A PERSPECTIVE ON THE FREE SPEECH GUARANTEE

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"The New First Amendment" is an appropriate title for our gathering, for the free speech guarantee, despite the primacy of its position in the Bill of Rights, is, in practical effect, one of the newer additions to the Constitution. When I began teaching Constitutional Law, I could correctly tell my students that no act of Congress had ever been held unconstitutional as an abridgment of the freedom of speech. Yet today, some 40 years later, no term of the Supreme Court goes by without the invalidation of some number of federal laws on free speech grounds. And, 40 years ago, the various provisions of the First Amendment were not held to be directly applicable to the states, although the Due Process Clause of the Fourteenth Amendment had, since 1925, been understood to incorporate the First Amendment's free speech guarantee. Prior to then, the Due Process Clause had been held to have a substantive component that protected liberty, but the liberty it protected was limited principally, if not exclusively, to liberty of contract and did not encompass liberty of speech. Indeed, in 1922, in Prudential Insurance Co. v. Cheek, the Supreme Court categorically declared that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech.'"

Prior to 1919, the Justices of the Supreme Court regarded with contemptuous disdain the very infrequent free speech claims that were presented to it--the lone exception being Justice Harlan, who, in an impassioned dissent in Patterson v. Colorado in 1907, argued vigorously that the Constitution commanded judicial protection of freedom of speech. In the Patterson case, Justice Holmes, for the majority, embraced the Blackstone definition of free speech, and declared that the constitutional guarantee was intended as a safeguard against prior restraints upon speech, not against the imposition of subsequent punishment for speech "deemed contrary to the public welfare." By 1919, however, federal prosecutions under the World War I Espionage and Sedition Acts, as well as state prosecutions under criminal syndicalism statutes and assorted other laws designed to enforce patriotism, began bringing significant numbers of free speech cases to the Court's docket.

In the first group of these cases, Justice Holmes spoke for a unanimous Court that affirmed the convictions and gave no discernible indication of any particular concern for the right of free speech. In the most famous of these cases, Schenck v. United States, Holmes articulated the "clear and present danger"

test, but since the test justified suppression of speech that was made under circumstances where it created a clear and present danger of a substantive evil--in that case, obstruction of the war effort--and since the circumstance of war was itself sufficient to create the necessary danger, the test offered absolutely no protection for the expression of opposition to a war in wartime. It was merely a restatement of the rationality standard of judicial review in the context of war. Yet, only eight months later, when a second group of convictions under these laws came before the Court, Holmes changed the meaning of his Schenck test and, joined by Justice Brandeis, declared in Abrams v. United States that the circumstance of war was not enough to deprive speech of constitutional protection. It also had to be shown that the particular speech leading to the prosecution and conviction actually endangered the success of the war effort. Otherwise, "the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them."

It is not known why Holmes changed his mind so dramatically in such a short time. Perhaps the shocking unfairness of the trial of the Abrams defendants that was to be described in the following year in the Harvard Law Review by Zechariah Chafee--for the publishing of which he almost lost his faculty position at the Harvard Law School--and the accumulating evidence of other instances of the prosecution of innocuous persons for the utterance of pacifist or anarchist ideas, had led him to conclude that judicial protection of "poor and puny anonymities" was imperative if the rights of political dissidents were not to be sacrificed to public hatred and intolerance. But while Holmes and Brandeis continued to contend for the new definition of "clear and present danger" throughout the decade of the 1920s, they were alone on the Court, which, in 1925, made clear that the "clear and present danger" test did not supplant the rationality standard. However, at the same time, there was a growing recognition of the injustices being permitted by judicial deference to legislative and prosecutorial zealousness, and, after Chief Justice Hughes and Justices Stone and Roberts joined Holmes and Brandeis to create a different majority, the Court in 1931, for the first time, invoked the freedom of speech and press to overturn the convictions of a camp counsellor for leading children in a pledge of allegiance to the red flag of Communism and of the publisher of lurid charges of corruption and criminality among public officials in Minnesota.

In the 1930s, the Hughes Court routinely overturned convictions of left-wing dissidents and labor organizers for speech-related offenses that would have been

just as routinely affirmed in the previous decade over the dissents of Holmes and Brandeis. Then, in the closing years of the decade, the Jehovah's Witnesses began determinedly to challenge laws that limited their ability to proselytize on behalf of their faith, and repeatedly carried their challenges to the Supreme Court. After initially striking down a number of laws requiring permits for the distribution of handbills or religious canvassing, the Court in the period 1940-1943 upheld several restrictions on the Witnesses' freedom, including a state law requiring all children in the public schools to salute the flag, an act that the Witnesses regarded as forbidden by their religious beliefs. Perhaps sensitized by reports of violence and intimidation suffered by the Witnesses in hostile communities, three Roosevelt appointees to the Court, Justices Black, Douglas, and Murphy, all of whom had concurred in the flag-salute decision (only Stone had dissented), gratuitously announced that they had erred in doing so, and, following the appointment of Justice Rutledge in 1943, a new majority was established that placed freedom of speech in a "preferred position," which meant that laws that abridged it would be denied the presumption of constitutionality. The "clear and present danger" test was revived, but in a revised form that virtually eliminated government authority to regulate speech or activities conducted in support of speech. "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" was Justice Rutledge's explanation of the doctrine. From the time of Rutledge's appointment to the time of his death and that of Justice Murphy in 1949, the Court struck down every state law and municipal ordinance challenged on grounds of freedom of speech that was argued before it. Early in this period was Justice Jackson's marvellously eloquent opinion for the Court in West Virginia State Board of Education v. Barnette, overruling the affirmance of the flag-salute requirement and positing as an absolute rule that no one could constitutionally be required to express any unheld belief.

The deaths of Justices Murphy and Rutledge left only Black and Douglas from the "preferred position" majority on the Court at the very time when the nature of the constitutional questions regarding freedom of speech coming before the Court changed from whether Jehovah's Witnesses could ring doorbells to distribute their materials to whether persons could be subjected to lengthy imprisonment for expressing allegiance to the Communist Party. The new Court under Chief Justice Vinson had no interest in protecting the rights of Communists, and eagerly abandoned "preferred position," but also had to contend with the reality that the late Justices Holmes and Brandeis had become venerated as legal heroes and that

the "clear and present danger" test that they had espoused as the basis for protecting dissident speech was now widely recognized as authoritative. The most well known of the Communist cases, Dennis v. United States in 1951, involved the prosecution under the Smith Act of the leaders of the American Communist Party for conspiring to teach and advocate the violent overthrow of the government, and Chief Justice Vinson sought to sustain the convictions while appearing to apply the "clear and present danger" standard in the absence of any real evidence that the speech activities of the Communist Party created a danger to the nation. He did so by borrowing the redefinition of the standard that had been employed by Judge Learned Hand in the Court of Appeals, under which the graver the putative evil, the less evidence of danger would be required. Since the alleged danger--violent overthrow of the government--was so grave, nothing more than evidence that Communists embraced the theories of Karl Marx was needed to uphold their convictions against a constitutional challenge.

Under this approach, of course, no Communist could raise a successful constitutional defense against a Smith Act prosecution, and the Justice Department did its best to charge as many as possible for violations of the law. Some members of the Court, apparently uneasy with what they had wrought, sought to ameliorate the effects of the Dennis ruling by making it somewhat more difficult to throw every Communist in jail, and, for a brief period from 1956 to 1958, the majority undertook (on technical legal grounds rather than constitutional grounds) to reverse some Smith Act convictions and convictions of uncooperative witnesses before the House Un-American Activities Committee, and to protect the rights of government employees against improper dismissal based on dubious accusations of disloyalty. However, the vehement anti-Court reaction in Congress to these decisions caused at least two members of the Court--Frankfurter and Harlan--to abandon the effort for reasons of prudence, and, from 1959 to 1961, the Court supinely sided with the government in cases relating to internal security, which were almost always decided by votes of 5-4, with Chief Justice Warren and Justices Black, Douglas, and Brennan dissenting.

But, at the same time that the Court was allowing the government to have its way with Communists or persons suspected of having Communist sympathies, it was staunchly defending the rights to free speech and association of civil rights advocates and civil rights organizations such as the NAACP against attempts by southern states to halt their activities and to intimidate their members. It was in these cases that the Court began the formulation of the "compelling

governmental interest" test (i.e., strict scrutiny) as the standard for reviewing free speech claims, for the "clear and present danger" test, as transmogrified at the hands of Judge Hand and Chief Justice Vinson, was completely abandoned after Dennis as no longer viable or effectively capable of protecting speech. Ironically, an important part of the groundwork for the development of the vocabulary of this test was articulated by Justice Frankfurter, the Court's most ardent defender of judicial self-restraint and adherence to the rationality standard in free speech cases, in his concurring opinion in Sweezy v. New Hampshire in 1957, where he defended the right of a witness in a state legislative investigation to refuse to answer questions regarding his political beliefs or affiliations, declaring that to require a citizen "to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling." The following year, in NAACP v. Alabama, the Court, in rejecting the state's claim of need to obtain the names of the members of the NAACP, it quoted Justice Frankfurter's standard and concluded that the state had demonstrated no compelling interest that could justify a command that would seriously interfere with the freedoms of speech and association. And, in 1960, in Shelton v. Tucker, a case dealing with the efforts of the state of Arkansas to identify the associational affiliations of its public school teachers, doubtlessly to discover if any were members of the NAACP (so, presumably, they could be fired), the Court added the remaining element to the test, holding that not only must the government have a compelling interest in order to take action that would limit these freedoms, that interest "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." If there are "less drastic means for achieving the same basic purpose," needlessly broad means cannot be constitutionally sustained. When, in 1962, Justice Goldberg replaced Justice Frankfurter on the Court, he immediately joined the four dissenters in the Communist cases, and the Warren Court was formed. The "compelling governmental interest" test became the Court's standard in all free speech cases, and, three years later, in Lamont v. Postmaster General, the Court, for the first time, struck down an act of Congress as violating the First Amendment.

The lesson of this history seems clear. From 1919, when the Supreme Court first faced significant numbers of free speech claims, until the Warren Court finally and unalterably committed the judiciary to the defense of this freedom, what cried out for judicial protection was the speech of those whose expression

was suppressed by the political branches of government because their beliefs were regarded as hateful or dangerous by the majority of the society or by those holding political power--pacifists, anarchists, labor organizers, muckrakers, Jehovah's Witnesses, left-wing dissidents, southern blacks. They are the paradigmatic examples of the "discrete and insular minorities" that Justice Stone referred to in the Carolene Products footnote, where he suggested that laws reflecting prejudice against such groups might not be entitled to the presumption of constitutionality. It is manifestly clear that the speech of these groups posed no realistic threat to any substantial social interests, and that the attempts to suppress their ideas or punish their adherents were simply manifestations of public fear, hatred, or intolerance. Unqualified judicial protection of the speech of such groups is essential. If the constitutional guarantee of freedom of speech is to have any meaning, courts must resolutely ensure that all persons (whether their beliefs are popular or unpopular) are entirely free to hold whatever beliefs they have arrived at, and to express those beliefs in whatever way they wish, at least in the absence of a paramount countervailing governmental interest, provided only that the time, place, or manner of the expression, as opposed to the ideas it contains, does not threaten the public order or endanger some other important social interest. To borrow Justice Jackson's memorable phrase, "if there is any fixed star in our constitutional constellation," it is that government may never suppress the expression of sincerely held beliefs or punish persons merely for holding or expressing those beliefs.

But in the more recent past, we have learned that not all laws abridging speech are aimed at suppressing the expression of beliefs. Speech is a means of communication, and thus a form of social interaction. It is a basic function of government to monitor all forms of social interaction when the public interest is affected, in order to guard against abuses that could harm the public or vulnerable individuals or groups, particularly where the interaction can involve the exercise of power. And speech is not only a means of expressing opinions; it can be used as a means of exercising power. It has the power to injure, to harass, to mislead, to intimidate, to threaten, to frighten, and even to destroy. And when speech is employed as a form of power, it should be subject to regulation. In the early years of the 20th century, when courts tended to view property rights as largely beyond the constitutional authority of government to control, that view was gradually overcome by the growing recognition that property

could be a form of power whose unrestrained exercise could produce socially deleterious results. In the course of protecting property against the public, courts sustained liberty of contract against state or federal interference by employing a standard that was, in practical effect, the "compelling governmental interest" test without the name. Judges would decide whether such laws were indispensable to the attainment of an overriding public purpose. But when the judiciary became willing to consider the fact that employers exercised power over employees by virtue of the property rights they possessed, it reverted to the rationality standard, and regulatory laws were readily upheld.

Similarly, there would seem to be little justification for employing heightened scrutiny to determine the constitutionality of a law for no reason other than that the form of social interaction being regulated involves speech. To pick an example more or less at random, the Supreme Court in 2002 invalidated a congressional restriction on advertising compounded drugs that, in their compounded form, had not been tested or approved by the Food and Drug Administration. The statute did not prohibit compounding or the sale of compounded drugs when prescribed by a physician for an individual patient, but it sought to preclude the more widespread use of untested drugs that advertising could generate. The Court majority found a First Amendment violation because it concluded that the government could satisfy its safety concerns in other ways that did not limit commercial speech, and thus the law was unconstitutional as not being the least restrictive means of achieving the government's goal. But why should that judgment be made by a court? As Justice Breyer argued in dissent, such an "overly rigid" approach "transform[s] what ought to be a legislative or regulatory decision about the best way to protect the health and safety of the American public into a constitutional decision prohibiting the legislature from enacting necessary protections." If there were evidence that those who wished to advertise untested medications were the target of hostile legislation for illegitimate reasons (such as the desire to protect a favored provider from competition) or that the law was designed to keep information from the public that the government did not want known, as was clearly the motivation behind the abortion gag order that the Court unwarrantedly upheld in Rust v. Sullivan in 1991, there would be ample justification for judicial intervention, but, in the absence of such evidence of improper legislative motivation, there was no necessity, as Justice Breyer said, to convert a matter of legislative judgment into a constitutional issue.

The refusal to defer to legislative judgments is appropriate where there is a basis for believing that the asserted reason for the legislative action is pretextual, particularly where the adverse consequences of the law fall on "discrete and insular minorities" hated or feared by the majority or the politically powerful. In the context of equal protection, that is the basis for the category of "suspect classification," which triggers strict scrutiny. It is, therefore, not surprising that, in First Amendment adjudication, the standard of strict scrutiny had its precursor in "preferred position," which was the basis by which laws restricting the freedom of Jehovah's Witnesses were evaluated, and came to its full fruition in cases arising from the efforts of states and communities in the south to shut down the civil rights movement. Courts knew what governments were up to in the south, and devised a rule that would simply and unequivocally invalidate their measures. Strict scrutiny was designed to insure that laws would fail, just as the rationality standard was designed to insure that laws would pass. It is virtually impossible for government to meet the burden of proof of showing that a law is absolutely indispensable to the attainment of its compelling interest, and that no law less restrictive of liberty would suffice. On the very infrequent occasions when the Court has held that a law survives strict scrutiny, it has had to ignore or play down the existence of possible alternatives for meeting the government's goal, which dissenters have invariably been quick to point out. Therefore, when the Court wants to uphold a law limiting speech, it either has to find a way to justify an alternative standard of review or disregard the literal requirements of the test. When the government's asserted reasons for its enactment are suspect, or when the speech of "discrete and insular minorities" is curtailed, the "compelling governmental interest" test is proper. And if the law prohibits the expression of an opinion without more, the judicial barrier to its constitutionality should be absolute. But the mere fact that the law involves some limitations on speech should not require "overly rigid" judicial scrutiny. And that is particularly true where the speech entails an exercise of power. There is a constitutional difference between burning a flag to express an opinion about the worth of government and burning a cross to intimidate persons of color, as the Court has properly recognized.

The insight that speech could provide an auxiliary source of power to augment the power inherent in property rights probably underlay the Court's decision in Gitlow v. New York in 1925 to include liberty of speech within the protection of substantive due process against state interference. The Gitlow

Court that took this step, and repudiated its assertion in Prudential Insurance Co. v. Cheek three years earlier that nothing in the Constitution limited the states in any way with regard to freedom of speech, was, after all, not a liberal body. It was very likely the most economically conservative Court in American history. The three Justices who dissented (without opinion) in Cheek were the most conservative members of the Court at that time--Chief Justice Taft and Justices VanDevanter and McReynolds. Between Cheek and Gitlow, Warren Harding had the opportunity to appoint three new Justices to the Court--Sutherland, Butler, and Sanford--who joined the three Cheek dissenters to form the 6-Justice Gitlow majority. (Holmes and Brandeis dissented but agreed that the Fourteenth Amendment protected speech; Stone was appointed too late to participate.) Why did the Gitlow majority take the precedent-shattering step of bringing speech within the protection of the Constitution? It was certainly not for the purpose of protecting the speech of revolutionary radicals like Gitlow, whose constitutional claim it dismissed out of hand. It is hard to conceive of any explanation except a desire to be able to offer the kind of judicial protection to businesses such as the Prudential Insurance Company that it had been unable to offer before, and to uphold in the future claims like those made by Prudential in 1922 that freedom of speech encompassed a freedom of silence which could not validly be abridged by a state law requiring a company to provide a letter to a former employee describing the character of that employee's service. These six Justices saw that the constitutional guarantee of free speech could protect businesses as well as dissidents. But, by the time there was an opportunity to use freedom of speech for this purpose, the Gitlow majority of six had been reduced to a minority of four--the Four Horsemen. Dissenting in Associated Press v. NLRB in 1937, a Wagner Act case that was a companion to Jones & Laughlin Steel, Justice Sutherland saw a shocking disregard of the First Amendment in permitting the government to forbid the Associated Press from dismissing an editorial employee for labor union activity. Writing for the Four Horsemen, none of whom had seen a constitutional problem in imprisoning radicals or, in Near v. Minnesota, enjoining the publication of a newspaper critical of public officials, Sutherland passionately argued that the government here had gone beyond the pale in restricting the right of a news organization to fire editorial employees who wished to have a union. The public, he declared, must be prepared to "withstand all beginnings of encroachment" (Sutherland's emphasis) on the precious rights protected by the First Amendment.

The aspirations of the Gitlow majority to use the constitutional guarantee of freedom of speech to augment the power of the economically dominant lacked a majority in 1937, but were impressively realized in 1976, when the Court gutted critical provisions of the Federal Election Campaign Act Amendments of 1974 that sought to control the amounts of money that could be contributed or expended to influence the outcome of federal elections. Prior to 1976, laws restricting contributions or expenditures in political campaigns had been around for a long time (the first federal law on the subject, prohibiting corporations from making monetary contributions in federal campaigns, was enacted in 1907 in reaction to public anger at corporate influence in the electoral process) and, although easily circumvented, had never been successfully challenged on constitutional grounds. The 1974 legislation was enacted in the wake of the Watergate scandals, which had revealed widespread dishonest use of the huge amounts of money collected by the Nixon campaign. It placed limits on individual contributions to federal election campaigns, individual expenditures by an individual or organization with respect to an election, the amount that a candidate could spend from personal or family funds in support of his or her own campaign, and on the overall amounts that could be spent on a campaign for federal office. The Supreme Court upheld the contribution limits as a necessary means of protecting the integrity of the political process, and public confidence in that process, against corruption or the appearance of corruption (although Chief Justice Burger, dissenting on this point, pointed out that these limits would not pass strict scrutiny, if properly applied, because the disclosure requirements of the law were a less restrictive means of preventing real or apparent corruption), but struck down the expenditure limits (over a powerful dissent by Justice White) because, in the opinion of the majority, individual expenditures not coordinated with a candidate's campaign could not have any corrupting tendencies (a contention ludicrous on its face), and also struck down the limits on spending by wealthy candidates and overall campaign spending because all candidates must be free to spend all the funds they can amass regardless of any adverse consequences. The result of the invalidation of the expenditure and overall spending limits was to guarantee that large amounts of money would be indispensable in political campaigns and that the political power of those who are in the financial position to put the largest amounts into making sure that the candidates they want are elected would be maximized. Individuals or organizations who avoided being seen coordinating their expenditures with the committees of their favored candidates were free to expend unlimited amounts of

money on those candidates' behalf, and all candidates were given little choice but to raise as much money as they could from whomever they could to avoid being outspent by their opponents.

To be sure, limitations on expenditures in political campaigns curtail speech, and provide an excellent rhetorical opportunity for opponents of these limitations, who can argue that speech relating to elections is the most vital form of expression in a democratic society and is at the very core of what the First Amendment was designed to protect. However, the limitations at issue in Buckley would not restrict political discussion and commentary by any but the most wealthy and powerful individuals and organizations--those who seek not merely to have their voices heard, but to have them dominate the political process by overwhelming the expression of contrary ideas through constant repetition of their own views. Although it may be said that "money talks," the respected constitutional scholar Paul Freund is reported to have observed that "that is the problem, not the solution." The challenged restrictions on campaign expenditures are content neutral and not specifically aimed at excluding unpopular groups from participating in elections. They are even-handed and limit the candidates of both major political parties equally. (They may have an unequal impact on minor parties, which could raise constitutional questions, but those questions can be dealt with as they arise.) Assuming that the expenditure limits are not set so low as to preclude a candidate, including the candidates who run against incumbents, from mounting an effective campaign (and this would be appropriate for judicial review if there is doubt), there should be no lack of opportunity for adequate exploration of whatever issues the candidates wish the voters to consider. And the limitations are imposed for the purpose of protecting the integrity of the political process, a goal that is an absolute imperative in a democratic society.

The Court in Buckley contended that restricting campaign expenditures, even if done even-handedly, has the unconstitutional effect of limiting the quantity of speech that may be made. But time, place, and manner limitations on speech, which are customarily upheld if they are content neutral and serve an important public purpose, also necessarily limit the quantity of speech. The problem with limiting quantity in the Court's view is that it constricts the number of issues discussed, the depth of their exploration, and the size of the audience reached. But, when one takes into account that the bulk of expenditures that exceed the normal baseline are for brief television advertisements, that concern seems much less

worrisome. Television commercials are not the medium for raising issues for consideration, but for presenting quick snapshots and superficial, if not misleading, comments, and they certainly do not provide for depth of exploration of whatever subjects they address. As for the size of the audience reached, they are much less likely to expand the audience than to reach the same audience over and over again. And that is a central reason why the free speech claims against campaign expenditure limitations are unpersuasive. Holmes's metaphor of the marketplace of ideas in which arguments compete is repeatedly invoked to attack these limitations, but, as in the economic area, if one competitor has an enormous advantage unrelated to the quality of his or her product, the market fails to operate as it theoretically should, and government intervention may be necessary. In the marketplace of ideas, there is market failure if one side is able constantly to bombard the audience with its messages so that opposing messages have difficulty being heard. In that very real sense, expenditure limitations actually serve to protect speech. Since the effect of these limitations on speech (even on the quantity of speech) are conjectural at best, since they are neutral and nondiscriminatory with respect to the major parties, since their burdens fall not on the politically powerless but on prominent political actors, since they are imposed to protect a public interest of paramount importance--the integrity of the political process and public confidence in its fairness--and since their invalidation gives the economically powerful an enormous advantage in influencing the outcome of elections, the reasons for their invalidation are not readily apparent.

The decision in Buckley v. Valeo applied to noncorporate expenditures. It did not directly affect the validity of restrictions on corporate or union expenditures in election campaigns. But a potentially heavy blow against the validity of these restrictions was delivered two years later in First National Bank of Boston v. Bellotti, where the Court invalidated a Massachusetts law forbidding corporate expenditures with regard to ballot referenda on matters having no material effect on the corporation's business, property, or assets. The Court distinguished between expenditures in referendum elections and in elections for public office because, in the former, there were no candidates who could be corrupted. The case reopened the question of whether corporations had free speech rights, for which the settled answer was that they did not--exceptions having been made for media corporations and corporations created for the express purpose of advocating a point of view--because the right belonged only to natural persons.

So the Court had to find a way to escape that difficulty, which it did by insisting that that was the wrong question. Moreover, to get the result it wanted, the Court needed a question that would allow the application of the "compelling governmental interest" test, and the question of whether corporations had free speech rights would not do so because, before that question is answered, there are no free speech rights at issue. So it insisted that the right question was whether speech which would otherwise be constitutionally protected because it could inform listeners would lose that protection because the speaker was a corporation. It should be instantly obvious that that is exactly the same question as the question of whether a corporation has free speech rights, but phrased in a way that allows for the use of strict scrutiny. Applying that standard, and speaking of the corporation's "views" and "ideas" as if the corporation was a rational entity capable of having views and ideas, the Court found the expenditure limitation unconstitutional. There was a powerful dissent by Justice White who pointed out that the views and ideas being expressed were those of the managers and directors of the corporation, who were perfectly free to expend their own money in support of them but had no claim to the use of other people's money--that of the corporation's shareholders, many of whom may not share those ideas--for that purpose, especially since the business interests of the corporation were not involved. But there was also a brief and brilliant dissent by Justice Rehnquist. Invoking John Marshall's definition of a corporation in the Dartmouth College case as "an artificial being" with no rights or privileges other than those conferred on it by its charter or by law, he contended that the state should be able to guard against the use by the corporation of the wealth that it could accumulate because of the special privileges allowed it by law for the purpose of acquiring greater privileges through the political process. Restricting corporate speech, Rehnquist pointed out, excludes no ideas from the marketplace inasmuch as natural persons remain free to articulate and advocate those ideas. However, given the views on corporate expenditures in the political process to which he assented in the litigation over the McCain-Feingold law, he no longer appears to hold the view he expressed so forcefully in Bellotti. Regrettably, ideology seems to have trumped reason.

As Justice White noted in his Bellotti dissent, if speech that is otherwise constitutionally protected does not lose its protection because the speaker is a corporation, then corporations must have the right to expend unlimited amounts of money not only in referendum elections but in candidate elections as well because

Buckley held that election expenditures constituted constitutionally protected speech. So it was only a matter of time before corporations began to assert that right. In 1986, the Court held that nonprofit corporations created expressly for the purpose of issue advocacy could not constitutionally be prohibited from expending funds to influence the outcome of candidate elections, but, in 1990, the Court, in Austin v. Michigan Chamber of Commerce, upheld, by 6-3 with Rehnquist in the majority, the constitutionality of a prohibition on the expenditure of funds from the general treasuries of business corporations for that purpose. Laws prohibiting corporations from contributing to political campaigns are now almost 100 years old, and their constitutionality, at least on First Amendment grounds, had not been questioned until Buckley opened the door. But because these laws were of long standing and commonplace, they went largely unchallenged, so, prior to Austin, there was no decision specifically affirming them, leaving opponents of campaign finance legislation free to argue, as they vigorously did in the McCain-Feingold case, that Bellotti was not limited in its application, and that corporations (and unions) should be free to expend as much money as they want from their general treasuries in election campaigns. Under this view, Austin is not an expression of settled law, but an aberrant decision that should be set aside.

Since 1974 when Buckley was decided, the cost of election campaigns has steadily escalated, and, as each of the major parties has found ways to amass and expend ever larger sums of money, the other party has had to do what was necessary to match them. One of the most effective ways was through the accumulation of soft money--most clearly and accurately defined as any money in politics that is not hard money, that is, money collected within the limits on contributions enacted in 1974 (now amended in 2002), and upheld in Buckley. Money collected outside these limits is soft money. Since the federal law applies only to federal elections, funds could be contributed to political parties for use in state and local elections without regard to the federal limit, and the Federal Election Commission ruled that parties could allocate some of their soft money to federal election activity where that activity affected both state and federal elections, as, for example, in voter registration efforts. Initially, these soft money expenditures were relatively modest, but, by 2000, had ballooned to almost half of the parties' total expenditures. Because there were no limits on the source or amount of soft money contributions, they could be made, and were made, by corporations, organizations, or wealthy individuals in amounts approaching or exceeding one million dollars. And federal candidates were frequently the obvious

beneficiaries. The corruptive potential of contributions of such magnitude is clear, and generated demands for reform. Legislation designed to curb the availability of soft money was introduced in the Senate by Senators John McCain and Russell Feingold, but passage was blocked in successive Congresses until the revelation of corporate scandals in 2002 involving businesses that had been major soft money contributors put irresistible pressure on Congress to do something in response. Then, contrary to previous expectations, Congress passed the McCain-Feingold law under the title of the Bipartisan Campaign Reform Act of 2002 (BCRA), which forbade parties to solicit, receive, or spend soft money.

BCRA also closed a loophole by which corporations and unions had been able, since Buckley, to evade the legal restrictions on their ability to use their funds to influence the outcome of elections by paying for "issue ads," advertisements placed on television shortly before an election whose purpose ostensibly was to express a viewpoint on a political issue, but whose real purpose, quite evidently, was to advance or set back the cause of a candidate running for election who was identified in the ad as being on the right side or the wrong side of the issue. Huge amounts of money were spent on these ads, and, because of the fiction that they were not campaign related, their sponsors were also free to avoid disclosing their identities. Senator Collins of Maine was quoted as observing that "the twin loopholes of soft money and bogus issue advertising have virtually destroyed our campaign finance laws, leaving us with little more than a pile of legal rubble." To prevent further evasion of the campaign laws, BCRA prohibited corporations or unions from expending funds from their general treasuries for "electioneering communications," which were defined as a "broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" within 60 days of a general election or 30 days of a primary, and is "targeted to the relevant electorate," In addition, it required that the identities of the sponsors of these communications be disclosed.

BCRA was immediately challenged on First Amendment (and other) grounds, and, given the Court's proclivity for employing the "compelling governmental interest" test in free speech cases regardless of the nature of the free speech claim, there was widespread anticipation that most provisions of the law would be struck down. Senator McConnell of Kentucky, the most outspoken opponent of campaign finance reform in Congress, brought a suit against the law in his own name, and, evidently anticipating victory, maneuvered to have his suit listed as the lead case among the various challenges to the law that were presented to the courts, so that his

name would be on the title of the Court's decision striking down the reform legislation. But, to his chagrin and to many people's surprise, the Court, in McConnell v. Federal Election Commission, chose, by a vote of 5-4, to place the public interest ahead of the concept of an impregnable First Amendment, and upheld virtually all of BCRA's provisions, thereby associating the Senator's name with the affirmation of the law he so bitterly opposed. This unexpected result was made possible by the decision of Justice O'Connor to side with the four liberal Justices, and, indeed, to be the joint author, with Justice Stevens, of the lead majority opinion (of which there were three in this case).

The majority disposed of the constitutional challenges to the law without rhetorical excess. It had little alternative given the number of provisions of the law that had to be considered, most of which were designed to avoid circumvention of the law's basic provisions prohibiting the use of soft money by political parties and corporate and union sponsorship of "electioneering communications." The foundation of the reasoning of the Stevens-O'Connor opinion on the validity of the soft money restrictions was that portion of the Buckley decision that upheld the contribution limits in the 1974 Federal Election Campaign Act Amendments. The majority treated the activities being regulated by BCRA as the equivalent of the contribution limits that were upheld by the Buckley Court, which used a standard of review that permitted the law to be upheld if the government "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment" of First Amendment rights. The majority in McConnell was at pains to differentiate that standard from the standard of strict scrutiny. The government's interest had to be "sufficiently important," not compelling, and the means employed had to be "closely drawn," not indispensable or least restrictive. The avoidance of corruption or the appearance of corruption in the electoral process was surely a sufficiently important interest, and the means were sufficiently closely drawn since the provisions of the law prohibiting political parties to receive or spend soft money do "little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders," and prohibit various devices that could be employed to circumvent the law. The majority held that, even though the soft money restrictions in part regulated spending, they could be regarded as the equivalent of the contribution limits that Buckley had upheld because, unlike expenditure limitations, they did not limit the total amount of money that a party could

spend, but only prohibited the spending of money collected from soft money donations.

The Court also had little difficulty in upholding BCRA's provisions relating to "electioneering communications." It found the disclosure requirements justified for the same reasons that the Court found the similar requirements in Buckley valid. They informed voters of who the supporters or detractors of a candidate are; they served to avoid corruption or its appearance; and they gathered information useful for insuring enforcement of the substantive provisions of the law. As did the Court in Buckley, the Court in McConnell properly recognized that disclosure requirements might forestall speech by unpopular groups who could fear exposure to harassment if they had to divulge their identities, but, as in Buckley, it left it open for groups who might have valid fears of this nature to challenge the law as applied to them. With regard to the prohibition against the use of corporate or union funds to sponsor "electioneering communications," the Court declared that such communications were functionally indistinguishable from communications expressly urging the election or defeat of a specified candidate, which corporations and unions were already forbidden from funding, and further noted that these entities could pay for these ads using PAC funds, or, if the communication was genuinely about an issue, rather than an attempt to influence the outcome of an election, funds could be spent from their general treasuries if the advertisement did not make any reference to a candidate for federal office.

The dissenters in McConnell each wrote separately, but joined parts or all of each other's opinions. The principal basis of their arguments was that restrictions on political speech had to be reviewed under the standard of strict scrutiny, which the key provisions of BCRA could not meet. Justices Scalia and Thomas took the broadest ground. They would overrule Buckley insofar as it upheld contribution limits, which would, of course, sweep away all of the underpinnings of the majority's reasoning. For these two Justices, the only permissible limitations on campaign financing were prohibitions on outright and direct bribery. And since the avoidance of corruption could be achieved through the enforcement of bribery laws, limitations on contributions and expenditures are not the least restrictive means of attaining the government's interest, and are thus invalid under strict scrutiny. Justice Kennedy would not go quite so far, but would only uphold campaign finance laws under Buckley where there could be direct quid pro quo corruption, as opposed to more subtle and indirect corruptive

possibilities. Quite clearly, the dissents would preclude any effective regulation of campaign financing, and leave the political process completely exposed to the domination of those individuals and groups with the resources to pour the greatest amount of money into the electoral machinery, which, one suspects, the dissenters would think is as it should be.

The dissent of Justice Scalia, however, went beyond the traditional constitutional arguments to impugn the motivation of the members of Congress who supported the legislation and to deny the existence of a problem that needed to be addressed at all. What this law does, he asserted, is to prohibit criticism of the government, and it thus abridges the most sacred aspect of the freedom guaranteed by the free speech clause of the First Amendment. It does so, he contended, because it shields government officials--members of Congress--from criticism by those with sufficient resources to make their criticisms heard. He scornfully rejected the notion that the law's apparent even-handedness was a demonstration of fairness. The law, he argued, was not fair. It obviously favors incumbents over challengers, and, equally obviously, was enacted precisely because it did so. Challengers need to spend more money in their campaigns than incumbents, who enjoy the substantial advantages of incumbency, and have a special need for soft money to overcome an incumbent's greater access to hard money. These arguments had been vigorously put forward by the critics of the legislation in both Buckley and this case, and was rejected by the Court in both instances. If, of course, BCRA were an artful effort by the incumbent legislators to use the campaign finance issue as a smokescreen for entrenching themselves in office, challengers could be regarded as the targets of prejudice, and the legislative effort would be open to serious constitutional attack. But there is a total lack of evidence that this is the case. Members of Congress have traditionally been reluctant to enact campaign finance legislation and thereby alter in some uncertain way the system under which they have attained electoral success. Generally, they have done so only when revelations of scandal have created a public demand for some sort of reform, as in 1907, 1974, and 2002. The McCain-Feingold bill was blocked in several successive Congresses prior to the Enron debacle, and Congress watchers have reported that many members who had voted for it did so only because they understood that the bill would not pass, thus allowing them piously but disingenuously to claim that they had supported reform. Scalia also argued that it was "fallacious" to assert that a regulation of money is not a regulation of speech, since money is essential to allow speech to be heard.

Without money, books could not be published. This, too, would be an unexceptionable argument, as supporters of campaign finance reform have always conceded, if the legislation would not allow a sufficient amount of money to be spent to conduct an effective campaign, but the members of Congress who enacted the 1974 legislation imposed expenditure limits that allowed ample funds to be spent based on what incumbents and challengers had spent in past campaigns for the offices in question, and, of course, BCRA does not legislate any limitation on what a campaign may expend.

Like the other dissenters--explicitly in the case of Kennedy and Thomas, and tacitly in the case of Rehnquist who did not adhere to the reasoning of his Bellotti dissent--Scalia also argued that to restrict speech by corporations was unconstitutional. Corporations, in his view, were entitled to "full First Amendment protection" because they "best represent the most significant segments of the economy and the most passionately held social and political views." There is not the slightest recognition in his opinion that allowing corporations to exercise the free speech rights that have traditionally been thought to be the rights of natural persons makes it possible for corporate managers to use other people's money, without their consent, to advance their own personal views. Instead he maintained that to require corporate managers to use their own money for this purpose would necessarily limit the amount of money available to advance these ideas, and thus limit the effectiveness of the speech. Scalia conceded that corporations could form political action committees to advocate their ideas, but he dismissed this option as time-consuming and inconvenient, whereas direct corporate speech could be immediate and effective. Concerns about the improper use of aggregations of wealth in politics are misguided, he asserted, because disclosure requirements and bribery laws insure against improprieties. It is difficult to see how such an argument can be made with a straight face.

On the subject of BCRA's restriction on electioneering communications, Scalia had no doubt that this was simply another aspect of legislative self-protection. And he denied that there was too much money in politics. Money spent on campaigns, he noted, was considerably less than the money spent by the public on movie tickets, food items, and cosmetics, an argument that ignores the fact that the entire population spends money on these consumer items, while campaign spending involves only a relative handful of candidates, supporters, and contributors. The fact that half as much money is spent today on political campaigns as on movie tickets is a powerful measure of the enormous sum of money

that is put into the political process, and, contrary to Scalia, it is also a measure of the advantages that the largest contributors believe they can attain by insuring the success of candidates who will be solicitous of their interests. And what are the advantages that would accrue to the society from allowing uncontrollable amounts of money to be spent in political campaigns in the name of freedom of speech? Justice Scalia quotes, for the purpose of refuting it, the seemingly incontrovertible statement of Senator Kerry of Massachusetts that, as campaign spending increases at a faster and faster pace, "we have not seen an improvement in campaign discourse, issue discussion, or voter education. More money does not mean more ideas, more substance or more depth." Be that as it may, Scalia declared, electioneering communications, including negative ads, are effective in persuading voters, and, in any event, "it is not the proper role of those who govern us to judge which campaign speech has 'substance' and 'depth' (do you think it might be that which is least damaging to incumbents?) and to abridge the rest." That argument could only be made by one who is content to see elections decided by a constant repetition of misleading assertions, half truths, and meaningless slogans, redounding in virtually all cases to the political advantage of those who prefer to triumph in the marketplace of ideas, not by the substance and depth of their opinions, but by the ability to use unlimited resources to overwhelm in volume and frequency all competing views.

The vital importance and indispensability of the First Amendment's guarantee of free speech was seared into the consciousness of the nation by recognition of the prejudicial treatment suffered by political dissidents, anti-war protesters, and religious and racial minorities whose beliefs and expressed aspirations were regarded with intense hostility by the public. Thus courts were correct to conclude, after a disgracefully long period of unwillingness to take free speech claims seriously, to embrace a standard of review that would disallow altogether restrictions on the freedom of expression of unpopular groups. But not all free speech claims are of this type. Because speech communication is a form of social intercourse that may involve power relationships between individuals and groups with vastly unequal resources, and because there may be highly important social interests that could be threatened by the uncritical acceptance of the idea that all speech requires the same degree of judicial protection as the despised opinions of "discrete and insular minorities," the strict scrutiny standard is not always appropriate in free speech cases, although an important part of judicial review in this area will always be to insure that the public interest allegedly

being protected by a law is indeed the legislature's real concern, and not a cover to silence ideas that the legislature does not want to have heard. The area of campaign finance regulation is one where according maximum constitutional protection to the free speech claims of those who want to be able to spend unlimited amounts of money to determine the outcome of elections, as the Court has sometimes done, could seriously erode the integrity of the democratic process. Thus we should be thankful that a bare majority of the Supreme Court was unwilling to do so again in deciding the constitutionality of the McCain-Feingold law. Justice Scalia began his dissent in the McConnell case by asserting that "This is a sad day for the freedom of speech." But the majority's decision was a salutary manifestation of good sense in the adjudication of free speech claims, and that achievement is to be celebrated, not condemned.