

# PACS POST–CITIZENS UNITED: IMPROVING ACCOUNTABILITY AND EQUALITY IN CAMPAIGN FINANCE

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*In this Note I argue that the Federal Election Campaign Act's \$5000 limitation on individual contributions to political committees should be removed. I advance two main arguments. First, in light of recent campaign finance decisions, the limitation appears to be unconstitutional as it imposes a limit on First Amendment rights without being tailored to the government's interest in preventing quid pro quo corruption. Second, eliminating the contribution limitation will have previously unrecognized normative benefits. Smaller PACs representing a variety of viewpoints will be more able to compete with established corporate and union PACs, and the volume of accountable political speech may increase as more money is channeled through PACs to candidates' hands.*

## INTRODUCTION

The modern campaign finance system is praised by few and maligned by many. At the center of the criticism lies the seminal 1976 Supreme Court decision *Buckley v. Valeo*,<sup>1</sup> which requires any regulation of political speech to be closely related to preventing corruption. *Buckley* holds that the risk of corruption justifies regulating contributions given to candidates but not independent expenditures made in support of candidates by unaffiliated individuals and groups.<sup>2</sup> The presence of limits on direct contributions to candidates in the absence of restrictions on independent expenditures makes it easier for money to flow to independent expenditure groups.<sup>3</sup> This outcome is worri-

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<sup>1</sup> 424 U.S. 1 (1976) (per curiam).

<sup>2</sup> See, e.g., Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729, 1733 (2001) (describing the creation of a “sharp distinction” between contributions and expenditures).

<sup>3</sup> See Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 951 (2005) (writing that the Bipartisan Campaign Reform Act of 2002 (BCRA) “sharply restricted the ability of political parties to accept . . . money not subject to [the Federal Election Campaign Act’s] requirements,” and that, consequently, “individuals and organizations interested in committing more funds to the 2004 election . . . became interested in exploiting the opportunities provided by section 527”); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705,

some, as it favors political expenditures by unaccountable independent groups at the expense of accountable speech—that is, speech from candidates who are accountable to the electorate and worry about how campaign speech affects their reputation.<sup>4</sup> This problem is also difficult to remedy because attempts to promote accountable speech via deregulation conflict with the goal of preventing candidate corruption, and attempts to regulate independent expenditures run up against *Buckley*'s constitutional line.

Recently, in *Citizens United v. FEC*,<sup>5</sup> the Supreme Court completed the deregulation of independent spending by invalidating the final limit on independent political speech—the prohibition on corporations and unions from engaging in independent electoral spending (i.e., airing advertisements) within sixty days of a general election.<sup>6</sup> In response to the decision, pundits and politicians blamed the Court for further enabling unaccountable groups to run undesirable negative advertising campaigns.<sup>7</sup> Others criticized the Court for reinforcing the perception that the political process is governed by corporate special interests.<sup>8</sup> While the verdict is still out on whether corporations

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1715 (1999) (“At every level where [efforts at regulation] have been attempted . . . the result has been simply to push the money further upstream to the emergent political action committees or independent expenditure committees that have assumed increasing control of the political stage.”); Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1703 (1999) (“If we restrict access to certain kinds of money . . . then we should expect to see candidates seeking money in other forms and other political actors spending money in other ways. And that is what happened . . .”).

<sup>4</sup> See *infra* notes 163–65 and accompanying text (discussing the notion of “accountable speech”). Accountable speech is valued under the assumption that it is of a higher quality and more truthful because the candidate is constrained to a degree by concerns about the electorate’s perception of the candidate. See Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity To Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 861 (1998) (“[B]ecause candidates are not accountable for ‘independent’ ad campaigns, these campaigns are likely to be particularly negative and reckless.”); J. Robert Abraham, Note, *Saving Buckley: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1116 & n.246 (2010) (describing treatment of accountability in literature). But see Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 VA. L. REV. 1761, 1789 (1999) (“[T]he unsupported assertion that ‘as accountability in political communication declines, levels of misinformation and deceit tend to rise’ invites scrutiny.”).

<sup>5</sup> 130 S. Ct. 876 (2010).

<sup>6</sup> BCRA, 2 U.S.C. § 441b(b)(2), (c)(1)–(5) (2006), *invalidated by Citizens United*, 130 S. Ct. 876. Also of note, following *Citizens United*, the D.C. Circuit, in *SpeechNow.org v. FEC*, held limitations on contributions to political action committees (PACs) that make only independent expenditures to be unconstitutional. 599 F.3d 686 (D.C. Cir. 2010).

<sup>7</sup> See, e.g., Timothy Egan, *John Roberts’s America*, N.Y. TIMES OPINIONATOR, (Oct. 20, 2010), <http://opinionator.blogs.nytimes.com/2010/10/20/john-robertss-america> (arguing that the “gusher” of out-of-state money and negative spending in the U.S. Senate race in Colorado was the result of the *Citizens United* decision).

<sup>8</sup> See, e.g., *Citizens United*, 130 S. Ct. at 973–74 (Stevens, J., dissenting) (discussing the undue influence corporations may exert on the political process); Michael R. Siebecker, A

became more politically active following the decision,<sup>9</sup> *Citizens United* certainly made it easier for corporations and unions that desire to engage in political activity to do so.

Interestingly, a potential doctrinal consequence of *Citizens United* and other recent decisions may prove to be an unexpected silver lining for these critics. While many of the potential collateral consequences of the Court's reasoning in these cases are discussed elsewhere,<sup>10</sup> little attention has been paid to the potential impact on one element of the Federal Election Campaign Act: the \$5000 limit on individual contributions to political action committees (PACs) that make contributions to candidates.<sup>11</sup> Under this limitation, an individual is prohibited from contributing more than \$5000 to any PAC that contributes directly to candidates. In this Note, I argue that, in light of several decisions culminating in *Citizens United*, this regulation on contributions to PACs, as well as the Supreme Court's decision in *California Medical Ass'n v. FEC (CalMed)*<sup>12</sup> that upheld it, are now out of line with the current doctrine.<sup>13</sup>

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*New Discourse Theory of the Firm After Citizens United*, 79 GEO. WASH. L. REV. 161, 165 (2010) (“[W]ith the recent Supreme Court decision in *Citizens United*, the reach of corporate influence will cascade into more and more aspects of society.”).

<sup>9</sup> It is difficult to gauge the effect of *Citizens United* because the studies that purport to analyze the decision ask the wrong question. For example, a recent report from Public Citizen on the effect of the *Citizens United* decision claims, “*Citizens United* was nothing less than a sweeping rewrite of constitutional law. It immediately caused a gushing stream of corporate money to flood into elections, posing grave threats to the integrity of the legislative process.” PUBLIC CITIZEN, 12 MONTHS AFTER: THE EFFECTS OF *Citizens United* on Elections and the Integrity of the Legislative Process 1 (2011). Yet there is not a single measurement of corporate spending in the report. Public Citizen's claim rests entirely on the overall increase in spending by independent groups in the 2010 election—as opposed to only corporations—and this statistic is not particularly informative. Without knowing the change in corporate spending specifically, it is impossible to quantify accurately the effect of the decision.

<sup>10</sup> Rick Hasen recently argued that the Court's suggestion that the government interest in preventing corruption extends only to preventing quid pro quos makes restrictions on electoral speech by foreign individuals (and perhaps even limitations on individual contributions to candidates) hard to coherently reconcile with the doctrine. Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

<sup>11</sup> 2 U.S.C. § 441a(a)(2)(C). Following *SpeechNow*, this limit no longer applies to PACs that make only independent expenditures—commonly referred to as Super PACs. *SpeechNow.org*, 599 F.3d 686; see *supra* note 6 (discussing *SpeechNow*). Allison Hayward, in a survey of the potential consequences of the Roberts Court's campaign finance decisions, notes that regulating all PACs might be problematic. She limits her argument, however, to the fact that the regulation is not indexed for inflation, and therefore is not “calibrated to any current threat . . . of corruption.” Allison R. Hayward, *What Changes Do Recent Supreme Court Decisions Require for Federal Campaign Finance Statutes and Regulations?*, 44 IND. L. REV. 285, 288–89 (2010).

<sup>12</sup> 453 U.S. 182 (1981).

<sup>13</sup> The argument is limited to PACs regulated under federal law. PACs organized for state elections are regulated by state laws. Many of these laws have less restrictive limits on

Contrary to the conventional viewpoint that deregulation is bad for reform, I argue that invalidating this regulation provides a means—within the confines of current doctrine—to obviate some of the common criticisms of *Citizens United*. Removing the restriction on contributions to PACs may reduce corporate money's influence by enabling other interests to better compete with unions and corporations that contribute to candidates through their connected PACs.

Currently, PACs associated with unions and corporations are unrestricted in their ability to use their host organization's general treasury funds to pay for administrative and operating expenses, while PACs not connected to a union or corporation are required to cover these expenses out of their limited contributions.<sup>14</sup> This enables corporations and unions to use a greater percentage of their PACs' funds for making contributions to candidates.<sup>15</sup> This advantage is important because PAC contributions comprise a substantial percentage of many congressional candidates' total fundraising.<sup>16</sup> Removing the restriction on the amount individuals may contribute to PACs will eliminate this structural disparity and better enable a diversity of groups to compete with more established corporate and union PACs. As the number of PACs seeking to influence candidates with contributions increases, the value of any particular PAC's contribution to a candidate will likely decrease, thereby diluting the political influence of large entities.

Increasing the amount individuals are permitted to contribute to PACs may also help promote accountable speech, while still guarding against the risk that political contributions will be used to corrupt candidates. PACs that contribute to candidates are uniquely positioned to further accountable speech and to prevent corruption. This is not because PACs are more accountable than other independent actors, but because they are a special vehicle for providing candidates with money: PACs are able to put money into the hands of candidates (who have a reputational stake in the way the money is spent), while also preventing corruption by attenuating the relationship between the individual donor and the candidate. Allowing individuals to donate

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PAC contributions to candidates and lack safeguards that prevent individuals from using PACs to circumvent contribution limits.

<sup>14</sup> 2 U.S.C. § 441b(b)(2).

<sup>15</sup> See *infra* notes 26–30 and accompanying text (explaining the differences between connected and nonconnected PACs).

<sup>16</sup> For example, Rep. Pete Sessions (R-TX) received forty-eight percent of his 2010 campaign funds from PACs; Rep. Linda Sanchez (D-CA) received seventy-six percent of her 2010 campaign funds from PACs. See Ctr. for Responsive Politics, *Members of the 112th Congress*, OPENSECRETS, <http://www.opensecrets.org/politicians/candlist.php?congno=112> (last visited Aug. 10, 2011) (providing a list of members of Congress and a breakdown of their campaign funds).

more to PACs that contribute to candidates will make such PACs a more enticing alternative to independent expenditure groups.

Part I of this Note provides a brief overview of relevant campaign finance regulations, the Court's framework in *Buckley* for evaluating these regulations, and the Court's decision in *CalMed* to uphold the limitation on individual contributions to PACs. Part II details the shift in doctrine that unsettled *CalMed* and now makes the restraint on PAC contributions constitutionally suspect. Most significantly, the Court limited the only recognized government interest justifying restrictions on political speech, the interest in preventing "corruption or the appearance of corruption," to an interest in preventing formal quid pro quo corruption.<sup>17</sup> This means that the corruption interest now extends only to a prohibition against explicit prearranged agreements between candidates and contributors to barter political contributions for political favors.<sup>18</sup> Part III reexamines the role of the PAC in the current campaign finance system and argues that eliminating the restriction on individual contributions will be normatively beneficial, as it will help minimize corporate influence following *Citizens United* and will likely make the political process more equal for proponents of noncorporate or nonunion viewpoints.

## I

### REGULATORY RESTRICTIONS ON INDIVIDUAL CONTRIBUTIONS TO POLITICAL COMMITTEES AND THE *BUCKLEY* FRAMEWORK

#### A. *The Federal Election Campaign Act Amendments of 1974*

The current campaign finance system originated with the 1974 Amendments to the Federal Election Campaign Act (FECA).<sup>19</sup> In the wake of the Watergate scandal, Congress sought to reduce the influence of money in politics.<sup>20</sup> The Amendments created a regulatory structure that restricted the supply of money available to candidates by limiting the amount individuals and PACs could contribute to candidates. It also reduced candidates' demand for money by imposing

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<sup>17</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010).

<sup>18</sup> *See id.* at 902 (explaining that prearrangement and coordination are necessary for quid pro quo).

<sup>19</sup> Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-455).

<sup>20</sup> *See* H.R. REP. NO. 93-1239, at 120, 131 (1974) (referencing Congress's desire to legislate in response to Watergate).

caps on the total amount any individual, PAC, or candidate could spend on a particular campaign.<sup>21</sup>

The 1974 Amendments also imposed new restrictions on PACs.<sup>22</sup> Like individuals, PACs engage in political activity by making monetary contributions to candidates or by making independent expenditures. Independent expenditures include all direct political advocacy that is not coordinated with a candidate, such as direct mailings or television advertisements. In an attempt to bring all group activity that has the purpose of influencing an election within the regulatory scheme, Congress defined “political committee” broadly. A “committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year”<sup>23</sup> is considered to be a PAC if its “major purpose” is electoral activity.<sup>24</sup> Entities are required to register with the Federal

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<sup>21</sup> See Justin A. Nelson, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524, 537 (2000) (describing the strategy of targeting supply and demand side factors).

<sup>22</sup> Before the 1974 Amendments, several provisions in the Federal Election Campaign Act (FECA) related to PACs, but they were intended to facilitate corporate, and especially union, political activity that was otherwise prohibited. See Labor Management Relations (Taft-Hartley) Act, ch. 120, § 304, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–187 (2006)) (prohibiting unions and corporations from directly engaging in political activity). Prior to FECA, labor unions circumvented the prohibition on unions and corporations making direct contributions or expenditures in connection with federal elections by forming PACs that solicited funds from individual members. PACs provided labor with a means to influence federal elections by making contributions to candidates while complying with the ban on direct union activity. These practices were eventually found suspect by the Eighth Circuit in *United States v. Pipefitters Local Union No. 562*, 434 F.2d 1127 (8th Cir. 1970), *rev'd*, 407 U.S. 385 (1972). Fearing an adverse result upon appeal to the Supreme Court, the AFL-CIO successfully lobbied Congress to include a provision in FECA authorizing the use of PACs for political activities. Edwin M. Epstein, *Business and Labor Under the Federal Election Campaign Act of 1971*, in PARTIES, INTEREST GROUPS, AND CAMPAIGN FINANCE LAWS 112 (Michael J. Malbin ed., 1980).

<sup>23</sup> 2 U.S.C. § 431(4)(A).

<sup>24</sup> *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam). The *Buckley* Court failed to provide guidance on the meaning of “major purpose.” Paul S. Ryan, *527s in 2008: The Past, Present, and Future of 527 Organization Political Activity Regulation*, 45 HARV. J. ON LEGIS. 471, 481 n.45 (2008). This has resulted in an exploitable ambiguity for groups that want to engage in political spending while avoiding regulation by the Federal Election Commission (FEC).

The ambiguity is magnified by the interaction between § 527 of the Tax Code and campaign finance laws. Section 527 provides tax exempt status for “political organizations,” including PACs; however, the definition of “political organization” is broader than FECA’s definition of “political committee.” *Id.* at 481. As a result, some organizations are able to take advantage of tax exempt status under § 527, while avoiding regulation by the FEC. These organizations are commonly referred to as “527s,” even though, in fact, they are a subset of organizations governed by § 527. However, following *SpeechNow*, contributions to PACs that make only independent expenditures are currently unlimited, so the distinction between unregulated 527s and PACs is no longer as important. A more

Election Commission (FEC) within ten days of meeting this definition and must abide by a number of restrictions, including contribution limits and donor disclosure.<sup>25</sup>

There are two main forms of PACs: nonconnected PACs and connected PACs. A nonconnected PAC is simply an independent group that meets the statutory definition. Nonconnected PACs are typically formed by ideological groups for the purpose of supporting similarly minded candidates with contributions and/or independent expenditures. As the name suggests, connected PACs—sometimes known as separate-segregated funds—are associated with a specific corporation or a labor union. Connected PACs enable these entities to engage in electoral activity, which they are otherwise prohibited from doing.<sup>26</sup> Connected PACs are limited to soliciting funds from their members and shareholders,<sup>27</sup> but they are permitted to accept unlimited financial assistance from their connected corporation or union for administrative and operating expenses (including fundraising expenses and political consultants).<sup>28</sup> Nonconnected PACs, on the other hand, are mostly unrestricted with respect to those from whom they may solicit contributions,<sup>29</sup> but they are required to pay all of their operational expenses out of the money they raise.

Connected and nonconnected PACs are subject to the same limitations on the amount they may contribute to candidates. Currently, PACs—like individuals—are permitted to contribute \$2500 per candidate per election.<sup>30</sup> A PAC seeking to contribute more may register as a multicandidate PAC and then contribute up to \$5000 per candidate.<sup>31</sup> To qualify as a multicandidate PAC, a PAC must be in existence for six months, receive contributions from over fifty individuals, and contribute to at least five different candidates.<sup>32</sup> Initially, there

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extended discussion of the meaning of “major purpose” is unnecessary for the argument advanced here, and an in-depth treatment is given to the subject elsewhere. *See id.* at 481–85.

<sup>25</sup> 2 U.S.C. § 433(a).

<sup>26</sup> *Citizens United* removed the prohibition on using general treasury funds for independent expenditures; however, the prohibitions on making direct contributions directly from a general treasury to a candidate remain. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

<sup>27</sup> 2 U.S.C. § 441b(b)(4)(A).

<sup>28</sup> 2 U.S.C. § 441b(b)(2)(C).

<sup>29</sup> PACs that make contributions to candidates are prohibited from accepting contributions from foreign nationals, 2 U.S.C. § 441e, and from corporations and labor unions, 2 U.S.C. § 441b(a).

<sup>30</sup> 2 U.S.C. § 441a(a)(1)(A). The contribution limits for individuals are adjusted annually by the FEC for inflation, but the limits for multicandidate PACs are not adjusted. 2 U.S.C. § 441a(c).

<sup>31</sup> 2 U.S.C. § 441a(a)(2)(A).

<sup>32</sup> 2 U.S.C. § 441a(a)(4).

were no limits placed on the amount of money an individual could contribute to either form of PAC. Following *Buckley v. Valeo*,<sup>33</sup> however, Congress limited individual contributions to \$5000 per PAC per year.<sup>34</sup> This restriction provides connected PACs with a significant advantage over nonconnected PACs, since connected PACs may augment individual contributions with money from their host organization's general treasury.<sup>35</sup>

### B. *Buckley v. Valeo and Judicial Review*

In 1976, the Supreme Court decided *Buckley v. Valeo*, which invalidated portions of the 1974 Amendments and established the prevailing framework for judicial review of campaign finance regulations. In a per curiam opinion, the Court upheld FECA's limits on contributions to candidates but struck down the Act's limits on expenditures.

The Court found that "the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, [but] its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions."<sup>36</sup> Expenditure ceilings pose a greater burden on First Amendment rights because they regulate direct political speech. Contributions to candidates convey only a "general expression of support for the candidate and his views, but [do] not communicate the underlying basis for the support."<sup>37</sup> Nevertheless, the Court still considered contribution limits to be a "significant interference with protected rights of association" and "'subject to the closest scrutiny.'"<sup>38</sup> Under *Buckley's* interpretation of the First Amendment, a contribution restriction may be sustained only if "the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."<sup>39</sup>

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<sup>33</sup> 424 U.S. 1 (1976) (per curiam).

<sup>34</sup> Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified as amended at 2 U.S.C. § 441a(a)(2)(C)).

<sup>35</sup> For example, in the 2007–08 cycle, connected PACs spent over fifty percent of their receipts on contributions and independent expenditures, while nonconnected PACs spent only twenty-nine percent. Press Release, FEC, Growth in PAC Financial Activity Slows, Table 4: Summary of PAC Activity 1990–2008 (Apr. 24, 2009), [http://www.fec.gov/press/press2009/20090415PAC/documents/4sumhistory2008\\_000.pdf](http://www.fec.gov/press/press2009/20090415PAC/documents/4sumhistory2008_000.pdf) [hereinafter FEC Data] (providing raw data on PAC receipts, contributions, and expenditures).

<sup>36</sup> *Buckley*, 424 U.S. at 23.

<sup>37</sup> *Id.* at 21.

<sup>38</sup> *Id.* at 25 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958)).

<sup>39</sup> *Id.*



*Buckley* also defined the government's "sufficiently important interest" narrowly, finding only the interest in combating "the actuality or appearance of corruption" to justify the regulation of contributions.<sup>40</sup> Specifically, the Court expressed concern that contributions "given to secure a political *quid pro quo* from current and potential office holders" would undermine the "integrity of our system of representative democracy."<sup>41</sup>

Congress's interest in preventing the appearance of corruption permitted it to prohibit a slightly wider range of conduct than specific *quid pro quo* arrangements.<sup>42</sup> Accordingly, the Court rejected the argument that the existence of bribery laws prohibiting *quid pro quos* made the contribution limits overbroad. Since the contribution limits focused precisely on the relationship between contributor and candidate—where "the actuality and potential for corruption have been identified"—the regulations were sufficiently tailored to the interest in preventing corruption, even though large contributions given with innocent motives could also be restricted.<sup>43</sup>

By contrast, the interest in preventing *quid pro quo* arrangements did not justify expenditure limits.<sup>44</sup> Since independent expenditures lack "prearrangement and coordination" with a candidate, there is less "danger that expenditures will be given as part of a *quid pro quo*."<sup>45</sup> In sum, the Court recognized a government interest in preventing "corruption or the appearance of corruption," which might justify restrictions on contributions to candidates, but failed to acknowledge *any* significant government interest in regulating expenditures or electoral speech made independent of a candidate.

The immediate impact of *Buckley* was "a regulatory structure created by the Court."<sup>46</sup> By permitting the regulation of contributions, but not expenditures, the Court effectively created a system that regulated the supply of money to candidates but not the overall demand for it.<sup>47</sup> This opened up the floodgates for money that the 1974

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<sup>40</sup> *Id.* at 26. The *Buckley* Court also rejected the notion that the government might have a significant interest in equalizing the ability of individuals to influence elections as "wholly foreign to the First Amendment." *Id.* at 48–51.

<sup>41</sup> *Id.* at 27–28.

<sup>42</sup> *Id.* ("[O]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

<sup>43</sup> *Id.* at 28–29.

<sup>44</sup> *Id.* at 45.

<sup>45</sup> *Id.* at 47.

<sup>46</sup> Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 119 (2010).

<sup>47</sup> See *id.* at 119 ("No rational regulatory system would seek to limit the manner by which money is supplied to political campaigns, then leave unchecked the demand."); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663,

Amendments' expenditure limits had briefly kept out of the political process. And since contributions to candidates remained regulated, the money flowed more freely to less accountable actors.<sup>48</sup>

C. *The 1976 Amendments to FECA and California Medical Association v. FEC*

Congress responded to *Buckley* with the 1976 Amendments to FECA. In addition to removing the unconstitutional expenditure limits, Congress imposed a \$5000 ceiling on individual contributions to PACs.<sup>49</sup> Congress took pains to frame the new \$5000 limit as necessary for the effective regulation of contributions.<sup>50</sup> In the Conference Committee Report, the Conference Committee gave three justifications for the new restriction: The limit was necessary to: (1) "restrict the opportunity to circumvent the \$1000 and \$5000 limits on contributions to a candidate"; (2) "assure that candidates' reports reveal the root source of the contributions the candidate has received"; and (3) minimize the problem of "political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign."<sup>51</sup>

The constitutionality of this new regulation was immediately questioned.<sup>52</sup> Though it targeted a form of contribution—rather than an independent expenditure—*Buckley*'s logic suggested that the regulation was constitutionally tenuous.<sup>53</sup> Like an independent expenditure, a contribution to a PAC lacks any prearrangement or coordination with a candidate. Since a quid pro quo requires coordination between candidate and contributor, PACs substantially reduce the risk that a donor's contribution will be given as an express quid

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666 (1997) ("The split regime of *Buckley* thus authorizes government to limit the *supply* of political money, but forbids it to limit *demand*.").

<sup>48</sup> See *supra* note 3 and accompanying text (describing how regulations led to the rise of independent political actors).

<sup>49</sup> Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified as amended at scattered sections of 2, 18, and 26 U.S.C.).

<sup>50</sup> It may seem obvious that limits on how much people may "contribute" to PACs are contribution restrictions, yet it is possible to classify the conduct as a "donation," which could conceivably draw stricter scrutiny than contributions. See Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments*, 86 YALE L.J. 953, 960-61 (1977) [hereinafter Note, *Unconstitutionality of Limitations on Contributions*] ("[D]onations to political committees do not fit precisely *Buckley*'s characterization of either independent expenditures or contributions.").

<sup>51</sup> H.R. REP. NO. 94-1057, at 57-58 (1976) (Conf. Rep.).

<sup>52</sup> See generally Note, *Unconstitutionality of Limitations on Contributions*, *supra* note 50 (arguing that limits on contributions to PACs are unconstitutional).

<sup>53</sup> See *id.* at 966-68 (arguing that *Buckley*'s tailoring analysis renders limitations on PAC contributions unconstitutional).

pro quo. Moreover, since individuals or organizations are free to contribute more than \$5000 aggregate to a variety of candidates—currently individuals may contribute an aggregate maximum of \$46,200 to candidates every two years<sup>54</sup>—it is suspect that individuals or organizations are subject to special limitations when they choose to engage in electoral activity with others through a PAC. Such a restriction impedes associational rights without being tailored to the interest in preventing candidate corruption. Unlike the contribution limits upheld in *Buckley*, the limit on contributions to PACs targets the PAC-donor relationship—a relationship removed from that where the potential for corruption has been recognized.<sup>55</sup>

The Court, however, in response to a challenge brought by the California Medical Association (CMA), upheld the regulation in *CalMed*.<sup>56</sup> The CMA sought a declaratory judgment finding the contribution limit, as applied to a PAC's administrative expenses, to be unconstitutional. The CMA also argued that the contribution limit was unconstitutional on its face.<sup>57</sup> The Court rejected the CMA's arguments but failed to form a majority on the First Amendment analysis.<sup>58</sup> Justice Marshall, writing for three other Justices, read *Buckley*'s protection of electoral speech very narrowly and concluded that *Buckley* found only expenditures “made *independently* by a candidate, individual or group in order to engage directly in political speech” to be entitled to full constitutional protection.<sup>59</sup> Since PAC contribution limits did not bar the CMA from engaging in indepen-

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<sup>54</sup> 2 U.S.C. § 441a(a)(3) (2006).

<sup>55</sup> See Note, *Unconstitutionality of Limitations on Contributions*, *supra* note 50, at 966 (arguing that restricting contributions to PACs is overinclusive, as it regulates the donor-committee relationship, which is broader than the donor-candidate relationship).

<sup>56</sup> *Cal. Med. Ass'n v. FEC (CalMed)*, 453 U.S. 182 (1981).

<sup>57</sup> Brief of Appellants at 19–20, *CalMed*, 453 U.S. 182 (No. 79-1952).

<sup>58</sup> Justice Blackmun concurred in part and in the judgment but wrote separately to express his disagreement with the plurality's First Amendment analysis, specifically the proposition that contribution limits are not subject to full First Amendment protection. *CalMed*, 453 U.S. at 202 (Blackmun, J., concurring) (“[C]ontribution limitations can be upheld only ‘if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam))). Unlike the plurality, Justice Blackmun believed that the same test should be applied to contribution limits as to expenditure limits. *Id.* Applying this rigorous standard of review, Justice Blackmun concluded—albeit with little in the form of analysis—that the statute was “narrowly drawn . . . as a means of preventing evasion of the limitations on contributions to a candidate” and “analogous” to the aggregate individual contribution limitations also upheld in *Buckley*. *Id.* at 202–03. If a PAC that did not make contributions to candidates were involved, the government's anticorruption interest would not be implicated and “a different result would follow.” *Id.*

<sup>59</sup> *Id.* at 195 (plurality opinion).

dent expenditures on its own, Justice Marshall concluded that the speech was not entitled to full constitutional protection.<sup>60</sup>

The *CalMed* plurality prominently employed an imperfect analogy to the contribution limits examined in *Buckley*. As in *Buckley*, Justice Marshall found contributions to PACs to simply “symbolize . . . general approval of [the committee’s] role in the political process.”<sup>61</sup> Extending the *Buckley* analogy further, the plurality concluded that if there is no constitutional violation in limiting contributions to candidates, there is similarly no infringement in limiting contributions to committees that support a number of candidates.<sup>62</sup>

The plurality also found that the regulation was an appropriate tool for preventing corruption, as PACs might otherwise provide a means for circumventing contribution limits. Without limits on PAC contributions, “an individual or association seeking to evade the [\$2500] limit on contributions to candidates could do so by channeling funds through a multicandidate political committee.”<sup>63</sup> Citing *Buckley*’s rejection of the argument that antibribery and disclosure laws made candidate contribution limits unnecessary for the prevention of quid pro quo corruption,<sup>64</sup> the plurality rejected the argument that other regulations made the limitation superfluous. Narrow tailoring was unnecessary because “the challenged limitation does not restrict the ability of individuals to engage in protected political advocacy.”<sup>65</sup>

Finally, the CMA’s argument that the restrictions on contributors paying for administrative expenses were unconstitutional did not persuade the plurality. Justice Marshall expressed a concern that an individual or group that paid for the administrative expenses of a political organization would “completely dominate” the contribution policies of the organization.<sup>66</sup> Such a result would corrupt the political process, as individuals would be able to use PACs to “influence the electoral process to an extent disproportionate to their public support and far greater than the individual or group that finances the committee’s

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<sup>60</sup> *Id.* at 196 (“[T]he ‘speech by proxy’ that CMA seeks to achieve through its contributions to CALPAC is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection.”).

<sup>61</sup> *Id.* at 196 n.16.

<sup>62</sup> *Id.* at 197.

<sup>63</sup> *Id.* at 198. At the time *CalMed* was decided, the limit on individual contributions was \$1000. *Id.* The limit is now \$2500. See *supra* note 30 and accompanying text.

<sup>64</sup> See *supra* notes 42–43 and accompanying text (describing the *Buckley* Court’s rejection of the overbreadth argument).

<sup>65</sup> *CalMed*, 453 U.S. at 199 n.20.

<sup>66</sup> *Id.* at 199 n.19.

operations would be able to do acting alone.”<sup>67</sup> This concern with disproportionate influence was a departure from *Buckley*’s focus on the corruption of candidates in favor of a broader definition of corruption that also included considerations of systemic fairness.

#### D. Subsequent Deference

While the *Buckley* Court appeared to embrace a definition of corruption limited to quid pro quo arrangements,<sup>68</sup> “the quid pro quo formulation did not stick.”<sup>69</sup> The scope of what constituted the government’s interest in preventing corruption expanded between 1980 and 2003 to include concerns with undue influence of corporations on the electoral process,<sup>70</sup> donors gaining undue access to legislators,<sup>71</sup> and corporations wielding political power disparate to public support for their initiatives.<sup>72</sup> As the Court adopted these broader notions of corruption, “the quid pro quo formulation largely disappeared from majority opinions about corruption.”<sup>73</sup> Understanding how *CalMed* fits into a broader deferential period is helpful for recognizing how the Court has retreated from this approach and for evaluating the potential implications of this change for the decision. It is necessary to understand the animating principles supporting these decisions in order to appreciate the significance of the recent changes.

During this period, the Court also became more deferential to regulations that reached beyond the immediate donor-candidate relationship. As long as the regulation appeared to target a recognized source of corruption, the Court would not closely scrutinize the con-

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<sup>67</sup> *Id.*

<sup>68</sup> See *supra* note 42 (discussing *Buckley*’s reliance on quid pro quo and the appearance of quid pro quo); see also Abraham, *supra* note 4, at 1085 & n.45 (noting that following *Buckley*, the Court “relied on *Buckley*’s focus on quid pro quo corruption while overruling campaign finance restrictions”).

<sup>69</sup> Zephyr Teachout, *The Anti-corruption Principle*, 94 CORNELL L. REV. 341, 390 (2009).

<sup>70</sup> See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658–60 (1990) (finding that the corporate form gives corporations unfair advantages justifying regulation), *overruled by Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>71</sup> See *McConnell v. FEC*, 540 U.S. 93, 150–54 (2003) (classifying “access to high-level government officials” as an example of corruption), *overruled in part by Citizens United*, 130 S. Ct. 876.

<sup>72</sup> See *Austin*, 494 U.S. at 659–60 (arguing that corporate wealth is corrupting because it has “little or no correlation to the public’s support for the corporation’s political ideas”); *CalMed*, 453 U.S. 182, 199 n.19 (1981) (finding that PACs could “corrupt the political process” if they exercise disproportionate influence over the electoral process). Several others have written about the expansion of the corruption interest. See, e.g., Briffault, *supra* note 2, at 1730 (discussing the conflation of anticorruption and equality); Issacharoff, *supra* note 46, at 121–25 (describing the expanding and contracting definition of corruption); Abraham, *supra* note 4, at 1086–88 (discussing the pre-Roberts expansion of corruption).

<sup>73</sup> Teachout, *supra* note 69, at 390.

tent of the regulation.<sup>74</sup> In the years following *Buckley*, when the Court agreed that a proffered theory of political corruption posed a serious risk, it granted tremendous deference to legislatures' regulations aimed at eliminating such a risk.<sup>75</sup> Even on the expenditure side of the *Buckley* divide, the Court deferred to legislative judgment when regulations addressed a recognized source of corruption.<sup>76</sup>

As "corruption" expanded beyond quid pro quo, the Court had little difficulty upholding prohibitions on connected PACs soliciting contributions from outside of their membership,<sup>77</sup> corporations using general treasury funds to run issue advertisements,<sup>78</sup> and corporations and unions making contributions to candidates.<sup>79</sup> In *National Right To Work Committee v. FEC*, for example, the Court explicitly deferred to Congress. After concluding that Congress had a sufficient interest in targeting the "special characteristics of the corporate structure" to prevent corruption or its appearance, the unanimous Court refused to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."<sup>80</sup> Only when regulations were clearly removed from the risk of corruption did the Court more closely scrutinize and invalidate the restrictions.<sup>81</sup>

<sup>74</sup> See, e.g., *FEC v. Nat'l Right To Work Comm. (NRTW)*, 459 U.S. 197, 209–10 (1982) (noting reluctance to scrutinize regulations that target political corruption).

<sup>75</sup> See *id.* at 392–94 (finding that the affidavit of a legislator and a newspaper article provided a sufficient evidentiary basis to uphold the contribution limitation).

<sup>76</sup> See, e.g., *McCConnell*, 540 U.S. at 189–90, 203–09 (upholding the BCRA ban on candidate-related advertisements by corporations and unions within 60 days of a general election); *Austin*, 494 U.S. 652 (upholding Michigan law analogous to the FECA ban on the use of corporate general treasury funds to support or oppose candidates in elections). Expenditure limitations were rejected when they regulated conduct that was unlikely to be corrupt, such as in ballot initiatives when no candidate was present. See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978) (finding expenditure limits on corporations in a ballot initiative unconstitutional).

<sup>77</sup> *NRTW*, 459 U.S. 197 (1982).

<sup>78</sup> *Austin*, 494 U.S. at 652.

<sup>79</sup> *FEC v. Beaumont*, 539 U.S. 146 (2003) (upholding the FECA prohibition on corporate contributions to candidates). The holding in *Beaumont* was partly based on past findings that "special characteristics of the corporate structure require particularly careful regulation." *Id.* at 155 (quoting *NRTW*, 459 U.S. at 209–10). As a result of the risk of corporations corrupting the political process through campaign contributions, "deference to legislative choice [was] warranted." *Id.*

<sup>80</sup> *NRTW*, 459 U.S. at 209–10.

<sup>81</sup> See, e.g., *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (invalidating limits on independent expenditures made in support of publicly financed candidate in part because "[t]he absence of prearrangement and coordination of an expenditure . . . alleviates the danger that expenditures will be given as a *quid pro quo*" (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam) (internal quotation marks omitted))); *Bellotti*, 435 U.S. at 790, 792 (invalidating a Massachusetts ban on corporations making independent expenditures in opposition to a ballot initiative where there is "no risk of corruption").

Justice Souter's reasoning in *Nixon v. Shrink Missouri Government PAC (Shrink)*<sup>82</sup> is also illustrative of this deferential approach, and it provides a useful foil for understanding the recent doctrinal changes. In *Shrink*, the Court concluded that a Missouri statute imposing a \$1075 limit on contributions to candidates for state auditor should not be invalidated, despite a lack of empirical evidence linking contributions to corruption in Missouri.<sup>83</sup> Justice Souter rejected the notion that empirical evidence of corruption is always required to uphold a regulation:

The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.<sup>84</sup>

After recognizing the interest in preventing corruptive contributions, the Court deferred to the legislative judgment without much scrutiny of the limitation's magnitude.<sup>85</sup>

The preceding analysis illustrates how *CalMed* is part of a jurisprudence based on broad notions of corruption and deference to legislative judgment. The next Section details the Court's well-documented return to campaign finance jurisprudence based on skepticism<sup>86</sup> and argues that the regulation of contributions to PACs upheld in *CalMed* is not supported by the current doctrine.

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<sup>82</sup> 528 U.S. 377 (2000).

<sup>83</sup> *Id.* at 383–85.

<sup>84</sup> *Id.* at 391. Richard Hasen argues that *Shrink* lowered the bar for judicial review of contribution restrictions from the standard announced in *Buckley* by “ratchet[ing] down the level of scrutiny . . . ; expand[ing] the definition of ‘corruption’ . . . ; [and] lower[ing] the evidentiary burden for a government defending contribution limits . . . .” Richard L. Hasen, *Shrink Missouri, Campaign Finance, and “The Thing That Wouldn’t Leave,”* 17 CONST. COMM. 483, 484 (2000). In *Randall v. Sorrell*, 548 U.S. 230 (2006), the Court departed from this approach. See *infra* Part II.A.2 (describing the contrast between *Shrink* and *Randall*).

<sup>85</sup> *Shrink*, 528 U.S. at 393 (finding the “case [not to] present a close call requiring further definition of whatever the State’s evidentiary obligation may be” because the State could rely on the same concern as Congress in *Buckley*).

<sup>86</sup> See, e.g., Richard Briffault, WRTL and *Randall*: *The Roberts Court and the Unsettling of Campaign Finance Law*, 68 OHIO ST. L.J. 807, 808, 843 (2007) (arguing that the Roberts Court’s first year “may constitute a pivotal moment” in campaign finance, “end[ing] a period of relative deference” and likely “start[ing] . . . a new period of much closer scrutiny”).

## II

### THE COURT'S MORE SKEPTICAL APPROACH TO CAMPAIGN FINANCE REGULATION

Three changes in the Court's approach to campaign finance greatly weaken *CalMed*'s foundation. First, the Court explicitly concluded that the interest in preventing corruption does not include concerns about the distorting effects of political speech, instead restricting the interest to preventing quid pro quos.<sup>87</sup> Second, consistent with a more skeptical view of the corrupting effects of campaign money, the Court has scrutinized legislative regulations more closely.<sup>88</sup> Finally, the Court has rejected regulations based on the identity of the speaker.<sup>89</sup> Without a broad definition of corruption and relaxed scrutiny, the regulation of contributions to PACs appears to violate the First Amendment.<sup>90</sup>

#### A. *The Erosion of the Doctrinal Basis of CalMed*

##### 1. *The Limited Definition of Corruption as Quid Pro Quo*

In *Citizens United*, the Court explicitly rejected the broader notions of corruption that developed following *Buckley* and returned to a restricted definition of corruption as encompassing only quid pro quo arrangements.<sup>91</sup> Cases relying solely on a broader corruption interest, therefore, are unlikely to withstand constitutional scrutiny today.

*Citizens United* explicitly overruled *Austin v. Michigan Chamber of Commerce* and portions of *McConnell v. FEC* for improperly relying on an expansive view of the government's interest in preventing corruption.<sup>92</sup> While the most restrictive statements in Justice Kennedy's opinion are arguably "dicta,"<sup>93</sup> the narrowness of the Court's understanding of corruption is still remarkable. Writing for the majority, Justice Kennedy recognized that broader notions of corruption exist in the Court's jurisprudence but dismissed these inter-

<sup>87</sup> See *infra* Part II.A.1 (discussing *Citizen United*'s narrowing of the definition of corruption).

<sup>88</sup> See *infra* Part II.A.2 (examining *Randall v. Sorrell*, in which the Court engaged in greater scrutiny of a contribution limit).

<sup>89</sup> See *infra* Part II.A.3 (discussing the Court's rejection of regulations on corporations and self-funders).

<sup>90</sup> See *infra* Part II.B.

<sup>91</sup> Authors have speculated on the consequences of changing the meaning of corruption. See, e.g., Hasen, *supra* note 10, at 583 (observing that broader notions of corruption are at the heart of some of the Court's contribution restriction opinions).

<sup>92</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 911–13 (2010).

<sup>93</sup> See Hasen, *supra* note 10, at 616 (referring to *Citizens United*'s restrictive definition of corruption as "dicta").



ests as unjustified departures from *Buckley*: “When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”<sup>94</sup> Leaving little doubt about the Court’s view of expansive or even popular notions of corruption, Justice Kennedy plainly stated that “[i]ngratiation and access . . . are not corruption.”<sup>95</sup> Instead, “favoritism,” “influence,” and “access,” or the appearance of such, were reframed as central aspects of democratic politics.<sup>96</sup> Thus, following *Citizens United*, the Court limited the corruption rationale to preventing *quid pro quo* corruption.<sup>97</sup>

Justice Kennedy’s understanding of corruption as *quid pro quo* also suggests that *Citizens United* undermines the government’s interest in regulating contributions that are not given directly to candidates. A concentration on *quid pro quo* arrangements focuses exclusively on the relationship between the contributor and the candidate, rather than on the contribution’s effect on the political process generally. While the Court explicitly noted that its decision did not address contribution limits, and one lower court did “not read *Citizens United* as changing how [courts] should evaluate contribution limits on political parties and PACs,”<sup>98</sup> the reasoning of *Citizens United* suggests otherwise.<sup>99</sup>

First, the majority reaffirmed that “[t]he absence of prearrangement and coordination” with a candidate “alleviates the danger . . .

<sup>94</sup> *Citizens United*, 130 S. Ct. at 909.

<sup>95</sup> *Id.* at 910.

<sup>96</sup> *Id.* Quoting himself, Kennedy continued: “It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.” *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part) (internal quotation marks omitted)).

<sup>97</sup> The interest in preventing *quid pro quo* corruption likely still allows the government to target behavior that could generate *quid pro quos* or their appearance. *See id.* at 908 (recognizing that the Court in *Buckley* permitted preventative regulations for direct contributions even where “few if any contributions to candidates will involve *quid pro quo* arrangements”).

<sup>98</sup> *In re Cao*, 619 F.3d 410, 422 (5th Cir. 2010), *cert. denied*, *Cao v. FEC*, 131 S. Ct. 1718 (2011) (mem.); *see also* Justin Levitt, *Confronting the Impact of Citizens United*, 29 *YALE L. & POL’Y REV.* 217, 220 (2010) (“*Citizens United* gives no reason to question regulation of direct contributions to candidates.”).

<sup>99</sup> Recently, a judge in the Eastern District of Virginia found that *Citizens United*’s logic compels allowing corporations to contribute directly to candidates. *See United States v. Danielczyk*, No. 1:11cr85 (JCC), 2011 WL 2161794, at \*18 (E.D. Va. May 26, 2011) (“If human beings can make direct campaign contributions *within* FECA’s limits . . . and if . . . corporations and human beings are entitled to equal political speech rights [under *Citizens United*], then corporations must also be able to contribute within FECA’s limits.”).

[of] a *quid pro quo*.”<sup>100</sup> While this reaffirmation referred only to independent expenditures, this statement should be equally applicable to contributions to PACs, as such contributions also lack prearrangement and coordination with a candidate.<sup>101</sup> Second, Justice Kennedy also argued that independent expenditures do not pose a risk of *quid pro quo* corruption because “[t]he fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.”<sup>102</sup> The same holds for contributions to PACs.

## 2. *Closer Scrutiny of Contribution Limits*

In addition to narrowing its definition of corruption, the Court is now more willing to look beyond the stated purpose of a regulation and scrutinize a regulation’s specific content to discern the effect on First Amendment rights and the relationship to the government interest in preventing corruption.

*Randall v. Sorrell*,<sup>103</sup> the most recent case addressing contribution limitations, illustrates this change. *Randall* concerned a Vermont campaign finance statute similar to the Missouri statute upheld in *Shrink*, with the notable difference that the contribution limits were significantly lower.<sup>104</sup> Confronted with the constitutionality of stringent contribution limits just a few years after *Shrink*, the Court fractured, issuing six different opinions. The lack of a majority makes it difficult to determine the opinion’s full consequences, but *Randall* marks a departure from the deferential *Shrink* approach. Of the six Justices voting to strike down the regulation, three expressed skepticism con-

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<sup>100</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 908 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam)).

<sup>101</sup> See *infra* notes 132–33 and accompanying text (discussing the attenuated relationship between contributors to PACs and candidates); *infra* notes 162, 166–68 and accompanying text (discussing why channeling money to PACs is less corrupting than the current system).

<sup>102</sup> *Citizens United*, 130 S. Ct. at 910. Pushing this argument to its logical conclusion, it follows that contributions to candidates’ campaigns also may not be considered corruptive because the contribution is only valuable for its ability to be used for electoral speech by the candidate. This means that the electorate will still have the ultimate influence. This argument is likely too far-reaching to be adopted by the Court and is outside the ambit of this Note.

<sup>103</sup> 548 U.S. 230 (2006).

<sup>104</sup> Vermont’s Act 64 limited “[t]he amount any single individual can contribute to the campaign of a candidate for state office during a ‘two-year general election cycle’ . . . as follows: governor, lieutenant governor, and other statewide offices, \$400; state senator, \$300; and state representative, \$200.” *Id.* at 238 (plurality opinion) (quoting VT. STAT. ANN. tit. 17, § 2805(a) (2002), *invalidated by Randall*, 548 U.S. 230).

cerning the constitutionality of *any* contribution limits.<sup>105</sup> The other two joined Justice Breyer's controlling opinion.

Unlike in *Shrink* and *CalMed*, in which the Court did not seriously examine the content of the regulation beyond the connection between the stated purpose and the government interest in preventing corruption, Justice Breyer's opinion was far more searching.<sup>106</sup> The critical departure from *Buckley* and *Shrink* came in Justice Breyer's willingness to scrutinize closely the amount of the contribution limit—something the Court had previously expressed great discomfort and skepticism over its ability to do.<sup>107</sup> Justice Breyer held that the Court has the duty to “exercise . . . independent judicial judgment . . . [and] review the record independently and carefully with an eye toward assessing the statute's ‘tailoring’” when limits appear to have the potential to harm the political process.<sup>108</sup> The *Shrink* language suggesting that it is not the Court's place to assess the appropriateness of the amount is absent.<sup>109</sup> While this scrutiny may be explained by the Vermont limit's stringency and a concern with ensuring that candidates have ample resources to mount effective campaigns, the opinion provides no guidance for determining when a limit is suspiciously low. In effect, this means that future courts will likely need to engage in the bizarre exercise of closely scrutinizing a contribution restriction to determine whether the limit is low enough to merit close scrutiny.<sup>110</sup>

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<sup>105</sup> Justice Kennedy continued to express misgivings about the level of scrutiny applied to contributions in the *Buckley* framework, thus signaling his willingness to revisit the conceptual system. *See id.* at 264–65 (Kennedy, J., concurring). And Justice Thomas, joined by Justice Scalia, explicitly argued for *Buckley* to be overruled and for limitations on contributions to be prohibited. *Id.* at 266 (Thomas, J., concurring).

<sup>106</sup> *See* Lillian R. BeVier, *Full of Surprises—And More To Come: Randall v Sorrell, the First Amendment, and Campaign Finance Regulation*, 2006 SUP. CT. REV. 173, 190–91 (calling Justice Breyer's scrutiny of Vermont's contribution limit “unanticipated” and “undertheorized”); Rachel Gage, *Randall v. Sorrell: Campaign-Finance Regulation and the First Amendment as a Facilitator of Democracy*, 5 FIRST AMENDMENT L. REV. 341, 355 (2007) (“[*Randall*] did not follow the precedential trajectory toward greater legislative deference on the question of contribution limits.”).

<sup>107</sup> *See, e.g., Shrink*, 528 U.S. 377 (2000) (upholding a \$1075 contribution limit without closely scrutinizing the amount); *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (per curiam) (observing that courts have “no scalpel to probe” the appropriateness of the amount of the contribution limit (quoting *Buckley v. Valeo*, 519 F.2d 821, 842 (D.C. Cir. 1975) (per curiam) (internal quotation marks omitted), *aff'd in part and rev'd in part*, 424 U.S. 1 (per curiam))).

<sup>108</sup> *Randall*, 548 U.S. at 248–49 (plurality opinion).

<sup>109</sup> *Shrink*, 528 U.S. at 391 & n.5, 393 (accepting legislative judgment concerning the need for contribution restriction).

<sup>110</sup> While Vermont's contribution limits were the lowest in the country, *Randall*, 548 U.S. at 250 (plurality opinion), the legislative and empirical record provided little evidence that they were harmfully low, *id.* at 284–87 (Souter, J., dissenting). The legislative record contained explicit testimony from legislators about how campaign money “gets their special attention.” *Id.* at 285. Yet Justice Breyer disregarded these findings and rested his

The plurality's departure from the approach in *Shrink* was clear to Justice Souter. In dissent, he criticized the plurality for forgetting the "facts of *Shrink* . . . [and the Court's] self-admonition against second-guessing legislative judgments about the risk of corruption to which contribution limits have to be fitted."<sup>111</sup> While a single case presents too small of a sample from which to draw any concrete conclusions, the Court's deep examination of the regulation in *Randall* suggests that it is now willing to examine contribution restrictions closely and "give the benefit of any doubt to protecting rather than stifling speech."<sup>112</sup>

### 3. *Rejection of Speaker-Based Distinctions*

Finally, the Court expressed skepticism concerning regulations that make distinctions based on the characteristics of the speaker. While the Court's opinions do not adopt an equal protection argument for invalidating these regulations like that advanced by the CMA in *CalMed* or the viewpoint discrimination rationale, the Court seems to believe that campaign finance regulations cannot be based on differences between electoral actors.

*Davis v. FEC*<sup>113</sup> makes this concern apparent. The *Davis* Court invalidated a provision of the Bipartisan Campaign Reform Act of 2002 that permitted the opponent of a candidate who self-financed in excess of \$350,000 to accept contributions above the standard contribution limits.<sup>114</sup> Because the regulation was intended to equalize the amount of money available to candidates, and because a self-funded candidate cannot corrupt himself, the Court found the regulation too

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conclusion on the suggestion, which the record "does not conclusively prove," that the limits would make it difficult for "challengers to run competitive campaigns." *Id.* at 253 (plurality opinion). In reaching this decision, Justice Breyer rejected the significance of evidence that the Vermont limit was larger per citizen than the limits upheld in Missouri, *id.* at 251–52, and criticized the legislature for considering the average race, rather than "strongly contested campaigns," in making its determination about the effect of the limits, *id.* at 255. There are certainly strong reasons to be concerned with both of the metrics the legislature used, but such methodological distinctions are ones that the Court had traditionally considered to be within the purview of the legislature.

<sup>111</sup> *Id.* at 285 (Souter, J., dissenting).

<sup>112</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (plurality opinion).

<sup>113</sup> 554 U.S. 724 (2008).

<sup>114</sup> 2 U.S.C. § 441a-1 (2006), *invalidated by Davis*, 554 U.S. 724. The BCRA represents Congress's most recent attempt at significant campaign finance reform. In addition to the Millionaire's Amendment at issue in *Davis*, the BCRA also banned political parties from accepting soft money (money not subject to contribution limits), prevented corporations from running issue advertisements in the weeks immediately preceding an election, and raised the limits on contributions to candidates. BCRA, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2, 18, 36, and 47 U.S.C.), *invalidated in part by Davis*, 554 U.S. 724, *and in part by Citizens United v. FEC*, 130 S. Ct. 876 (2010).

removed from the government's interest in preventing corruption and therefore unconstitutional.<sup>115</sup> In dicta, the Court went on to discuss its discomfort with attempts to level the electoral playing field. Candidates have different strengths, so any effort to equalize "electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election."<sup>116</sup> Yet the question of which candidate qualities should be salient is precisely the choice the Constitution left to the voters.<sup>117</sup>

Similarly, in *Citizens United*, the Court expressed the same concern with regulations specifically targeting corporations. Rejecting *Austin*'s approval of regulations based on corporate identity, Justice Kennedy made clear that "the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."<sup>118</sup>

### B. Reconsidering CalMed

In light of these changes, the decision in *CalMed* appears out of step with current doctrine. First, part of the *CalMed* opinion relied on an understanding of corruption that is no longer recognized by the Court,<sup>119</sup> and the prevention of quid pro quo corruption, while still a significant government interest, is not at issue with respect to contributions not given directly to a candidate. Second, even if the government has a significant interest in preventing quid pro quo corruption when contributions to independent groups are involved, the regulation is not closely drawn to this interest. It appears to be the kind of "prophylaxis-upon-prophylaxis" regulation that Chief Justice Roberts criticized in *FEC v. Wisconsin Right to Life* as unnecessary for preventing either corruption or the circumvention of contribution limits.<sup>120</sup>

As a preliminary matter, it is important to note that the restriction on PAC contributions constitutes a First Amendment injury. Though the *CalMed* plurality dismissed the idea that the limitation was a meaningful restriction on the right to free speech, this position failed to garner a majority of the Court.<sup>121</sup> And since *CalMed*, the

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<sup>115</sup> *Davis*, 554 U.S. at 740–41 (ruling that § 441a-1(a) is invalid because it "imposes a substantial burden" on the exercise of First Amendment rights without being "justified by any government interest in eliminating corruption or the perception of corruption").

<sup>116</sup> *Id.* at 742.

<sup>117</sup> *Id.*

<sup>118</sup> *Citizens United*, 130 S. Ct. at 908–11.

<sup>119</sup> See *supra* note 67 and accompanying text (describing the *CalMed* plurality's adoption of the disproportionate influence theory of corruption).

<sup>120</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 479 (2007) (plurality opinion).

<sup>121</sup> See *supra* note 58 and accompanying text (describing Justice Blackmun's disagreement with the plurality over the issue of First Amendment injury).

Court has been more sensitive to First Amendment injuries for restrictions on campaign speech.<sup>122</sup> For example, in *Citizens Against Rent Control v. City of Berkeley (CARC)*,<sup>123</sup> decided one year after *CalMed*, the Court invalidated a Berkeley ordinance that limited contributions to campaign committees organized to influence the outcome of ballot initiatives. By limiting the amount individuals could expend in concert without limiting how much individuals could expend on their own, the regulation impermissibly privileged individual speech over associational speech.<sup>124</sup>

Restrictions on contributions to PACs pose a similar intrusion on associational rights.<sup>125</sup> The contribution limitations place greater restrictions on individuals who make campaign contributions in conjunction with others than on individuals who contribute alone. This is because individuals may currently make aggregate contributions to candidates of up to \$46,200 per election cycle, but they are prohibited from contributing more than \$5000 through a single group of their choice.<sup>126</sup> As in *CARC*, an individual is permitted to contribute more individually than with a group of others, even though associating with others may be a more desirable way to make contributions.<sup>127</sup> This restriction may not appear particularly severe because the individual is still permitted to contribute individually; however, it is nearly identical to the injury recognized by a majority of the Court in *CARC*.<sup>128</sup>

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<sup>122</sup> Of note, the Court found an injury to the claimant in *Davis v. FEC* on the basis of the burden placed on his own expenditure of funds for his campaign. 554 U.S. 724, 734 (2008) (finding that the limits “burden his expenditure of personal funds by allowing his opponent to receive contributions on more favorable terms”). Recently, in *McComish v. Bennett*, the Court found a similar injury where a public financing scheme provided matching funds to a candidate whose challenger spent above a certain threshold. 131 S. Ct. 2806, 2818–20 (2011).

<sup>123</sup> *Citizens Against Rent Control v. City of Berkeley (CARC)*, 454 U.S. 290, 300 (1981).

<sup>124</sup> *Id.* at 296 (“It is only when contributions are made in concert with one or more others in the exercise of the right of association that they are restricted by [the ordinance].”).

<sup>125</sup> See *CalMed*, 453 U.S. 182, 202 (1981) (Blackmun, J., concurring) (disagreeing with the plurality’s conclusion “that political contributions are not entitled to full First Amendment protection”).

<sup>126</sup> See FEC, Contribution Limits 2011–12, [www.fec.gov/pages/brochures/contriblimits.shtml](http://www.fec.gov/pages/brochures/contriblimits.shtml) (last visited Aug. 9, 2011) (describing contribution limits).

<sup>127</sup> Like the relationship between the NAACP and its members in *NAACP v. Alabama ex rel. Patterson*, the committee is “but the medium through which its individual members seek to make more effective the expression of their own views.” 357 U.S. 449, 459 (1958); see also Note, *Unconstitutionality of Limitations on Contributions*, *supra* note 50, at 958 & n.37 (highlighting the principle, established in *Patterson*, that the collective expression of an association is an extension of the free speech of its members).

<sup>128</sup> See *supra* notes 123–24 and accompanying text (describing the First Amendment injury found by the Court in *CARC*).

### 1. *Government Interest in Preventing Corruption*

*Citizens United* explained that regulations intruding on First Amendment rights must further the government interest in preventing quid pro quo corruption.<sup>129</sup> Reexamining *CalMed* with this in mind, the government still has an interest in preventing quid pro quo corruption by restricting large contributions to candidates and in preventing the circumvention of these limits.<sup>130</sup> The government, however, no longer has an interest that justifies regulation in preventing corruption arising from electoral speech that is “disproportionate to . . . public support.”<sup>131</sup> Accordingly, the constitutionality of a restriction will depend on whether it is closely tailored to the interest in preventing quid pro quo corruption. The limit on PAC contributions is constitutionally suspect because the regulation is removed from where quid pro quos may take place (i.e., the limitation targets the donor-PAC—not the donor-candidate—relationship).

A more searching review of the regulation reveals that the \$5000 contribution limit, as well as the inclusion of contributions for administrative expenses within this limit, is not tailored to the interest in preventing quid pro quo corruption. Since money contributed to PACs is pooled with money donated by other contributors and then sent from the PAC to the candidate, the risk of a quid pro quo is attenuated. Even in the rare circumstances in which the candidate can determine the money’s source, the contributor will not interact with the candidate directly when contributing.<sup>132</sup> After *Citizens United*, it is hard to imagine the Court finding a risk of quid pro quo corruption when there is no interaction between the donor and the candidate. This conclusion is analogous to the Court’s rejection in *Citizens United* of the possibility of quid pro quo corruption arising from independent

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<sup>129</sup> See *supra* notes 92–99 and accompanying text (explaining the limited notion of corruption in *Citizens United*).

<sup>130</sup> See, e.g., *FEC v. Beaumont*, 539 U.S. 146, 155 (2003) (describing the importance of preventing circumvention of contribution limitations).

<sup>131</sup> *CalMed*, 453 U.S. 182, 199 n.19 (1981) (expressing concern with disproportionate influence).

<sup>132</sup> A candidate may be able to determine the money’s source when, for example, a PAC receives contributions from a single large donor and a very small number of small donors, and the amount contributed to the candidate exceeds the total contributions of the small donors. However, if the large donor has complete control over which candidates receive his money, then the prohibition on earmarking contributions would prevent him from exceeding the individual contribution limit. See *infra* notes 136–38 and accompanying text (describing the regulation of earmarked contributions under FECA). While this would reduce the strength of the normative argument if it occurred frequently, the constitutional argument advanced in Part II is independent of the normative argument.

expenditures due to the lack of a relationship between the spender and the candidate.<sup>133</sup>

## 2. *The \$5000 Limitation Does Not Further the Government Interest in Preventing Corruption*

Assuming *arguendo* that a risk of corruption exists, the \$5000 limit on individual contributions to PACs does not reduce this risk. Currently, multicandidate PACs are prohibited from contributing more than \$5000 to any single candidate.<sup>134</sup> This means that \$5000 is the maximum amount by which an individual could theoretically circumvent the individual contribution limit by using a single PAC. Individuals, however, are currently permitted to contribute up to \$5000 to a single PAC.<sup>135</sup> Since PACs are restricted in the amount they may contribute to candidates, any limitation on donations to PACs at or above \$5000 is redundant. Even if an individual could donate \$100,000 to a PAC, the PAC would still only be able to donate \$5000 to a particular candidate. In other words, removing the restriction on contributions to PACs would not result in increasing the amount individuals could give to a candidate.

The circumvention concern is also already explicitly protected against by other regulations. Under FECA, contributions made to PACs that are earmarked for a particular candidate are considered contributions from the individual and count against the individual's cap.<sup>136</sup> Unlike in *Buckley*, where the Court permitted regulations that were broader than bribery laws (because bribery laws did not fully protect against the Court's conception of the *quid pro quo*),<sup>137</sup> this provision of FECA addresses the entirety of the interest Congress seeks to protect.<sup>138</sup>

While there is certainly a concern that this provision will not be enforced, the Court was happy to ignore this possibility in *Citizens United*.<sup>139</sup> Relying on the definition of independent expenditures as expenditures lacking coordination with a candidate, the Court reasoned that any secret collusion with a candidate would make the

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<sup>133</sup> See *supra* notes 100–02 and accompanying text (summarizing *Citizens United*'s analysis of the risk of *quid pro quo* corruption).

<sup>134</sup> 2 U.S.C. § 441a(a)(2)(A) (2006).

<sup>135</sup> 2 U.S.C. § 441a(a)(2)(C).

<sup>136</sup> 2 U.S.C. § 441a(a)(8).

<sup>137</sup> See *supra* notes 42–43 and accompanying text (outlining the *Buckley* Court's rejection of the overbreadth argument).

<sup>138</sup> See *supra* notes 50–51 and accompanying text (describing the purpose of limitations on contributions to PACs).

<sup>139</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010) (failing to recognize the possibility of coordinated expenditures appearing to be uncoordinated).



spending a coordinated expenditure (which would be subject to the individual contribution limits). The Court was not concerned that the tacit agreement might never be discovered.<sup>140</sup> Applying this same reasoning to PAC contribution limits, the threat of circumvention is already protected against by limits on earmarking, so the regulation is not closely drawn.<sup>141</sup>

The *CalMed* plurality also raised the related concern that a large contributor might evade contribution limits by controlling a PAC's contribution policies.<sup>142</sup> Presumably, this is a concern because the PAC could become a conduit for a single large donor's political contributions rather than a reflection of donor desires. Since the large donor would control the distribution of other donors' money, he could circumvent the regulation prohibiting earmarking. It is hard to imagine this concern with disproportionate influence being accepted by the Court today.

If we read the disproportionate influence argument so that it does not reflect a concern with undue influence but rather a concern with preventing the individual from using the PAC as a vehicle for quid pro quo agreements with candidates, then it is unclear why this risk is not present with any PAC. After all, every PAC has an individual or a group of individuals who decide to which candidates the PAC will contribute. If the PAC is large, these individuals might possess considerable power in directing hundreds of thousands of dollars in contributions. Yet such PACs are tolerated. Thus, the concern with the administrative expenses contributor, or large donor, is not that an individual might control the PAC, but that an individual might control the PAC as a result of making a large monetary contribution.<sup>143</sup> While this distinction may be in line with the Court's undue influence line of

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<sup>140</sup> *Id.* ("By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.").

<sup>141</sup> Moreover, the multicandidate PAC requirements seek to reduce the risk of any individual assuming control over a PAC or the PAC becoming a vehicle for contributions to a single candidate by requiring that multicandidate PACs have at least fifty donors and make contributions to at least five candidates. See *supra* note 32 and accompanying text.

<sup>142</sup> See *supra* notes 63–65 and accompanying text (describing the circumvention argument advanced by the plurality in *CalMed*).

<sup>143</sup> A recent D.C. Circuit opinion highlights the weakness of this concern. In *EMILY's List v. FEC*, the court held that an organization that both contributes to candidates and makes independent expenditures may accept unlimited contributions for its independent expenditure related activities as long as the funds are kept in a separate account from the funds for making contributions. 581 F.3d 1, 12 (D.C. Cir. 2009). Yet the court also held that the PAC could still be required to pay administrative expenses related to the costs of making contributions to candidates out of the hard money account. *Id.* The court did not recognize the tension between the conclusions that a large contribution made for administrative purposes might result in the donor assuming de facto control of the PAC, while a large contribution made to the independent expenditure account would not. It is unclear

cases, it is not a constitutionally valid concern after *Citizens United*. The wealth of the individual who controls a PAC does not alter the likelihood of quid pro quo corruption.<sup>144</sup>

Finally, the argument for prohibiting larger contributions for the limited purpose of paying administrative expenses is even more suspect, because organizations with connected PACs are permitted to contribute unlimited money to cover their PACs' administrative expenses. This discrepancy undermines the claim that the regulation is necessary to prevent quid pro quo corruption. The same perceived risk of circumvention is present when a corporation is involved as when an individual or association is involved.<sup>145</sup> Further, this disparate treatment is inconsistent with the Court's rejection of speaker-based distinctions in *Davis* and *Citizens United*.<sup>146</sup> By permitting unions and corporations to pay connected PACs' administrative expenses, while restricting other PACs from utilizing comparable forms of support, Congress has, in effect, based the regulation on a substantive judgment concerning the qualities of PACs it seeks to promote.

Permitting individuals to contribute larger sums of money to PACs will require either Congress to revisit FECA or the Court to overrule *CalMed*. As the above discussion demonstrates, the *CalMed* decision upholding the limits on contributions to PACs no longer withstands close scrutiny on its merits. The next Section argues that disposing of this regulation will be beneficial.

### III

#### POLITICAL PROCESS BENEFITS OF OVERRULING *CALMED*

Overruling *CalMed* and permitting individuals, at a minimum, to contribute up to the aggregate limit on individual contributions to PACs—\$70,800—would positively change campaign finance law.<sup>147</sup>

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how the character of the bank account the money goes into is closely related to the risk of circumventing contribution limits or the risk of quid pro quo corruption.

<sup>144</sup> Additionally, it is unlikely that a single individual would be able to maintain complete control over a PAC because the individual would still need to appeal to the citizenry in order to successfully solicit money.

<sup>145</sup> In *FEC v. Beaumont*, the Court found that, to the extent that a corporation has the power to donate to candidates, the individuals "who created it, who own it, or whom it employs" may be able to use that corporation to circumvent individual contribution limits. 539 U.S. 146, 155 (2003).

<sup>146</sup> See *supra* Part II.A.3 (describing the Court's criticism of speaker-based distinctions).

<sup>147</sup> I limit my argument to the aggregate contribution limit because contributions to a PAC in excess of this limit would provide a stronger basis for an argument that there is a risk of circumvention. The aggregate biennial limit on contributions to PACs and parties is \$70,800, however, so the risk that PACs may enable donors to circumvent the aggregate limit on contributions to candidates is already present to a degree in the current system. It

Whatever the merits of *Citizens United* and the Court's profound skepticism toward campaign finance regulation, this Section argues that relaxing the regulation of PACs will improve the campaign finance regulatory structure within the Court's doctrinal constraints. The argument is a limited one. I do not maintain that removing the contribution limit is the single best way to promote accountable speech or to create an equitable system of campaign finance. My goal is simply to show that removing the regulation will likely have positive ramifications.

Many reformers revile PACs.<sup>148</sup> For them, PACs are synonymous with "special interest[s]," which corrupt the political process with never-ending attempts to gain influence.<sup>149</sup> Because PACs usually exist to promote a specific interest, contributions from PACs to candidates may be considered less legitimate than contributions from individuals that are perceived to be made in support of the candidate's general ideology. PAC contributions, the argument goes, are made with the hope of influencing lawmakers.<sup>150</sup> Unsurprisingly, existing proposals for reform seek to limit, rather than empower, these political actors.<sup>151</sup>

Despite this criticism, there is little that is inherently wrong with PACs.<sup>152</sup> PACs simply aggregate contributions from individuals with similar views on an issue, or group of issues, and may actually have

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might make sense then to limit contributions to PACs to the total overall biennial limit of \$117,000 on individual contributions to candidates, parties, and PACs as long as this limit remains law.

<sup>148</sup> See, e.g., Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key To Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1136–40, 1154–56 (1994) ("The dependence of Members of Congress on special-interest PAC contributions has seriously compromised the integrity and public credibility of the congressional decision-making process.").

<sup>149</sup> See, e.g., Fred Wertheimer, *The PAC Phenomenon in American Politics*, 22 ARIZ. L. REV. 603, 605 (1980) ("PAC money has a major and negative impact on the legislative process.").

<sup>150</sup> See Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1409 (1994) ("PAC contributions . . . are particularly likely to be given with the specific purpose of influencing lawmakers.").

<sup>151</sup> Proposals have included imposing a limit on the aggregate amount of contributions candidates may accept from PACs, encouraging PACs to accept more small contributions, and reducing the amount any particular PAC may contribute to a candidate. See, e.g., Wertheimer, *supra* note 149, at 618 (supporting bill that would reduce amount of PAC contributions and impose an aggregate cap). Several of these reforms have nearly succeeded. In 1979, the House passed the Campaign Contribution Reform Act of 1979, a bill limiting the aggregate amount House candidates could accept from PACs and the maximum amount a PAC could contribute to a candidate. H.R. 4970, 96th Cong. (1979). A sustained lobbying effort, however, led to the bill's defeat in the Senate.

<sup>152</sup> Though he is critical of the role PACs play in the political process, Daniel Hays Lowenstein has observed that "[t]here is nothing about the PAC form that makes PAC contributions any worse than other contributions." Daniel Hays Lowenstein, *On Campaign*

real benefits. For example, David A. Strauss observed that PACs often have “more knowledge and a greater capacity to monitor an elected official’s performance,” making them better able to spend a contributor’s money than the contributor would be on his or her own.<sup>153</sup> PACs may also serve as a valuable heuristic for voters choosing between candidates.<sup>154</sup> For example, a candidate’s acceptance of a \$5000 contribution from the National Rifle Association’s PAC will inform voters about the candidate’s position on gun control. With a greater diversity of well-funded PACs, it might become easier for voters to learn about candidates.

Raising the amount individuals may contribute to PACs to the limit on aggregate contributions and permitting individuals to donate unlimited sums to nonconnected PACs for administrative expenses will have three main benefits. First, it will help level the playing field between connected and nonconnected PACs and make it easier for PACs to grow and to advocate the views of their supporters. Second, it will provide a partial solution to the tradeoff between preventing corruption and promoting accountability. Third, it will make it easier for individuals to signal their policy preferences by enabling them to show greater support for a specific issue.

#### A. *Leveling the Playing Field Between Different Interest Groups*

The real problem with PACs is not that they are designed to promote single interests; it is that they are perceived to perpetuate inequality in the political process. It is difficult to develop a theory for why supporting a candidate on the basis of a single issue is less legitimate than supporting a candidate on the basis of the candidate’s entire platform. If we accept that democratic politics is a competition of interests, some of them particularized and others more abstract, the number of interests one supports should be an irrelevant consideration. However, it is still important that particular interests do not have structural advantages over other interests. Echoing the familiar refrain from *Austin v. Michigan Chamber of Commerce*, PACs are problematic when the rules of the system give some interests the power to influence candidates and elections disproportionately.<sup>155</sup>

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*Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 357 (1989).

<sup>153</sup> David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 150.

<sup>154</sup> See Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011, 1026–27 (2003) (“Another effective voting shortcut is to rely on information that reveals which groups support a candidate and the intensity of their support.”).

<sup>155</sup> Cf. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659 (1990) (discussing the unfair advantage corporations can have in the “political marketplace”).

The limitation on individual contributions to PACs, coupled with connected PACs' ability to draw from their host organization for administrative expenses, gives connected PACs a significant advantage over other interests. This advantage manifests itself in two ways. First, the ability to receive general treasury funds allows connected PACs to use all of the donations they obtain for contributions to candidates, since they do not need to use their donations for administrative expenses. The import of this advantage is illustrated by spending disparities between connected and nonconnected PACs. The connected PACs, on average, contributed forty-one percent of their receipts to candidates in 2008, while nonconnected PACs contributed eighteen percent.<sup>156</sup> Second, connected PACs are able to use general treasury funds for soliciting contributions. This makes it easier for connected PACs to develop because, unlike nonconnected PACs, their desire to grow is not constrained by the requirement that they pay for their expansion through fundraising.

The fundraising difficulty nonconnected PACs face is also reflected in FEC data. In the 2008 cycle, forty-four percent of nonconnected PACs spent less than \$5000. In contrast, only about twenty percent of connected PACs spent this little.<sup>157</sup> Connected PACs also raised more than twice the money of all nonconnected PACs combined in the 2008 election cycle.<sup>158</sup> Armed with the ability to raise more money and to use a greater percentage of the money raised, connected PACs are in a better position to influence the electoral marketplace than nonconnected PACs. Raising or removing the limits on contributions to PACs will enable nonconnected PACs to compete on a more level playing field with connected PACs.

This is preferable to simply removing connected PACs' ability to draw from their organizations' general treasuries. In addition to the political infeasibility of such a proposal and the constitutional issues discussed in Part II, this approach would freeze the status quo and

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<sup>156</sup> See FEC Data, *supra* note 35 (providing raw data on PAC spending disaggregated by PAC type). This disparity is even greater when unions are excluded. Unions utilize a significant amount of their PAC funds for independent expenditures, unlike corporations, which almost exclusively make contributions. When unions are not considered, connected PACs contribute forty-nine percent of their receipts to candidates. *Id.* This disparity also persists when total electoral activity is considered (independent expenditures plus contributions). Connected PACs spend fifty-nine percent of their receipts on electoral activity, while nonconnected PACs spend only twenty-nine percent. *Id.*

<sup>157</sup> Press Release, FEC, Growth in PAC Financial Activity Slows, Table 6: PAC's Grouped by Total Spent — 2007–2008 (Apr. 24, 2009), <http://www.fec.gov/press/press2009/20090415PAC/documents/6groupbyspending2008.pdf>.

<sup>158</sup> In the 2007–08 election cycle, connected PACs raised \$839,699,761, while nonconnected PACs raised \$372,720,837. See FEC Data, *supra* note 35 (providing data on total receipts by type of PAC).

impede the development of new PACs. Since many connected PACs have invested in developing a large donor base, they will remain in an advantageous position even without future access to general treasury funds.

For example, imagine that a local group of individuals with modest means decides to promote environmental conservation by banding together and forming a PAC called EnviroPAC. None of these individuals can give anywhere near the statutory maximum of \$2500 to a candidate, but through the PAC they hope that they will be able to make contributions that are large enough to influence candidate policies. Realizing that others might have similar environmental sensibilities, and knowing that their impact will be greater if they can pool more money, the founders of EnviroPAC want to seek contributions from environmentalists throughout the country. But doing this will require more money than the founders can muster. If the founders could accept a large contribution—such as \$30,000 from a local environmental philanthropist—they could fund a campaign to advertise their mission to other environmentalists.<sup>159</sup> But without the ability to accept help from a large donor, an organization like EnviroPAC is unlikely to reach a wide enough audience to have a significant impact.

Making it easier for nonconnected PACs to develop could minimize the influence of corporate PAC donations. Given the Supreme Court's rejection of regulation, empowering other interests is the key to reducing the influence of powerful groups that lack majority support. As PACs become more representative of the views held by the public at large, reformers' concerns about the ability of "special interests" to use PACs as a means for achieving legislative outcomes that are opposed by the general public will be reduced.<sup>160</sup>

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<sup>159</sup> It is possible that the EnviroPAC founders could create a nonprofit corporation and then register a connected PAC that would be permitted to accept unlimited contributions to its general fund and then use general treasury funds for paying administrative expenses. While this means of circumventing the administrative expenses prohibition is available, creating a nonprofit is significantly more burdensome than creating a PAC.

This is also an imperfect solution. In order to avoid paying taxes on its contributions, the group will need to register as a 501(c)(4) corporation. While 501(c)(4) corporations are permitted to engage in political activity, their "primary activity" must be the promotion of social welfare. IRS regulations explicitly exclude participation in political campaigns from the definition of social welfare promoting activities. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (2005). Thus, for an aspiring PAC to take advantage of this loophole, the nonprofit corporation associated with the PAC would need to engage in social welfare promoting activity. This might not be something the founders are interested in doing.

<sup>160</sup> I do not mean to suggest that strengthening nonconnected PACs will fix the problem of corporate groups successfully lobbying Congress in general. The argument contends only that enabling PACs to accept unlimited funds will blunt one tool of corporate influence.

Nevertheless, it is possible that removing the cap on contributions to PACs will not have this positive outcome. Contributors to connected PACs may have deeper pockets than contributors to nonconnected PACs, and the removal of the contribution limit may result in more money flowing to connected PACs. At the systemic level, this increase could overwhelm any increases nonconnected PACs experience.

While this is a possibility, it seems unlikely to be a significant concern. There are wealthy individuals of all political persuasions, and it is hard to imagine that an overwhelming number would be more likely to give to connected corporate PACs. Many donors do not give exclusively to a single PAC, so there is also likely crossover between those who donate to connected and to nonconnected PACs. Most significantly, even if connected PACs end up getting more money, PACs are currently limited in the amount that they may contribute to candidates. This means that an increase in contributions will be less meaningful to an established, well-funded, connected PAC that is already able to make a number of contributions at the maximum level than it will be to a small PAC. In other words, the marginal benefit of increased contributions will be far greater for a new PAC that is trying to establish itself than for an already established PAC with resources and a reputation.

### *B. A Partial Solution to the Corruption-Accountability Problem*

Increasing the contribution limit could also promote more accountable speech and reduce the risk of candidate corruption. The corruption-accountability problem arises from the conflicting goals of preventing the corruption of candidates (by restricting large contributions) and promoting campaign speech by candidates who are accountable to voters. Since *Buckley* and its progeny prohibit the regulation of campaign spending by independent groups, when big contributors are limited in the amount they may contribute to candidates and PACs, their money often ends up flowing to unregulated independent spending groups.<sup>161</sup> Permitting individuals to contribute more to PACs might allow additional resources to flow through this mediating mechanism into candidates' hands. Large donors who have turned to 527s and independent expenditure groups in light of contribution limitations might redirect some of this money to PACs, which would then pass the money on to a number of candidates. This would increase the

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<sup>161</sup> See *supra* notes 47–48 and accompanying text (describing how regulation causes money to flow to independent actors).

amount of accountable campaign speech and reduce the risk of corruption.<sup>162</sup>

Accountable speech is valued on the theory that it will be more positive and substantive than independent spending. A common refrain of *Citizens United*'s critics is that the decision caused an undesirable increase in negative independent spending by increasing the number of unaccountable independent spending groups.<sup>163</sup> Candidate speech is likely to be more accountable than speech by independent groups because candidates are judged by the electorate. Candidates are concerned about their reputation with the voters and have an incentive to be sensitive to the tone and content of their advertisements. Deceitful or vitriolic advertisements may give candidates a bad reputation and make them less appealing to voters. Since independent political groups are not accountable to the electorate, and typically are unconcerned with their reputation,<sup>164</sup> they are free to sponsor advertisements intended to ruin a candidate they oppose without the fear of electoral repercussions. A recent analysis of all the advertisements aired in federal campaigns between September and Election Day 2010 supports this view. Eighty-seven percent of independent group advertisements were pure attack advertisements, compared to only thirty-six percent of candidate advertisements. If hybrid positive-negative advertisements are included, the total negative advertising increases to sixty-four percent for candidates and ninety-two percent for independent groups.<sup>165</sup>

Just as the limit on contributions to PACs creates a structural bias in favor of connected PACs, the limit also benefits independent expenditure groups. Since restrictions on contributions to independent

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<sup>162</sup> The obvious critique of this argument is that the risk of corruption will simply change from the individual possibly corrupting the candidate to the PAC possibly corrupting the candidate. However, PACs are limited in the amount that they may give to a candidate, so increasing the amount a donor may give to a PAC will not alter the existing amount a PAC may give to a particular candidate.

<sup>163</sup> See, e.g., Tanya Somanader, *Citizens United Decision Allows Corporations To Make 2010 a Record-Breaking Year in Campaign Spending*, THINKPROGRESS (Sept. 17, 2010, 2:52 PM), <http://thinkprogress.org/2010/09/17/citizens-united-corporations-spending> (“‘Liberated’ by the Supreme Court’s recent *Citizens United* decision, corporations and ‘well-established political players’ will pump in 10 to 15 percent more cash in 2010 to ‘disrupt[ ]’ races with more negative ads.” (quoting Peter Overby, *Campaign Cash Surges from Undisclosed Donors*, NPR (Sept. 16, 2010), <http://www.npr.org/templates/story/story.php?storyId=129914137>)).

<sup>164</sup> For-profit corporations are likely to be concerned about their reputations and should be accountable if they engage in electoral speech in their own names. Nonprofit advocacy groups dedicated to political persuasion lack such a constraint.

<sup>165</sup> See Erika Franklin Fowler & Travis N. Ridout, *Advertising Trends in 2010*, THE FORUM 11 (2010), <http://www.bepress.com/forum/vol8/iss4/art4> (analyzing advertising data).



groups that do not contribute to candidates have been held unconstitutional, these groups are attractive options for donors. Removing the \$5000 limit on contributions to PACs will free donors to give more to PACs (which then give to candidates), thus promoting more politically accountable spending.

PACs are also able to reduce the risk of corruption by masking the identity of the individual contributor from the candidate. A candidate who receives a PAC contribution will know which PAC contributed, but the candidate will often not know the identities of the original individual contributors. This idea is a more practical variation on the concept of the anonymous donation booth advanced by Ian Ayres and Jeremy Bulow.<sup>166</sup> Ayres and Bulow challenge the conventional wisdom that disclosure of contributions is a normatively desirable mechanism for discouraging corruption. Rather, they argue, disclosure provides an essential condition for a quid pro quo to take place.<sup>167</sup> If all contributions were given through an anonymous donation booth, then the candidate would be unable to determine the identity of the contributor.<sup>168</sup> A contributor could tell the candidate that he made the contribution, but the candidate would not have any basis for relying on this assertion. Without the ability for the contributor to convince the candidate that the contribution came from him, the contribution will not have any value for securing a political quid pro quo.

While the donation booth idea has been criticized for being unworkable<sup>169</sup> and for withholding valuable information about a candidate's supporters from voters,<sup>170</sup> the application of the concept to PACs is free from both of these concerns. First, perfect anonymity is not required for PACs to achieve some of the benefits of the donation booth. PACs can, and should, disclose their donors without undermining the effectiveness of the device in many situations. Since the candidate will usually not know which donor's money she is receiving, and because there is no interaction between the donor and the candidates, the risk of quid pro quo is attenuated.<sup>171</sup> The masking mecha-

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<sup>166</sup> Ayres & Bulow, *supra* note 4. See generally BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002) (advocating for a system of anonymous political contributions).

<sup>167</sup> Ayres & Bulow, *supra* note 4, at 838 ("Knowledge about whether the other side actually performs his or her promise is an important prerequisite for trade.")

<sup>168</sup> *Id.*

<sup>169</sup> See Richard Briffault, *Reforming Campaign Finance Reform: A Review of Voting with Dollars*, 91 CALIF. L. REV. 643, 658–61 (2003) (reviewing BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002)) (arguing that anonymity will likely be difficult to preserve).

<sup>170</sup> See *id.* at 664 (arguing that disclosure provides voters with important information).

<sup>171</sup> Under the Court's understanding of corruption, this attenuation removes the risk of corruption. And while this formalism may not comport well with reality, even with a more

nism of PACs is by no means perfect, but it is an advance in this regard over direct contributions to candidates. Second, because both the identities of individuals who contribute to PACs and the PACs that contribute to candidates are known, voters will still be able to utilize information about a candidate's supporters.

An increase in the number of well-funded PACs may also combat corruption by reducing the influence of any single PAC. The current limits on contributions to candidates coupled with a limited supply of donors make campaign money a scarce commodity. Increasing the number of PACs will increase the supply of donors and make each individual PAC's contribution less valuable to a candidate, because the more PACs there are, the less valuable the product each PAC offers. This idea has already proven successful. One of the most effective features of the Bipartisan Campaign Reform Act of 2002 was a provision that doubled the limit on individual contributions to candidates.<sup>172</sup> Enabling candidates to raise more money from a variety of wealthy donors decreased the value of any individual contribution to the candidate, thus reducing the risk that contributions would be successfully given in exchange for access.

Since PACs remain limited in the amount they may contribute to individual candidates, it is unclear how great the flow of new money from PACs to candidates will be. Depending on the confidence we have in the attenuated relationship between the contributor and the candidate created by a PAC, it might make sense to increase the limit on PAC contributions to candidates, even though doing so is not constitutionally required.<sup>173</sup>

### C. Signaling Donor Preferences

PACs' prominent vice—that their contributions are made with the purpose of supporting a specific cause—also provides a means for citizens to communicate their preferences to candidates more effectively. Without the existing contribution restrictions, it will be easier for individuals to participate effectively in the electoral process.<sup>174</sup> Imagine a wealthy American who has little interest in partisan politics

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fluid understanding of corruption as influence, it seems less likely that contributions made through PACs will secure political sway for the individual contributor.

<sup>172</sup> BCRA § 307(a)(1)–(2) (codified at 2 U.S.C. § 441a(a)(1) (2006)); *see* Issacharoff, *supra* note 46, at 137 (“Paradoxically, the history of BCRA reforms suggests that the influence of money on policy is diminished when candidates and parties have ample access to fundraising.”).

<sup>173</sup> The Court has given no indication that a contribution limit of \$5000 is unconstitutionally low.

<sup>174</sup> I concede that this benefit will be realized only by individuals who seek to contribute more than \$5000 to political campaigns.

but is strongly committed to improving the environment. For this individual, researching candidates, competitive races, and issue positions are costly activities. If she were permitted to donate all of the money she is permitted to use for candidate contributions under existing campaign finance law to an environmental PAC, she would be able to avoid the cost of candidate research while supporting candidates whose environmental views are consistent with her own.

Even more significantly, her contribution money might be more influential coming from an environmental PAC because it would signal support for a specific issue. By donating to a candidate, an individual can show support for that candidate's general platform, but it is difficult to distinguish support for a candidate from support for an issue.<sup>175</sup> Since PACs typically represent a specific issue or group of issues, candidates know what the basis for the support is and may be more inclined to alter their policies to align them with a group's expressed interests.<sup>176</sup>

## CONCLUSION

Many campaign finance reformers are wary of deregulatory movements, often for good reasons. In light of the arguments advanced above, however, reformers should resist the urge to cling to the PAC regulation for fear that the invalidation or repeal of existing reform measures will be another nail in the coffin of meaningful campaign finance reform. The regulation on contributions to PACs not only fails to achieve intended reforms, but also furthers the exact distortions in the electoral arena that the reformers seek to prevent. The \$5000 limitation on individual contributions to PACs exacerbates the problems reformers see with PACs by advantaging PACs that are more likely to serve "special interests" and reducing the extent to which the recognized benefits of PACs may be realized. Maintaining ineffective regulations for the sake of having more, rather than fewer,

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<sup>175</sup> The Target Corporation learned this lesson during the 2010 election cycle. Target made a large contribution to a PAC that supported Tom Emmer's campaign for Governor of Minnesota. Presumably, Target supported Emmer for his pro-business tax policies. Emmer, however, was also an opponent of gay rights, and Target faced boycotts, shareholder protests, and negative press for supporting a candidate with such views. See Jennifer Martinez & Tom Hamburger, *Target Faces Investor Backlash*, L.A. TIMES, Aug. 20, 2010, at A1 (detailing the shareholder reaction to Target's contribution to the PAC that supported Emmer).

<sup>176</sup> Cf. Sunstein, *supra* note 150, at 1409 ("[C]andidates who receive individual contributions are often unaware of the particular reason for the money, whereas PAC beneficiaries know exactly what reasons underlie any donation.").

campaign finance regulations is not in anyone's interest. The current campaign finance system is undoubtedly problematic, but it can be improved within its confines.