage. But \textit{Davis} and \textit{WRTL II} suggest that it may be time to abandon our generation-long game of Whac-A-Mole.

Certainly reasonable regulation of campaign finance is appropriate, but the more ambitious manifestations of reform seek to improve participatory democracy in a way that suggested by Justice Breyer in his recent book \textit{Active Liberty}. Justice Breyer argues for an interpretive hermeneutic that is informed by what he believes to be the Constitution’s democratic nature\textsuperscript{313} and rooted in what he calls the “liberty of the ancients,” i.e., the participatory self government evoked by the citizens of ancient Athens.\textsuperscript{314} In the context of campaign finance reform, the idea is to act in a way that removes the presumed improper interference of wealth and to “facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process.”\textsuperscript{315} Limiting the influence of money is presumed to build public confidence in the process, broaden the base of a candidate’s financial support and encourage “greater public participation.”\textsuperscript{316} It will, the argument continues, help to ensure that a candidate’s financial support more closely reflects his popular support.

A full consideration of this objective is beyond the scope of this essay. But there are, I think, three fatal problems with the project of campaign finance egalitarianism. The first is the improbability, if not impossibility, of success. It is hardly surprising that the collective public body is willing to spend hundreds of millions of dollars to influence a government that spends trillions. In fact, the money spent on political advertising remains a fraction of what is spent on advertising movies, automobiles and beer along with other products and services.\textsuperscript{317} Given the stakes, it seems unlikely that regulators will be able to stop...
money, like water, from seeking its own level.  Even if, for example, reform effectively prevented donors from purchasing paid media, it could not prevent them from purchasing the media outlets themselves. Although current doctrine arguably permits regulation of broadcast outlets, emerging technologies have multiplied the ways in which messages can be delivered.

Even if the flow of money could be stemmed, it is unlikely that it will be done in a way that furthers the objectives of some presumably pure form of participatory democracy. As the Davis Court observed, different candidates have a variety of different advantages. Many are wholly unrelated to the participation of the citizenry in an open public conversation and exchange of ideas. Eliminating some and not others will benefit certain candidates at the expense of others. Removing the advantage of those who can attract wealthy donors benefits incumbents whose advantage lies not only in their existing name recognition, but the ability to use the resources of the state and the guise of “communicating” with constituents to enhance not only their own electoral prospects but to shape public opinion. It will benefit celebrities and those who already have access to the public. It will enhance the power of the media and what John McGinnis calls the “scribal class.” It may enhance the prospects of candidates further to the left or the right who can attract larger numbers of small donors if, as seems plausible, it turns out that the ideologically committed are more likely to contribute. It may help those in a position to attract the endorsement of large membership organizations – such as unions – whose members are likely to follow the cue of their leadership.

It is evident that not all of these advantages can be eliminated so the idea of a public conservation unsullied by confounding elements unrelated to the collective deliberation regarding candidates’ ideas and qualifications is

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318 See n. _, supra.
320 Davis, supra note , at 
321 Although we frequently hear reference to “phony” or “sham” issue ads, we less often hear of “sham newsletters” distributed through the Congressional franking privilege.
attainable. There is, in fact, no public conversation and no prior distribution of support apart from these confounding elements.

Of course, wishing for the perfect should not be the enemy of achieving the good. But, as the majority in Davis emphasized, campaign finance rules are not set by disinterested persons. It is incumbents, acting on an arcane and technical topic, who fashion the rules that will govern the process by which they will seek to retain their offices. It takes a rather sunny view of human nature to remain sanguine about the manner in which they will undertake that task.

Another way to achieve the good and not the perfect is the Madisonian notion of allowing factions to check each other. Indeed, in a Madisonian world, it is not at all clear that it is even desirable to completely insulate the political process from the influence of the economically successful. That influence may serve as one way in which populism is prevented from descending into demagoguery.

The wealthy, as Judge Richard Posner argues, are “not a monolith” and, in any event, “do not have the votes.” Wealthy donors must craft messages that appeal to the masses and, if those messages provoke – or call for – a populist response, other candidates will seek to raise money from the much larger pool of nonwealthy small donors.

The internet has made the latter approach far more effective as demonstrated by the fundraising success of President Barack Obama. Given

323 Davis, supra note _, at _.
324 In fact, one commenter has suggested that Justice Breyer’s view represents a Pelagian view of our Augustinian Constitution. William E. Thro, A Pelagian Vision For Our Augustinian Constitution: A Review of Justice Breyer’s Active Liberty, 12 J. College & University Law 491 (2006) Pelagius was a fifth century British monk who taught that humanity was inherently virtuous and that individuals could achieve their own salvation. Augustine taught that individuals are fallen and can achieve salvation only through the grace of God.
325 Cf. McGinnis, supra note _, at 29-30, citing MANCUR OLSON, POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS 15-16 (2000), (suggesting that “societies grow faster and have less conflict when the political power is diffused throughout … those involved in producing the social surplus of society.”)
326 Posner, supra note _, at 1705.
327 Id.
328 But see Reality Check: Obama Received About the Same Percentage From Small Donors In 2008 as Bush in 2004, Report of Campaign Finance Institute (available on line
the success of internet fundraising, it may increasingly be the case that small money counters, to a greater or lesser extent, big money. Although this seems unlikely to result in a world where the distribution of contributions and expenditures reflects some presumed distribution of public opinion or one in which the wealthy will not give more than the nonwealthy, the “distorting” impact of wealth may turn out to be less than is feared.

VI. CONCLUSION

The Court’s campaign finance jurisprudence may be a bit like the weather in my home state. If you don’t like it, the saying goes, just wait. But the principles underlying WRTL II and Davis have a longstanding pedigree in that jurisprudence. Expenditures differ from contributions. It is not the role of the state to level the political playing field. Recognizing the implication of these principles may remind us that democracy may be better served by competition than control.

B. The Battle Over Corporate Expenditures

In Buckley, preexisting prohibitions on contributions by corporation and unions were not challenged. 1 It quickly became clear, however, that corporate entities have some constitutionally protected interests in electoral participation. In First Nat. Bank of Boston v. Bellotti, 2 for example, the Court struck down a Massachusetts statute prohibiting corporations from spending on communications relating to referenda other than those “materially affecting any of the property, business or assets of the corporation.” 3 The Court found no support for the proposition that otherwise protected speech loses its protection because its source is a corporation. 4 Bellotti addressed competing narratives that have dominated the Court’s jurisprudence on corporate participants in elections ever since. In Bellotti, the majority rejected the argument that corporate wealth – or the supposed legal advantages enjoyed by corporations in amassing that wealth – could justify the prohibition:

According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee’s arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government. 5

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1 cite to them and why they were enacted
2 435 U.S. 765
3 Id. at 766.
4 Id.
5 Id. at 789-90.
At least one reason to do so was distrust of state management of the political process. In MCFL, for example, it argued that

The potential impact of this argument, especially on the news media, is unsettling" it argued, noting [o]ne might argue with comparable logic that the State may control the volume of expression by the wealthier, more powerful corporate members of the press in order to "enhance the relative voices" of smaller and less influential members."

is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." It observed that 'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." In Bellotti, Justice Powell warned that "power on government to channel the expressing of views is unacceptable under the First Amendment." The state must not "give one side of a debatable public question over advantage in expressing its views . . . ."

This did not mean, however, that corporate restrictions on contributions could not be upheld. The Bellotti court distinguished restrictions on corporate contributions as an attempt to prevent apparent or actual corruption on interests not presented by the referenda restriction."

In FEC v. Massachusetts Citizens for Life (MCFL), the Court considered whether the prohibition against corporate use of treasury funds "in connection" with a federal election set forth in 2 U.S.C. § 441b, could be constitutionally applied to the activities of MCFL. MCFL was a nonprofit corporation that did not accept donations from business corporations, but raised money from its individual members and activities such as raffles, garage and bake sales, picnics and dances. The Court applied the same narrowing construction to § 441b as it had to the prohibitions of independent expenditures in Buckley, holding that it prohibited only those expenditures that constitute "express advocacy.""

Although MCFL’s activities did constitute express advocacy, a majority of the Court found that, as applied to MCFL, § 441b unconstitutionally burdened MCFL’s right of free expression. Although § 441b could be justified as a limit on the capacity of corporate entities to

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6 Bellotti, 435 U.S. at 791 n.30
7 Id. at 791., n.31.
8 Id. at 790-91 (quoting Buckley, supra note __), 424 U.S. at 48-49).
9 Id. at 785-786.
10 Id. at 788 n. 26.
11 Id. at 242.
12 Id. at 249.
13 Id. (explain why)
14 Id. at 261.
use resources amassed in the economic marketplace to provide an unfair advantage in the political marketplace.\textsuperscript{15} Application of the statute to MCFL did not serve that interest: Regulation of corporate political activity thus has reflected concern not about use of the corporate form per se, but about the potential for unfair deployment of wealth for political purposes. Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace. While MCFL may derive some advantages from its corporate form, those are advantages that redound to its benefit as a political organization, not as a profit-making enterprise. In short, MCFL is not the type of "traditional corporation organized for economic gain," that has been the focus of regulation of corporate political activity.\textsuperscript{66}

Thus it announced an exception for what has come to be known as MCFL corporations:

In particular, MCFL has three features essential to our holding that it may not constitutionally be bound by § 411's restriction on independent spending. First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities. This ensures that political resources reflect political support. Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity. Third, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.\textsuperscript{16}

Although MCFL could have established a segregated fund subject to certain disclosure and regular requirements and restrictions on the source of funding, it was not free to use its general treasury fund.\textsuperscript{17} While this did not constitute "an absolute restriction on speech, it is a substantial one,"\textsuperscript{18} and that even use of a segregated fund would require "very significant efforts."\textsuperscript{19}

The scope of MCFL's constitutional limitation has not proven to be particularly robust. For example, in \textit{Austin v. Michigan Chamber of Commerce}, the Court upheld a Michigan statute that prohibited corporate treasury funds from being used for independent expenditures in support

\textsuperscript{15} Bellotti, 435 U.S. at 264.
\textsuperscript{66} Id. at 259.
\textsuperscript{16} Id. at 263-64.
\textsuperscript{17} Id. at 245.
\textsuperscript{18} Id. at 252.
\textsuperscript{19} Id.
The prohibition, the Court concluded, was narrowly tailored to serve a compelling state interest. Although the Chamber of Commerce was a non-profit entity, it was not formed for the purpose of advocacy. Additionally, it did not consist entirely of members supporting its political purposes and accepted money from for-profit corporations. Just as significantly, candidates who could not, nor would not, self-finance were restricted by contribution limitations and, consequently, wealthy candidates – often with no prior political experience – became more frequent and more successful. The result on the ground was a substantial increase in self-financed candidates.

But, again, although the number of MCFL corporations might be small, the Court's interpretation of the scope of the prohibition on corporate independent expenditures undoubtedly contributed to the proliferation of issue ads. However, the regulatory gap might simply be a function of the statutory language employed in FECA.

C. An Attempt to Limit Independent Expenditures

Some guidance may be provided by the Supreme Court in Citizens United v. FEC. The film focused on then-presidential candidate Senator Hillary Rodham Clinton's "Senate record, her White House record during president Bill Clinton's presidency... her presidential bid" and include[d] 'express opinion on whether she would make a good president.' The District Court denied Citizens' motion for a preliminary injunction, finding that the film did not reference legislative issues, referenced the election and Senator Clinton's candidacy and "takes a position on her character, qualifications, and fitness for office." In the court's view, the film was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." The intriguing thing about Citizens United is that the Court granted certiorari. If the District Court's description is accurate, the conclusion that "Hillary: The Movie" constitutes the "functional equivalent" of express advocacy seems unexceptional under McConnell in WRTL II. Perhaps the Court will simply make clear that "magic words" are not required. It seems unlikely, however, that it will retreat from the broad protection that it announced only two years earlier.

20 Id. at 652.
21 Id. at 672 (Brennan, J., concurring)
22 Id. at 664.
23 See Krauthammer, supra note 5.
25 Id. at 275.
26 Id.
27 Id. at 279.
28 Id.
Issue ads are likely to continue to be directed at those with whom the advocacy organizations disagrees. While one could imagine advocacy calling on the audience to urge Senator Foghorn to continue his staunch support of ethanol mandates, there would seem to be more risk that this will be seen as express advocacy. Thus, in a post-WRTL world, issue ads are likely to remain negative.

This larger scope for issue advocacy is not, of course, unlikely to be restricted to corporate and union treasury funds. If WRTL II forecloses the prohibition of most issue advertising for corporations and unions, it forecloses it as well for issue advertising paid from other funding sources. WRTL II, then, is significant not only for its restriction on the scope of BCRA's limitation on the use of corporate and treasury funds for issue advocacy, but for its implications with respect to further regulation of such advocacy.30

The second implication is that the majority seemed unmoved by the posited state interests that supported the outcome in McConnell. That an ad may have been intended to influence an election and had that effect is insufficient to restrict it on anti-corruption grounds, notwithstanding that politicians will "know who their friends are."

WRTL II represents the continued viability of the now over thirty-year old distinction between expenditures and contributions. The latter can be restricted to avoid actual or apparent corruption, but the former – even if candidates are able to know who their friends are – cannot.

Nor are restrictions of the use of corporate and union treasury funds for genuine issue ads justified by the supposed advantages of these entities in amassing wealth. It is not justified by a desire to equalize resources and to diminish the influence of money in elections, or to make it more likely that the ability to finance communications is more reflective of popular support. Getting "Big Money" out of elections is not, in the view of a majority of justices, a robust justification for restrictions on speech.

A better argument might distinguish Davis by arguing that the constitutionally protected right is to speak on issues and the additional subsidy would be provided to a targeted candidate and not to some individual or organization seeking to present the opposing view on the pertinent issue. One could argue that this is an "indirect" burden, i.e., it does not necessarily fund a message advocating the opposing position on the pertinent issue (although it might) but will burden the speaker only if it's issue advocacy fails to convince the targeted candidate. If the protected interest is to persuade the targeted candidate to support the advocacy group's position, the provision of additional campaign funds does not, it could be said, directly burden that interest.

But that would seem to exalt form over substance. The protected interest does not simply involve communication directed to the targeted candidate but to the public at large as well. The burden on the constitutionally protected right of the advocacy organization is clear. If it chooses to speak, the government will give money to a candidate who opposes what it supports.

Whether one characterizes this as "direct" or "indirect" seems wholly beside the point. The burden is real and substantial. As the Eighth Circuit noted in Day, "[T]he knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech."31

Some circuit courts have upheld asymmetrical systems on such a rationale.32

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31 Day, 34 F.3d at 1360.

32 Cite to specific case.
I. INTRODUCTION

II. CONSTITUTIONAL PROTECTION OF EXPENDITURES

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IV. (p. 29 currently)

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